Chapter 12

Law of Contract: Selective Principles influencing the Law of Contract and impacting on medical contracts

12.1 Introduction

Besides the traditional defences, *inter alia,* fraud, undue influence, duress, illegality and mistake impacting on contract, in general, there are a number of other factors as well, which influence the validity of exclusionary clauses in standardized contracts. The factors include fraud or *dolus* and negligence, public policy, the status and bargaining power of the contracting parties, public interests and statutory duty. Consequently, in this Chapter, each factor as recognized and applied in the different jurisdictions will be discussed comprehensively.

In so far as the exclusion of liability on the grounds of fraud, or *dolus,* and negligence in the South African jurisdiction is concerned, the legal position is fairly settled except where otherwise indicated. In the first instance, an exclusionary clause excluding liability for *dolus* (wilful conduct) or fraud is deemed to be against public policy and void [1] and so is a clause which excludes liability for an intentional breach of contract. [2]

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1 This seems to be the general consensus amongst the South African legal writers Van der Merwe et al *Contract: General Principles* (2003) 215; Kerr *The Principles of the Law of Contract* (1998) 405; Christie *The Law of Contract in South Africa* (1996) 206; Lubbe and Murray *Farlam and Hawthaway Contract, Cases and Materials* (1988) 425; O'Brien "Legality of Contractual terms exempting a contractant from liability" *TSAR* (2001) 2001-3, 599; Lotz "Caveat subscriptor: Striking down exception clauses" *SALJ* (1974) 423; Van Dokkum "Hospital Consent Forms" *Stellenbosch Law Review* (1996) 2. In so far as case law is concerned, ever since the landmark decision of *Wells v South African Alumenite Co* 1927 (AD) 69 in which the court held that courts will not lend themselves to the enforcement of a stipulation for fraud as to do so would be to protect and encourage fraud. The South African courts in a series of cases including more recently the Supreme Court of Appeals followed this principle.

2 For the views expressed by the South African legal writers refer to Van der Merwe et al (2003) 215; Kerr (1998) 404-406; Christie (1996) 205ff; Lubbe and Murray (1988) 340; O'Brien *TSAR* (2001) 2001-3 597-601; Kahn "Imposed Terms in Ticket and Notices" *Businessman's Law* (1974) 159. In the case of *East London Municipality v South African Railways and Harbours* 1951 (4) SA 466, 490 the court found that a clause exempting a doctor from liability for its own wilful misconduct is against public policy and void. This principle was reconfirmed in the

It is also trite to say that a clause excluding liability for ordinary and gross negligence (*culpa lata*) is not against public policy. [3]

But, the allowance to include exclusionary clauses containing indemnities for gross negligence or *dolus* is not unlimited or unrestricted. Various rules have been created by the legal writers and accepted by the courts. In the first instance, there is a general presumption, where doubt is present that the contracting parties did not intend to exclude liability for negligent acts. [4]

Secondly, a rule has developed that where the courts deal with exemption clauses which are ambiguous, or the language used in the contract is capable of more than one meaning, the exemption clause is interpreted narrowly. [5]

Whether the notion that exemption clauses, excluding a contracting party from ordinary and/or gross negligence (*culpa lata*), ought to be extended to hospital contracts, is presently the subject of a raging debate in South Africa. [6] This also forms the core issue in the

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Appellate Division (as it was known then) case of *First National Bank of South Africa Ltd v Rosenblum and Rosenblum* Unreported case No 392/99 1 June 2001 (SCA).

3 This is the general view expressed by the South African legal writers Van der Merwe et al (2003) 215; Kerr (1998) 405; Christie (1996) 206ff; Lubbe and Murray (1988) 425; O'Brien *TSAR* (2001) 597, 599; Strauss *Doctor, Patient and The Law* (1991) 305; Burchell and Schaffer "Liability of Hospitals for Negligence" *Businessman's Law* (1977) 109-111; Claassen and Verschoor *Medical Negligence in South Africa* (1992) 102. Although this is the position today, the South African courts at one stage only recognized the validity of exclusionary clauses excluding liability for ordinary negligence. See *Rosenthal v Markes* 1944 TPD 172; *Essa v Divaris* 1947 (1) SA 753 (A). The said cases ruled out the exclusion of gross negligence (*culpa lata*). But this changed in time in that the notion to include a cause excluding liability for gross negligence was recognized for the first time in *Government of the Republic of South Africa v Fibre Spinners and Weavers (Pty) Ltd* 1978 (2) SA 794 (A) 794. The principle enunciated in this case was followed in a number of other cases in South Africa including *First National Bank of South Africa Ltd v Rosenblum and Rosenblum* Unreported case No 392/99 1 June 2001 (SCA).

4 For the academic view see Van der Merwe et al (2003) 275; Christie (1996) 204; Lubbe and Murray (1988) 425; Turpin "Contract and Imposed Terms" (1956) *SALJ* 44; Van Dokkum (1996) 252. The South African courts have also recognized the general presumption against the exclusion of liability in the cases of *Essa v Divaris* 1947 (1) SA 753 (A); *SAR&H v Lyle Shipping Co Ltd* 1958 (3) SA 416 (A).

5 This rule is widely recognized by the South African legal writers Christie (1996) 204; Lubbe and Murray (1988) 425; Van Dokkum (1996) 252; Van der Merwe et al (2003) 215 and the courts alike. See the *Government of the RSA v Fibre Spinners and Weavers* 1978 (2) SA 794 (A); *Durban's Water Wonderland (Pty) Ltd v Botha and Another* 1999 (1) SA 982 (SCA); *First National Bank of SA Ltd v Rosenblum and Another* 2001 (4) SA 189 (SCA); *Johannesburg Country Club v Stott and Another* 2004 (5) SA 511 (SCA).

6 Most legal writers in South Africa after commenting on the controversial judgement of Brandt J in the Supreme Court of Appeals case of *Afrox Healthcare Bpk v Strydom* 2002 (6) SA 21 (SCA) appear to be of the view 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" (2005) 78 *SAPR/PL* 430 18; Steyn *The law of malpractice*

research of this thesis. For a comprehensive discourse see Chapter 14.

The English position with regard to the validity of exclusionary clauses excluding a contracting party from liability for *dolus,* or fraud and negligence, including, gross negligence, prior to the enactment of the Unfair Contractual Terms Act 1977 was very similar to the South African jurisdiction. In the first instance, any attempt to exclude liability on the grounds of fraud or *dolus* would be void as against public policy. However, any attempt to incorporate in a clause the exclusion of liability for ordinary and gross negligence, was against public policy. [7]

But, in English law, the exclusion or restriction of liability for negligence in exclusion clauses will only be recognized, by the English courts, provided certain requirements are first met. The requirements include: The wording of the clause, when read as a whole, must clearly and unambiguously convey such limitation. [8] Secondly, the reliance on exclusionary clauses for negligent acts would only be permitted by the courts, where to do so, was fair and

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liability in clinical psychiatry Unpublished LLM dissertation UNISA (2003) 3-27; Van den Heever "Exclusion of Liability of Private Hospitals in South Africa" *De Rebus* (April 2003) 47-48; Jansen and Smith "Hospital Disclaimers: Afrox Health Care v Strydom" 2003 *Journal for Juridical Science* 28(2) 210, 218; Tladi "One step forward, two steps back for constitutionalising the common law: Afrox Health Care v Strydom" (2003) 17 *SAPR/PL* 473, 477; Cronje-Retief *The Legal Liability of Hospitals* (2000) Unpublished LLD Thesis Orange Free State University (1997) 474; Pearmain "*A Critical analysis of the Law of Health Services Delivery in South Africa"* An unpublished LLD Thesis University of Pretoria (2004) 532-533; Naude and Lubbe "Exemption Clauses - A Rethink occasioned by Afrox Health Care Bpk v Strydom" (2005) 122 *SALJ* 144, 447; Hawthorne "Closing of the open norms in the law of contract" (2004) 67 (2) *THRHR* 294, 299. For the views of the older writers see Strauss *Doctor, Patient and the Law* (1991) 305; Claassen and Verschoor *Medical Negligence in South Africa* (1992) 103 that the general rule ought not to be extended to contracts or provisions of contracts involving health care.

7 For the general view regarding the legal position prior to the passing of the *Unfair Contractual Terms Act* 1977 see Lawson *Exclusion Clauses* (1990) 26ff; Yates and Hawkins *Standard Business Contracts: Exclusion and Related Devices* (1986) 103ff; Lewison *The Interpretation of Contracts* (1997) 319ff; McKendrick *Contract Law Text, Cases and Materials* (2003) 442; Coote *Exception Clauses* (1964) 29ff. Although the English courts have traditionally been hostile to exclusion clauses, nonetheless, the English courts have given affect to such clauses. See also *Craig Fishing Co Ltd v Malvern Fishing Co Ltd* (1983) 1 W.L.R. 964, 970; *George Mitchell (Chesterhall) Ltd v Finney Lock Seeds Ltd* (1983) 2 A.C. 803, 814. See also *Continental Illinois National Bank and Trust Co of Papanicolau* (1986) 2 Lloyd's Rep 441, 444 and *Skipskreditforeningen v Emperor Navigation* (1988) 1 Lloyd's Rep 66, 76; *Gillespie Bros Ltd v Roy Bowles Transport Ltd* (1973) Q.B. 400, 419; *Sonat Offshore SA v Amerada Hess Development Ltd* 1988 Lloyd's Rep 145, 157.

8 The position by the legal writers is set out in Yates and Hawkins (1986) 89; Lawson *Exclusion Clauses* (1990) 39; Coote (1964) 30. It is especially Lewison *The Interpretation of Contracts* (1977) 319 who opines that *"an exemption clause will not relieve a party from liability for negligence unless it does so expressly or by necessary implication, or unless that party has no liability other than liability in negligence."* The English courts in a number of cases including *Szymonowske and Co v Berk and Co* (1923) 1 K.B. 457; *White v Warnick (John) and Co Ltd* (1953) 1 W.L.R. 1285; *Hillier v Rambler Motors (A.M.C.) Ltd* (1972) 2 Q.B. 71 have made it quite clear that, for a contracting party to rely on the exemption clause to escape liability for negligence, the meaning must be plain and clear.

reasonable. [9]

The courts also developed certain methods in dealing with exemption clauses containing exclusions for liability arising for negligence. In the first instance, the courts consistently construed exemption clauses strictly. The clause must therefore cover exactly the nature of the liability in question. [10] The courts also developed the *contra proferentem* rule. [11]

But, in time, with the enactment of the *Unfair Contract Act* 1977, the operation of exclusionary clauses was severely affected. Moreover, the Act prohibits the exclusion or restriction of liability for death or personal injury resulting from negligence. On the other hand, a contracting party may guard himself against any loss or damages caused by excluding or restricting his liability for negligence provided the terms or notice satisfies the requirement of reasonableness. [12]

The effect of the introduction of the Act is seen as placing restrictions on the powers of a contracting party to secure an exemption from liability.

The position of exclusionary clauses in the American Law of Contract, as was the case in England, is fairly settled. Generally, clauses limiting liability are not invalid, provided the contracting party against whom the clause operates, understood the negotiations and has

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9 Prominence to this requirement was given by the English courts in especially, the following cases: *Craig Fishing Co Ltd v Malvern Fishing Co Ltd* (1983) 1 W.L.R. 964, 970; *George Mitchell (Chesterhall) Ltd v Finney Lock Seeds Ltd* (1983) 2 A.C. 803, 814. See also *Continental Illinois National Bank and Trust Co of Papanicolau* (1986) 2 Lloyd's Rep 441, 444 and *Skipskreditforeningen v Emperor Navigation* (1988) 1 Lloyd's Rep 66, 76; *Gillespie Bros Ltd v Roy Bowles Transport Ltd* (1973) Q.B. 400, 419; *Sonat Offshore SA v Amerada Hess Development Ltd* 1988 Lloyd's Rep 145, 157.

10 The English courts in construing exemption clauses strictly in the cases of *Hollier and Ramble Motors (A.M.G.) Ltd* (1972) Q.B. 71, per Salmon LF; *Lamport and Holt Lines Ltd v Coubra and Scrutton (Mandl) Ltd* (1982) 2 Lloyd's Rep 42 per Stephenson L.J. laid down the method namely that these type of clauses must be given its plain meaning on its face. It was also stated in *Smith v South Wales Switchgear Co Ltd* (1978) 1 W.L.R. 165 mentioned that there must be a clear and unmistakable reference to negligence. Where there is no reference to negligence or some synonym, the courts in *Hinks v Fleet* (1986) 2 E.G.L.R. 242 and *Gillespie Brothers Ltd v Bowles (Roy) Transport Ltd* infer from the intention of the parties what liability is excluded.

11 This rule according to the legal writers Beatson *Anson's Law of Contract* (2002) 439; McKendrick (2003) 170; Coote (1964) 30; Yates and Hawkins (1986) 194; Lewison (1997) 322ff and the courts work on the basis that where there is any ambiguity in a contract, the ambiguity is resolved against the party relying upon the term. See the cases of *Hollins v Davy (J) Ltd* (1963) 1 Q.B. 844; *ACME Transport Ltd v Betts* (1981) R.T.R. 190.

12 The authors Adams and Brownswood *Understanding Contract Law* (2000) 129, 130 regards this reasonableness requirement as giving the courts a very open-ended discretion.

assented to the terms freely. [13]

However, any attempted exemption of liability for a future intentional tort, or for a future wilful act, or one of gross negligence, is void. [14]

It follows, therefore, that an attempted exemption of liability for future negligence, although not favoured in American law, is valid. [15]

Many rules have been created, by the writers and the courts alike, which need to be complied with before a contracting party may rely successfully on such an exclusionary clause.

One of the requirements which have to be shown before an exclusionary clause for negligence will be adjudged valid is, if it is shown that the clause does not violate public interest. [16]

A further factor considered by the American Courts, in determining whether an exculpatory clause is valid or not, is whether the clause is contrary to public regulation. If so, the exclusionary clause is invalid. [17] This includes a public duty owed. [18]

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13 This is the general view adopted by Williston *Williston on Contracts* (1972) Para 1750.

14 The American writers are very clear in their thinking about this position. See Williston (1972) Para 1750 and Calamari and Perillo *The Law of Contract* (1977) 268. The American courts, in a number of cases, have cited the general law applicable to exclusionary clauses as enunciated by the legal writers including Corbin "Corbin on Contracts" 872, 12AM *Jur. Contracts* 683. See in this regard the well-known case of *Kuzmiak v Brookchester Inc* 33 N.J. Super 575, 111A, 2d 425.

15 The reasons for these type of clauses not favoured in America according to the legal writers Williston 1936 with 1965 *Cumulative Supplement* Vol. 6 Para 1750 A; Calamari and Perillo (1977) 268; American Jurisprudence 57A *AM Jur* 2d 120 can be ascribed to the discouraging of negligence by making wrongdoers pay for damages caused by them; to protect those in need of goods and services from being exploited by those who drive hard bargains. The courts have also in a number of cases expressed the view that exclusionary clauses are generally not favoured in the United States of America. See *McCutcheon v United Homes Corp* 75 Was. 2d 443, 480 P.2d 1093 (1971); *Schlobohm et al v Spa Petite Inc* 32 N.W. 2d 920 (1982); *Graham d/b/a the Graham Seed Company v Chicago Rock Island and Pacific Railroad Company* 431 F.Supp 444 (1976); *Hunter v American Rentals Inc* 189 Kan 615 371 P.2d (1983); *Kuzmiak v Brookchester Inc* 33 N.J. Super 575, 111A 2d 425.

16 *Globe Home Improvements Co v Perth Amboy Chamber of Commerce Credit Bureau* 116 N.J.L. 168, 182 A 641 (1976); *Banfield v Louis Cat Sports Inc* 589 So. 2d 441 (1991); *Tunkl v Regents of University of California Co* Cal 2d 92 383 P.2d 441, 32 Cal Rptr 33 (1963); *Crawford v Buckner et al* 839 S.W. 2d 754 (1992).

17 *Olson v Molzon* 558 S.W. 2d 429 (Tenn 1977) quoted with approval in *Crawford v Buckner et al* 839 S.W. 2d 784 (1992); *Scholobohm et al v Spa Petite Inc* 326 N.W. 2d 920 (1982).

18 The American courts have in the past held that where a public duty exists and this is excluded by an attempted

The American courts have also held that any clause or contract contrary to public policy or which tends to be injurious to the public or contrary to the public good is invalid. [19] Often, the relationship of the parties will determine, depending upon what type of relationship exists between the parties, whether an exclusionary clause will be valid or not. [20]

The bargaining position of the parties to a release in the contract, has served as a determining factor, in deciding the validity of an exemption clause inserted in a contract, exempting a company from liability for its future negligence. [21]

Besides the factors enumerated hereinbefore, the American legal writers and the courts alike, have, on numerous occasions, also stated that the courts will not give effect to indemnity clauses caused by his/her own negligence, unless such effect is clearly and unequivocally expressed in such an agreement. [22]

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exclusionary clause, the clause is invalid. See *Chicago and North Western Railway Company v Rissler et al* 184 F.Supp 98 (1960).

19 *Walker v American Family Mutual Insurance Company* 340 N.W. 2d 599 (1983); *Powell v American Health Fitness Centre of Fort Wayne Inc* 694 N.E. 2d 757 (1998); *Leidy et al v Hescht Enterprises Inc d/b/a Body Shop Health Spa* 252 So. Super 162, 381 A. 2d 164. In the case of *Henningson v Bloomfield Motors Inc* 32 N.J. 358, 161 A.2d 69 (1960) the court used the unequal bargaining position of the contracting parties and where one party lost his rights to sue as a factor influencing the court to declare the waiver as contrary to public policy.

20 In sporting and recreational activities, the American courts have often ruled that those exclusionary clauses governing the relationship between the parties would be valid. See *Allan v Snow Summit Inc* 51 Cal App 4th 1358, 59 Rptr 2d 813 (1996) involving a skiing contract. On the other hand a lease agreement between landlord and tenant excluding liability for negligence would be against public policy and void. This was the position in *McCutcheon v United Homes Corp* 79 Wash. 2d 443, 486 P.2d 1093 (1971); *Kuzmiak v Brookchester Inc* 33 N.J. Super 575 111A 2d 425.

21 This was the position in the cases of *Banfield v Louis Cat Sports Inc* 589 So.2d 441 (1991). But the voluntary position between the parties did not affect public interests hence the exclusionary clause was declared valid. But in the case of *Weaver v American Oil Co* 25 Ind 458, 276 N.E. 2d 144 (1971) the court used the unconscionable-ness of the contract between the two contracting parties who stood in an unequal bargaining position to invalidate the contract. In *McCutcheon v United Homes Corp* 79 Wash 2d 493, 486 P.2d (1971) the court also fell back on the exclusionary clause. This was also the case in *Kuzmiak et al v Brookchester Inc* 33 N.J. Super 575, 111A 2d 425 (1955); *Krohnert v Yacht Systems Hawaii Inc* 4 Haw App 150, 664 P.2d 738 (1983); *Crawford v Buckner* 839 S.W. 2d 754 (1992).

22 This principle is advocated by the American legal writers Williston 1936 with 1965 *Cumulative Supplement* Vol. 6 Para 1759A; Calamari and Perillo (1977) 268-269; Kelner and Kelner "Waivers of Liability in Personal Injury" *New York Law Journal American* October (1992) 3 Jurisprudence 57A *AM Jur* 2d 120. The courts in *Ciofalo et al v Vic Tanney Gyms Inc* 10 N.Y. 2d 294, 177 N.E. 2d 925, 22 N.Y.S. 2d 962 (1961); *Scholobohm et al v Spa Petite Inc* 326 N.W. 2d 920 (1982); *Graham d/b/a the Graham Seed Company v Chicago Rock Island and Pacific Railroad Company* 431 F.Supp 444 (1976); *Sunny Isles Marina Inc v Adului et al* 706 So. 2d 920 (1998); *Hunter v American Rentals Inc* 189 Kan 615, 371 P.2d 131; *Kuzmiak v Brookchester Inc* 33 N.J. Super 575, 111A 2d 425 indicate that the language in the exclusionary clause must be expressed in clear and unequivocal terms.

Another factor which weighs heavily with the courts, in the jurisdictions selected for the research undertaken in this thesis, is that of public policy. Public policy, then, is possibly the factor which is most widely used by the courts in striking down exemption clauses contaminated by the exclusion of liability for negligence.

There is substantial consensus amongst the South African legal writers that the doctrine of public policy may be used to invalidate exemption clauses, excluding liability for negligent conduct and fraudulent conduct. [23]

The South African courts have also, frequently, grappled with the question namely, what norms and values should be considered in deciding whether a contract, or provisions of a contract, are against public policy? Much has been written by the South African writers as well. It appears generally that the general sense of justice of the community, the *boni mores*, manifested in public opinion, is a factor of huge import. [24] Other factors include the concept of good faith, fairness and reasonableness, moral and ethical issues, foreign law, and the values underlying the *Constitution and the Bill of Rights*. [25]

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23 Recognition given by the South African legal writers, including those contained in Van der Merwe et al (2003) 215; Christie (1996) 204; Wille and Millen *Mercantile Law in South Africa* (1984) 34; Turpin (1956) *SALJ* 144 at 145 is founded upon the principle that courts ought to be protective towards members of the public who do not stand in an equal bargaining position. Rautenbach and Van der Vywer *"Volenti non fit iniuria* en Grondwetlike Waarborge" *TSAR* (1993) 637 at 647-648; These type of clauses undermine the consensual basis of contract as, in the so-called ticket cases, often parties are not given any chance of negotiating the terms of the agreement. Terms and conditions are given on a `take it or leave it' basis, often to their detriment. The South African courts have also since the landmark decision in *Morrison v Anglo Deep Gold Mines Ltd* 1905 (AD) 775 on numerous occasions used public policy to invalidate contracts or contract terms. The principle was followed in *SA Railways and Harbours v Conradie* 1928 (AD) 137; *Wells v SA Alumenite Co* 1927 AD 69; *Goodman Brothers (Pty) Ltd v Rennies Group Ltd* 1997 (4) SA 1 (WLD); *Sasfin (Pty) Ltd v Beukes* 1989 (1) SA 1 (A). For the more recent controversial cases see *Afrox Healthcare Bpk v Strydom* 2002 (6) SA 21 SCA; *De Beer v Keyser and Others* 2002 (1) SA 827 (SCA) *contra* however *The Johannesburg Country Club v Stott and Another* 2004 (9) SA 57.

24 The legal writers Neethling Potgieter and Visser *Law of Delict* (2001) 37-38; Van der Walt and Midgley *Delict: Principles and Cases* (1997) 55-57; Boberg *Delict* (1984) et seq; Neethling *Persoonlikheidsreg* (1998) 67-70; Van Heerden and Neethling *Unlawful Competition* (1995) 122-124; Van der Merwe and Olivier *Die Onregmatige Daad in the Suid-Afrikaanse Reg* (1989) 58 et seq; Neethling "Die Reg Aangaande Onregmatige Mededinging sedert 1983" (1991) *THRHR* 219; Van Dyk "Die Bewys van boni mores" 1975 *THRHR* 383 attach great reliance thereto. For the discussion of the origin of norms and values see Corbett "Aspects of the role of policy in the evolution of our common law" 1987 104 *SALJ* 52 67-68.

25 It is especially the writings of Naude and Lubbe "Exemption Clauses - A Rethink occasioned by Afrox Health Care Bpk v Strydom" (2005) 122 *SALJ* 441 at 459, 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) 8 *SAPR/PL* 430, 441 who argue that medical ethics and the unequal bargaining position between the hospital and patient ought to influence the courts in declaring exclusionary clauses indemnifying hospitals from liability against public policy.

But, the general trend in South Africa is that the courts have shown a great reluctance to denounce contracts, or contractual provisions, to be contrary to public policy. [26]

The English legal position with regard to exclusionary clauses seems to be fairly settled since the Promulgation of the *Unfair Contractual Terms Act* 1977. The Act directs that exclusionary clauses should be denounced by the courts where these types of clauses seek to exclude liability for personal injury, or death, caused through negligent conduct.

Public policy, however, continues to play an influencing role in placing certain limitations upon the freedom of contract. English law uses the word `illegality' to cover the multitude of instances where the law for some reason of public policy under statutory prohibition or at common law will set aside contracts or contractual provisions.

But, despite the recognition given to public policy as a means to invalidate a contract or contractual provisions, both the English legal writers and the English courts alike advocate a cautious approach in developing new heads of damages. [27] With parliament playing an active role in law reform by creating legislation such as the *Unfair Contract Terms Act*, the function of the courts are seen to interpret and enforce existing principles and not to create new law in England. [28]

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26 This was clearly the position in *Sasfin (Pty) Ltd v Beukes* 1989 (1) SA 1 (A). This judgement was followed in the controversial judgement of *Afrox Healthcare Bpk v Strydom* 2002 (6) SA 21 SCA and in *De Beer v Keyser and Others* 2002 (1) SA 827 (SCA). See also the more recent Supreme Court of Appeals judgement in the case of *Napier v Barkhuizen* 2006 (4) SA 1 (SCA); 2006 (9) BCLR 1011 and the Constitutional Court judgement of *Barkhuizen v Napier* 2007 (5) SA 323 (CC).

27 The author Beale *Chitty on Contracts* (2004) Para 16-004 sets out the English position with regard to the narrow view and the broad view. Beale (2004) Para 16-004 also argue that with Government interference and an activist legislature in England, the courts are kept in check in developing new heads. Ever since the case of *Richardson v Mellish* (1824) 2 BING 229 in which it was held that `public policy is an unruly horse' English courts have been reluctant to develop new heads of damages. Courts according to the English writers Beatson *Anson's Law of Contract* (2002) 353-365; Koffman and MacDonald *The Law of Contract* (2004) 249-352 will not enforce the traditional contracts which are contrary to public policy including agreements committing a crime; agreements to commit a civil wrong or fraud; agreements contrary to good morals etc.

28 McKendrick (2004) 843 expresses the thinking that parliament is better equipped to formulate new heads of public policy than the courts. *Contra* however, Beatson (2002) 352 who believes certain contracts to commit crime, fraud, contracts which tend to injure public good etc are best controlled through heads developed by the courts. The English courts as far back as 1891 in the case of *Re Mirans* (1891) 1 QB 594 stated the English judges should be trusted `as interpreters of the law rather than expounders of what is called public policy'. The English courts per Lord Halsbury in *Janson v Driefontein Consolidated Mines Ltd* 1902 A.C. 484 often expressed the concern that to allow the courts to develop new heads would cause the risk that a judge who sets a precedent today could change tomorrow due to a change in his thinking.

But, notwithstanding the above thinking, another school of thought emerged in the second half of the twentieth century, advocating the ability and competency of the English courts to develop new heads of public policy. An example hereof emerged with the issues surrounding the restraint of trade clauses. [29] The English courts have expressed the desire that courts should be given the opportunity in adopting flexible measure to rid itself from jurisprudential immutability especially where the law needs to adapt due to economical, social and moral factors and changes. [30]

Due to the courts' inconsistency in developing public policy, the British Government, in the end, stepped in, appointing the English Law Commissions, resulting in the promulgation of the *Unfair Contract Terms Act* 1977 and the *Unfair Terms in Consumer Contracts Regulation* 1994. This step was taken, as it was resolved by the Commission that public policy dictated that some stricter form of control be introduced for exclusionary clauses.

In the American jurisdiction, both legal writers and the courts rely heavily on public policy in influencing the validity of exclusionary clauses. As a general rule, contracts of this nature are not favoured. Such clauses are strictly construed against the party relying on these types of exculpatory or exclusionary clauses. [31]

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29 It is especially, the writers Beatson (2002) 325 and Koffman (2004) 249 who advocate the competency of the courts in developing the heads of public policy. The English courts have also expressed the view that greater faith be shown in the ability of judges to handle matters of public interests and allow courts to develop new heads of public policy. Lord Denning M.R. in the case of *Enderby Town F.C. Ltd v The Football Association Ltd* (1971) CA 215 when advocating for judges to develop public policy, when referring to the metaphoric language of Burroughs in *Richardson v Mellish* (1824) 2 BING 229 regarding the `unruly horse' stated *inter alia "with a good man in the saddle, the unruly horse can be kept in control"*.

30 Lord Halane in *Rodriquez v Speyers Bros* (1919) A.C. 59 recognizes the fact that public policy varies greatly from time to time. The English courts have especially, signalled out the development of agreements in restraint of trade which have underlined a number of modifications. Cases in which this principle was emphasized include *Esso Petroleum Co Ltd v Harper's Garage (Stourport) Ltd* (1968) A.C. 269 HC; *Schoeder Music Publishing Co Ltd v MaCaulay* (1974) 1 W.L.R. 1308. Other areas concentrated on by the courts include the contingency fee arrangement between the solicitor and client. See *Thai Trading Co v Taylor* (1998) Q.B. 781 (1998) 3 ALL E.R. 65.

31 The American legal writers Calamari and Perillo (1977) 169 as well as Jaeger *A treatise on the law of contracts* (1953) Para 1630 emphasize this general rule by expressing the opinion that unless these type of clauses are expressed in clear, explicit or unequivocal terms, they ought not be construed in favour of the contracting party relying on them. Some American courts have not been willing to invoke public policy to invalidate exclusionary clauses due to their belief that public policy is said to encourage the freedom of contract in general. *Printing and Numerical Registering Co v Sampson* 19 L.R. Eq. 462, 465 (1875); *Chasen v Trailmobile Inc* 215 Tenn. 87, 384 S.W. 2d 1 (1964); *Chicago and North Western Railway Company v Rissler* 184 F.Supp 98 (1960); *Occidental Savings and Loan Association v Venco Partnership* 206 NEB 469, 293 N.W. 2d 843 (1980); *Banfield v Cat Sports Inc* 589 So. 2d 441 (1991); *Tucker and Sons Inc v GTE Directories Sales Corporation* 253 BEB 458, 57, N.W. 2d 64 (1997). Other courts have, however, taken an opposing view in declaring these types of contracts or clauses to be invalid and unenforceable as against public policy. *United States v United States Cartridge Co* 198 F.2d 456 (1952); *Equitable Loan and Security Co et al v Waring et al* 44 S.E. 320 (1903); *Henningsen v Bloomfield Motors*

The legal writers and courts also acknowledge that public policy will not permit parties to a contract to agree to consequences violative of a duty of care, or where the exemption provision is prohibited by statute or governmental regulation, the courts will use public policy to invalidate the contract or the provisions of the contract. [32]

The factors and circumstances most widely accepted in determining the conditions under which public policy will cause exemption, or exculpatory clauses, to be invalid and unenforceable, include, the nature and subject matter of the agreement, the relations of the parties and the presence or absence of equality of bargaining power. [33]

Inc 32 N.J. 358, 161 A. 2d 89. But the American courts have also cautioned there must be compelling reasons present when pronouncing their invalidity and courts should not lightly extend the rules to invalidate these types of contracts. *Occidental Savings and Loan Association v Venco Partnership et al* 206 NEB 469, 293 N.W. 2d 843 (1980). It was stated in *Equitable Loan and Security Co et al v Waring et al* 44 S.E. 320 (1903) that it must be executed by the courts *"only in cases free from doubt"*. See also *Tucker and Sons Inc v GTE Directories Sales Corporation* 253 NEB 458, 571 N.W. 2d 64 (1997); *Banfield v Louis Cat Sports Inc* 589 So 2d 441 (1991).

32 For legal writings see Calamari and Perillo (1977) 269; Jaegar (1953) para 1750A. For the American courts' position on attempts to exempt a contracting party from liability violative to a stature see Jaegar (1953) para 1750A. Likewise, liability in conflict with the performance of a legal duty, or a duty of public service, or a public duty, refer to Calamari and Perillo (1977) 270; Jaegar (1953) Para 1751. The rationale of the American legal writers and the courts for recognizing the prohibition in these circumstances is founded on the idea that wrongdoers should not benefit from their negligent action, but rather, they should pay for the damages which they cause. Moreover negligence should be discouraged. Calamari and Perillo (1977) 270; Jaegar (1953) 1751. As to the deviation or violation from a duty to take care, the American courts are particularly hard where these clauses and contracts are injurious to the public. *Russel v Martin* 88 So. 2d 35 (1986); *Kuzmiak et al v Brookchester Inc* 33 N.J. Supra 575, 111 A.2d 425; *Tucker and Sons Inc v GTE Directories Sales Corporation* 253 NEB 458, 571 N.W. 21 64 (1997); *Banfield v Louis Cat Sports Inc* 589 So. 2d 441 (1991). For the American courts views on hospital contracts excluding liability for negligence see *Belshaw v Feinstein and Levin* 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* 469 F.Supp 914 (1979); *Emory University v Porubianski* 249 Ga. 391, 282 S.W. 2d 903 (1981); *Olson v Molzen* 555 S.W. 2d 429 (1977); *Tunkl v Regents of University of California* 383 P.2d 441 (1963); *Cudnick v William Beaumont Hospital* 207 Mich App. 378, 525 N.W. 2d 891 (1995).

33 The writers Calamari and Perillo (1977) 268ff hold the view that save for instances where the agreement is prohibited by statute or where the public interest is invalid, exclusionary clauses, in the general sense, are not void due to public policy. Public interest is however affected, according to Calamari and Perillo (1977) 269 as well as Jaeger (1953) Para 1751, where there is a violation of a legal duty or a duty of public service. The relations of the contracting parties are an important determining factor in invalidating a contract or exculpatory provisions. Some relationships, by their very nature, involve a status requiring of one of the contracting parties greater responsibility than that required of the ordinary person. The relationships identified by Calamari and Perillo (1977) 270, as well as Jaeger (1953) Para 1791, include the relationship of landlord and tenant, hospital/doctor and patient, common utilities and public users, the railways or air transportation and public users, innkeepers and public patrons. In this regard the said legal writers rely on the common law duty of due care and/or statutory regulations, or a relationship involving public service. Any attempt to exempt or exculpate a contracting party from exercising their duties would be invalid and unenforceable. The relative bargaining powers and the presence, or absence, of the equality of bargaining power may also be considered in testing the validity of a contract. It follows therefore, according to the writers Calamari and Perillo (1977) 271, as well as Jaegar (1953) Para 1791, that a contractual provision, undertaking to exculpate a party from his/her own negligence, will not be sustained where he/she stands in a superior bargaining position to that of the other contracting party. Moreover, the effect thereof would be to put the weaker party at the mercy of the stronger party. Contracts most greatly affected, according to Calamari

The United States of America have also introduced the *Uniform Commercial Code* in curbing the hardship which exclusionary or exculpatory clauses have brought with them in certain circumstances. [34]

It appears therefore that, in the United States of America, save for the presence of the factors and circumstances discussed hereinbefore, where public policy plays a major role in assessing the validity of these contracts or contractual provisions, any attempt to exempt a contracting party from liability for future conduct will be valid and enforceable. However, any attempt to exclude liability for a future intentional tort or for a future wilful act or for gross negligence will be invalid and unenforceable. [35]

The status and bargaining power of the contracting parties is a factor known in all three jurisdictions selected for this research. Although, as will be seen from the contents that follow, it is a concept that is not unknown in the South African law of contract, nonetheless, very little has been written about this subject matter in the past, and unlike in the jurisdictions of England and the United States of America, the South African case law is not very rich in jurisprudence dealing with the status and bargaining power of the contracting parties.

The introduction and explosive usage of standard form contracts in the commercial field, as well as other fields, have caused the South African legal writers and courts to acknowledge the ills which these types of contracts bring with them, especially when these types of contracts include exclusionary or exculpatory clauses. The main area of concern, focused on by the South African legal writers, include the following: in the main, the argument

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and Perillo (1977) 271ff, as well as Jaeger (1953) para 1751, include agreements entered into between the landlord and tenant, hospital/patient etc.

34 Jaegar (1953) Para 1763A opines that the *Uniform Commercial Code* was designed to establish a broad business ethic and public policy will stem the impairment of the integrity of the bargaining process where one contracting party stands in a superior bargaining position to that of the weaker party.

35 The general position with regard to exclusions is set out by Calamari and Perillo (1977) 169, as well as, Jaeger (1953) Para 1630. The American courts have continuously relied upon the principle of freedom of contract in generally upholding these types of contracts. See in this regard, Printing and Numerical Registering Co v Sampson 19 L.R. Eq. 462, 465 (1875); *Chasen v Trailmobile Inc* 215 Tenn. 87, 384 S.W. 2d 1 (1964); *Chicago and North Western Railway Company v Rissler* 184 F.Supp 98 (1960); *Occidental Savings and Loan Association v Venco Partnership* 206 NEB 469, 293 N.W. 2d 843 (1980); See also *Banfield v Cat Sports Inc* 589 So.2d 441 (1991); *Tucker and Sons Inc v GTE Directories Sales Corporation* 253 BEB 458, 57, N.W. 2d 64 (1997). But the courts are quite willing at times, to use public policy to declare these types of clauses invalid. *United States v United States Cartridge Co* 198 F.2d 456 (1952); *Equitable Loan and Security Co et al v Waring et al* 44 S.E. 320 (1903); *Henningsen v Bloomfield Motors Inc* 32 N.J. 358, 161 A. 2d 89.

advanced is that the ignorant who find themselves in an inferior bargaining position is obliged to accept terms and conditions, including the exclusion of liability contained in exclusionary or exculpatory clauses, often to their detriment. [36]

In more recent times, the South African legal writers when having regard to the sanctity of contract and contractual autonomy, have criticised the general acceptance that contract is premised on the contracting parties possessing equal bargaining power. [37] This is regarded as a fallacy by many, especially, the inequality which exists when contracting parties make use of standard form contracts. The effects of the contracting parties been placed in an unequal bargaining position are multiple. [38]

The South African courts as previously stated have not developed a rich jurisprudence in this field of contract law. [39] More recently, the Supreme Court of Appeals in the case of *Afrox Healthcare Bpk v Strydom* 2002 (6) SA 21 (SCA) missed a golden opportunity to develop the South African law of contract, by placing greater emphasis on the inequality of bargaining power between the hospital and the patient, in pronouncing on the invalidity of exclusionary clauses in hospital contracts. Instead the court squandered the opportunity by holding that the inequality of bargaining power between the parties to a contract, *per se,* does not justify the inference that a provision in a contract which is to the advantage of the stronger contracting party, is necessarily against public interest. The court does say

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36 Some of the legal writers include Van der Merwe et al (2003) 225, Aronstam *Consumer Protection, Freedom of Contract and the Law* (1979) 22ff hold the view that the inequality of bargaining power has often been exploited by monopolies that use abusive methods to exploit economically weaker contracting parties. Another issue which is strongly emphasized by the writers is that oppressive or unreasonable terms, often hidden in small print in standardized contracts, can easily escape the notice of the weaker contracting party. The latter is often left in a so-called `take it or leave it' situation, and because of the situation he/she is often obliged to act to their detriment.

37 Hopkins "Standard-form Contracts and the evolving idea of Private Law Justice: A Case of Democratic Capitalist Justice v Natural Justice" *TSAR* (2003-1) 150, 152-153 in particular, argue that this type of argument is based on an erroneous premise, especially, the harshness and oppressiveness that standard-form contracts bring is founded upon an unequal bargaining position between the contracting parties. This often results in the weaker contracting party been abused by the stronger contracting party.

38 Hopkins (2003) 152ff holds the view that in some instances the inequality causes an infringement of fundamental rights often amongst the most ignorant in society.

39 Some 50 years ago Claassen J in *Linstrom v Venter* 1957 (1) SA 125 (SWA) save for describing the oppressive nature of standard form contracts, did not develop the law in declaring these type of contracts invalid as against public policy. This again occurred in the case of *Western Bank Ltd v Sparta Construction Company* 1975 (1) SA 839 (W) in which the court again expressed its concern over the use of standardized contracts. The judge suggested a minimum size in, especially, the print in standard form contracts in order to protect the weaker contracting parties.

however, that unequal bargaining power between contracting parties is a factor which the courts weigh up with other factors to assess public interest. The court, however, stated no evidence was lead that the hospital was in a stronger position and could draw no inference in that regard. [40]

More recently, in the case of *Napier v Barkhuizen,* [41] the Supreme Court followed the principle enunciated in the *Afrox case*. The Supreme Court of Appeal however, found that there was no evidence to suggest that Mr Barkhuizen was in an unequal bargaining position. In fact, the court found that he was given all the information needed to, consensually, enter into the agreement.

A similar finding was made by the Constitutional Court in the case of *Barkhuizen v Napier*. [42] The court, however, emphasized the importance of this principle in establishing whether the contractual provisions of the contract itself were contrary to public policy.

The English law of contract has, over a significant period of time, entertained a wide debate over the status and bargaining power of contractants. [43]

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40 Many South African legal writers including Van den Heever "Exclusion of Liability of Private Hospitals in South Africa" *De Rebus* (April 2003) 47-48; Jansen and Smith "Hospital Disclaimers: Afrox Health Care v Strydom" (2003) *Journal for Juristical Science* 28(2) 210, 217-218; Hawthorne "Closing of the Open Norms in the Law of Contract" 2004 67(2) *THRHR* 294 at 301; Naude and Lubbe "Exemption Clauses - A rethink occasioned by Afrox Health Care Bpk v Strydom" The South African Law Journal (2005) 122 *SALJ* 441 at 460 all argue that the court ought to have attached greater weight to the imbalance of the bargaining position of the patient. The fact that patients when admitted to the hospital cannot negotiate the terms is severely criticized as unconscionable. So strong is the objection by the legal writers against this dictum that it has been suggested that legislation ought to be introduced to protect the weaker party against the stronger party.

41 2006 (4) SA 1 (SCA); 2006 (9) BCLR 1011 (SCA).

42 2007 (5) SA 323 (CC).

43 The effect of unfair bargains in English law was raised as far back as 1834 in the case of *Bawtree v Watson* (1834) 3 MY and K 339, 341 in which relief was given to parties who did not stand on equal footing resulting in harsh results. Lord Selbourne in *Earle of Aylesford v Morris* (1873) 8 CH App 484 also dealt with the issue of unfair bargains as far back as 1873. The courts of equity especially came out strongly in favour of the vulnerable that stood on an unequal footing with the stronger contracting party. Courts often voided these transactions. See *Wood v Leach* (1818) 3 MADA 417; *Fry v Lane* (1888) 40 CHD 3 112... The principle of fairness of bargain and the potential effects of unequal bargaining continued into the twentieth century with the case of *The Port Caledonia and the Anna* (1903) 184 Probate Division. The need for protection of a weaker contracting party who stands in an unequal bargaining position was more recently emphasized by Lord Denning in *Lloyd's Bank Ltd v Bundy* (1975) 1 QB 326. The position was repeated in a number of cases namely *Schroeder Music Publishing v Macauly* (1974) 3 ALL ER 616; *Clifford Davis Management Ltd v W.E.A. Records Ltd* (1975) 1 W.L.R. 61; *Alec Lobb (Garages) Ltd v Total Oil (Great Britain) Ltd* (1985) 1 W.L.R. 173 LA. *Contra* however the stance taken in *National Westminster Bank PLC v Morgan* (1985) AC 686 where the court is not prepared to make this a free floating defence. See also *Director General of Fair Trading v First National Bank PLC* (2001) UKHL (2002) 1 AC 481.

English law, as is the case in the jurisdictions of South Africa and the United States of America, have expressed grave doubt over the philosophy that when contracting parties enter into agreements they occupy a position of equality. This, according to English law is, especially, the position with the utilization of standard form contracts. [44]

These standard form contracts often incorporate exemption clauses or exculpatory clauses causing great harm to the consumers, so much so, that the consumer's moral rights are signed away or diminished, leaving them without remedy. [45]

Realizing the exploitation by the stronger contracting party of the weak, the poor and the vulnerable, a concerted effort was made, in England, to bring about law reform to stem the exploitation of the weak etc. and to prohibit the enforcement of some kinds of contracts or contractual provisions. Because of the inconsistency of the English courts in the development of the common law, as a means to protect the weaker contracting parties from being exploited by the stronger parties, with whom they stood in an unequal bargaining position, the Government deemed it necessary to look to the legislature instead of the courts. [46]

Consequently, parliament passed the *Unfair Contract Terms Act* 1977. The effect of the legislation passed, is that courts are now compelled in England to strike down a contract or a clause of a contract deemed to be unconscionable where one contracting party has extracted a grossly unfair bargain at the expense often of the weaker or poor and vulnerable party. [47]

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44 Writers such as Tillotson *Contract Law in Perspective* (1995) 8 and Atiyah *An Introduction to the Law of Contract* (1995) 15 are very critical of the standard form contracts in that no individually negotiated agreements take place. The weaker contracting party's position is such that he/she bargains from an inferior bargaining position. Often his/her choice as such is restricted to `taking it' or `leaving it', thus leaving one of the parties vulnerable to accept the terms of the agreement or go without the agreement.

45 For that reason writers such as Tillotson (1995) 8, Yates (1995) 15 have supported the consumer welfarism ethos which call for reasonableness and fairness in contracting. It also calls for the prohibition of the weak being exploited by the strong in an unequal bargaining position and that no party should benefit from his/her own wrong. In this regard no party who is at fault should dodge their responsibility.

46 The legal writers Atiyah (1995) 25-26, Furston *Law of Contract* (1986) 23, convincingly argue that legislative intervention reflects the needs of society to control agreements or contractual provisions which lead to harsh results. The writer Tillotson (1995) 105 also argues that parliament in this way is called upon to restore some semblance of balance between the strong and the weak contracting parties.

47 To this end the English law writers Atiyah (1995) 300; Yates *Exclusion Clauses in Contracts* (1982) 279 argue that part of the justification for the passing of the legislation is due to the fact that the inequality of bargaining power has never been a socially free floating common law defence such as misrepresentation, mistake, undue influence etc. Since the accrual of the *Unfair Contractual Terms Act* 1977 courts do deal with unfair terms

The status of the contracting parties, the relations of the parties and the absence of equality of bargaining power are factors which play a tremendous role in influencing the validity of exemption or exculpatory clauses in contracts in the United States of America. [48]

Besides the procedural unfairness which exclusionary clauses or exculpatory clauses often bring with them, both the American legal writers and the courts alike recognize the substantive unfairness of these type of contracts as well. [49]

Several factors have been recognized by the American legal writers and the courts in determining the substantive unfairness of the provisions of contracts incorporated in exculpatory or exemption clauses. The factors include, firstly, whether the agreement entered into affects the general public. [50] The relationship between the contracting parties is

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especially in exemption clauses.

48 The American legal writers, especially, Calamari and Perillo (1987) 407 are emphatic that in situations where one of the contracting parties enjoys a superior bargaining position over the other, resulting in the latter contracting party being left at the mercy of the former parties negligence, such exculpatory or exemption clause for his or her own negligence should not be sustained. Likewise, the American courts do not look favourably at exclusionary clauses where one of the contracting parties because of his superior bargaining position, capitalizes on the situation, often to the detriment of the weaker party. The underlying reason for adopting this attitude is said to lie in the protection of the uneducated and, often illiterate individual who is the victim of gross inequality of bargaining power. See *McCutcheon v United Homes Corp* 79 Wash.2d 443, 486 P. 2d 1093 (1971); *Henningsen v Bloomfield Motors Inc* 32 N.J. 358, 161A.2d 69 (1960); *Kuzmiak v Brookchester Inc* 33 N.J. Super 575, 111A. 2d 425 (1955); *Krohnert v Yacht Systems Hawaii Inc* 4 Haw. App. 190, 664 P. 2d 738 (1983); *Chazen v Trail Mobile Inc* 215 Tenn. 87, 384 S.W. 2d 1 (1964); *Chicago and North Western Railway Company v Rissler et al* 184 F.Supp. 98 (1960); *Banfield v Louis, Cat Sports Inc et al* 589 So. 2d 441 (1991); *Crawford v Buckner et al* 839 S.W. 754 (1992); *Leidy v Desert Enterprises Inc d/b/a Body Shop Health Spa* 252 Pa. Super 162, 381 A. 2d 164 (1977); *Rooz v Kimmel et al* 55 Cal. App. 4th 473, 64 Cal.Rptr 2d 177 (1997); *Zeit v Foley* 264 S.W. 2d 267 (1954); *Twin City Pipe Line Co et al v Harding Glass* 283 U.S. 303, 51 S.Ct 476 (1931); *New York Life Ins Co. v Durham* 166 F.2d 874 (1948); *Lazenby v Universal Underwriters Insurance Company* 214 Tenn. 639, 383, S.W. 2d 1 (1964).

49 The American legal writers denounce contracts which have at its base substantive, unfairness. The rationale for their thinking is based on the principles of moral philosophy and ethics. See Calamari and Perillo (1987) 406. The presence of unconscionable-ness in the contracting provisions of exculpatory or exclusionary clauses is a huge factor in invalidating the provisions of the contract or the contract as a whole. Unconscionable provisions which often find themselves at the centre of exclusionary or exculpatory clauses resulting in the hardship of the ignorant or poor and vulnerable, should also not be sustained, Jaeger (1952) Para 1632B, according to the legal writers.

50 It is especially, the American courts which draw a great distinction between private voluntary transactions and those affecting the general public. The general approach by the courts amount to this, whilst the courts would be more amenable in allowing parties to shoulder a risk in private voluntary transactions in the form of exculpatory agreements, the courts are less amenable to protect a contracting party who relies upon an exculpatory clause where a public interest has been infringed or a public duty has not been complied with.See *McCutcheon v United Homes Corp* 79 Wash.2d 443, 486 P. 2d 1093 (1971);*Henningsen v Bloomfield Motors Inc* 32 N.J. 358, 161A. 2d 69 (1960); *Kuzmiak v Brookchester Inc* 33 N.J. Super 575, 111A. 2d 425 (1955); *Krohnert v Yacht Systems Hawaii Inc* 4 Haw. App. 190, 664 P. 2d 738 (1983); *Chazen v Trail Mobile Inc* 215 Tenn. 87, 384 S.W. 2d 1 (1964); *Chicago and North Western Railway Company v Rissler et al* 184 F.Supp. 98 (1960); *Banfield v Louis, Cat Sports Inc et al* 589 So. 2d 441 (1991); *Crawford v Buckner et al* 839 S.W. 754 (1992); *Leidy v Desert*

a factor of huge import in the American law of contract, often influencing the validity of contractual provisions or contracts as a whole. [51] Depending on the nature of the relationship between the two contracting parties, it is generally accepted in American law, that some relationships involving the status of certain contracting parties will result in a greater responsibility expected from certain contracting parties than required from the ordinary person. It is, especially, in the hospital/other caregiver-patient relationship and that of the relationship of landlord and tenant that the responsibility includes a certain standard of care and skill to be exercised by the service provider. [52] The relationship is often described as a special relationship affecting public interest. [53] Both the legal writers and the courts are *ad idem* that, arising from the special relationship any attempt, therefore, to absolve the hospital/caregiver from liability arising from a deviation from the standard of care and which involves public interest is regarded as obnoxious and invalid. [54] The same

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Enterprises Inc d/b/a Body Shop Health Spa 252 Pa. Super 162, 381 A. 2d 164 (1977); *Rooz v Kimmel et al* 55 Cal. App. 4th 473, 64 Cal.Rptr 2d 177 (1997); *Zeit v Foley* 264 S.W. 2d 267 (1954); *Twin City Pipe Line Co et al v Harding Glass* 283 U.S. 303, 51 S.Ct 476 (1931); *New York Life Ins Co. v Durham* 166 F.2d 874 (1948); *Lazenby v Universal Underwriters Insurance Company* 214 Tenn. 639, 383, S.W. 2d 1 (1964).

51 The nature of the relationship according to the legal writers Jaeger (1972) Para 1751 often involves a status requiring of one of the contracting parties a greater responsibility than that required of the ordinary person. The relationships signalled out by the American legal writers Waltz and Inbau *Medical Jurisprudence* (1971) 17ff, 42ff; Furrow et al *Health Law* (1995) 237ff; Morris and Moritz *Doctor, Patient and The Law* (1971) 135; Sanbar *Legal Medicine* (1995) 7, 62-63, 208, 209; Holder *Medical Malpractice* (1975) 40ff; Kramer and Kramer *Medical Malpractice* (1983) 8ff and the courts for the healthcare giver - patient relationship see Belshaw v Feinstein and Levin 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* 469 F.Supp 914 (1979); *Emory University v Porubianski* 249 Ga. 391, 282 S.W. 2d 903 (1981); *Olson v Molzen* 555 S.W. 2d 429 (1977); *Tunkl v Regents of University of California* 383 P.2d 441 (1963); *Cudnick v William Beaumont Hospital* 207 Mich App. 378, 525 N.W. 2d 891 (1995) include *inter alia* the hospital and other caregiver and patient, the landlord and tenant in a lease relationship, a relationship involving public service between common carriers, air transportation, garage keepers and the general public.

52 This standard of care and skill according to the American legal writers is a duty imposed upon certain contracting parties by the common law or statutory law derived from professional canons of ethics, licensing laws and regulations set up by professional organizations. It is especially, in the hospital/other caregiver-patient relationship that the courts have recognized the duty of the service provider to exercise due diligence and care in compliance with the common law as well as statutory obligations. *Belshaw v Feinstein and Levin* 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* 469 F.Supp 914 (1979); *Emory University v Porubianski* 249 Ga. 391, 282 S.W. 2d 903 (1981); *Olson v Molzen* 555 S.W. 2d 429 (1977); *Tunkl v Regents of University of California* 383 P.2d 441 (1963); *Cudnick v William Beaumont Hospital* 207 Mich App. 378, 525 N.W. 2d 891 (1995).

53 The special relationship according to the legal writers Waltz and Inbau (1971) 17ff, 42ff; Furrow et al (1995) 237ff; Morris and Moritz (1971) 135; Sanbar (1995) 7, 62-63, 208, 209; Holder (1975) 40ff; Kramer and Kramer (1983) 8ff arises from the relationship involving public service.

54 For the legal position see the legal writings of Waltz and Inbau (1971)177ff, 42ff; Furrow et al (1995) 237; Holder (1975)44ff. For the courts' attitude see *Belshaw v Feinstein and Levin* 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* 469 F.Supp 914 (1979); *Emory University v Porubianski* 249 Ga. 391, 282 S.W. 2d 903 (1981); *Olson v Molzen*

can be said, albeit to a lesser extent, in the relationship of landlord and tenant and relationships involving public service, for example, common carriers, garage keeping etc. [55]

From what has been mentioned hereinbefore, public interest is a factor influencing the validity of exemption clauses. South Africa, as is the position in the other jurisdictions, does recognize where public interests are infringed through the use of certain exclusionary clauses, the courts will not hesitate to strike down these types of clauses. [56] The English legal writers and the courts have also recognized public interests as a factor which influences the invalidity of certain contractual provisions or contracts. It is especially when the validity of restraint of trade clauses are questioned, that "public interests" has often served as an aid to invalidate these types of contracts. [57]

It is especially, in the United States of America, that public interests are frequently used in invalidating contracting provisions or contracts as a whole, more especially, exculpatory or exclusionary clauses.

As was seen earlier, as a general rule contracting parties may lawfully contract to absolve one of the contracting parties from liability for future negligence, unless the exculpatory clause is violative of public interests or against some statutory prohibition. [58]

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555 S.W. 2d 429 (1977); *Tunkl v Regents of University of California* 383 P.2d 441 (1963); *Cudnick v William Beaumont Hospital* 207 Mich App. 378, 525 N.W. 2d 891 (1995).

55 See the writings of Jaeger (1972) Para 1951 and the case authority see Crawford v Buckner et al 839 S.W. 2D 754 (1992): McCutcheon v United Homes Corp 99 Wash 2d 443,486 P. 2d 1093 (1971).

56 Examples used by the South African legal writers include the entrapment of an unwary customer. Christie *The Law of Contract* (2004) 204; Agreements which have as their aim the obstruction or defeating the administration of justice for example restricting someone's freedom to act are according to Van der Merwe et al *Contract: General Principles* (2003) 215 contrary to public interest. The South African courts have regarded the so-called "contracting out" clauses in a contract as contrary to public interest. See *Morrison v Anglo Deep Gold Mines Ltd* 1905 (AD) 775 followed in *SA Railways and Harbours v Conradie* 1921 (AD) 137. In the case of *Wells v SA Alumenite Co* 1927 (AD) 69, the court also ruled that an exemption from liability involving fraud would, in public interest, be against public policy. This was also the position in other matters and, more recently, in *Afrox Healthcare Bpk v Strydom* 2002 (6) CA 21 (SCA).

57 Besides restraint of trade clauses, Beatson (2002) 371ff also uses agreements involving cartels and other forms of restrictive trading agreements as contrary to public interests. The English courts have for decades used public interests in invalidating restraint of trade clauses. See in this regard the case of *Alex Lobb (Garages) Ltd v Total Oil (Great Britain) Ltd* (1985) 1 W.L.R. 173; *A Schroeder Music Publishing Co Ltd v Macauly* (1974) 1 W.L.R. 1308; *Eastham v New Castle United Football Club Ltd* (1964) CH 413; *Greig v Insole* (1978) 1 W.L.R. 302. Other agreements in which the English courts have used public interests to invalidate agreements include restrictive trading agreements and cartel agreements.

58 Support for this general rule can be found amongst the legal writers Calamari and Perillo (1977) 270ff as well as Jaeger (1957) para 1751 respectively.

Therefore, any exculpatory clause involving the performance of a legal duty owed or public interest required and attempting to exonerate a contracting party from liability for negligence, will be invalidated by the courts. [59]

Although the concept "public interest" has not been defined in the American jurisdiction, nonetheless, several factors have crystallized, the presence of which, if present, influenced the validity of exculpatory clauses exempting a contracting party from future liability. The factors include certain relationships. Depending on the nature of the relationship, certain relationships, for example, the hospital/doctor-patient relationship, brings with them greater responsibility required of, say, the hospital or doctor, than that required of the ordinary person entering into a contract. [60]

The licensing regulations govern not only the relationship between the hospital and patient, they also regulate the greater responsibility the hospital is obliged to exercise. The responsibility, in turn, is transformed into a legal duty, or duty of public service, owed to the public, in which the hospital is expected to maintain pre-defined standards. [61]

It is clear from the American writings that the legal duty or duty of public service owed can in no way be compromised. Any attempt, therefore, to contract against its (the hospitals) own negligence, in violation of a legal duty, or duty of public service owed and impacting negatively on the standards set in terms of the licensing regulations, would be regarded as affecting the public interest, unenforceable and invalid. [62]

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59 The legal position is highlighted by Calamari and Perillo (1977) 270ff as well as the Supreme Court in the well-known decision and much quoted decision of *Tunkl v Regents of the University of California* 60 Cal 2d 92, 32, Cal, Rptr 33, 383 P.2d 441 (1963).

60 The responsibility according to Jaeger (1957) Para 1751 is foreshadowed by licensing regulations in which a hospital is awarded a license to operate. Furthermore, the services of the hospital according to Jaeger (1957) Para 1751 is a crucial necessity for public use. The court in the case of *Tunkl v Regents of University of California* 60 Cal 2d 92, 383 P.2d 441, 32 Cal Rptr 33 (1963) highlights the essential nature of the service which the hospital performs which is suitable for public regulation.

61 The legal writers Calamari and Perillo (1977) 270 as well as Waltz and Inbau (1971) 17-18 point out that when a hospital is awarded a license to operate and shows its willingness to serve the public, pre-defined standards are set for the hospital which hospitals are obliged to adhere to. *Tunkl v Regents of the University of California Co* Cal 2d 92, 383 P.2d 441, 32 Cal Rptr 33 (1963) highlights the established standards which hospitals have to maintain after obtaining their licenses.

62 The rationale for this thinking is described by Furrow (1995) 257 as well as Jaeger (1957) Para 1751 as a contracting party's common law right to sue which cannot be alienated. Reasons for the inalienability rest in the vulnerability of the patient, the anxious state patients find themselves in when entering the hospital and the superior bargaining position the hospital occupies in the hospital-patient relationship. For support of this legal

Other relationships which also involve public services and which are, likewise, affected by public interest when attempts are made to exonerate a contracting party from liability for his/her/its negligence, includes the relationship of landlord and tenant, common carriers and innkeepers and the public at large. [63]

Finally, from what follows, all three jurisdictions, selected for the research undertaken in this thesis, recognise the contravention of a statutory duty as a factor impacting on the validity of exculpatory or exemption clauses. In this regard, the South African academic writers hold the view that where an exemption clause is aimed at, or tends to induce the contravention of a general or statutory law; it will be struck down by the South African courts, because it is contrary to public policy. [64]

Turning to statutory duties in medical and health services, in South Africa, the Minister of Health, by virtue of the powers vested in him, issued some regulations, in 1980, which regulate the reasonable degree of care and skill which has to be exercised by private hospitals and accompanying obligations to practise under that standard, which is conditional

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principle followed by the American courts. See *Belshaw v Feinstein and Levin* 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* 469 F.Supp 914 (1979); *Emory University v Porubianski* 249 Ga. 391, 282 S.W. 2d 903 (1981); *Olson v Molzen* 555 S.W. 2d 429 (1977); *Tunkl v Regents of University of California* 383 P.2d 441 (1963); *Cudnick v William Beaumont Hospital* 207 Mich App. 378, 525 N.W. 2d 891 (1995).

63 Legal writers such as Calamari and Perillo (1977) 271, as well as Jaeger (1957) 1751, hold the view that these service providers also have a common law duty and sometimes, statutory duties, to safeguard users against injury or damages. Any attempt to absolve a contracting party from a common law or according to the American courts *Mayfair Fabrics v Henley* 48 N.J. 483, 226 A. 2d 602 (1968); *McCutcheon v United Homes Corp* 79 Wn. 2d 443, 486 P.2d 1093 (1971); *Crawford v Buckner et al* 839 S.W. 2d 754 (1992) are clearly against public interests.

64 The South African writers who share this view are mentioned in Van der Merwe et al (2003) 215; Turpin *SALJ* (1956) 157. The prohibition of excluding a statutory duty in the form of an exclusionary clause was dealt with in the case of *Newman v East London Town Council* 1855 (EDL) 61. In this case the municipality sought to exclude its liability contractually. The Appeal Court held that the council could not contract out of the liability where there is a public duty to guard against foreseeable harm. This was also the view taken by the Appellate Division (as it was known then) in the case of *Morrison v Angelo Deep Gold Mines Ltd* 1905 (AD) 775 the court specifically emphasized that public policy requires the observance of statutory duties contained in a statute. The court consequently held that any attempt to exonerate a company from liability in breach of a statutory duty would be invalid. In the case of *Dukes v Marthinusen* 1937 (AD) 12 in which the court emphasized the need to take precautions as means to guard against the breach of a duty owed by the employer to the employees. Subsequently in the case of *Crawhall v The Minister of Transport and Another* 1963 (3) SA 614 (T) the court also dealt with the duty of an authority namely the Minister of Transport to safeguard the public against foreseeable harm.

to the maintenance of a license held by the licensee. [65] It is the very nature of the regulations which will be used, in Chapter 14, in advancing the argument that any exculpatory, or exemption clause, attempting to exonerate a hospital from liability in its failure to maintain the duty to exercise reasonable care, as provided for by the regulations, will be invalid and undesirable, as such conduct would be contrary to public interest and public policy.

In so far as English law is concerned, the promulgation of both the *Unfair Contract Terms Act* 1977 and the *Unfair Consumer Contracts Regulations* 1999 certainly brought about statutory control of exemption clauses in the English jurisdiction. One of the underlying reasons for the introduction of the *Unfair Contract Terms Act* 1977 is said to be to create a control mechanism, in England, to counter the practise of the exploitation by the stronger contracting parties of the weaker, notwithstanding standards of care being compromised. [66] The aim of the *Unfair Contract Terms Act* 1977 encompasses both the prevention of the breach of a contractual duty to exercise reasonable care, as well as tortuous negligence. Therefore, any attempt to exclude liability for death or personal injury caused by negligence is ineffective. Any attempt therefore to exclude liability for such losses will be invalidated by the courts save in certain situations where the requirement of reasonableness is present. [67] In this regard, the prohibition against the exclusion of liability for death or personal injury caused by negligence is so strictly controlled by the courts, that there is no longer room for the defences of *volenti non fit iniuria*, consent and the like. Likewise, the *Unfair Terms in Consumer Contracts Regulations* 1999 were also promulgated to curb unfairness in contract. [68] The regulations, as opposed to the *Unfair Contract Terms Act* 1977, are not restricted to exemption and limitation clauses (as the latter measure). But concentrate more on the broader issues, such as contractual fairness and good faith. [69]

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65 S25 (23) of the Regulations published in 1980, reads *"All services and measures generally necessary for adequate care and safety of patients are maintained and observed."*

66 McKendrick (2005) 460ff suggests the reason for the legislative intervention is to counter the practice which prevailed in England namely the negation of the existence of the duty of care.

67 To qualify however, Schedule 2 of the *Unfair Contractual Terms Act* 1977 lay down certain guidelines of circumstances when reasonableness will be construed by the courts. They include *inter alia* the strength of the bargaining position of the parties, whether there was an inducement to agree to the term, knowledge of the term by the contracting parties etc.

68 In this regard the legal writers Beatson (2002) 200, Koffman and MacDonald (2004) 216 as well as McKendrick (2005) 507 advance the argument that statutory control was introduced as a measure curbing unfair and unconscionable bargains and to prevent the exploitation of parties to the contract who are in a disadvantageous position.

69 See Reg 5(1) of the *Unfair Terms in Consumer Contracts Regulations* 1999.

The violation of a statutory duty is one of the factors the American courts take into consideration in determining whether conduct, in general, is against public policy. Public policy, on the other hand, is viewed, *inter alia,* in the light of legislative acts. [70] Any attempt, therefore, especially to exempt from liability negligence, is void and unenforceable where it is violative of a statute or governmental regulation. [71] One of the principal reasons advanced there-for is that no-one should profit from their own wrongdoing.

The areas most greatly affected by a legal duty, or duty of public service, bestowed upon the contracting parties in compliance with the statutory duty brought about by a legislative enactment, include, the relationship between common carriers and the public, the relationship of landlord and tenant, the relationship between the railways and air transportation and the public, as well as innkeepers and patrons. [72] Likewise, the relationship between medical caregivers, including hospitals and their patients, emphasizes the statutory duty placed upon the medical profession, in terms of the legislative enactments, to maintain predefined standards in public interest. [73]

The effect of the imposed statutory duty, in all the relationships enumerated hereinbefore, is said to amount to this, namely, any attempt to immunize one of the contracting parties from liability for his/her/its negligent act, in violation of the statutory duty included in the statutory provisions or the common law, would be void and unenforceable as against public policy. [74]

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70 The legal writers Calamari and Perillo (1977) 168 as well as Jaegar (1993) Para 1630 hold the view that the rationale for conduct to be against public policy where a statutory duty is violated, is based on the idea that it has the tendency to injure the public or contravene some established interest in society.

71 Both the legal writers Calamari and Perillo (1977) 272ff and the American case law *Chicago Great Western Railway Company v Farmers Produce Company* 164 F. Supp 532 (1958); *McCutcheon v United Homes Corp* 79 Wash. 2d 443, 486 P. 2d 1093 (1971); *Kuzmiak v Brookchester Inc* 33 N.J. Super 575, 111A. 2d 425 (1955); *Crawford v Buckner et al* 839 S.W. 754 (1992) view such attempts with great disfavour. The American courts are especially, critical as the statutes are passed for the protection of the public as well as promoting the interest and safety of the public. For that reason the American courts reason that the greater the threat to the general safety of the community, the greater the restrictions ought to be placed on contractual freedom.

72 The legal writers Calamari and Perillo 1977) 269 and Jaeger (1993) 1751 highlight common carriers, landlord and tenant, the railways and air transportation as institutions where legal duty is imposed.

73 The legal writers Waltz and Inbau (1971) 17 highlight the fact that the minimum standards of conduct and the usage of related facilities are designed to protect the public from incompetent and unethical practitioners and inferior services by hospitals and other caregivers.

74 The writers Jaegar (1953) 1751 and Waltz and Inbau (1971) 17 in particular express strong views thereon.

12.2 Factors impacting on the validity of exclusionary clauses

12.2.1 Exclusion of liability on the grounds of fraud or dolus and negligence

12.2.1.1 South Africa

12.2.1.1.1 Legal Writings

Some of the legal writers have, in the past, held the view that although a contracting party may, validly, contractually exclude liability for ordinarily negligence; the same cannot validly be executed for gross negligence and dolus. A clause which attempts to do so is null and void as it is against public policy. [75] Others have taken an opposing view. Despite some uncertainty which existed in legal thinking, it is fairly settled amongst legal writers that a clause excluding liability for dolus (wilful conduct) or fraud is against public policy and void [76] and so is a clause which excludes liability for an intentional breach of contract. [77] A clause excluding liability for ordinary and gross negligence (*culpa lata*) is, on the other hand, not against public policy. [78]

But, caution the legal writers, the allowance to include exclusionary clauses containing indemnities for gross negligence or *dolus*, is not unlimited. For that reason, various rules have been developed and promoted by the legal writers. The rules include, firstly, the general presumption that contracting parties did not intend to exclude liability for negligent acts. [79] This can however, only take affect after the intention of the parties is sought to determine whether they intended to contract out of liability. But this should not readily be assumed. [80]

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75 Dönges *The Liability for Safe Carriage of Goods in Roman Dutch Law* (1928) 112; Van der Walt *Delict: Principles and Cases* (1979) 8 cf.; Hosten et al *Introduction to South African Law and Legal Theory* (1995) 799.

76 Van der Merwe et al (2003) 215; Kerr (1998) 405; Christie (1996) 206; Lubbe and Murray (1988) 425; O'Brien *TSAR* (2001) 2001-3, 599; Lotz "Caveat subscriptor: Striking down exception clauses" *SALJ* (1974) 423; Van Dokkum "Hospital Consent Forms" *Stellenbosch Law Review* (1996) 2.

77 Van der Merwe et al (2003) 215; Kerr (1998) 404-406; Christie (1996) 205ff; Lubbe and Murray (1988) 340; O'Brien *TSAR* (2001) 2001-3 601; Kahn "Imposed Terms" in `Tickets and notices' *Businessman's Law* (1874) 159.

78 Van der Merwe et al (2003) 215; Kerr (1998) 405; Christie (1996) 206ff; Lubbe and Murray (1988) 425; O'Brien *TSAR* (2001) 597, 599; Strauss (1991) 305; Burchell and Schaffer *Businessman's Law* (1977) 109-111; Claassen and Verchoor (1992) 102.

79 Van der Merwe et al (2003) 275; Christie (1996) 204; Lubbe and Murray (1988) 425; Turpin (1956) *SALJ* 144; Van Dokkum (1996) 252.

80 Kerr (1998) 406; Lubbe and Murray (1988) 467; Van Loggerenberg "Unfair exclusionary clauses in contracts: A Plea for Law Reform" *Inaugural and Emeritus address University of Port Elizabeth* (1987) 6.

Secondly, limits are set to exemptions permitted, by interpreting exemption clauses narrowly. [81] In interpreting such clauses, what needs to be done, first and foremost, is to examine the nature of the contract in order to decide what legal grounds of liability would exist in the absence of the clause, for instance strict liability, negligence, gross negligence. The clause will then be given the minimum of effectiveness by being interpreted to exempt the party concerned only from the ground of liability for which he would otherwise be liable. This involves the least degree of blameworthiness. Where there is doubt, the writers have suggested, that such a clause should be construed against the proferens. [82]

The general rule acknowledges that an exemption clause, excluding a contracting party from ordinary and gross negligence (*culpa lata*), is not against public policy. Whether this, should be extended to hospital contracts, is presently, the subject of a raging debate amongst the legal writers in South Africa. It appears that most of the modern legal writers [83] hold the view that the general rule ought not to be extended to contracts, or provisions of contracts, involving health care. Various different reasons are advanced for an extensive discussion. See Chapter14.

12.2.1.1.2 Case Law

The legality of a clause exempting a contracting party from liability for dolus is fairly settled, in the contractual setting, in South Africa. Ever since the landmark decision of *Wells v South African Alumenite Co*,[84] the South African courts have, on numerous occasions, held that a clause exempting a contracting party from liability for the fraud of a representative (employee) is against public policy. A *fortiori* that would be the case where

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81 Christie (1996) 204; Lubbe and Murray (1988) 425; Van Dokkum *Stellenbosch Law Review* (1996) 252; Van der Merwe et al (2003) 215.

82 Christie (1996) 209; See the remarks in the annual survey of South African law (1991) 55 when commenting on the approach taken by McNally JA in *Galloon v Modern Burglar Alarms (Pty) Ltd* 1973 (3) SA 647 (6). It is suggested that when interpreting exclusion clauses of which the provisions have the affect of depriving one of the contracting parties of a common law right afforded the contracting parties, little effect must be given to the clause. Van der Merwe et al (2003) 215.

83 Carstens and Kok (2005) 78 *SAPR/PL* 430 18; Steyn *Unpublished L.L.M.dissertation UNISA* (2003) 3-27; 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; Cronje-Retief (2000) *Unpublished LLD Thesis Orange Free State University* (1997) 474; Pearmain *An unpublished LLD Thesis University of Pretoria* (2004) 532-533; Naude and Lubbe (2005) 122 SALJ 444, 447; Hawthorne (2004) 67 (2) *THRHR* 294, 299. For the views of the older writers see Strauss (1991) 305; Claassen and Verschoor (1992) 103.

84 1927 AD 69.

the clause seeks to exempt the contracting party from his own fraud. The facts that gave rise to this landmark decision included, the purchaser was sued by the seller for the price of a lighting plant which he had purchased.

The purchaser raised the defence that he had been induced to enter into the contract by certain misrepresentations made by the seller's salesman. It appeared that the purchaser, when entering into the contract, signed an order form which contained the following clause: *"I hereby acknowledge that I have signed this order irrespective of any representations made to me by any of your representatives and same is not subject to cancellation by me."*

In this case the purchaser failed to allege fraudulent misrepresentation, which had the consequence that he did not escape the operation of the clause and his defence failed. The court stated:

"Had (the purchaser) alleged that the representations were not only untrue but fraudulent, he might, as a matter of pleading, have escaped the operation of the obnoxious clause. But he has not done so. And the language of the undertaking which he subscribed covers all non-fraudulent misrepresentations. No doubt the condition is hard and onerous; but if people sign such conditions they must, in the absence of fraud, be held to them. Public policy so demands. If there is one thing which, more than another, public policy requires, it is that men of full age and competent understanding shall have the utmost liberty of contracting, and that their contracts, when entered into freely and voluntarily, shall be held sacred and shall be enforced by courts of justice.(Per Jessel MR in Printing Registering Co v Sampson L.R. 19 Eq. at P 465)."

Consequently the court held:

"Now these words are as wide and general as they well could be. They refer to `any representation' made by `any of your representatives'. But clearly they would cover representations not only incorrect but fraudulent. On grounds of public policy the law will not recognise an undertaking by which one of the contracting parties binds himself to condone and submit to the fraudulent conduct of the other. The Courts will not lend themselves to the enforcement of such a stipulation, for to do so would be to protect and encourage fraud." [85]

Uncertainty prevailed for many years as to what form of negligence could, validly, be included in a contract limiting or excluding liability between two contracting parties.

At first, the position appeared to be that, only a clause excluding liability for ordinary negligence would be valid. [86]

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85 *Wells v South African Alumenite Co* 1927 AD 69 followed in the cases of *East London Municipality v South African Railways and Harbours* 1951 (4) SA 466 (E); *First National Bank of Southern Africa Limited v Rosenblum and Rosenblum* unreported case No 392/99 delivered 1 June 2001 (SCA); *Afrox Health Care Bpk v Strydom* 2002 (6) SA 21 (SCA) 35.

86 *Rosenthal v Markes* 1944 TPD 172. The court included culpa levis (ordinary negligence) but declined to include culpa lata, (gross negligence) as a factor influencing exemption clauses in the so called "at owners risk" contracts

In time the position changed, in that, the South African Courts moved away from the notion that to include in a clause excluding liability for gross negligence (culpa lata), would be against public policy.

The legality of a clause exempting the contracting party from liability for gross negligence was first recognised in the case of *Government of the Republic of South Africa v Fibre Spinners and Weavers (Pty) Ltd*, [87] in which the Appellate Division (as it was known then) heard the following facts in brief:

The government addressed a letter to *Fibre Spinners and Weavers* which *inter alia* stated that the latter was *"hereby absolved from all responsibility for loss of or damage howsoever arising"* pertaining to the contract that the parties were concluding.

After the contract was concluded, three people, which included one RF Milburn, stole grain bags which Fibre Spinners and Weavers (as bailers)) stored for the government. Milburn (who was deceased by the time of the trial) had been employed by Fibre Spinners and Weavers as its chief security officer.

After hearing a submission, on plaintiff's behalf, that the exemption clause ought to be so construed as not to apply to liability for loss or damage caused by the bailer's gross negligence, the court found that the words contained in the clause were clearly wide enough to exempt the respondent company from liability arising from gross negligence. In a brief statement, Wessels ACJ removed the uncertainty as follows:

"In my opinion, there is no justification for so restricting the plain meaning of the words of the exemption clause, nor is there any reason, founded on public policy, why it should be held that, in so far as the clause refers to loss or damage caused by defendant's gross negligence, it is not enforceable." [88]

Referring to the judgement of *East London Municipality v South African Railways and*

involving the parking of a vehicle in a garage. See also *Essa v Divaris* 1947 (1) SA 753 (A). The court following the *Rosenthal v Marks* case, and referring to the case of *C.S.A.R v Adlington and Co* 1906 (TS) 964, preferred to hold the view that the effect of the owner's risk clause involving the garaging of a motor vehicle, included *calpa levissima* (slight negligence) but did not include gross negligence. (*culpa lata*).

87 1978 (2) SA 794 (A) 794.

88 *Government of the Republic of South Africa v Fibre Spinners and Weavers (Pty) Ltd* 1978 (2) SA 794 (A) 807; the principle has been applied as well in the following cases: *Van Deventer v Louw* 1980 (4) SA 105 (O); *Minister of Education v Stuttaford and Co (Rhodesia) (PVT) Ltd* 1980 (4) SA 517 (ZS).

Harbours 1951 (4) SA 466 (E) 490, the court found that a clause exempting a debtor from liability for its own wilful misconduct is against public policy and void, so too, is a clause which excludes liability for intentional breach of contract. [89]

The same principle was reconfirmed by the Appellate Division (as it was known then) in an unreported decision of *First National Bank of South Africa Ltd v Rosenblum and Rosenblum*. [90] The facts, briefly stated, included: The Rosenblums instituted action against the bank arising out of the theft of the contents of a safe deposit box, provided by the bank, for the use of Mr Rosenblum. The bank did not admit (a) that the theft was committed by its employees in the course and within the scope of their employment; (b) that it had failed to exercise reasonable care and so had negligently rendered it possible for the theft to take place; or (c) that the negligence or gross negligence of its staff members, acting in the course and within the scope of their employment, regarding control of the keys to the place where the safe deposit box and its content were kept, had rendered it possible for the theft to take place (par 10 11 27). However, it submitted that, even assuming that the aforesaid was the case, the bank's liability to the Rosenblums was excluded by virtue of a term (clause 2) contained in the contract for the provisions of the safe deposit box. Clause 2 provided as follows:

"The Bank hereby notifies all its customers that while it will exercise every reasonable care, it is not liable for any loss or damage caused to any article lodged with it for safe-custody, whether by theft, rain, flow of storm water, wind, hail, lightning, fire, explosion, action of the elements or as a result of any cause whatsoever, including war or riot damage, and whether the loss or damage is due to the Bank's negligence or not."

The views expressed in the *Fibre Spinners case* regarding gross negligence was confirmed in this case, when it was stated:

"Finally there is the submission for respondents that gross negligence is not covered by clause 3. In my view, it cannot be upheld. Nothing in clause 2 suggests that only culpa levis is to enjoy immunity but not culpa lata. Indeed, in the case of Fibre Spinners and Weavers (supra) a clause which made no mention of negligence at all was held to cover both negligence and gross negligence. (Here negligence is expressly mentioned in clause 2). It was also held that there was no reason founded or public policy, why a clause exempting a person from liability for gross negligence should not be enforceable ....." [91]

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89 *Government of the Republic of South Africa v Fibre Spinners and Weavers (Pty) Ltd* 1978 2 SA 794 (A) 803; *East London Municipality v South African Railways and Harbours* 1951 4 SA 466 (E) 490; *Hughes v SA Fumigation Co (Pty) Ltd* 1961 4 SA 799 (C) 805.

90 Unreported case No 392/99 delivered on the 1st June 2001 (SCA).

91 *First National Bank of South Africa Ltd v Rosenblum and Rosenblum* Unreported case No 392/99 delivered on the 1st June 2001 (SCA).

Consequently, the court found that a contracting party may lawfully exclude liability for its own gross negligence. A *fortiori* a contracting party may lawfully exclude its liability for the gross negligence of its employees.

Despite recognition given to the validity of exemption clauses exonerating a contracting party from liability for loss or damage caused by gross negligence, the South African courts have not upheld this principle, without placing some limit to the rule. The South African courts have developed a tendency towards giving a restrictive interpretation of exemption clauses, especially to situations marked by a concurrence of various heads of liability.

The Appellate Division (as it was known then) as far back as 1958 in the case of *SAR and H v Lyle Shipping Co Ltd* [92] had to deal with for instance, a towing contract which contained the following clause: *"I hereby agree to accept all such assistance or service of whatsoever nature on the condition that the said Administration will not be liable for any loss or damage that may be occasioned to the said ship through accident, collision or any other incident whatsoever occurring whilst the tug is engaged in any operation in connection with holding, pushing, pulling or moving the said ship."* The question on appeal was whether or not the clause exempted the appellant from liability for negligence, as opposed to breach of contract. Relying on the case of *Essa v Divaris* 1947 (1) SA 753 (A) Steyn JA held:

"The rule to be applied in construing an exemption of this nature, appears from Essa v Divaris 1947 (1) SA 753 (A) at 766. Generally speaking, where in law the liability for the damages which the clause purports to eliminate, can rest upon negligence only, the exemption must be read to exclude liability for negligence, for otherwise it would be deprived of all effect, but where in law such liability could be based on some ground other than negligence, it is excluded only to the extent to which it may be so based, and not where it is founded upon negligence. The appellant did not seek to cast any doubt upon the soundness of this rule ....." [93]

This dictum was quoted, with approval, in the case of *Government of the RSA v Fibre Spinners and Weavers* [94] but, Wessels ACJ, in this case, refuses to restrict the construction of the widely phrased exemption clause *"You are hereby absolved from all responsibility for loss or damage however arising."* The court per Wessels ACJ in this regard stated:
"There is no justification for so restricting the plain meaning of the words of the exemption clause, nor is there any reason founded on public policy, why it should be held that, in so far as the clause refers to loss or damage caused

92 1958 (3) SA 416 (A).

93 *SAR&H v Lyle Shipping Co Ltd* 1958 (3) SA 416 (A).

94 1978 (2) SA 794 (A) at 804.

by defendant's gross negligence, it is not enforceable." [95]

In a subsequent case of *Durban's Water Wonderland (Pty) Ltd v Botha and Another* ,[96] in which the respondent claimed damages in the court a quo arising from mother and daughter being flung from a ride at the appellant's amusement park, as a result of the mechanical failure in the machinery. Besides denying the claim for negligence, the appellant, in addition, pleaded that the contract that governed the ride had been subject to a term exempting it from liability in respect of any injury or damage, arising from the use of the amenities at the park. The respondents' claims were thus founded in delict, while the appellant relied on a contract that excluded liability for negligence.

After ruling in favour of the plaintiffs in the court *a quo*, the matter has subsequently found its way on appeal. One of the issues dealt with by the Supreme Court of Appeals is to consider the rules of interpretation or the proper construction to be placed on the disclaimers. The court consequently set out the legal position as follows:

"The correct approach is well established. If the language of a disclaimer or exemption clause is such that it exempts the proferens from liability in express and unambiguous terms, effect must be given to that meaning. If there is ambiguity, the language must be construed against the proferens. (See Government of the Republic of South Africa v Fibre Spinners and Weavers (Pty) Ltd 1978 (2) SA 794 (A) at 804C). But the alternative meaning upon which reliance is placed to demonstrate the ambiguity must be one to which the language is fairly susceptible. It must not be `fanciful' or `remote' (cf. Canada Steamship Lines Ltd v Regem (1952) 1 All ER 305 (PC) at 310C-D)."

Turning to the application of the legal position to the facts *in casu* the court held:

"What is immediately apparent from the language employed in the disclaimer is that any liability founded upon negligence in the design or construction of the amusement amenities would fall squarely within its ambit. The first sentence contains specific reference to the design and construction of the amusement amenities."

The court continues:

"The use of words such as `do not accept liability' or `unable to accept liability' (geen aanspreeklikheid aanvaar) in disclaimers of this kind is not uncommon. In the context in which they are used they mean that liability will not be incurred. No doubt what was intended could have been expressed differently, but that is not the point. In my view, the language used is capable of only one meaning and that, in short, is that the appellant would not be liable for injury or damage suffered by anyone using the amenities, whether such injury or a damage arise from negligence or otherwise." [97]

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95 *Government of the RSA v Fibre Spinners and Weavers* 1978 (2) SA 794 (A) at 807.

96 1999 (1) SA 982 (SCA).

97 *Durban's Water Wonderland (Pty) Ltd v Botha and Another* 1999 (1) SA 982 (SCA) 989-991. The principles enunciated in both the cases of the *Government of the RSA v Fibre Spinners and Weavers (supra)* and *Durban's*

The approach to the interpretation of exemption clauses with reference to *First National Bank of SA Ltd v Rosenblum and Another* 2001 (4) SA 189 (SCA) was quoted with approval in *Johannesburg Country Club v Stott and Another*. [98] In the said case, the following was stated, namely:

"In matters of contract the parties are taken to have intended their legal rights and obligations to be governed by the common law unless they have plainly and unambiguously indicated the contrary. Where one of the parties wishes to be absolved either wholly or partially from an obligation or liability which would or could arise at common law under a contract of the kind which the parties intend to conclude, it is for that party to ensure that the extent to which he, she or it is to be absolved is plainly spelt out. This strictness in approach is exemplified by the cases in which liability for negligence is under consideration. Thus, even where an exclusionary clause is couched in language sufficiently wide to be capable of excluding liability for a negligent failure to fulfil a contractual obligation or for a negligent act or omission, it will not be regarded as doing so if there is another realistic and not fanciful basis of potential liability to which the clause could apply and so have a field of meaningful application.(See South African Railways and Harbours v Lyle Shipping Co Ltd 1958 (3) SA 416 (A) at 419D-E)."

The court also quoted the dictum of Scott JA, in *Durban's Water Wonderland (Pty) Ltd v Botha and Another* 1999 (1) SA 982 (SCA) 989, when he stated:

"Against this background it is convenient to consider first the proper construction to be placed on the disclaimer. The correct approach is well established. If the language of a disclaimer or exemption clause is such that it exempts the proferens from liability in express and unambiguous terms, effect must be given to that meaning. If there is ambiguity, the language must be construed against the proferens. (See Government of the Republic of South Africa v Fibre Spinners and Weavers (Pty) Ltd 1978 (2) SA 794 (A) at 804C). But the alternative meaning upon which reliance is placed to demonstrate the ambiguity must be one to which the language is fairly susceptible; it must not be `fanciful' or `remote' (cf. Canada Steamship Lines Ltd v Regime (1952) 1 ALL ER 305 (PC) at 310C-D)" [99]

In an unreported judgement of *Booysen v Sun International (Bophuthatswana) Ltd,* [100] a case which involved a claim for damages, against the Sun City Hotel Resort, after the plaintiff had slipped on the footpath at the Sun City premises. The reasons advanced for the negligence of the hotel group included; the footpath was unlit and dark when it ought to have been properly lit for the use of pedestrians; to prevent the pathway from becoming too slippery and unsafe for the pedestrian to use it. The defendant, on the other hand, filed a special plea averring that the plaintiff had signed a registration card which regulated the

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Water Wonderland (Pty) Ltd v Botha and Another (supra) are enhanced in the dictum of Brandt JA in *Afrox Healthcare Bpk v Strydom* 2002 (6) SA 21 (SCA) 31.

98 2004 (5) SA 511 (SCA).

99 *Johannesburg Country Club v Stott and Another* 2004 (5) SA 511 (SCA); See also *Van der Westhuizen v Arnold* 2002 (6) SA 453 (SCA).

100 1998 SA (W) 1 (Unreported).

conditions of attendance at Sun City, and in terms whereof, she discharged the defendant from any liability.

The court, in deciding the question of liability, considered some of the general principles of the Law of Contract in South Africa, *inter alia*: with regard to contractual freedom the court stated:

"My understanding of the applicable legal principles commences with Burger v Central SAR 1903 TS 571 in which Innes CJ concluded at p578: "It is sound principle of law that a man, when he signs a contract, is taken to be bound by the ordinary meaning and effect of the words which appear over his signature. "This dictum has been followed and applied on numerous occasions in our courts, most notably, for present purposes in George v Fairmead (Pty) Ltd 1958 (2) 465 A. The signatory is bound because as Fagan CJ said at 472A "Where a man is asked to put his signature to a document he cannot fail to realise that he called upon to signify, by doing so, his asset to whatever words appear above his signature."

Referring to the traditional defences recognized by the legal writers, including Christie *The Law of Contract in South Africa* (1993) 182, including fraud, illegality, duress, undue influence, misrepresentation, iustus error, and contracts exempting contractants from liability, the court, with reference to the case of *Du Toit v Atkinson's Motors Bpk* 1985 (2) SA 852 (A) at 905, stated that; for a plaintiff to escape such an exemption clause, the plaintiff has to show, *inter alia,* that he/she was misled as to the nature of the document or as to its content.

Turning to the recognition of exemption clauses the court stated:

"The rationale for such exemption clauses is, in the main, to reduce the uncertainties for which management will have to make allowances in its planning and costing by seeking to define as closely as possible the extent of the company's legal liability to customers. It is trite that clauses exempting a party from the consequences of his own negligence are permissible. SAR&H v Conradie 1922 AD 137; Essa v Divaris 1947 (1) 753 A; SAR&H v Lyle Shipping Co Ltd 1958 (3) 416 A."

Satchwell J acknowledged that exemption clauses ought not to be enforced where the loss suffered is founded on the gross negligence of the defendant's conduct, but found that; in this case, the defendant had not *"been in flagrant breach of its duty of care towards its guests."*

The court, subsequently, repeated the test for gross negligence as defined in *S v Dhlamini*: [101]

101 1988 (2) SA 304 (A).

".....connotes a particular attitude or state of mind characterised by an entire failure to give consideration to the consequences of ones actions, in other words an attitude of reckless disregard of such consequences." [102]

More recently, the Supreme Court of Appeals, per Brandt JA, in the controversial decision of *Afrox Healthcare Bpk v Strydom,* [103] held that an exemption clause contained in a contract with a private hospital, excluding liability for negligence, causing damages, by the nursing staff of the hospital, was valid and not contrary to public policy. The court also held that there was no legal duty, upon admission of a patient, for the hospital staff to bring an exemption clause to the attention of the patient. The court, however, left open the question of whether negligence included gross negligence, as the respondent had not relied on gross negligence on the part of the appellant's nursing staff in his pleadings. The question of whether the contractual exclusion of a hospital's liability for damages, caused by the gross negligence of its nursing staff, was in conflict with the public interest was accordingly not relevant in the instant matter.

In a consequent decision by the Supreme Court of Appeals per Harmse JA in the case of the *Johannesburg Country Club v Stott and another*[104] the court referred to *"the radical nature of the exclusion of liability for damages for negligently causing the death of another."* To this end, the court with reference to the Constitutional Court decisions [105] suggested: *"It is arguable that to permit such exclusion would be against public policy because it runs counter to the high value the common law and, now, the Constitution place on the sanctity of life."* [106]

With reference to the legislation in England, Wales and Northern Ireland, the court obiter, suggests that despite the decision in *Afrox Healthcare Bpk v Strydom,* [107] the law governing

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102 *S v Dhlamini* 1988 (2) SA 304 (A) at 308E. This case was subsequently quoted with authority in *Mafikeng Mail (Pty) Ltd v Centre (No 2)* 1995 (4) 607 W; *Ozinsky NO v Lloyd and Others* 1992 (3) 396 (C). For other cases in which it was also held that there was no flagrant breach of a defendant's duty of care see *Koenig v Hotel Rio Grande (Pty) Ltd* 1935 CPD 93; *Spencer v Barclays Bank* 1947 TPD 230 at 241; *Beaven v Lansdown Hotel (Pty) Ltd* 1961 (4) (D&C).

103 2002 (6) SA 21 (SCA).

104 2004 (5) SA 511 (SCA).

105 See *S v Makwanyane* 1995 (3) SA 391 (CC); *Mohammed v President of the Republic of South Africa* 2001 (3) SA 893 (CC); *Ex parte Minister of Safety and Security in re S v Walters* 2002 (4) SA 613 (CC).

106 2002 (6) SA 21 (SCA).

107 *Johannesburg Country Club v Stott and Another* 2004 (5) SA 511 (SCA).

exemption clauses is in need of adaptation.

In a most recent case decided in the Constitutional Court, namely, *Barkhuizen v Napier* [108] Sachs J, in a minority judgement, when assessing a time-limitation clause, preventing an insured claimant from instituting legal action if summons is not served on the insurance company within the time limit set out in the clause, relied heavily upon legislation in the United Kingdom [109] and other countries. [110] Sachs J also considered the recommendations of the *South African Law Reform Commission* Project 47 (April 1998) [111] and concluded that these interventions are strong indications that public policy has moved away from automatic application of standard form contracts, towards a more balanced approach, in keeping with contemporary constitutional values.

12.2.1.1.3 Legal Opinion

It is trite to say that a party to a contract may be exonerated from liability by virtue of a so-called exemption clause, which clauses have become a way of life in South Africa. Both the public, as well as private spheres make use of this practise when attempting to exclude, or limit their potential liability through the usage of standard form contracts, which include exemption or indemnity clauses.

The legal position regarding the legality of contractual terms, exempting a contracting party from liability, depending upon the conduct of the contracting party, is fairly settled in South Africa.

A contracting party, in the first instance, may validly exclude liability for ordinary negligence. A clause which attempts to do so is, in law, valid and not against public policy. [112]

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108 2007 (5) SA 323 (CC).

109 *Unfair Contract Terms Act* 1979; *The Unfair Terms in Consumer Contracts Regulations* 1999.

110 With reference to the *South African Law Reform Commission's* investigation into introducing legislative measures in South Africa in order to regulate unfairness, unreasonableness and unconscionable ness in standard - form contracts, Sachs J refer to legislation passed in a number of South African countries, for example Brazil as well as Mexico, Spain and France.

111 "Unreasonable Stipulations in Contracts and the Rectification of Contracts" Project 47 (April 1998).

112 For legal writings see Van der Merwe et al *Contract: General Principles* (2003) 215; Kerr *The Principles of the Law of Contract* (1998) 404-406; Christie *The Law of Contract in South Africa* (1996) 205ff; Lubbe and Murray *Farlam and Hathaway Contract Cases, Materials and Commentary* (1988) 340; O'Brien "The Legality of Contractual Terms exempting a contractant from liability arising from his own of his servant's gross negligence or dolus" *TSAR* (2001) 2001-3 601; Kahn "Imposed Terms" in `Tickets and on Notices' *Businessman's Law* (1874)

Although there was a school of thought [113] that a clause attempting to exclude a contracting party from liability for gross negligence was null and void as it is against public policy, it appears that the legal position is, today, fairly settled, in South Africa. It is, today, generally accepted, amongst legal writers and the courts, that a clause excluding liability for gross negligence (*culpa lata*) is valid and not contrary to public policy. [114]

The allowance to include exclusionary clauses containing indemnities for gross negligence as legally valid contractual terms has certain limitations. For that reason, various rules have developed and been promoted by the legal writers and the courts, alike. The rules include, firstly, there is a general presumption that contractants did not intend to exclude liability for negligent acts. Caution is also rendered in this regard, namely, the intent to contract out of liability should not readily be assumed. [115]

Secondly, the rules of interpretation dictate that exemption clauses be interpreted narrowly. This is done by first examining the nature of the contract in order to decide what legal grounds of liability (if any) exist in the absence of the clause, for example, strict liability,

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159; O'Brien "Legality of Contractual terms exempting a contractant from liability" *TSAR* (2001-3) 597, 599-600. For case law see *Rosanthal v Marks* 1944 TPD 172. The court included *culpa levis* (ordinary negligence) but declined to include *culpa lata* (gross negligence) as a factor influencing exemption clauses in the so-called "at owner's risk" contracts involving the parking of a vehicle in a garage. See also *Essa v Divaris* 1947 (1) SA 753 (A). The court following the *Rosenthal v Marks* case, and referring to the case of *C.S.A.R. v Adlington and Co* 1906 (TS) 964, preferred to hold the view that the effect of the owner's risk clause involving the garaging of a motor vehicle, included *culpa levissima* (slight negligence) but did not include gross negligence. (*culpa lata)*.

113 Dönges *The Liability for Safe Carriage of Goods in Roman Dutch Law* (1928) 112; Van der Walt *Delict Principles and Cases* (1979) 8 cf.; Hoston et al *Introduction to South African Law and Legal Theory* (1995) 799.

114 For legal writings see Van der Merwe et al *Contract: General Principles* (2003) 215; Kerr *The Principles of the Law of Contract* (1998) 405; Christie *The Law of Contract in South Africa* (1996) 206; Lubbe and Murray *Farlam and Hathaway Contract Cases, Materials and Commentary* (1988) 425; O'Brien "The Legality of Contractual Terms exempting a contractant from liability arising from his own of his servant's gross negligence or dolus *TSAR* (2001) 597, 599; Strauss *Doctor, Patient and The Law* (1991) 305; Burchell and Schaffer "Liability of Hospital for Negligence" *Businessman's Law* (1977) 109-111; Claassen and Verschoor *Medical Negligence in South Africa* (1992) 102. For case law see *Government of the Republic of South Africa v Fibre Spinners and Weavers (Pty) Ltd* 1978 (2) SA 794 (A) followed by *Van de Venter v Louw* 1980 (4) SA 105 (O); *Minister of Education v Stuttaford and Co (Rhodesia) (PVT) Ltd* 1980 (4) SA 517 (ZS). The unreported judgement of *First National Bank of South Africa Ltd v Rosenblum and Rosenblum* Case No 392/99 delivered on the 1st June 2001 (SCA).

115 For legal writings see Van der Merwe et al *Contract: General Principles* (2003) 275; Christie *The Law of Contract in South Africa* (1996) 204; Lubbe and Murray *Farlam and Hawthawa Contract Cases Materials and Commentary* (1988) 426, 467; Turpin "Contract and Imposed Terms (1956) *SALJ* 144; Van Dokkum "Hospital Consent Forms" *Stellenbosch Law Review* (1996) 252; Kerr *The Principles of the Law of Contract* (1998) 406; Van Loggerenberg "Unfair exclusionary clauses in contracts: A Plea for Law Reform" *Inaugural and Emeritus address, University of Port Elizabeth* (1987) 6. For case law see *Essa v Divaris* 1947 1 SA 753 (A); *SAR&H v Lyle Shipping Co Ltd* 1958 3 SA 416 (A); *Galloon v Modern Burglar Alarms (Pty) Ltd* 1973 3 SA 647 (C); *Yorigantsi Maritime Construction Co Ltd v Nissho-Iwai Co Ltd* 1977 4 SA 682 (C).

negligence, gross negligence etc. The clause will then be given the minimum of effectiveness by interpreting to exempt the contracting party against liability. Where there is doubt, the writers have suggested and the courts have ruled that, such clauses should be construed against the proferens. [116]

Whether the validity of exemption clauses exonerating a contracting party from ordinary and gross negligence (*culpa lata*), in hospital contracts, in which the hospital staff and/or its agents may escape liability for damages arising from their negligent conduct, is presently a raging debate in the Law of Contract in South Africa. The law, as it stands at present, as per the much criticized judgement of Brandt AJ in the Supreme Court of Appeals decision in Afrox Healthcare Bpk v Strydom 2002 (6) SA 21 (SCA), amounts to this, a contract with a private hospital excluding liability for negligence causing damages by the nursing staff of the hospital, is valid and not contrary to public policy. In addition, there is no legal duty, upon admission of a patient, for the hospital staff to bring an exemption clause to the attention of the patient. The court, however, left open the question of whether negligence includes gross negligence, as the respondent had not relied on gross negligence on the part of the nursing staff, in his pleadings. Much criticism [117] has been expressed that the

116 For legal writings see Christie *The Law of Contract in South Africa* (1996) 204, 209; Lubbe and Murray Farlam and Hathaway *Contract Cases, Materials and Commentary* (1988) 425; Van Dokkum "Hospital Consent Forms" *Stellenbosch Law Review* (1996) 252; Van der Merwe et al *Contract: General Principles* (2003) 215. See also the remarks in the annual survey of South African Law (1991) 55 when commenting on the approach taken by McNally JA in *Galloon v Modern Burglar Alarms (Pty) Ltd* 1973 (3) SA 647 (6). It is suggested that when interpreting exclusion clauses of which the provisions have the affect of depriving one of the contracting parties of a common law right afforded the contracting parties, then little effect must be given to the clause. For case law see *Government of the Republic of South Africa v Fibre Spinners and Weavers (Pty) Ltd* 1978 2 SA 794 (A); *Bristow v Lycett* 1971 4 SA 223 (RA) 236; *Lawrence v Konmotel Inns (Pty) Ltd* 1989 1 SA 44 (D) 53D-54F; *Zietsman v Van Tonder* 1989 2 SA 484 (T). See also *Afrox Healthcare Bpk v Strydom* 2002 (6) SA 21 (SCA) 34 with reference to *Johannesburg Country Club v Stott and Another* 2004 (5) SA (SCA); *Government of the Republic of South Africa v Fibre Spinners and Weavers (Pty) Ltd* 1978 (2) SA 794 (A) 804C-706D and *Durban's Water Wonderland (Pty) Ltd v Botha and Another* 1999 (1) SA 982 (SCA) at 989G-I; *First National Bank of SA Ltd v Rosenblum and Another* 2001 (4) SA 189 (SCA).

117 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" (2005) 78 *SAPR/PL* 430 18; Steyn "The Law of Malpractice liability in clinical psychiatry" *Unpublished L.L.M. dissertation UNISA* (2003) 3-27; Van den Heever "Exclusion of Liability of Private Hospitals in South Africa" *De Rebus* (April 2003) 47-48; Jansen and Smith "Hospital Disclaimers; Afrox Health Care v Strydom" 2003 *Journal for Juridical Science* 28(2) 210, 218; Tladi "One step forward, two steps back for Constitutionalising the Common Law: Afrox Health Care v Strydom" (2002) 17 *SAPR/PL* 473, 477; Cronje-Retief "The Legal Liability of Hospitals" (2000) *Unpublished LLD Thesis Orange Free State University* (1997) 474; Pearmain "A Critical analysis of the Law of Health Service Delivery in South Africa" *An unpublished LLD Thesis University of Pretoria* (2004) 532-533; Naude and Lubbe "Exemption Clauses - A rethink occasioned by Afrox Health Care Bpk v Strydom" (2005) 122 *SALJ* 444, 447; Hawthorne "Closing of the open-norms in the Law of Contract" (2004) 67 (2) *THRHR* 294, 299. For the views of the older writers see Strauss *Doctor, Patient and the Law* (1991) 305; Claassen and Verschoor *Medical Negligence in South Africa* (1992) 103.

decision is incorrect and that such a clause was against public interest and therefore *contra bones mores* or against public policy and invalid.

Since then, the Supreme Court of Appeals,[118] on two subsequent occasions, has indicated with reference to legislative intervention in England, Wales and Northern Ireland, that the law governing exemption clauses is in need of adaptation.

It is also trite that a clause excluding liability for *dolus* or fraud is against public policy and void [119] and so is a clause which excludes liability for an intentional breach of contract. [120]

12.2.1.2 ENGLAND

12.2.1.2.1 Legal Writings

It is generally accepted that, in English Law, especially prior to the introduction of the *Unfair Contractual Terms Act* 1977, liability for negligence may be excluded or restricted in exclusionary clauses. [121]

But, in English Law, the exclusion or restriction of liability for negligence in exclusionary clauses is only recognized provided certain requirements are complied with. The requirements include the following, namely:

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118 *Johannesburg Country Club v Stott and Another* 2004 (5) SA 511 (SCA); *Napier v Barkhuizen* 2006 (4) SA 1 (SCA) SA; See also the comments of Sachs J in the minority judgement of *Barkhuizen v Napier* 2007 (5) SA 323 decided in the Constitutional Court.

119 Van der Merwe et al *Contracts: General Principles* (2003) 215; Kerr *The Principles of the Law of Contracts* (1998) 404-406; Christie *The Law of Contract in South Africa* (1996) 205ff; Lubbe and Murray *Farlam and Hathaway Contract Cases, Materials and Commentary* (1988) 340; O'Brien "The Legality of contractual terms exempting a contractant from liability arising from his own or his servant's gross negligence or dolus" *TSAR* (2001) 2001-3 601; Kahn "Imposed Terms" in `Tickets and notices' *Businessman's Law* (1974) 159; O'Brien "Legality of contractual terms exempting a contractant from liability" *TSAR* (2001-3) 597-600. For case law see *Wells v South African Alumenite Co* 1927 AD 69 followed in the cases of *East London Municipality v South African Railways and Harbours* 1951 (4) SA 466 (E); *First National Bank of Southern Africa Limited v Rosenblum and Rosenblum* unreported case No 392/99 delivered 1 June 2001 (SCA); *Afrox Health Care Bpk v Strydom* 2002 (6) SA 21 (SCA) 35.

120 Van der Merwe et al *Contracts: General Principles* (2003) 215; Christie *The Law of Contract in South Africa* (1996) 206ff; O'Brien "The Legality of contractual terms exempting a contractant from liability *TSAR* (2001-3) 597, 602. For case law see *Government of the Republic of South Africa v Fibre Spinners and Weavers (Pty) Ltd* 1978 2 SA 794 (A) 803; *East London Municipality v South African Railways and Harbours* 1951 4 SA 466 (E); *Hughes v SA Fumigation Co (Pty) Ltd* 1961 4 SA 799 (C) 805.

121 Lawson (1990) 26ff; Yates and Hawkins (1986) 103ff; Lewison (1997) 319ff; McKendrick (2003) 442; Coote (1964) 29ff.

Where a clause purports merely to limit the compensation payable by one of the contractants for loss or damage caused by his negligence, it is enough that the wording of the clause, when read as a whole, clearly and unambiguously conveys that limitation. [122] The wording of the clause when containing an express exemption of liability for negligence may be looked at through the eyes of an ordinary literate sensible person and will be aided if it contains the word "negligent" or "negligence" or some synonym of these words. [123] Where there is no express reference to negligence, liability for negligence may still be excluded if a fair reading of the clause shows that the parties intended to exclude such liability. [124] But where the wording for example provide the exemption relieves of limits liability "in respect of any loss howsoever caused" then liability for negligence would not protect a contract from the consequences of his own negligence. [125]

What also emerged were the restrictive rules on the interpretation of exclusion and limitation clauses. The *contra proferentem* principle was applied, with particular venom, to exclusion clauses. It provided that, in the event of there being an ambiguity in a contract term, the ambiguity was to be resolved against the party relying upon the term. Therefore, an ambiguously drafted exclusion clause was ineffective to exclude liability, at least in the case where it was not clear whether the clause covered the loss that had been suffered. [126]

In time, however, with the passing of the *Unfair Contract Act* 1977, clauses restricting or limiting or excluding liability for negligence were often affected by the statutory provisions. In particular, the Act prohibited the exclusion or restriction of liability for death or personal injury resulting from negligence. [127]

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122 Yates and Hawkins (1986) 89; Lewison (1997) 319 opines that *"an exemption clause will not relieve a party from liability for negligence unless it does so expressly or by necessary implication, or unless that party has no liability other than a liability in negligence."* See also Lawson (1990) 39; Coote (1964) 30.

123 Lewison (1997) 320; Coote (1964) 30; McKendrick (2003) 443.

124 Lewison (1997) 322.

125 Yates and Hawkins (1986) 105; McKendrick (2003) 443.

126 Beatson (2002) 439; McKendrick (2003) 170; Coote (1964) 30; Yates and Hawkins (1986) 194; Lewison (1997) 322ff.

127 S2 (1) of the *Unfair Contract Act* 1977; Yates *Exclusion Clauses in Contracts* (1982) 74; Yates and Hawkins (1986) 104ff; McKendrick (2003) 453ff; Tillotson (1985) 132; Adams and Brownsword *Understanding Contract Law* (2000) 129.

Where, on the other hand, resultant from other loss or damage, a person could not so exclude or restrict his liability for negligence, except in so far as the terms or notice satisfied the requirement of reasonableness. [128]

The reasonableness requirement gave the courts a very open-ended discretion. The relevant question the Judges asked is, whether the exclusion was "a fair and reasonable one having regard to the circumstances which were, or ought reasonably to have been known to or in the contemplation of the parties when the contract was made". [129]

Any attempt, therefore, to exclude liability for death or personal injuries caused by negligence was ineffective. Also the court was not given a choice in the matter, as the Act provided that it was not possible to exclude liability for such losses. [130]

Negligence, in terms of the *Unfair Contract Act* 1977, means the `breach' of an obligation to exercise reasonable care. This, in turn, may arise from an express or implied contractual duty to exercise care and skill, reasonably expected of the contracting party. This may be because one of the contracting party's holds himself out as being competent in his field, which may include a machine designer, a chemical manufacturer etc. The contracting party's status may impose, by itself, a duty of varying degrees of care on him, for example, the duties of care imposed on solicitors, medical practitioners, architects etc. [131]

12.2.1.2.2 Case Law

The English courts have traditionally been hostile to exclusion clauses. The history of the court's approach to exclusion clauses was stated by Lord Denning M.R., in *Mitchell (George) (Chesterhall) Ltd v Finney Lock Seeds Ltd,* [132] wherein he concluded that the court had only permitted reliance on exclusion clauses where to do so was fair and reasonable. The court also emphasized the court's tendency to adopt a strained and artificial construction in order to strike down the clause. In *Photo Production Ltd v Securicor Ltd* [133]

128 S2 (2) of *The Unfair Contract Act* 1977; Yates and Hawkins (1986) 104; McKendrick (2003) 453ff; Tillotson (1985) 134; Adams and Brownsword (2000) 129.

129 Adams and Brownsword (2000) 130.

130 McKendrick (2003) 456; Yates and Hawkins (1986) 104; Tillotson (1985) 134.

131 McKendrick (2003) 456; Yates and Hawkins (1986) 103; Yates (1982) 74.

132 (1983) 2 A.C. 803, 814.

133 (1983) QB 284.

Lord Salmon said: *"Clauses which absolve a party to a contract from liability for breaking it are no doubt unpopular, particularly when they are unfair ....."* [134] So too in *Ailsa Craig Fishing Co Ltd v Malvern Fishing Co Ltd,* [135] Lord Wilberforce considering a clause which attempted to limit the liability of one party to a fixed financial amount, said:

"Clauses of limitation are not regarded by the courts with the same hostility as clauses of exclusions, this is because they must be related to other contractual terms, in particular to the risks to which the defendant party may be exposed, the remuneration which he receives and possibly also the opportunity of the other party to insure." [136]

Although these types of contracts, as fore stated, were not popular with the courts, especially, where they were unfair, the courts, however, did allow these types of contracts and/or clauses to stand, but the courts developed their own rules in dealing with these types of clauses and/or contracts. The courts, in the following cases, recognized clauses which purport to limit compensation payable by one party for loss or damage caused by his negligence, provided the wording of the clause, when read as a whole, clearly and unambiguously, had the effect of excluding liability.[137]
As a general rule, the courts have stated, that it is inherently improbable that one party to the contract would intend to absolve the other party entirely from the consequences of the latter's own negligence.

In the first place, the English courts adopted a rule that where any of the contracting parties wished to reply upon the exemption clause to escape liability for negligence, the meaning must be made plain and clear. In this regard, in the case of *Szymonowski and Co v Berk and Co,* [138] Scrutton L, stated:

"Now I approach the consideration of that clause applying the principle repeatedly acted upon by the House of Lords and this Court - that if a party wishes to exclude the ordinary consequences that would flow in law from the

134 *Photo Production Ltd v Securicor Ltd* (1983) QB 284.

135 (1983) 1 W.L.R. 964.

136 *Ailsa Craig Fishing Co Ltd v Malvern Fishing Co Ltd* (1983) W.L.R. 964.

137 See *Ailsa Craig Fishing Co Ltd v Malvern Fishing Co Ltd* (1983) 1 W.L.R. 964, 966, 970; *George Mitchell (Chesterhall) Ltd v Finney Lock Seeds Ltd* (1983) 2 A.C. 803, 814. See also *Continental Illinois National Bank and Trust Co of Papanicolau* (1986) 2 Lloyd's Rep 441, 444, and *Shipskreditforeningen v Emperor Navigation* (1998) 1 Lloyd's Rep. 66, 76 ("no set-off" clause). *Gillespie Bros Ltd v Roy Bowles Transport Ltd* (1973) Q.B. 400, 419; *Sonat Offshore SA v Amerada Hess Development Ltd* (1988) Lloyd's Rep 145, 157.

138 (1923) 1 K.B. 457.

contract he is making he must do so in clear words." [139]

And in *White v Warnick (John) and Co Ltd* [140] Denning LJ said:

"In this type of case, two principles are well settled. The first is that, if a person desires to exempt himself from a liability, which the common law imposes on him, he can do so by a contract freely and deliberately entered into by the injured party in words that are clear beyond the possibility of misunderstanding." [141]

Salmon LJ, in a later case of *Hillier v Rambler Motors (A.M.C.) Ltd,* [142] stated:

"It is well settled that a clause excluding liability for negligence should make its meaning plain on its face to an ordinarily literate and sensible person. The easiest way of doing that, of course, is to state expressly that the garage, tradesman or merchant, as the case may be, will not be responsible for any damage caused by his own negligence. No doubt merchants, tradesman, garage proprietors and the like are a little shy of writing in an exclusion clause quite as blunt as that. Clearly it would not attract customers, and might even put many off." [143]

The courts have, therefore, consistently construed exemption clauses strictly. The exemption clause must, therefore, cover, exactly, the nature of the liability in question. Whether the words of the exemption clause were adequate or not to exclude liability, the following test was laid down, namely: whether the clause makes *"its meaning plain on its face to any ordinarily literate and sensible person."* [144]

Other tests laid down by the courts include: *"there must be a clear and unmistakeable reference to ..... negligence"* [145] and as was stated, by Lord Fraser of Tullybeltron, in the same case:

"I do not see how a clause can `expressly' exempt or indemnify the proferens against his negligence unless it

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139 *Szymonowshi and Co v Beck and Co* (1923) 1 K.B. 457.

140 (1953) 1 W.L.R. 1285.

141 *White v Warwick (John) and Co Ltd* (1953) 1 W.L.R. 1285.

142 (1972) 2 Q.B. 71.

143 *Hollier v Ramble Motors* (A.M.C.) Ltd (1972) 2 Q.B. 71; See also *Clark v Sir William Arrol and Co Ltd* 1974 S.L.T. 90, 92; *Smith v South Wales Switchgear Co Ltd* (1978) 1 W.L.R. 165, 169, 173; *Lamport and Holt Lines Ltd v Coubro and Scruiton (M and L) Ltd* (1982) 2 Lloyd's Rep 42, 45, 47, 51; *Spriggs v Sotheby Parka Bernet and Co* (1986) 1 Lloyd's Rep. 487; *Shell Chemicals Ltd v P and O Roadtanks Ltd* (1995) 1 Lloyd's Rep. 297.

144 *Hollier and Ramble Motors (A.M.G.) Ltd* (1972) Q.B. 71, per Salmon I.F.; *Lamport and Holt Lines Ltd v Coubra and Scrutton (Mandl) Ltd* (1982) 2 LLoyd's Rep 42 per Stephenson L.J..

145 *Smith v South Wales Switchgear Co Ltd* (1978) 1 W.L.R. 165.

contains the word `negligence' or some synonym for it." [146]

But, even in the absence of the wording `negligence' or some synonym, the courts have held that, where the intention of the contracting parties can be inferred, the clause would be sufficient to exclude liability for negligence. This was the position in *Hinks v Fleet,* [147] in which the following clause was accepted, namely:

"Vehicles and caravans are admitted on condition that the Park Owner shall not be liable for loss or damage to (a) any vehicle or caravan (b) anything in, on or about any vehicle or caravan however such loss or damage may be caused ....." [148]

Liability for negligence was also allowed to be excluded, without an express reference to negligence, where a fair reading of the clause showed that the parties intended to exclude such liability. This featured in the case of *Gillespie Brothers Ltd v Bowles (Roy) Transport Ltd*, [149] Buckley L.J. said:

"It is a fundamental consideration in the construction of contracts of this kind that it is inherently improbable that one party to the contract should intend to absolve the other party from the consequence of the latter's own negligence ..... The intention to do so must therefore be made perfectly clear, for otherwise the court will conclude that the exempted party was only intended to be free from liability in respect of damage occasioned by causes other than negligence for which he is answerable." [150]

The courts have also broadened the canons of construction of written contracts by introducing the *contra proferentum* rule, which provides that where there is an ambiguity in an exemption clause, it will be resolved against the party seeking to rely on the clause. The principle was aptly stated in *Hollins v Davy (J) Ltd,* [151] in which Sachs J said:

"I need, of course, hardly add that all exemption clauses are construed contra proferentem so that if there were here two reasonable constructions of a word or phrase, then the construction least favourable to the defendants will be adopted." [152]

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146 *Smith v South Wales Switchgear Co Ltd* (1978) 1 W.L.R. 165.

147 (1986) 2 E.G.L.R. 243.

148 *Hinks v Fleet* (1986) 2 E.G.L.R. 243.

149 (1973) QB 400.

150 *Gillespie Brothers Ltd v Bowles (Roy) Transport Ltd* (1973) Q.B. 400 cited with approval by Viscount Dilhorse in *Smith v South Wales Switchgear Ltd* (1978) 1 W.L.R. 165.

151 (1963) 1 Q.B. 844.

152 *Hollins v Davy (J) Ltd* (1963) 1 Q.B. 844.

Similarly, in *Acme Transport Ltd v Betts*, [153] Cumming-Bruce L.J. said:

"But, the principles are that the Language of an exemption clause is prima facie to be construed against the person who drafted it or put it forward that the language of an exemption clause must be sufficiently explicit to disclose the common intention of the parties without straining the language." [154]

It is, especially in exemption clauses relieving a party from liability for negligence, that the English courts demanded that the exclusion of liability for negligence must be expressly stated, alternatively, it could be deduced by necessary implication. The approach of the court was summarized by Lord Morton in *Canada Steamship Lines Ltd v R,* [155] as follows:

"(1) if the clause contains language which expressly exempts the person in whose favour it is made (hereafter called the profaners) from the consequences of the negligence of his own servants, effect must be given to that provision.

(2) If there is no express reference to negligence, the court must consider whether the words are wide enough, in their ordinary meaning, to cover negligence on the part of the servants of the proferens. If a doubt arises at this point, it must be resolved against the proferens.

(3) If the words used are wide enough for the above purpose, the court must then consider whether `the head of damage may be based on some ground other than negligence'..... The other ground must not be so fanciful or remote that the proferens cannot be supposed to have desired protection against it, but subject to his qualification ..... the existence of a possible head of damage other than that of negligence is fatal to the proferens even if the words used are prima facie wide enough to cover negligence on the part of his servants." [156]

Although this is a dictum emanating from a Canadian case on appeal, the law in England has been similarly stated in the case of *Gillespie Brothers and Co Ltd v Bowles (Roy) Transport Ltd* per Beckley L.J. [157]

In *Rutter v Palmer* [158] Scrutton L.J. put forward three principles for determining whether an exclusion clause excluded liability for negligence. The two relevant principles for present purposes are that:

153 (1981) R.T.R. 190.

154 *Acme Transport Ltd v Betts* (1981) R.T.R. 190.

155 (1952) A.C. 192.

156 *Henryton in Canada Steamship Lines Ltd v R* (1952) A.C. 192.

157 (1973) Q.B. 400.

158 (1922) 2 K.B. 8.

" ..... The defendant is not exempted from liability for the negligence of his servants unless adequate words are used"

And

"If the only liability of the party pleading the exemption is a liability for negligence, the clause will more readily operate to exempt him." [159]

Words such as "at sole risk", "at customers' sole risk", "at owners' risk" and "at their own risk" will normally cover negligence. [160]

Words such as "however arising" or "any cause whatever" cover losses by negligence. [161]

Since the introduction of the *Unfair Contract Terms Act* 1977, restrictions have been placed, legislatively, on the powers of a party to a contract to secure exemption from liability for negligence. For that reason, it is prohibited, to exclude or restrict liability for death or personal injury, resulting from negligence, by reference to any contract term. [162]

12.2.1.3 Legal Opinion

The English courts have, traditionally, been hostile to exclusion clauses. But, notwithstanding this, English courts have, on occasions, been willing to permit reliance on exclusion clauses, but, only where the outcome was fair and reasonable. [163]

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159 *Rutter v Palmer* (1922) 2 K.B. 8.

160 *Forbes, Abbott and Lennard Ltd v G.W. Ry* (1927) 44 T.L.R. 97; *The Jessmore* (1951) 2 Lloyd's Rep. 512; *James Archdale and Co Ltd v Conservices Ltd* (1954) 1 W.L.R. 459; *Scottish Special Housing Assn v Wimpey Construction U.K. Ltd* (1986) 1 W.L.R. 995; *Norwich City Council v Harvey* (1989) 1 W.L.R. 828
Rutter v Palmer (1922) 2 K.B. 87; *Burton and Co v English and Co* (1883) 12 Q.B.D. 218; *Levison v Patent Steam Carpet Cleaning Co Ltd* (1978) Q.B. 69cf; *Allan Bross and Co v James Bros and Co* (1897) 3 Com.Cas 10, 12; *Svenssons Travarwaktiebolag v Cliffe Steamship Co* (1932) 1 K.B. 490, 496; *Exercise Shipping Co Ltd v Bay Maritime Lines Ltd* (1991) 2 LLoyd's Rep 391; *Reynolds v Boston Deep Sea Fishing and Ice Co Ltd* (1921) 38 T.L.R. 22, 429; *Pyman SS Co v Hall and Barnsley Ry.* (1915) 2 K.B. 729. *Contrast Woolmer v Delmer Price Ltd* (1955) 1 QB 291.

161 *Austin v Manchester, Sheffield and Lincs Ry* (1852) 10 C.B. 454; *Joseph Travers and Sons Ltd v Cooper, supra, Ashhby v Tolhurst* (1937) 2 K.B. 242; *Harris Ltd v Continental Express Ltd, supra; White v Blackmore* (1972) 2 Q.B. 651; *Stag Line Ltd v Tyne Shiprepair Group (Parcels) Ltd* (1962) 1 Q.B. 617 ("however sustained"); *Ashenden v L.B. and S.C. Ry* (1880) 5 Ex. D 190; *Manchester, Sheffield and Lincs. Ry v Brown* (1883) 8 App. Cas 703; *Pyman Steamship Co v Hull and Barnsley Ry.* (1915) 2 K.B. 729; *Swiss Bank Corpn v Brink's Mat Ltd* (1986) 2 Lloyd's Rep 79 cf.; *Bishop v Bonham* (1988) 1 W.L.R. 742; *A.E. Farr Ltd v Admiralty* (1953) 1 W.L.R. 965.

162 S2 (1) of the *Unfair Contract Terms Act* 1977. See *Johnstone v Bloomsbury H.A.* (1992) Q.B. 337 at 343, 346

163 See the comments of Lord Denning M.R. in *Mitchell (George) Chesterhall Ltd v Finney Lock Seeds Ltd* (1983) 2 A.C. 803, 814; *Photo Production Ltd v Securicor Ltd* (1983) QB 284; *Ailsa Craig Fishing Co Ltd v Malvern Fishing*

The English courts and legal writers have also, throughout the years, developed certain rules which serve as an aid to handling clauses which attempt to exclude or restrict liability. The rules, so designed, include: in the first instance, the wording of the clause, when read as a whole, must clearly and unambigiously convey that limitation before it can be given effect to. [164]

Save where the meaning is made plain and clear, the courts, as a general rule, have stated that it is inherently improbable that one party to a contract would intend to absolve the other party entirely from the consequences of the latter's own negligence. [165]
In the second instance, there must be a clear and unmistakeable reference to negligence. The word `negligence', or some synonym for it, must be used. The courts do, however, allow an exception to the general rule, in that; even in the absence of the wording, negligence or some synonym, the courts have held that, where the intention of the parties can be inferred that the parties intended to exclude such a liability [166] this need to be given effect to.

Both the legal writers and the courts alike have, in the third instance, also introduced restrictive rules to the interpretation of exclusion and limitation clauses, by utilizing the *contra proferentem* rule which provides that, where there is an ambiguity in the exemption

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Co Ltd (1983) W.L.R. 964.

164 For the legal writings see Lewison *The Interpretation of Contracts* (1997) 319-320; Coote *Exception Clauses* (1964) 30; McKendrick *Contract Law Text, Cases and Materials* (2003) 443; Yates and Hawkins *Standard Business Contracts: Exclusions and Related Devices* (1986) 89; Lawson *Exclusion Clauses* (1990 39; Coote *Exception Clauses* (1964) 30. For case law see *Ailsa Craig Fishing Co Ltd v Malvern Fishing Co Ltd* (1983) 1 W.L.R. 964, 966, 970; *George Mitchell (Chesterhall) Ltd v Finney Lock Seeds Ltd* (1983) 2 A.C. 803, 814. See also *Continental Illinois National Bank and Trust Co of Papanicolau* (1986) 2 Lloyd's Rep 441, 444 and *Skips Kreditforeningen v Emperor Navigation* (1998) 1 Lloyd's Rep. 66. 76 ("no set-off" clause); *Gillespie Bros Ltd v Roy Bowles Transport Ltd* (1973) Q.B. 400, 419; *Sonat Offshore SA v Amerada Hess Development Ltd* (1988) Lloyd's Rep 145, 157.

165 For legal writings see Yates and Hawkins *Standard Business Contracts: Exclusions and Related Devices* (1986) 105; McKendrick *Contract Law Text, Cases and Materials* (2003) 443. For case law see *Szymonowski and Co v Berk and Co* (1923) 1 K.B. 457; *White and Warnick (John) and Co Ltd* (1953) 1 W.L.R. 105; *Hollier v Ramble Motors A.M.C. Ltd* (1972) 2 Q.B. 71; *Clark v Sir William Arrol and Co Ltd* 1974 S.L.T. 90, 92; *Smith v South Wales Switchgear Co Ltd* (1978) 1 W.L.R. 165, 169, 173; *Lamport and Holt Lines Ltd v Coubro and Scruiton (MandL) Ltd* (1982) 2 Lloyd's Rep 42, 45, 47, 51; *Spriggs v Sotheby Parka Bernet and Co* (1986) 1 Lloyd's Rep 487; *Shell Chemicals Ltd v P and O Roadtanks Ltd* (1995) 1 Lloyd's Rep 297.

166 For legal writings see Lewison *The Interpretation of Contracts* (1997) 320; Coote *Exception Clauses* (1964) 30; McKendrick *Contract Law Text, Cases and Materials* (2003) 443. For case law see *Smith v South Wales Switchgear Co Ltd* (1978) 1 W.L.R. 165.

clause, it will be resolved against the party seeking to rely on the clause. [167] Therefore, an ambiguously drafted clause is ineffective to exclude liability, at least, in the case where it is not clear whether the clause covers the loss that has been suffered. [168]

With the statutory intervention in England, Northern Ireland and Wales in promulgating the *Unfair Contract Act* 1977, greater restrictions have been placed on limiting or excluding liability for negligence. The Act prohibits the exclusion or restriction of liability for death or personal injury from negligence. [169] Any attempt, therefore, to exclude liability for death or personal injuries, caused by negligence, is ineffective. Also, the courts are given no choice in the matter, as the Act provides that it is not possible to exclude liability for such losses. [170]

12.2.1.3 UNITED STATES OF AMERICA

12.2.1.3.1 Legal Writings

Generally, as was stated earlier, contracts incorporating clauses regulating future tortuous negligent conduct involving exclusion from liability, are not invalid, provided they do not involve a serious moral wrong, they are not violative of law or contrary to some rule of public policy. [171]

Also, clauses limiting liability are strictly construed by the courts and are unenforceable, unless it is shown that the contracting party, against whom the clause operates, has

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167 For legal writings see Lewison *The Interpretation of Contracts* (1997) 322. For case law see *Hinks v Fleet* (1986) 2 E.G.L.R. 243; *Gillespie Brothers Ltd v Bowles (Roy) Transport Ltd* (1973) QB 400 quoted with approval in *Smith v South Wales Switchgear Ltd* (1978) 1 W.L.R. 169.

168 For legal writings see Beatson *Anson's Law of Contract* (2002) 439; McKendrick *Contract Law Text, Cases and Materials* (2003) 170; Coote *Exception Clauses* (1964) 30; Yates and Hawkins *Standard Business Contracts: Exclusion and Related Devices* (1986) 194; Lewison *The Interpretation of Contracts* (1997) 322ff. For case law see *Hollins v Davy* (J) (1963) 1 QB 844; *ACME Transport Ltd v Betts* (1981) R.T.R. 190; *Canada Steamship Lines Ltd v R* (1952) A.C. 192 (Canadian case) quoted with authority in *Gillespie Brothers and Co Ltd v Bowles (Roy) Transport Ltd* (1973) Q.B. 400.

169 S2 (1) of the *Unfair Contract Act* 1977; Yates *Exclusion Clauses in Contracts* (1982) 74; Yates and Hawkins *Standard Business Contracts: Exclusion and Related Devices* (1986) 104ff; McKendrick *Contract Law Text, Cases and Materials* (2003) 453ff; Tillotson *Contract Law in Perspective* (1985) 132; Adams and Brownsword *Understanding Contract Law* (2000) 129.

170 For the legal writings see McKendrick *Contract Law Text, Cases and Materials* (2003) 456; Yates and Hawkins *Standard Business Contracts: Exclusion and Related Devices* (1986) 104; Tillotson *Contract Law in Retrospective* (1985) 134. For case law see the decision of *Johnstone v Bloomsburg H.A.* (1992) Q.B. 337 at 343, 346.

171 Williston 1936 with 1965 *Cumulative Supplement* Vol. 6 Para 1750; Calamari and Perillo *The Law of Contracts* (1977) 268.

assented to in a context of free and understanding negotiation. [172]
But, any attempted exemption of liability for a future intentional tort, or for a future wilful act, or one of gross negligence, is void. [173] A promise not to sue for future damages, caused by simple negligence, is therefore valid but not favoured. However, and if possible, disclaimers or exculpatory clauses are construed not to confer this immunity. [174]

As a general rule, indemnity clauses in an agreement will not be construed to cover losses to the contracting party against whom the indemnity operates and caused by his own negligence, unless, such effect is clearly and unequivocally expressed in the agreement. [175]
The main reasons for the creation and application of the rule against enforcement of release from negligence contract provisions are to discourage negligence, by making wrongdoers pay the damages and to protect those in need of goods or services from being overreached by others who have power to drive hard bargains. [176]
Any attempt to exempt a contracting party from statutory liability or governmental regulation is void, unless the purpose of the statute is aimed to give an added remedy, which is not based on any strong policy. [177]

Whether or not such a contract is enforceable depends on the nature and subject matter of the agreement, the relations of the parties, the presence or absence of equality of bargaining power and the circumstances of each matter. [178]

A bargain, otherwise valid, which exempts one, from future liability to another, because of a contracting party's negligence, would be invalid, depending upon the recognized

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172 Williston 1936 with 1965 *Cumulative Supplement* Vol. 6 Para 1750; Kelner and Kelner "Waivers of Liability in Personal Injury" *New York Law Journal* October (1992) 3.

173 Williston 1936 with 1965 *Cumulative Supplement* Vol 6 Para 1750; Calamari and Perillo *The Law of Contracts* (1977) 268.

174 Williston 1936 with 1965 *Cumulative Supplement* Vol. 6 Para 1750 A; Calamari and Perillo *The Law of Contracts* (1977) 268; American Jurisprudence 57A *AM Jur* 2d 120.

175 Williston 1936 with 1965 *Cumulative Supplement* Vol. 6 Para 1750A; Calamari and Perillo *The Law of Contracts* (1977) 268-269; Kelner and Kelner "Waivers of Liability in Personal Injury" *New York Law Journal American* October (1992) 3 Jurisprudence 57A *AM Jur* 2d 120.

176 Calamari and Perillo *The Law of Contracts* (1977) 270.

177 Williston 1936 with 1965 *Cumulative Supplement* Vol. 6 Para 1750A; Calamari and Perillo *The Law of Contracts* (1977) 269.

178 Calamari and Perillo *The Law of Contracts* (1977) 270.

relationship between the contracting parties. It is stated that some relationships are such that, once entered upon, they would involve a status requiring of one party greater responsibility than that required of the ordinary person. A provision avoiding liability is peculiarly obnoxious therefore, where a party to the agreement, because of his relationship is under a legal duty or a public duty entailing the exercise of care, he may not relieve himself of liability for negligence through an exculpated clause. [179]

One of the most prominently recognised relationships involving a public duty and which has been the focal point in many cases in the United States of America is that of the doctor and patient relationship, or that of a hospital/other health care provider and patient relationship. Arising from these relationships, it often occurred that exculpatory agreements were entered into between hospital and other healthcare providers and patients, that seek to relieve the hospital/other healthcare provider of liability for negligence. Similarly, agreements were also entered into between doctors and patients, in which doctors tended to relieve themselves from liability for their own negligence. Generally, waivers of liability and other attempts at exculpating health care providers from liability, are treated with disfavour by the courts, as public interests requires the performance of such duties and because the parties do not stand upon equal footing of equality. [180]

For a greater in-depth discussion on the effects of waivers or exculpatory clauses in hospital contracts or contracts between other healthcare providers, including doctors, and patients, see Chapter 14.

12.2.1.3.2 Case Law

With the advent of standardized contracts in a changing commercial world, this has, as was previously stated, brought greater challenges to the American courts. More particularly, the courts, in the different jurisdictions of the United States of America, have, over a long period of time, wrestled with different types of contracts containing an array of exculpatory provisions, also referred to as exclusionary clauses. Moreover, the contentious issue has always been to determine, with certainty, the validity and enforceability of exculpatory provisions or, exemption clauses.

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179 Williston 1936 with 1965 *Cumulative Supplement* Vol. 6 Para 1751; Calamari and Perillo *The Law of Contracts* (1977) 270.

180 Flamm "Health care provider as defendant" A Chapter published in *Legal Medicine American College of Legal Medicine* (1991) 127; Furrow et al *Health Law* (1995) 256; Annotation "Validity and Construction of Contract exempting hospital or doctor from liability for negligence to patient" 6 *ALR* 3d 704 at 705; Kelner and Kelner "Waivers of Liability in Personal Injury" *New York Law Journal* October (1992) 3; American Jurisprudence 57A *AM Jur* 2d 121, Reynolds Comments "Torts - Negligence - Exculpatory Clause *Kentucky Law Journal* Vol. 58 (1970) 583 at 584.

In pursuit thereof, the American courts have identified various factors which influence the validity of these types of clauses. One of the most prominent and influencing factors identified is that of the exclusion of liability on grounds of negligence. Although identified, nonetheless, the American Courts have stated that no magic formula exists in determining the validity of these types of clauses. Generally however, contracts against liability for negligence are not favoured by the law. Contracts against liability may, nevertheless, be valid and enforceable, provided they comply with certain requirements. The requirements laid down by the courts and which are absorbed in the case discussions that follow, include:

(i) It does not contravene any policy of the law, that is, if it is not a matter of interest to the public or state. Included in this is the public interest factor are contracts injurious to the public or contrary to public good or public policy; acts in violation of a public or statutory duty;

(ii) The contract is between persons relating entirely to their own private affairs;

(iii) Each party is a free bargaining agent and the clause is not in effect a mere contract of adhesion, whereby one party simply adheres to a document which he is powerless to alter, having no alternative other than to reject the transaction;

(iv) The intention of the parties is expressed in sufficiently clear and unequivocal language;

(v) The standard of conduct complained of does not fall greatly below the standard established by law for the protection of others or does not violate a duty of public service or does not influence a public or statutory duty.

In one of the first cases involving the validity of exemption clauses in contract, the New Jersey Court of Appeals as far back as 1936, in the case of *Globe Home Improvement Co v Perth Amboy Chamber of Commerce Credit Rating Bureau Inc*; [181] set out the legal position as follows: *"If parties who make ordinary contracts cannot agree to limit the extent of liability, it is difficult to see where such a ruling would lead us."* The court goes on to state: *"Contracts against liability for negligence we think are universally held valid except in those cases where a public interest is involved, as in the case of carriers, and in such case the action is not on the contract or its breach, but on the failure to perform a public duty. See Tomlinson v Armour and Co 75 N.J. Law 748, 70 A. 314, 19 L.R.A. (N.S.)*

[181] 116 N.J.L.168, 182 A. 641 (1936).

923." [182]

The public interest factor featured very prominently in the following cases. In the matter of *Banfield v Louis Cat Sports Inc,* [183] the appellant completed and signed an "official entry form" in California, to compete, as a professional, in a triathlon series. Whilst practising, in Fort Lauderdale, on the designed bicycle race course, she was struck and seriously injured by a motor vehicle, owned and operated by the respondent.

The appellant subsequently instituted action seeking to recover damages for the alleged negligence of, *inter alia,* Louis and the sponsors, organizers, and promoters of the triathlon. Banfield alleged that these individuals and organizations breached their duty to Banfield by failing to establish and maintain a safe bicycle course and failing to properly control traffic around the course.

Although the appellant relied upon the "public interest" test set forth in *Tunkl v Regents of University of California* 60 Cal. 2d 92, 383 P.2d 441, 32 Cal Rptr 33 (1963), which provides: *"The public interest factor will invalidate an exculpatory clause when: (1) it concerns a business of a type generally suitable for public regulations; (2) the party seeking exculpation is engaged in performing a service of great public importance, which is often a matter of practical necessity for some members of the public; (3) the party holds himself out as willing to perform this service for any member of the public who seeks it; (4) as a result of the essential nature of the service and the economic setting of the transaction, the party seeking exculpation possesses a decisive advantage in bargaining strength; (5) in exercising superior bargaining power, the party confronts the public with a standardized adhesion contract of exculpation; and (6) as a result of the transaction, the person or property of the purchaser is placed under control of the party to be exculpated. Id. at 98-100, 32 Cal.Rptr at 37-38, 383 P.2d at 445-46"* [184] the court found that arguably two of these factors are present in this case. The court consequently held that the participation in the triathlon series was completely voluntarily and the entrance form was not a standardized adhesion contract. Subsequently, the court ruled that, depending on the capacity of the parties, in certain circumstances, it is sufficient to absolve those parties from liability for negligence, as a matter of law. But, cautions the court, *"It should only be struck down on public policy grounds if it is clear that it is injurious to public good or*

182 *Globe Home Improvement Co v Perth Amboy Chamber of Commerce Credit Rating Bureau Inc* 116 N.J.L. 168, 182 A. 641 (1936).

183 589 So. 2d 441 (1991).

184 *Banfield v Louis Cat Sports Inc* 589 So. 2d 441 (1991).

contravenes some established interests of society".

But, in this case, the court held the appellant had not made a sufficient showing of *"great prejudice to the dominant public interest".* [185]

Public interest, as a factor nullifying an exculpatory provision, also featured in the appeal case of *Crawford v Buckner et al*. [186] the determinative issue raised in this appeal is whether an exculpatory clause in a residential lease bars recovery against the landlord for negligence which causes the tenant injury?
The issue arose two months after Crawford, the appellant, rented her apartment. A fire started in the apartment of Debra and Larry Buckner, who lived in the apartment below the plaintiff. The fire quickly spread to the plaintiff's apartment, blocking her exit through the front, and only door. To escape the fire, Crawford jumped from a window in her second story apartment. When she landed, the plaintiff suffered numerous injuries, partly due to the debris on the ground behind her apartment building.

The appellant, before occupying the premises, signed a lease agreement contained in a standard lease, which included an exculpatory clause providing that: *"(t)enant agrees that the landlord, his agents and servants shall not be liable to tenant or any person claiming through tenant, for any injury to the person of loss of or damage to property for any cause. Tenant shall hold and save landlord harmless for any and all claims, suits, or judgements for any such damages or injuries however occurring."*

Relying on the general acceptance of exculpatory clauses, the court stated:

"As early as 1938, Williston recognized that while such exculpatory clauses were recognized as "legal", many courts had shown a reluctance to enforce them. Even then, courts were disposed to interpret them strictly so they would not be effective to discharge liability for the consequences of negligence in making or failing to make repairs. Williston, A Treatise on the Law of Contracts <section> 1751 p. 4968 (Rev Ed 1938)).
McCutcheon v United Homes Corp. 79 Was. 2d 443, 486 P.2d 1093, 1095 (1971)"

But finds the court: *".....courts have held that such clauses may be void as against public policy where the landlord had greater bargaining power so that the tenant must accept the lease as written, or where the tenant was unaware of or did not fully understand the clause's effect, or where the clause was overly broad or was unconscionable. See*

185 *Banfield v Louis Cat Sports Inc* 589 So. 2d 441 (1991).

186 839 S.W. 2d 754 (1992).

Annotation, Validity of Exculpatory Clause, 49 A.L.R.3d at 325-26."

A further exception to the general acceptance of these types of clauses stated by the court *"is that a common carrier (which) cannot by contract exempt itself from liability for a breach of duty imposed on it for the benefit of the public. Moss v Fortune supra."*

In so far as public interest is concerned, the court relied on the court's decision in *Olson v Molzen* 558 S.W. 2d 429 (Tenn 1977), albeit in a hospital-patient relationship, in which an exculpatory contract, signed by a patient as a condition of receiving medical treatment, was invalid as contrary to public policy and could not be pleaded as a bar to the patient's suit for negligence. Id. at 432.

The court consequently concluded:

"..... A residential lease concerns a business of a type that is generally thought suitable for public regulation. Our conclusion is bolstered by the fact tat the legislature of this state has seen fit to regulate this area, and that other states, such as Illinois, Maryland, Massachusetts, and New York, have enacted legislation regulating the residential landlord-tenant relationship."

And further:

" ..... A residential landlord is engaged in performing a service of great importance to the public, which is often a matter of practical necessity for some members of the public. In addition, a residential landlord holds itself out as willing to perform a service for any member of the public who seeks it. Therefore, we conclude that the residential landlord-tenant relationship falls within the final public interest criteria." [187]

The court also found the residential landlord-tenant relationship had satisfied all six of the public interest criteria. The court consequently rejected the defendant's contention that the landlord and tenant relationship was a purely private affair and not a matter of public interest. Consequently, the court found that the exculpatory clause in the residential lease, in this case, was contrary to public policy.

Public policy was considered, in the following cases, as the determining factor in considering the validity of an exculpatory clause. In *Walker v American Family Mutual Insurance Company* [188] the court considered whether a provision contained in a liability policy, issued to the owner of a vehicle, prior to the time he was fatally injured as a

187 *Crawford v Buchner et al* 839 S.W. 2d 754 (1992).

188 340 N.W. 2d 599 (1983).

passenger in that vehicle, it was being driven with his consent and which provision operated to exclude coverage for bodily injury to the insured or any member of the insured's family residing in the same household notwithstanding negligence being shown.

Consequently, relying on public policy, the court, although it acknowledged *"a contract which contravenes public policy will not be enforced by our courts"* and *"a court ought not to enforce a contract which tends to be injurious to the public or contrary to the public good",* [189] nonetheless, held that the exclusionary clause inserted in the contract in question, was not contrary to public policy as there were other insurance policies available. The court consequently refused to invalidate the exclusionary clause on public policy grounds.

In *Powell v American Health Fitness Centre of Fort Wayne Inc* [190] the appellant signed a membership agreement ("agreement") to become a member of American Health. The agreement contained an exculpatory clause which read:

"17. DAMAGES: By signing this agreement and using the Club's premises, facilities and equipment, Member expressly agrees that the Club will not be liable for any damages arising from personal injuries sustained by Member or his guest(s) in, on, or about the Club, or as a result of using the Club's facilities and equipment etc."

The appellant subsequent to signing suffered an injury to her foot while using the whirlpool on the premises of American Health.

The appellant subsequently filed suit against American Health alleging that her injury was caused by its negligence. American Health relied upon the exculpatory clause. The trial court found for American Health. The court concluded that there was "nothing ambiguous about the language in paragraph 17;" that the appellant knowingly signed the membership agreement; and that, as a matter of law, the appellant had released American Health from liability for her claims of injury.

The appellant subsequently appealed and the Court of Appeals in Indiana stated the general position in Indiana as follows:

189 *Walker v American Family Mutual Insurance Company* 540 N.W. 2d 599 (1983); See also *Home Beneficial Ass'n v White* 180 Tenn. 585, 177 S.W. 2d 545 (1944). See also *Messersmith v American Fidelity Co* 232 N.Y. 161, 133 N.E. 437 (1921).

190 694 N.E.2d 757 (1998).

"It is well established in Indiana that parties are permitted to agree in advance that one is under no obligation of care for the benefit of the other, and shall not be liable for the consequences of conduct which would otherwise be negligent." Marshall v Blue Springs Corp. 641 N.E. 2d 92, 95 (Ind.Ct.App.1994). We have held that it is not against public policy to enter an agreement which exculpates one from the consequences of his own negligence where there is no statute to the contrary. Id. Neither party has cited any statute which prohibits health clubs from requiring such contracts from their patrons."

Interpreting the exculpatory clause in the agreement the court stated:

"As a matter of law, the exculpatory clause did not release American Health from liability resulting from injuries she sustained while on its premises that were caused by its alleged negligence. Therefore, the exculpatory clause is void to the extent it purported to release American Health from liability caused by its own negligence." [191]

The New York Court of Appeals, in the case of *Ciofalo et al v Vic Tanney Gyms, Inc,* [192] took an opposing decision in an action for damages, by the plaintiff wife for personal injuries, and by the plaintiff husband, for medical expenses and loss of services, stemming from injuries which the wife sustained as the result of a fall at, or near, the edge of a swimming pool located on defendant's premises. Plaintiff claimed that because of excessive slipperiness and lack of sufficient and competent personnel, she was caused to fall and fractured her left wrist.

At the time of the injury, plaintiff wife was a member, or patron, of the gymnasium operated by the defendant, and, in her membership contract, she had agreed to assume full responsibility for any injuries which might occur to her in or about defendant's premises, including, but without limitation, any claims for personal injuries resulting from, or arising out of, the negligence of the defendant.

The defendant relied on the exculpatory provision contained in the membership contract exonerating the defendant from liability. The court stated the general position of exculpatory clauses as follows: *"Although exculpatory clauses in a contract, intended to insulate one of the parties from liability resulting from his own negligence, are closely scrutinized they are enforced, but with a number of qualifications. Whether or not such provisions, when properly expressed, will be given effect depends upon the legal relationship between the contracting parties and the interest of the public therein."*

But, states the court, exculpatory provisions will be enforced *"where the intention of the parties is expressed in sufficiently clear and unequivocal language (Tompson-Starrett Co v*

191 *Powell v American Health Fitness Centre of Fort Wayne Inc* 694 N.E. 2d 757 (1998).

192 10 N.Y. 2d 294, 177 N.E. 2d 925, 22 N.Y.S. 2d 962 (1961).

Otis Elevator Co 271 N.Y. 36, 41, 2 N.E. 2d 35, 37) and it does not come within any of the aforesaid categories where the public interest is directly involved. A provision absolving a party from his own negligent acts will be given effect in those circumstances."

Turning to this case the court found: *"The wording of the contract in the instant case expresses as clearly as language can the intention of the parties to completely insulate the defendant from liability for injuries sustained by plaintiff by reason of defendant's own negligence, and, in the face of the allegation of the complaint charging merely ordinary negligence, such agreement is valid."*

The court also found: *"Here there is no special legal relationship and no overriding public interest which demand that this contract provision, voluntarily entered into by competent parties, should be rendered ineffectual. Defendant, a private corporation, was under no obligation or legal duty to accept plaintiff as a `member' or patron. Having consented to do so, it had the right to insist upon such terms as it deemed appropriate."* [193]

The plaintiffs (respondents in the appeal) faced the same fate in the case of *Scholobohm et al v Spa Petite Inc* [194] in which the Supreme Court of Minnesota had to decide whether an exculpatory clause in health spa's membership contract, purporting to exculpate the spa, its agents and employees from liability to members, for personal injuries arising out of negligence, was not invalid on grounds of ambiguity, where the clause specifically purported to exonerate the spa from liability for acts of negligence and negligence only.

In this case, the Appellant, Spa Petite, Inc (Spa Petite) owned and operated the Spa Petite in Owatonna. In January 1976, the respondent, Sandra C Schlobohm (Schlobohm), entered into a contract to become a member of Spa Petite, which offered a program of weight reduction and general physical fitness through exercise. The facility had various exercise paraphernalia including a leg extension apparatus, which required the user to sit on the edge of a bench, to place the ankles under a padded bar, to which weights had been attached by a pulley, and then lift the legs straight up until they are parallel with the floor.

The respondent Schlobohm signed the membership contract on her initial visit to the facility. There was no compulsion in her joining.

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193 *Ciofalo et al v Vic Tanney Gyms Inc* 10 N.Y. 2d 294, 177 N.E. 2d 925, 220 N.Y.S. 2d 962 (1961).

194 326 N.W. 2d 920 (1982).

The signed contract contained inter alia an exculpatory clause headed and provided for as follows:

"ACCIDENTS
It is further expressly agreed that all exercises and treatments and use of all facilities shall be undertaken by member at member's sole risk and that Spa Petite shall not be liable for any claims, demands, injuries, damages, actions or causes of action, whatsoever to member or property arising out of or connected with the use of any of the services and facilities of Spa Petite etc."

Before signing the membership contract, Schlobohm had the opportunity and did "somewhat" read the context of the contract.

She, and her husband subsequently, after she sustained an injury, instituted action against the appellant, alleging that the appellant was negligent.

The court first set out the general position of exculpatory clauses albeit constriction and commercial leases: *"..... Those parties to a contract may, without violation of public policy, protect themselves against liability resulting from their own negligence. (FN4) In so doing, we have noted that the public interest in freedom of contract is preserved by recognizing such clauses as valid. Northen Pacific Railway Co v Thornton Brothers Co 206 Minn. 193, 196, 288 N.W. 226, 227 (1939)."*

But cautions the court: *"Even though we have recognized the validity of exculpatory clauses in certain circumstances, they are not favoured in law. A clause exonerating a party from liability will be strictly construed against the benefitted party. If the clause is either ambiguous in scope or purports to release the benefitted party from liability for intentional wilful or wanton acts, it will not be enforced."*

The court also advocates the following rule, namely:

" ..... Those indemnity clauses were to be strictly construed against the purported indemnitee, and that indemnity will not be created by implication. We extended that rule of strict construction to exculpatory clauses in Solidification Inc v Minter 305 N.W. 2d 871, 873 (Minn.1981)"

On examining the exculpatory clause in the appellant's contract, the court found the contract demonstrated an absence of ambiguity. The clause specifically purported to exonerate Spa Petite from liability for acts of negligence and negligence only.

The court also considered the approach of other courts, in various jurisdictions, including

Minnesota and identified the two-prong test, used by the courts in analysing policy considerations, namely:

> *"(1) whether there was a disparity of bargaining power between the parties in terms of a compulsion to sign a contract containing an unacceptable provision and the lack of ability to negotiate elimination of the unacceptable provision). (North Star Centre, Inc v Sibley Bowl, Inc 295 Minn. 424, 426, 205 N.W. 2d 331, 333 (1973)) (Per curiam) (FN45) and (2) the types of services being offered or provided (taking into consideration whether it is a public or essential service). Jones v Dressel Colo. 623 P.2d 370, 376 (1981))"*

The court also recognized that "public interest" was also a determining factor in ascertaining whether exculpatory clauses are enforceable. The court however, acknowledged that, in determining what is in "public interest", there was no neat formula to arrive at an answer. The court, consequently, cited the criteria enumerated in Tunkl, *inter alia,* if the type of service being offered by the appellant was subject to public regulation. Consequently the court identified certain types of services which were generally thought to be subject to public regulation, which included common carriers, hospital and doctors, public utilities, public warehouse men, employees and services involving extra-hazardous activities. The court concluded that *"the business of the Spa Petite is not the type generally thought suitable for public regulation."*

The court also concluded; *"there were no special legal relationship and no overriding public interest which demand that the contract provision voluntarily entered into by the competent parties should be rendered ineffective. It was also found that the Respondent voluntarily applied for membership in a private organization, and agreed to the terms upon which membership was bestowed. She may not repudiate them now."* [195]

Consequently, the court concluded, the exculpatory clause in the contract was not against public interest.

In another case involving a health spa, the health spa and its membership agreement, containing an exculpatory clause purporting to relieve the spa from liability for injuries resulting from its negligence, or that of its employees, the Superior Court of Pennsylvania, in *Leidy et al v Desert Enterprises Inc d/b/a Body Shop Health Spa,* [196] had to decide whether the membership agreement, required to be signed by members of the health spa, in which they thereby acknowledged that the health spa made no medical recommendations

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195 *Schlobohm et al v Spa Petite Inc* 326 N.W. 2d (1982).

196 252 Sa. Super 162, 381 A.2d 164.

to them, waived any claims or damages arising from use of the health spa's facilities and services, and released the health spa from all actions arising from negligent acts during treatment, was valid and enforceable.

The facts which gave rise to the action for damages include: Mrs Leidy had been referred to the Spa, by her doctor, as part of post-operative treatment following surgery on the lumbar area of her spine. She alleges however, that the treatment she was, in fact, given at the spa was directly contrary to her doctor's instructions to the Spa and resulted in various injuries.

The Spa attempted to escape liability by shielding behind a purported release contained in an exculpatory provision, included in a standard membership agreement, which clause provided, *inter alia*:

"..... it is expressly agreed that all exercises and use of all facilities shall be undertaken by Member at Member's sole risk and Body Shop Health Spa shall not be liable for any claims, demands, injuries, damages, actions or causes of action whatsoever, to person or property, arising out of or connected with the use of any of the services or facilities of Body Shop Health Spa ....."

The plaintiff's (respondents in the Appeal) main contention to the purported release is that to release the Spa from liability for injuries resulting from its negligence, is unconscionable.

The court consequently held, as a general rule, although an exemption against liability for negligence are not favoured by the law, nonetheless, in some instances they have been held to be valid. But cautions the court: *"In all cases, such contracts should be construed strictly with every intendment against the party showing their protection."* But, the court emphasizes, such contracts will only be held valid if:

(a) "it does not contravene any policy of the law, that is, if it is not a matter of interest to the public or State ....." (b) "the contract is between parties relating entirely to their own private affairs" (c) "each party is a free bargaining agent and the clause is not in effect a mere contract of adhesion, whereby (one party) simply adheres to a document which he is powerless to alter, having no alternative other than to reject the transaction entirely".

The court with reference to the case of *Boyd v Smith* 372 Pa. 306, 94 A.2d 44 (1953) held: *"Courts have been particularly sensitive to the public interest in considering contracts that involve health and safety."*

Thus, the court emphasized, it would be made easier to enforce if there was legislation,

which acted as a police measure, intended for the protection of human life. In such event, the court stated: *"Public policy does not permit an individual to waive the protection which the statute is assigned to afford him."*

Turning to the contract in the case the court held: *"Here the contract clearly concerned health and safety. The allegation is that a business purporting to provide for the physical health of its members acted directly contrary to a doctor's orders specifying necessary post-operative treatment, and that serious injuries resulted. The public has an interest in assuring that those claiming to be qualified to follow a doctor's orders are in fact so qualified, and accept responsibility for their actions."*

The court also relied upon legislation in the form of *Physical Therapy Practice Act*, Act of October 10, 1975, P.L. 383, No 110, and s1, 63 P.S. s 1301 et seq., which provided for the examination and licensing of physical therapists and which served to manifest the public interest required.

Turning to the status of physical therapists who may do as much harm as a doctor or druggist, the court held: *"A physical therapist who as alleged here negligently performs therapy in direct contradiction to a doctor's orders should likewise be "guilty of a breach of duty imposed on him by law to avoid acts dangerous to the lives or health of Others."* [197]

The court consequently held that the exculpatory clause was invalid.

In *Henningsen v Bloomfield Motors Inc* [198] the defendant company sought to exclude its liability by way of a disclaimer. The facts briefly stated were: The plaintiff bought a new Plymouth from the defendant-dealer. The steering mechanism failed ten days after the car was delivered and the plaintiff's wife was injured. Plaintiff and his wife instituted action against the defendant and against Chrysler, the manufacturer, for breach of an implied warranty of merchantability, that is, a warranty against defective manufacture. In the absence of any contractual disclaimer, an implied warranty of merchantability would, under the law, entitled a car-buyer to damages for personal injuries even if (in the Court's words) *"due care were used in the manufacturing process."* Seeking to avoid such liability, the defendants pointed out that the purchase agreement did, in fact, specifically disclaim all

197 *Leidy et al v Desert Enterprises Inc d/b/a Body Shop Health Spa* 252 Pa. Super 162, 381 A. 2d 164 (1977).

198 32 N.J. 358, 161 A.2d 69 (1960).

warranties, express or implied, other than liability to replace defective parts for a period of 90 days following purchase. While the defendants presumably stood ready to replace the defective steering mechanism, they contended that the contract effectively eliminated any further liability, including liability for personal injuries. The contract was, of course, a standardized purchase agreement, with the warranty disclaimer printed in small type on the back of the form.

The Supreme Court of New Jersey, in a decision generally regarded as path-breaking, found for the plaintiffs - meaning, in the circumstances, that the contractual disclaimer, insofar as it sought to immunize the defendants from personal injury claims, would be regarded as void.

The court in considering the inequality of the bargaining position occupied by the consumer in the automobile industry and the controls the industry has over the consumers. The court also considered the limitations placed on consumers of their remedies regardless of the negligence of the manufacturers in the industry and stated:

"Such control and limitation of his remedies are inimical to the public welfare and, at the very least, call for great care by the courts to avoid injustice through application of strict common-law principles of freedom of contract. Because there is no competition among the motor vehicle manufacturers with respect to the scope and protection, guaranteed to the buyer, there is no incentive on their part to stimulate good will in that field of public relations. Thus, there is lacking a factor existing in more competitive fields, one which tends to guarantee the safe construction of the article sold. Since all competitors operate in the same way, the urge to be careful is not so pressing."

Turning to the rationale governing the limitation of liability cases the court held:

"Basically, the reason a contracting party offering services of a public or quasi-public nature has been held to the requirements of fair dealing, and, when it attempts to limit its liability, of securing the understanding consent of the patron of consumer, is because members of the public generally have no other means of fulfilling the specific need represented by the contract."

It was true, said the Court, *"that competent parties are free, in general, to make any lawful agreement (of which this was surely one), and that anyone who signs a contract without reading it does so at his peril."* Here, however, the court stated the overriding considerations of public policy, in effect, entail the need *"to protect the ordinary man against the loss of important rights"*, made it appropriate to disregard the conventional premises of laissez-faire and to treat the warranty-disclaimer as a nullity. [199]

In *Graham d/b/a The Graham Seed Company v Chicago, Rock Island and Pacific Railroad*

199 *Henningsen v Bloomfield Motors Inc* 32 N.J. 358, 161 A. 2d 69 (1960).

Company [200] an action for damages the plaintiff sought to recover damages allegedly sustained as a result of Defendant's negligent operation of its railroad. Plaintiff alleged that on November 30, 1974 a train, operated by Defendant, derailed in Marlow, Oklahoma while travelling south on a track owned and maintained by Defendant. At the time of the wreck, Plaintiff operated a business at a point approximately 50 feet south of the point of derailment. Plaintiff leased the land on which his business was situated from Defendant. As a result of the derailment, Plaintiff's place of business was damaged. The means of public access to Plaintiff's business was also impaired and had not yet been repaired.
Although the Defendant admitted the Plaintiff's allegations, the Defendant relied on an exculpatory clause contained in the lease agreement, exempting or exculpating it from liability for any damages caused, which read:

"The Lessee releases the Lessor, its agents and employees from all liability for loss or damage caused by fire or other casualty by reason of any injury to or destruction of any real or personal property, of any kind, owned by the Lessee, or in which the Lessee is interested, which now is or may hereafter be placed on any part of the leased premises."

Consequently, the court set out the legal position as follows:

"Our Court of Appeals has consistently held, in cases applying Oklahoma law, that private contracts exculpating one from the consequences of his own acts of negligence are not favoured by the law, will only be enforced where there is no vast disparity in bargaining power between the parties and the intent of the parties, that one party excuses the other from the consequences of his own acts of negligence, is expressed in clear, definite, and unambiguous language. Sterner Aero AB v Page Airmotive Inc 499 F.2d 709 (Tenth Cir. 1974); Colorado Milling and Elevator Co v Chicago, R.I. and P.R. Co 382 F.2d 834 (Tenth Cir. 1967); Mohawk Drilling Company v McCullough Tool Company 271 F.2d 627 (Tenth Cir. 1959)."

The Court of Appeals subsequently found that, upon interpreting the exculpatory clause, *"it does not in clear, definite, and unambiguous language, release the Lessor from the consequences of his own acts of negligence."* And further: *"If the parties had contemplated releasing the Lessor from his own negligence as distinguished from the negligence of some one else, they could have so contracted in clear and definite language. A party who desires to be excused from his own negligence has the burden to insist and see to it that clear and definite language is used to that effect. The import of the above cases is clear. If an exculpatory clause is not clear, definite, and unambiguous it does not as a matter of law, release the designated party from his own acts of negligence."* [201] The court subsequently declined to enforce the exculpatory clause in question.

200 431 F. Supp 444 (1976).

201 *Graham d/b/a The Graham Seed Company v Chicago, Rock Island and Pacific Railroad Company* 431 F. Supp 444 (1976); See also *Swift v Choe et al* 242 A.D. 2d 188, 674 N.Y.S. 2d 17 (1998).

In a similar matter, in the case of *Smith d/b/a Smith v Seaboard Coast Line Railroad Company,* [202] but, on the facts reaching a different decision, the court considered a lease agreement containing indemnity provisions. In terms of the lease agreement, the lessee had constructed a metal shed used in connection with his business. He agreed to hold the railroad company harmless (blameless) for any fire damage to the shed due to railroad negligence. He also had agreed not to sue the railroad company for any property damage caused by, or connected with, the use of leased premises, regardless of whether such resulted from the railroad company's negligence. The latter relieved the railroad company of liability for damage to the metal shop building which was not located on a right-of-way but which was used in lessee's business and which was damaged by fire that spread from right-of-way. This, notwithstanding that the sole cause of fire may have been the railroad company's negligence.

Subsequent thereto, a fire broke out and spread to the shed, containing combustible products used by the plaintiff in his business. The plaintiff sued the defendant, who pleaded that the plaintiff had contracted away his right to sue the defendant for damages. Consequently, the whole issue for the court to decide was whether these indemnity provisions could be construed to absolve the defendant from any liability.

Relying heavily upon the doctrine of freedom to contract, the court held:
"If the language of the agreement is clear, then it is controlling, and the court needs look no further. Carsello v Touchton 231 Ga. 878, 204 S.E. 2d 589 (1974). This principle is the obverse of the broad freedom of contract the law grants the parties; once a contract is signed, its provisions define the full measure of rights accorded each party. Worth v Orkin Exterminating Co 142 Ga. App 59."

Turning to the question of negligence, the court stated:
"As a general rule a party may contract away liability to the other party for the consequences of his own negligence without contravening public policy, provided the parties' intention to this effect is expressed in clear and unequivocal terms, and except when such an agreement is prohibited by statute or where a public duty is owed. Batson-Cook Co v Georgia Marble Setting Co 112 Ga.App. 226, 229-30, 144 S.D. 2d 547 (1965)."

Relying on case law the court went on to state:
"Applying this standard, Georgia courts have held in a number of cases that an exculpatory clause shielded a defendant from liability for the plaintiff's injury, even when his negligence caused or contributed to the accident. E.g. Southern Railway Co v Insurance Company of North America 228 Ga. 23, 183 S.E. 2d 912 (1971); Blitch v Central of Georgia Railway Co 122 Ga. 711, 50 S.E. 945 (1905); Binswanger Glass Co v Beers Construction Co 141 Ga.App 715, 234 S.E. 2d 363 (1977); Georgia Ports Authority v Central of Georgia Railway Co 135 Ga. App 859, 219 S.E. 2d 467 (1975); Benson Paint Co v Williams Construction Co 128 Ga.App 47, 195 S.E. 2d 671 (1973); Hearn v Central of Georgia Railway Co 22 Ga.App 1 95 S.E. 368 (1918)."

202 639 F.2d 1235 (1981).

The key issue to the court was that: *"In each of these cases the courts determined that as a matter of law the indemnity provision in question was drafted in clear enough terms to protect the indemnitee even though he had been negligent."*

Construing the clause *in casu* the court held: *"The clause states explicitly that the defendant is to be protected from liability for the damages to any of the plaintiff's property caused by or in any way connected with the plaintiff's use of the leased premises."*

As to whether the exculpatory provisions offend the statute, the court found that the statute did not apply to the lease agreement, but to the erecting building contractor in constructing the building.

The court consequently held: *"For these reasons, the scope of the statute should not be extended beyond its intended limits to so tenuous a connection with any building activity."* [203]

Consequently, the court did not rule the exculpatory provisions to be void and unenforceable.

The private affairs of contracting parties, in a contractual relationship, featured, in considering the validity of exculpatory clauses in contract, in the following cases:
The Court of Appeal of Florida, in the case of *Sunny Isles Marina Inc v Adulmi et al,* [204] in an appeal, considered exculpatory provisions in boat storage agreements. Citing the general position with regard to the validity and enforceability of exculpatory provisions in the State of Florida, the court stated:

> *"(1) Exculpatory provisions which attempt to relieve a party of his or her own negligence are generally looked upon with disfavour, and Florida law requires that such clauses be strictly construed against the party claiming to be relieved of liability. See Hertz Corp v David Klein Mfg, Inc 636 So. 2d 189, 191 (Fla. 3d DCA 1994); Southworth and McGill v Southern Bell Tel. and Tel Co 580 So. 2d 628, 634 (Fla. 1st DCA 1991); Ivey Plants Inc v FMC Corp 282 So. 2d 205, 208 (Fla. 4th DCA 1973), cert denied, 289 So.2d 231 (Fla. 1974); Middleton v Lomaskin 266 So 2d 678, 680 (Fla 3d DCA) 1972)."*

But, states the court, such provisions, however, have been found to be valid and

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203 *Smith d/b/a Smith v Seaboard Coast Line Railroad Company* 639 F.2d 1235 (1981).

204 706 So. 2d 920 (1998).

enforceable by Florida courts *"where the intention is made clear and unequivocal. See Michel v Merrill Stevens Dry Dock Co 554 So.2d 593, 595 (Fla. 3d DCA 1989); Goings v Jack Ruth Eckerd Found. 403 So 2d 1144, 1146 (Fla. 2d DCA 1981); Orkin Exterminating Co v Montagano 359 So. 2d 512, 514 (Fla. 4t DCA 1978)."*

Consequently, the court found there was *"ambiguity caused by the conflict of paragraphs seven and eight, and the internal conflict within paragraph seven, we find that an ordinary and knowledgeable party would not know what he or she is contracting away in this regard."* [205]

The exculpatory clause was held to be invalid and unenforceable.

An exculpatory clause contained in a skiing contract, formed the subject of decision making in *Allan v Snow Summit Inc*. [206] The Court of Appeal in California heard the appeal, in a negligence action, against a ski resort, by a novice skier injured in fall, after being encouraged by the instructor to try a more difficult slope, was barred by a release, signed by the skier as a condition of enrolling in the ski school, in which the skier agreed that, in exchange for permission to ski and receive lessons, he would not sue the resort or its employees for any injury caused by participation in the hazardous activity, even if the resort or employees were negligent.

The court stated the general position with regard to exemption clauses, as *"ordinarily, people owe a general duty of care to others not to act so as to injure them, the exception to the general rule is found in the context of "active" sports or recreational activities."* In this sense *"players owed each other no duty of care not to injure each other in the regular course of play."*

But stated the court: *"..... the defendant owes no duty to protect the plaintiff from risks of injury which are "inherent" in the sport. Defendants still owe a duty, however, not to increase the risks of injury beyond those that are inherent in the sport."*

The court continued to set out the effect of "assumption of the risk" in stating:

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205 *Sunny Isles Marina Inc v Adulamini et al* 706 So. 2d 920 (1998); See also Foster v Matthews 714 So. 2d 1215 (1998).

206 51 Cal.App. 4th 1358, 59 Rptr. 2d 813 (1996).

"....., where a plaintiff has expressly contracted not to sue for negligence, discussion of defences to an action for negligence would be irrelevant." In this case the court held "*Here, Allan admits he signed the "Agreement and Release of Liability", in which he agreed not to sue Snow Summit, or its employee, even if he suffered injury, even if he suffered death, and even if the injury or death was caused by Snow Summit's or Oldt's negligence. A release or waiver could hardly be clearer."*

The court also looked at the effect of the doctrine of freedom of contract in these types of cases and stated:

"(13) The general principle remains unaltered that "there is no public policy which "opposes private, voluntary transactions in which one party, for a consideration, agrees to shoulder a risk which the law would otherwise have placed upon the other party. (McAtee v Newhall Land and Farming Co (1985) 169 Cal App 3d 1031), supra, at p. 1034 (216 Cal. Rptr. 465), quoting from Tunkl v Regents of the University of California (1963) 60 Co 2d 92), supra, at p. 101 (32 Cal. Rptr. 33, 383 P.2d 441). (Kurashige v Indian Dunes, Inc (1988) 200 Cal. App. 3d 606, 612, 246 Cal. Rptr. 310)"

The court continued: *"Although exculpatory clauses affecting the public interest are invalid (Tunkl v Regents of University of California (1963) 60 Cal 2d 92, 32 Cal. Rptr. 33, 383 P.2d 441), exculpatory agreements in the recreational sports context do not implicate the public interest. (See e.g. Buchan v United States Cycling Federation, Inc (1991) 227 Cal. App. 3d 134, 149-154, 277 Cal. Rptr. 887 (bicycle racing); Madision v Superior Court supra, 203 Cal.App.3d 589, 598-599, 250 Cal.Rptr. 299 (scuba diving); Kurashige v Indian Dunes, Inc supra 200 Cal.App.3d 606, 246 Cal. Rptr 310 (motorcycle dirt-bike riding); Coates v Newhall Land and Farming, Inc (1987) 191 Cal.App 3d 1, 8, 236 Cal.Rptr 181 (same); Okura v United States Cycling Federation (1986) 186 Cal.App.3d 1462, 231 Cal.Rptr. 429 (bicycle racing): Thus, it has been held before that release agreements were binding."*

Consequently, turning to this case, the court held that the plaintiff's *"voluntary participation in recreational and sports activities does not implicate the public interest: Skiing, like other athletic or recreational pursuits, however beneficial, is not an essential activity. (See e.g. Randas v YMCA of Metropolitan Los Angeles (1993) 17 Cal.App.4th (158) at P. 162 (21 Cal.Rptr.2d 245) (swimming)). (Olsen v Breeze, Inc (1996) 48 Cal.App.4t 608, 621-622, 55 Cal. Rptr.2d 818)."* [207]

Consequently the court held the agreement was not unconscionable and upheld the exculpatory clause.

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207 *Allan v Snow Summit Inc* 51 Cal.App. 4th 1358, 59 Rptr.2d 813 (1996).

The position with regard to the validity of an indemnity provision in a private-crossing license agreement was stated as follows in the case of *Chicago Great Western Railway Company v Farmers Produce Company*: [208]

Dealing firstly with the legal position, in general, in the State of Iowa the court stated: *"(9) It is the well settled law that, subject to certain exceptions, contracts relieving one from the consequences of his own negligence are valid. See cases cited by this court in the case of Fire Association of Philadelphia v Allis Chalmers Mfg, Co D.C. 1955, 129 F.Supp. 335, 350, 351, 352."*

The court however, quoted with approval the case of *Weik v Ace Rents, Iowa* 1958, 87 N.W.2d 314, in which the plaintiff contended that contracts, exempting parties from liability for their own negligence, are against public policy. In regard to that contention, the Court stated (at page 317): *"Subject to certain exceptions, based upon the public interest, statutory prohibitions, etc, not here present, the rule to the contrary is well settled."*

The court consequently recognized: *"One of the exceptions to the rule just stated is where one of the parties is charged with a public service and the bargain relates to negligence in the performance of any part of its duty to the public for which it has received or had been promised compensation. Restatement, Contracts <section> 575 (1) (b)."*

The court further stated: *"The Railway Company was not under any obligation to grant the Produce Company a license to construct and use the private crossing. The Railway Company was free to impose any lawful conditions that it desired into the license agreement. Under the Iowa law it was lawful for the Railway Company to include in the license agreement a provision which would require the licensee to indemnify the Railway Company as to claim arising against it because of its negligence in connection with the private crossing."* [209]

Turning to the language used in the provisions of the contract, the court found the provision in question in the case under consideration, to be clear and unambiguous in consequence, whereupon, the agreement was found to be valid and properly consummated.
The American courts have, however, in a number of cases, held that where a contract containing an exculpatory provision is in contravention of a statute and the public policy of

208 164 F.Supp. 532 (1958).

209 *Chicago Great Western Railway Company v Farmers Produce Company* 164 F.Supp. 532 (1958).

a State, the exculpatory provision is void and unenforceable. This forms the subject matter in *Hunter v American Rentals Inc*, [210] in which the court had to decide whether a portion of the rental agreement which read: *"The renter hereby absolved the AMERICAN RENTALS of any responsibility or obligation in the event of accident, regardless of causes of consequence, and that any costs, claims, court or attorney's fees, or liability resulting from the use of described equipment will be indemnified by the renter regardless against whom the claimant or claimants institute action."*

The court commenced by setting out the general approach by the courts, namely: *"..... Contracts for exemption for liability from negligence are not favoured by the law. They are strictly construed against the party relying on them. The rule is unqualifiedly laid down by many decisions that one cannot avoid liability for negligence by contract. The rule against such contracts is frequently limited to the principle that parties cannot stipulate for the protection against liability for negligence in the performance of a legal duty or a duty of public service, or where the public interest is involved or a public duty owed, or when the duty owed is a private one where public interest requires the performance thereof.(17 C.J.S. Contracts <section> 262; 12 Am.Jur.Contracts <section> 183)."*

And further:

"There is no doubt that the rule that forbids a person to protect himself by agreement against damages resulting from his own negligence applies where the agreement protects him against the consequences of a breach of some duty imposed by law. It is; of course, clear that a person cannot, by agreement, relieve himself from a duty which he owed to the public, independent of the agreement.(Murray v Texas Co 172 S.C. 399, 174 S.E. 231)."

The court consequently, with reference to a traffic statute, held:

"(3)(4) Under the statute the defendant, being engaged in the business of renting trailers to the general public, including trailer hitches and other attendant equipment necessary to connect the rented trailers to the automobiles, owed a duty, not only to the plaintiff but also to the general public, to see that the trailer hitch was properly installed and the trailer properly attached thereto in order that the same might be safely driven on the highway for the purpose and use for which it was intended; and defendant, by contract, could not relieve itself from its negligent acts of failing to make those safe connections and installations."

And further:

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[210] 189 Kan. 615, 371 P.2d 131.

"(5)(6) It is apparent that the mentioned statute was passed for the protection of the public, that the business in which the defendant is engaged, i.e., that of renting trailers to the public, is one where the interest and safety of the public must be kept in view, and, where one violates a duty owed to the public, he may not come into a court of law and ask to have his illegal contract, exempting him from liability to comply with such duty, carried out."

Consequently, the court found:

"The contract on the part of the defendant to relieve itself from such negligent liability is against the public policy of this state and void. (Nushua Gunmed and Coated Paper Co v Noyes Buick Co 93 N.H. 348, 41 A.2d 920)." [211]

The American courts have also, in a number of cases, held that the law will not sustain an exclusionary clause which relieves one of a duty imposed by law, for public benefit. In this regard, in the case of *Dessert Seed Co et al v Drew Farmers Supply Inc,* [212] the court dealt with the enforceability, or not, of a Tomato seed distributor's tag on seed bag which, in fine print, limited liability on warranty to the purchase price of the seed and stated that the distributor would be in no way liable where a crop was insufficient to comply with statute relating to prerequisites to exclude or modify implied warranty of merchantability, since the statute requires that the writing mention merchantability.

The court, as a general rule, acknowledged that, in certain instances, liability for negligence may be avoided by contract, when it stated:

"We are not unmindful of the general rule that in many instances liability for negligence may be avoided by contract. 17 Am.Jur.2d Contracts s 188, ad p.556."

But the court duly recognises exceptions to the general rule in stating:

"On the other hand, the same authority enumerates many exceptions to the rule. For example, it is there stated: "The law will not sustain a covenant of immunity which relieves one of a duty imposed by law for the public benefit."

Consequently, the court relied on the case of *Arkansas Power and Light Co v Kerr*, 204 Ark. 238, 161 S.W. 2d 403 (1942), in which it was held that appellant could not, by contract, relieve itself of negligence in not keeping the proper temperature for eggs stored by appellee. It was then pointed out that such clauses of immunity are not productive of *`caution and forethought by those in whose control rests the agencies that may cause damage'.*

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211 *Hunter v American Rentals Inc* 189 Kan. 615, 371 P.2d 131.

212 248 Ark. 858, 454 S.W. 2d 307 (1970).

The court subsequently concluded: *"To hold that Service Seed is limited to a recovery of the purchase price of the seed in the face of established negligence would be unreasonable, unconscionable, and against sound public policy."* [213]

Besides public interests and statutory duty, the American courts have also, in the past, expressed the view that where a party to an agreement is under a public duty, entailing the exercise of care, he may not relieve himself of liability for negligence through an exculpatory clause. This featured very prominently in *McCutcheon v United Homes Corp*., [214] in which the court had to decide whether an exculpatory provision in a lease agreement, which read as follows: *"neither the Lessor, nor his Agent, shall be liable for any injury to Lessee, his family, guests or employees or any other person entering the premises or the building of which the demised premises are a part"*, was valid and enforceable. The defendant invoked the exculpatory clause after being sued for damages, the plaintiff being injured when she fell down an unlighted flight of stairs leading from her apartment. She alleged the defendant was negligent because the lights at the top and bottom of the stairwell were not operative.

The defendant contended that such exculpatory clauses are not contrary to public policy because the landlord-tenant relationship is not a matter of public interest, but relates exclusively to the private affairs of the parties concerned and that the two parties stand upon equal terms. Thus, there should be full freedom to contract.

The court then articulated the recognition of exculpatory clauses as follows:

".... Such an exculpatory clause may be legal, when considered in the abstract. However, when applied to a specific situation, one may be exempt from liability for his own negligence only when the consequences thereof do not fall greatly below the standard established by law."

Applying the standard expected from a landlord in the case in casu, the court held:

"In the landlord-tenant relationship it is extremely meaningful to require that a landlord's attempt to exculpate itself, from liability for the result of its own negligence, not fall greatly below the standard of negligence set by law. As indicated earlier, a residential tenant who lives in a modern multi-family dwelling complex is almost wholly dependant upon the landlord for the reasonable safe condition of the "common area". However, a clause which exculpates the lessor from liability to its lessee, for personal injuries, caused by lessor's own acts of negligence, not only lowers the standard imposed by the common law, it effectively destroys the landlord's affirmative obligation or duty to keep or maintain the "common areas" in a reasonable safe condition for the tenant's use."

213 *Dessert Seed Co et al v Drew Farmers Supply Inc* 248 Ark. 858, 454 S.W. 2d 307 (1970).

214 79 Wash. 2d 443, 486 P.2d 1093 (1971).

The court concluded:

"When a lessor is no longer liable for the failure to observe standards of affirmative conduct, or for any conduct amounting to negligence, by virtue of an exculpatory clause in a lease, the standard ceases to exist."

And further:

"An exculpatory clause of the type here involved contravenes established common law rules of tort liability that exist in the landlord-tenant relationship. As so employed, it offends the pubic policy of the state and will not be enforced by the courts. It makes little sense for us to insist, on the one hand, that a workman have a safe place in which to work, but, on the other hand, to deny him a reasonable safe place in which to live." [215]

In a similar case, in that of *Kuzmiak v Brookchester Inc,* [216] the tenant, the plaintiff, instituted action against the landlord to recover for personal injuries sustained, by the tenant, when she fell down a stairway in defendant's apartment building, allegedly due to negligent construction and maintenance of stairway.

The defendant, the landlord, denied liability raising, *inter alia,* the defence that the plaintiff had signed a lease agreement containing an exculpatory provision which attempted to immunize the landlord against every conceivable wrongdoing, including affirmative acts of negligence and violations of positive statutory duties. Put differently, the exculpatory clause purported to release the defendant, in advance, of occurrence from liability for damage or loss, which would include personal injury and property damage, howsoever caused, whether the result of nonfeasance or misfeasance, active wrongdoing or wilful and deliberate act.

Consequently the court had to decide whether the provision did immunize the landlord from liability to his tenants for negligence and the maintenance of a nuisance.

The court commenced by stating the general law applicable to exclusionary clauses, namely: *"Generally, the law does not favour a contract exempting a person from liability for his own negligence, as it induces a want of care. Although in disfavour, a promise not to sue for future damage caused by simple negligence may be valid, but an attempted exemption from liability for future intentional tort or wilful act or gross negligence is generally declared to be void. Williston on Contracts (rev Ed) sec 1751(b) Page 4964,*

215 *McCutcheon v United Homes Corp* 79 Was. 2d 443, 486 P.2d 1093 (1971).

216 33 N.J. Super 575, 111A, 2d 425.

Corbin on Contracts, sec 1472, page 872, 12 Am.Jur. Contracts sec 183 page 683; 17 C.J.S. Contracts, s 262, and page 644."

The court also identified various factors influencing the validity of transactions releasing people or institutions from liability which included:

"Where the public interest is involved, stipulations purporting to relieve from liability for negligence are usually held to be invalid ....."

And further:

"It is clear that private parties to a transaction lacking public interest are bound by their agreements relieving against liability for negligence ....."

But the court found that in a landlord-tenant relationship, public interest came in to play as the State, because of its interest in the welfare of its citizens, regulated and supervised apartment buildings through the Board of Tenement House Supervision, N.J.S.A. 55:9 et seq. Additionally, "*the landlord is under a common law duty for the maintenance of the premises under his control."*

The court also identified the bargaining power of the parties as a factor for declaring an exculpatory clause invalid when it stated:

"Another basis for declaring invalid a bargain, otherwise valid, which exempts one from future liability, is where a relationship exists in which the parties have not equal bargaining power, and one of them must accept what is offered or be deprived of the advantage of the relation."

The court held in this regard that:

"The validity of a particular exculpation contract depends on the whole complex of considerations bearing on the question whether it is socially desirable to allow escape from liability in the situation under scrutiny."

The court subsequently responded: *"Taking judicial notice of the fact that the lessor and the lessee are definitely not in equal bargaining positions where suitable living quarters are at a premium, the courts have held exculpatory provisions to be contrary to public policy."*

The court consequently found: *"…. the comparative bargaining positions of landlords and tenants in housing accommodations within may areas of the state are so unequal that tenants are in no position to bargain; and an exculpatory clause which purports to immunize*

the landlord from all liability would be contrary to public policy." [217]

The court consequently held that the exculpatory provision was invalid.

The court in *Levine et al v Shell Oil Company and Visconti* [218] considered the validity of the indemnification clause. In this case, the service station employees brought an action against the owner for injuries sustained in an explosion and fire. The owner pleaded that he, of right; he had been indemnified under theories of common law and pursuant to an indemnification agreement.

The court found that: *"Indemnification clauses have traditionally plagued both drafters and courts alike. Since one who is actively negligent has no right to indemnification unless he can point to a contractual provision granting him that right ...."*

In identifying that right, the court suggests: *"..... A rule has evolved under which courts have carefully scrutinized these agreements for an expression of intent to indemnify and for some indication of the scope of that indemnification."*

And further: *"Thus we have said that `contracts will not be construed to indemnify a person against his own (active) negligence unless such intention is expressed in unequivocal terms' (Thompson-Starrett Co v Otis Elevator Co 271 N.Y. 36, 41, 2 N.E. 2d 35, 37)."*

The rationale for such a rule, according to the court, was premised: *"..... upon the view that where a person is under no legal duty to indemnify, his contract assuming that obligation must be strictly construed (613, 223 N.E. 2d 25, 26)."*

Turning to the case *in casu*, the court held: *"..... there has been no showing that the agreement involved herein is either a contract of adhesion or an unconscionable agreement. Shell was under no legal obligation to allow Visconti to operate the service station. Similarly, Visconti was not required to assume the responsibilities of the contract."*

The court concluded: *"In this arm's length transaction the indemnification provision was a part of business relationship between the parties. If Visconti had reservations as to the scope of the agreement, he should have insisted on a different indemnification clause or*

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217 *Kuzmiak v Brockchester Inc* 33 N.J. Super 575, 111A 2d 425.

218 28 N.Y. 2D 205, 269 N.E. 2D 799, 321N.Y.S. 2D 81 (1971).

refused to give his assent to the contract (see Ciofalo v Vic Tanney Gyms 10 N.Y. 2d 294, 220 N.Y.S. 2d 962, 177 N.E. 2d 925). Since he apparently elected not to do so and has not demonstrated to this court that Shell was guilty of fraud or overreaching conduct, he is bound by the expression of intent in the lease." [219]
Consequently the exculpatory provision was held to be valid and enforceable.

The rule that courts ought to carefully scrutinize agreements for an expression of intent to indemnify, has featured in other cases as well. In *Chazen v Trailmobile Inc* [220] the Supreme Court of Tennessee was confronted by a landlord and tenant agreement where the lease, drafted by the lessors, provided that all right of recovery was waived, for any loss resulting from fire, lessors could not recover for damages from fire even if fire was caused by lessees' negligence.

The facts, briefly stated, include: The plaintiffs leased a building they owned to the defendants for use, by the defendants, in their business. In the scope of their business, the defendants repaired trailers used in connection with tractor-trailer rigs, in heavy over-the-road hauling. While an employee of the defendants was using a torch, in the repair of a trailer, he set fire to certain inflammable portions of it. With the knowledge that the trailer was susceptible to ignition and burning, the employee of the defendants continued to use the torch and set fire to the trailer which, in turn, set fire to the premises resulting in a considerable loss due to the fire. The plaintiff sued the defendants on what amounted to common law negligence allegations.

The defendants, on the other hand, relied on a waiver of the right to sue, voluntarily entered into between the plaintiffs and the defendants, the nature thereof is that it barred recovery by the plaintiff's, notwithstanding the degree of negligence present, in the action of the defendants' employee, in starting the fire and notwithstanding the clause of the lease providing for return of the premises in good condition.

Consequently, the court looked at the application of indemnity clauses in general and found:
"There is no disagreement within the various courts and jurisdictions over the fact that parties may contract to absolve themselves from liability, and this rule is applicable, and has been applied to the field of landlord and tenant."

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219 *Levine et al v Shell Oil Company and Visconti* 28 N.Y. 2d 205, 269 N.E. 2d 799, 321 N.Y.S. 2d 81 (1971).

220 215 Tenn. 87, 384 S.W. 2d 1 (1964).

The court went on to state that, although *"it has often been held that public policy is best served by freedom of contract and this freedom is prompted by allowing the parties to limit their liability for fire damage under lease agreements."*

Nonetheless, the court held that a rule has been developed that: *"The language in a covenant to a lease is to be construed most strongly against the person drafting the instrument and, in this case the plaintiff's drafted the lease, its clauses and covenants."*

Construing the exculpatory provision, the court held: *"..... It is sufficiently clear from the language that the parties intended almost all liability from fire no matter how caused to be excluded."* [221]

The court consequently upheld the exclusionary provision.

Other cases in which the American courts held that although a party can contract to exempt himself from liability for harm caused by his negligence, such an exculpatory provision will not be enforced where a contracting party deviates from his duty to use due care or deviates from a standard of good practise. The case of *Krohnert v Yacht Systems Hawaii Inc* [222] concerned an action for damages allegedly caused by the errors and omissions of a mooring surveyor, acting during the course and scope of his duties as employee of the defendant company. After conducting an in-water survey of the vessel in question, the marine survey prepared a report setting out the condition of the boat, for insurance purposes, concerning the condition of the boat. His report stated *inter alia*:

"The boat appears to be made of good material and is well fastened. The vessel lay afloat and hence the bottom cannot be vouched for. There is however, no reason to suspect its condition. The Waikane is considered to be a satisfactory insurance risk."

At the bottom of the typed report, just below the marine surveyor's signature, appeared an exculpatory provision in the following terms:

"This report is issued subject to the condition that it is understood and agreed that neither this office nor any surveyor or any employee thereof is under any circumstances whatsoever to be held responsible in any way for any error in judgement, default of negligence nor for any inaccuracy, omission, misrepresentation or misstatement in this report, and that the use of this report shall be construed to be an acceptance of the foregoing conditions."

221 *Chazen v Trailmolbile Inc* 205 Tenn. 89, 784 S.W. 2d 1 (1964).

222 5 Haw.App. 196, 664 P.2d 728 (1983).

After the sale of the boat, the new owner discovered a leak and extensive damages; the keel was found to be rotten. The plaintiff sued the defendant for damages. The defendant relied upon the exculpatory clause to escape liability.

The court subsequently assessed the duty of a marine surveyor when executing insurance, financing and condition surveys and concluded that the duty entails: *"....The duty to use due care to detect and give notice of perceptible structural defect."*

The standard required according to the court:*".... will be held to a standard of `good marine surveying practise" i.e. what is customary and usual in the practice."*

The court held that, had the marine surveyor utilised such skill and judgement as is ordinarily exercised, by similarly situated professionals, acting in a reasonable manner, he would have discovered the conditions identified by the witnesses of all parties as, `wood rot', `dry rot', `galvanic action', or otherwise, which conditions indicated the existence of latent defects and the deteriorated and unsafe structural condition.

Turning to the validity of the exculpatory provision, the court looked at the recognition of exclusionary clauses in general, when the court remarked:

"It is true that a party can contract to exempt himself from liability for harm caused by his negligence. Comment to Restatement 2nd of Contracts, <section? 195; 15 Williston on Contracts, <section> 1750A at 144 (3d ed. 1972)."

But remarked the court, it is also true that *"(s) uch bargains are not favoured, however, and, if possible, bargains are construed not to confer this immunity." Williston, supra <section> 1750A at 144-145."*

The court then quoted the rationale for striking down an exculpatory provision in a ship towing contract, decided by the United States Supreme Court, in the case of *Bisso v Inland Waterways Corp* 49 U.S. 85, 91, 75 S.Ct. 629, 632, 99 L.Ed. 911 (1955), in which the court stated:

"The two main reasons for the creation and application of the rule (invalidating such provisions) have been (1) to discourage negligence by making wrongdoers pay damages, and (2) to protect those in need of goods or services from being overreached by others who have power to drive hard bargain."

The court stated: *" ..... in light of these reasons, exculpatory clauses are valid only if: they are strictly construed against the promisee and will not be enforced if the promisee enjoys a*

bargaining power superior to the promisor, as where the promisor is required to deal with the promisee on his own terms. Nor will a contract be enforced if it has the effect of exempting a party from negligence in the performance of a public duty, or where a public interest is involved."

Notwithstanding the principles enunciated, the court found: *"Unlike a common carrier or a utility company, we do not believe that a marine surveyor falls within the definition above or is affected with such a public interest as to make him ineligible to bargain for exculpatory provisions."*

The court, however, found that: *"Although the exculpatory clause was permissible, it is not enforceable in this case."* Before an exculpatory clause may be enforced against a party the court found, it must be shown that *"he clearly and unequivocally agreed to the disclaimer with knowledge of its content."* [223]

In a number of cases, the bargaining position, especially where contracting parties stand in an unequal bargaining position, coupled with the fact that the type of contract is an adhesion contract, have influenced the courts to declare an exculpatory provision, contained in the contract, as void and unenforceable.

In this regard, it was held in *Banfield v Louis, Cat Sports, Inc,* [224] that the bargaining positions of parties to a release in contract, was a determining factor in deciding the validity of an exemption clause inserted in a contract, exempting a company from liability for negligence. But, notes the court with reference to the case of Ivey Plants Inc v FNC Corp 282 So. 2d 205, 208 (Fla. 4th DCA 1973): *"A typical situation involving such inequality of bargaining strength is one where a public utility or a company serving some public function, as a precondition to doing business with them, requires their customer to sign a stipulation exempting the company from liability for negligence."*

The court, however, was quick to distinguish the Ivey case from this case in that:

"The service provided herein can hardly be termed essential. It is a leisure time activity put on for people who desire to enter such an event. People are not compelled to enter the event but are merely invited to take part. If they desire to take part, they are required to sign the entry and release form."

223 *Krohnert v Yacht Systems Hawaii Inc* 4 Haw. App. 190, 664, P.2d 738 (1983).

224 589 So. 2d 441 (1991).

The court continued: *"The relative bargaining strengths of the parties does not come into play absent a compelling public interest in the transaction",*

And *"The transaction raises a voluntary relationship between the parties. The promoters and organizers volunteered to hold a race, if the entrants volunteered to take part for a nominal fee and signature on the entry and release form. These are not the conditions from which contracts of adhesion arise."* [225]

The requirement for relying upon the disparity in bargaining power between the parties, who intend to excuse the one from the consequences of his own acts of negligence, is described in *Graham d/b/a The Graham Seed Company v Chicago, Rock Island and Pacific Railroad Company* [226] is that there must be a *"vast disparity in bargaining power between the parties ....."* [227]

In the leading case of *Weaver v American Oil Co,* [228] the Supreme Court of Indiana had to decide whether an exemption clause i.e.: a "hold harmless" clause which provided, in substance, that the lessee operator would hold harmless, and also indemnify, the oil company for any negligence of the oil company, occurring on the leased premises. The litigation arose as a result of the company's own employee spraying gasoline over Weaver and his assistant and causing them to be burned and injured on the leased premises. It must be noted that this lease clause not only exculpated the lessor oil company from its liability for its negligence, but, also compelled Weaver to indemnify them for any damages or loss incurred as a result of its negligence.

The court quoted the *Uniform Commercial Code* 2-302, which provided:

"It is not the policy of the law to restrict business dealings or to relieve a party of his own mistakes of judgement, but where one party has taken advantage of another's necessities and distress to obtain an unfair advantage over him, and the latter, owing to his condition, has encumbered himself with a heavy liability or an onerous obligation for the sake of a small or inadequate present gain, there will be relief granted."

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225 *Banfield v Louis Cat Sports Inc* 589 So. 2d 441 (1991).

226 431 F.Supp. 444 (1976).

227 *Graham d/b/a The Graham Seed Company v Chicago, Rock Island and Pacific Railroad Company* 431 F.Supp. 444 (1976).

228 257 Ind. 458, 276 N.E. 2d 144 (1971).

The court states, the standardized mass contract in the current commercial life is used, primarily, by enterprises with strong power and position. Another feature of the present-day set up is that the Weaver party, in need of services, is frequently not in a position to shop around for better terms, because the author of the standard contract has a monopoly or because all competitors use the same clause.

The court sets out the legal position as follows:

"When a party can show that the contract, which is sought to be enforced, was in fact an unconscionable one, due to a prodigious amount of bargaining power on behalf of the stronger party, which is used to the stronger party's advantage and is unknown to the lesser party, causing a great hardship and risk on the lesser party the contract provision, or the contract as a whole, if the provision is not separable, should not be enforceable on the grounds that the provision is contrary to public policy."

As to the onus, the court holds:

"The party seeking to enforce such a contract has the burden of showing that the provisions were explained to the other party and came to his knowledge and there was in fact a real and voluntary meeting of the minds and not merely an objective meeting."

Turning to exculpatory provisions in contracts, the court states:

"We do not mean to say or infer that parties may not make contracts exculpating one of his negligence and providing for indemnification, but it must be done knowingly and willingly as in insurance contracts made for that very purpose." [229]

The Supreme Court of Washington, in the case of *McCutchion v United Homes Corp,* [230] was also confronted to decide the issue of whether the lessor of a residential unit within a multi-family dwelling complex, may exculpate itself from liability for personal injuries sustained by a tenant, which injuries result from the lessor's own negligence in maintenance of the approaches, common passageways, stairways and other areas under the lessor's dominion and control, but available for the tenants' use.

Turning to the issue of whether a bargain for exemption from liability for the consequence of negligence is valid and enforceable or not, the court relied on the *Restatement of*

229 *Weaver v American Oil Co* 257 Ind. 458, 276 N.E. 2d 144 (1971).

230 79 Wash 2d 493, 486 P.2d 1093 (1971).

Contracts 574 P.1079 (1982) which read:

"A bargain for exemption from liability for the consequences of negligence not falling greatly below the standard established by law for the protection of others against unreasonable risk of harm is legal ..... "

The flip side of it, the court held, is that, where the consequences of a negligent act falls far below the standard established by law, the contracting party seeking indemnity may not be shielded from his negligent act.

In the landlord-tenant relationship, the court holds, the tenant is almost wholly dependant upon the landlord for reasonably safe conditions. Therefore, *"a clause which exculpates the lessor from liability to its lessee, for personal injuries caused by lessor's own act of negligence, not only lowers the standard imposed to the common law, it effectively destroys the landlord's affirmative obligation or duty to keep or maintain the "common areas" in a reasonable safe condition for the tenant's use."* [231]

The American courts, in various jurisdictions, have held that exculpatory provisions in contracts which attempt to exempt from liability the consequences of negligence, will be enforced ,provided the conduct complained of, does not fall greatly below the standards established by law for the protection of others or it violates a duty of public service or infringes upon a public duty.
The court, in *Chicago and North Western Railway Company v Rissler et al,* [232] had to decide whether an agreement was valid. The parties had agreed upon terms of contract, whereby a construction company agreed to indemnify the railway against loss arising from the use of a temporary crossing and the company had been operating under agreement for three or four weeks prior to the collision, at the crossing, between a train and dirt remover.

The court stated the general position of indemnity or exculpatory clauses is that; *"an agreement to place another person at the mercy of one's own negligence is not ipso facto against public policy and jurisprudence. 181, Page 282."*

But warned the court: *"Courts are cautious in voiding a contract on the ground that it violates public policy. The judicial function is to maintain and enforce contracts rather than to enable parties thereto to escape from their obligations on the pretext of public policy*

231 *McCutcheon v United Homes Corp* 79 Wash 2d 443, 486, P.2d 1093 (1971).

232 184 F. Supp 98 (1960).

unless it clearly appears that they contravene public right or the public welfare."

The court continued to state the general position: *"A bargain for exemption from liability for the consequences of a wilful breach of duty is illegal and a bargain for exemption from liability for the consequences of negligence is illegal if ..... (b) one of the parties is charged with a duty of public service, and the bargain relates to negligence in the performance of any part of its duty to the public for which it has received or been promised compensation."*

But the court found: *"The agreement was not entered into by the Railway Company as a part of its public duty but as an owner of land dealing in the capacity as a private party."* [233]

Consequently the court decided for the railways.

In *Kuzmiak et al v Brookchester Inc,* [234] the court identified the inequality of bargaining power as another basis for declaring invalid a bargain, otherwise valid, which exempts one from future liability. This is where a relationship exists in which the parties do not have equal bargaining power; and one of them must accept what is offered or be deprived of the advantages of the relationship. 6 Williston on Contracts (Rev. Ed), sec.1751(c), pages 4968--9; Llewellyn, What Price Contract, 40 Yale L.J. 704 (1931). In 37 Columbia L.Rev. 248"

The court went on to state: *"The validity of a particular exculpation contract depends on the whole complex of considerations bearing on the question whether it is socially desirable to allow escape from liability in the situation under scrutiny. Consequently, no single element can be relied upon to explain all the cases. Yet it is interesting to note that exculpation is rarely allowed where the parties are not on roughly equal bargaining terms."*

The court continued to lay down the following test, namely: *"The farther apart the contracting parties are in their relative strength the greater is the probability that the exculpatory clause will be held invalid. Conversely, the closer they come in approaching absolute equality in bargaining strength, the greater is the probability that the clause will be held valid."* [235]

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233 *Chicago and North Western Railway Company v Rissler* 184 F.Supp. 98 (1960).

234 33 N.J. Super 575, 111A. 2d 425 (1955).

235 *Kuzmiak et al v Brookchester Inc* 33 N.J. Super 575, 111A, 2d 425 (1955).

In the case of *Krohnert v Yacht Systems Hawaii Inc* [236] the court also held that: *" ..... exculpatory clauses are valid only if: They are strictly construed against the promise and will not be enforced if the promisee enjoys a bargaining power superior to the promisor, as where the promisor is required to deal with the promisee on his own terms ....."*

The superior bargaining power, according to the court, *"involves the absence of alternatives specifically whether plaintiffs were free to use or not to use defendant's services. Lynch, supra, 627 P.2d at 1250"* [237]

The courts have also held that the validity of an exculpatory clause may be affected by the essential nature of the service and the economic setting of the transaction. In the case of *Crawford v Buckner,* [238] the court stated that in a residential landlord-tenant relationship the landlord has *"a decisive advantage in bargaining strength against any member of the public who seeks its service so much so that a residential tenant is usually confronted with a "take it or leave it" form contract which the tenant is powerless to alter. The tenant's only alternative is to reject the entire transaction."*

The residential lease, then, places the tenant and the property of the tenant under the control of the landlord, subject to the risk of carelessness by the landlord and his agents.

The relationship, the court held, fell within the public interest criteria. The lease was, therefore, held to be contrary to public policy.

The court, in *Schlobohm et al v Spa Petite Inc,* [239] adopted the two-prong test for determining whether exculpatory clauses are invalid as contrary to public policy: (1) Whether there was a disparity of bargaining power between the parties; and (2) the types of services being offered or provided.

The court held that, as a general rule, disparity between contracting parties arise with adhesion contracts *"which is drafted unilaterally by a business enterprise and forced upon*

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236 4 Haws. App.150, 664 P.2d 738 (1983).

237 *Krohnert v Yacht Systems Hawaii Inc* 4 Haw App. 150 604 P.2d 738 (1983).

238 *Krohnert v Yacht Systems Hawaii Inc* 4 Haw. App. 190, 644 P.2d 738, 839 S.W. 2d 754 (1983).

239 326 N.W. 2d 920 (1982).

an unwilling and often unknowing public for services that cannot readily be obtained elsewhere." Often this type of contract is imposed on the public for necessary services on a "take it or leave it" basis, but in this case the court decided: *"…. was no disparity in bargaining power. Schlobohm voluntarily applied for membership in Spa Petite and acceded to the terms of membership. There was no showing that Spa Petite's services were necessary or that the services could not have been obtained elsewhere. She had the option of becoming a member in Spa Petite subject to the regulations and policies clearly set forth in the membership contract or not to do so, as she chose."* [240]

The contract was held not to be one of adhesion.

12.2.1.3.3 Legal Opinion

Given the active sphere of commercial life in the United States of America, standardized contracts became the order of the day, rather than the exception to the rule. The standardized contracts also adopted, on a large scale, the incorporation of exclusionary or indemnity contracts, which often attempted to exclude one of the contracting parties from liability arising from his/her own conduct. These types of contracts often resulted in unfair and unreasonable results. This, in turn, lead to consumer groups being formed, who led a campaign against the hardship which some of these types of contracts bring. The American legal writers and the courts, both, started taking a more active interest in standardized contracts in the ever-changing commercial world. This brought greater challenges to the American courts when dealing with different types of contracts containing an array of exculpatory provisions, also referred to as exclusionary clauses. Moreover, the contentious issue was always to determine, with certainty, the validity and enforceability of exculpatory provisions or, exemption clauses. [241]

In time, rules were created to curb the hardship, some of these types of contracts bring with them. The main reasons for the creation and application of some of the rules against the enforcement of some of these types of clauses are said to lie in discouraging negligence, and by making wrongdoers pay the damages caused by them through their conduct. In addition, it also protects those in need of goods or services from being

240 *Scholobohm et al v Spa Petite Inc* 326 N.W. 2d 920 (1982).

241 For legal writings see Williston 1936 with 1965 *Cumulative Supplement* Vol. 6 Para 1750; Calamari and Perillo *The Law of Contracts* (1977) 268. For one of the first cases involving the validity of exemption clauses in contract see the New Jersey Court of Appeals judgement in 1936 in the case of *Globe Home Improvement Co v Perth Amboy Chamber of Commerce Credit Rating Bureau Inc* 116 N.J.L. 168, 182 A. 641 (1936).

overreached by others, who have the power to drive hard bargains. [242]
The rules created include the following:

Firstly, generally contracts incorporating exclusionary clauses regulating future negligent conduct are not invalid *per se*, unless they involve a serious moral wrong, they are violative of law or contrary to some rule of public policy, including public interests or the public good. [243]
Any attempt to exempt a contracting party from statutory liability or governmental regulation is void. [244]

Secondly, as a general rule, indemnity clauses or exculpatory clauses will not be construed by the courts to cover losses to the contracting party against whom the indemnity or exculpation operates and caused by his or her own negligence, unless such effect is clearly and unequivocally expressed in the agreement and it is clear that the party affected had, freely and understandingly, negotiated the agreement. [245]

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242 Calamari and Perillo *The Law of Contracts* (1977) 270.

243 For legal writings see Williston 1936 with 1965 *Cumulative Supplement* Vol. 6 Para 1750; Calamari and Perillo *The Law of Contracts* (1977) 268. For case law affecting public policy including public interests or public good see *Banfield v Louis Cat Sports Inc* 589 So. 2d 441 (1991); *Olson v Molzen* 558 S.W. 2d 429 Tenn. (1977); *Walker v American Family Mutual Insurance Company* 340 N.W. 2d 599 (1983); *Home Beneficial Ass'n v White* 180 Tenn. 585, 177 S.W. 2d 545 (1944); *Messersmith v American Fidelity Co* 232 N.Y. 161, 133 N.E. 437 (1921); *Powell v American Health Fitness Centre of Fort Wayne Inc* 694 N.E. 2d 757 (1998); *Ciofalo et al v Vic Tanney Gyms Inc* 10 N.Y. 2d 294, 177 N.E. 2d 925, 220 N.Y.S. 2d 962 (1961); *Schlobohm v Spa Petite Inc* 326 N.W. 2d 920 (1982); *Leidy v Deseret Enterprises Inc d/b/a Body Shop Health Spa* 252 Pa. Super 162, 381 A.2d 164 (1977); *Henningsen v Bloomfield Motors, Inc* 32 N.J. 358, 161 A.2d 69 (1960); *Tunkl v Regents of University of California* (1963) 60 Cal. 2d 92, 32 Cal. RPTR. 33, 383 F.2d 441; *Chicago Great Western Railway Company v Farmers Produce Company* 164 F. Supp 532 (1958); *Weik v ACE Rents Iowa* 1958, 87 N.W. 2d 314; *Dessert Seed Co et al v Drew Farmers Supply Inc* 248 ARK 858, 454 S.W. 2d 307 (1970); *Kuzmiak v Brookchester* 33 N.J. Super 575, 11, A. 2d 425 (1955); *Chicago and North Western Railway Company v Rissler et al* 184 F. Supp. 98 (1960).

244 For legal writings see Williston 1936 with 1965 *Cumulative Supplement* Vol. 6 Para 1750A; Calamari and Perillo *The Law of Contracts* (1977) 269. For case law see *Powell v American Health Fitness Centre of Fort Wayne Inc* 694 N.E. 2d 757 (1998); *Leidy v Deseret Enterprises Inc d/b/a Body Shop Health Spa* 252 Pa. Super 162, 381 A.2d 164 (1977); *Chicago Great Western Railway Company v Farmers Produce Company* 164 F. Supp 532 (1958).

245 For legal writings see Williston 1936 with 1965 *Cumulative Supplement* Vol. 6 Para 1750A; Calamari and Perillo *The Law of Contracts* (1977) 268-269; Kelner and Kelner "Waivers of Liability in Personal Injury" *New York Law Journal American* October (1992) 3 Jurisprudence 57A *AM Jur* 2d 120. For case law see *Powell v American Health Fitness Centre of Fort Wayne Inc* 694 N.E. 2d 757 (1998); *Ciofalo et al v Vic Tanney Gyms Inc* 10 N.Y. 2d 294, 177 N.E. 2d 925, 220 N.Y.S. 2d 962 (1961); *Spa Petite, Inc (Spa Petite)* 326 N.W. 2d 920 (1982); *Leidy v Deseret Enterprises Inc d/b/a Body Shop Health Spa* 252 Pa. Super 162, 381 A.2d 164 (1977); *Graham d/b/a The Graham Seed Company v Chicago, Rock Island and Pacific Railroad Company* 431 F. Sup. 444 (1976); *Smith d/b/a Smith v Seaboard Coast Line Railroad Company* 639 F. 2d 1235 (1981); *Sunny Isles Marina Inc v Adulmz et al* 706 So. 2d 920 (1998); *Chazen v Trail Mobile Inc* 215 Tenn. 87, 384 S.W. 2d 1 (1964); *Krohert v Yacht*

Thirdly, in considering the validity of indemnity or exclusionary clauses involving exclusion from liability arising from negligent conduct, the American courts have, throughout the years, been strongly influenced by many factors, including the nature and subject matter of the agreement; [246] the relations of the parties; [247] the presence or absence of equality of bargaining power. [248]

From the fore stated and the cases in which the various factors were discussed, it is clear that an agreement, otherwise valid, which exempts one from future liability to another, because of a contracting party's negligence, would, depending upon the nature and subject matter, be held to be invalid, include, businesses or services suitable for public regulations and where there has been a breach of public interests or public good. For example, hospital contracts, [249] residential lease agreements; [250] public carriers; [251] health spas operating in

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Systems Hawaii Inc 5 Haw App. 196, 664 F.2d 728 (1983).

246 See *Banfield v Louis Cat Sports, Inc* 589 So. 2d 441 (1991) re sport and recreation events see also *Powell v American Health Fitness Centre of Fort Wayne Inc* 694 N.E. 2d 757 (1998); *Ciofalo et al v Vic Tanney Gyms Inc* 10 N.Y. 2d 294, 177 N.E. 2d 925, 220 N.Y.S. 2d 962 (1961); *Schlobohm et al v Spa Petite Inc* 326 N.W. 2d 920 (1982); *Allan v Snow Summit Inc* 51 Cal.App. 4th 1358; 59 Cal Rptr 2d 813 (1956); *Crawford v Buckner* 839 S.W. 2d 754 (1992); *Kuzmiak v Brookchester* 33 N.J. Super 575, 11, A. 2d 425 (1955) re residential leases. See also *Graham d/b/a The Graham Seed Company v Chicago, Rock Island and Pacific Railroad Company* 431 F. Sup. 444 (1976); *Smith d/b/a Smith v Seaboard Coast Line Railroad Company* 639 F. 2D 1235 (1981); *Hunter v American Rentals Inc* 189 Kan. 615, 371 F.2d 1131; *McCutcheon v United Homes Corp* 79 Wash 2d 443, 486, F.2d 1093 (1971); *Kuzmiak v Brookchester* 33 N.J. Super 575, 11, A. 2d 425 (1955); *Chazen v Trail Mobile Inc* 215 Tenn. 87, 384 S.W. 2d 1 (1964); *Leidy v Deseret Enterprises Inc d/b/a Body Shop Health Spa* 252 Pa. Super 162, 381 A.2d 164 (1977); *Krohnert Yacht System Hawai Inc* 4 Haw.App. 190, 664 P.2d 738 (1983) re duty to use care in marine matters.

247 See *Crawford v Buchner et al* 839 S.W. 2d 754 (1992) re the landlord-tenant relationship *Hunter v American Rentals Inc* 189 Kan. 615, 371 F.2d 131; *McCutheon v United Homes Corp* 79 Wash. 2d 443, 486 P. 2d 1093; *Kuzmiak v Brookchester* 33 N.J. Super 575, 11, A. 2d 425 (1955); *Chazen v Trail Mobile Inc* 215 Tenn. 87, 384 S.W. 2d 1 (1964).

248 See *Henningsen v Bloomfield Motors, Inc* 32 N.J. 358, 161 A.2d 69 (1960); *Kuzmiak v Brookchester* 33 N.J. Super 575, 11, A. 2d 425 (1955); *Banfield v Louis Cat Sports, Inc* 589 So. 2d 441 (1991); *Krohnert Yacht System Hawaii Inc* 33 N.J. Super 575 111A 2d 425 (1955); *Crawford v Buckner* 839 S.W. 2d 754 (1992); *Schlobohm v Spa Petite Inc* 326 N.W. 2d 920 (1982).

249 *Tunkl v Regents of University of California* 60 Cal. 2d 92, 383 F, 2d 441, 32 Cal RPTR 33 (1963); *Belshaw v Feinstein* 258 Cal App. 2d 711, 65 Cal RPTR 788 (1968); *Olson v Molzen* 558 S.W. 2d 429 (Tenn 1977); *Leidy et al v Deseret Enterprises Inc d/b/a Body Shop Health Spa et al* 252 Pa. Super 162, 381 A. 2d 164 (1977); *Ash v New York University Dental Centre* 164 A.D. 2d 366, 564 N.Y.S 2d 308 (1990); *Smith v Hospital Authority of Walker, Dade and Catoosa Cos* 160 Ga App 387, 287 2d 99 (1981).

250 *Crawford v Buckner* 839 S.W. 2d 754 (1992); *Graham d/b/a The Graham Seed Company v Chicago, Rock Island and Pacific Railroad Company* 431 F. Sup. 444 (1976); *Hunter v American Rentals Inc* 189 Kan. 615, 371 F.2d 1131; *McCutcheon v United Homes Corp* 79 Wash 2d 443, 486, F.2d 1093 (1971); *Kuzmiak v Brookchester* 33 N.J. Super 575, 11, A. 2d 425 (1955).

terms of health and safety regulations; [252] motor manufacturing. [253]

The courts, likewise, have considered, in some instances, the relationship between the contracting parties and found that some relationships are such that, once entered upon they would involve a status, requiring of one party, greater responsibility than that required of the ordinary person. Arising from the relationship is a duty, or public duty, entailing the exercise of care. Any attempt to relieve such a contracting party from liability, arising from negligent conduct, through an exculpatory clause, would be obnoxious. [254]
Relationships which have featured very prominently in the American law of contract include, especially, those of landlord and tenant in residential lease agreements [255] and the doctor-patient relationship, or that of a hospital/other health care provider and patient relationship. Exculpatory agreements entered into between the aforesaid, seeking to relieve the doctor/hospital/other healthcare provider of liability for negligence, are treated with absolute disfavour by the courts. The reasoning behind this is twofold.

Firstly, public interests require the exercise of the duty of care and skill. Secondly, the parties do not stand upon equal footing and the patient stands in an unequal bargaining position when entering into the agreement. [256]

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251 *Walker v American Family Mutual Insurance Company* 340 N.W. 2d 599 (1983). See also *Home Beneficial Ass'n v White* 180 Tenn. 585, 177 S.W. 2d 545 (1944). See also *Messersmith v American Fidelity Co* 232 N.Y. 161 133 N.E. 437 (1921).

252 *Leidy v Deseret Enterprises Inc d/b/a Body Shop Health Spa* 252 Pa. Super 162, 381 A.2d 164 (1977).

253 *Henningsen v Bloomfield Motors Inc* 32 N.J. 368, 161 A.2d 69 (1960).

254 Williston 1936 with 1965 *Cumulative Supplement* Vol. 8 Para 1751; Calamari and Perillo *The Law of Contracts* (1977) 270.

255 *Crawford v Buckner* 839 S.W. 2d 754 (1992); *Graham d/b/a The Graham Seed Company v Chicago, Rock Island and Pacific Railroad Company* 431 F. Sup. 444 (1976); *Hunter v American Rentals Inc* 189 Kan.615, 371 F.2d 1131; *McCutcheon v United Homes Corp* 79 Wash 2d 443, 486, F.2d 1093 (1971); *Kuzmiak v Brookchester* 33 N.J. Super 575, 11, A. 2d 425 (1955).

256 Flamm "Health care provider as defendant" A Chapter published in *Legal Medicine American College of Legal Medicine* (1991) 127; Furrouw et al *Health Law* (1995) 256; Annotation "Validity and Construction of Contract exempting hospital or doctor from liability for negligence to patient" 6 *ALR* 3d 704 at 705; Kelner and Kelner "Waivers of Liability in Personal Injury" *New York Law Journal* October (1992) 3; American Jurisprudence 57A *AM Jur* 2d 121; Reynolds Comments "Torts - Negligence - Exculpatory Clause *Kentucky Law Journal* Vol. 58 (1970) 583 at 584; *Tunkl v Regents of University of California* 60 Cal 2d 92, 383 P.2d 441, 32 Cal Rptr 33 (1963); *Belshaw v Feinstein* 258 Cal App. 2d 711, 65 Cal Rptr. 788 (1968); *Olson v Molzen* 558 S.W. 2d 429 (Tenn. 1977); *Leidy v Deseret Enterprises Inc d/b/a Body Shop Health Spa* 252 Pa. Super 162, 381 A.2d 164 (1977); *Ash v New York University Dental Centre* 164 A.D. 2d 366, 564 N.Y.S. 2d 308 (1990); *Smith v Hospital Authority of Walker, Dade and Catoosa Cos* 160 App. 387, 287 S.E. 2d 99 (1981); *Meiman Rehabilitation Centre Inc* 444 S.W. 2d 78 App 1969.

The American courts have also identified the inequity of bargaining power, as another factor influencing exemption clauses aimed at exonerating one of the contracting parties from future liability, arising from his/her/its own negligence. The courts are reluctant to declare such exculpatory clauses valid, where, the parties are not on equal bargaining terms. [257]

The American legal writers and the courts do not authorize contracting parties to exempt themselves from liability for a future intentional tort, or for a future wilful act, or one of gross negligence. Any attempt to do so is invalid and void. [258]

12.2.2 Public Policy

12.2.2.1 SOUTH AFRICA

12.2.2.1.1 Legal Writings

South Africa does recognise that public policy is an exception to the *caveat subscriptor* rule. It is, especially, in exemption clauses, where the doctrine of public policy is often used to invalidate these types of clauses. There is, therefore, substantial consensus amongst the South African legal writers that an exemption clause, depending on the facts, may be struck down because it is contrary to public policy. [259]

The fore stated must, however, be seen against the background of the doctrine of freedom of contract which South Africa has, so ardently, embraced throughout the years. [260]

Moreover, the departure point has always been and continues to be today, that a contracting party, when contracting in the absence of duress, without fraud and understanding what he does, may freely waive any rights, provided no arrangements is

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257 *Kuzmiak v Brookchester* 33 N.J. Super 575, 11, A. 2d 425 (1955); *Krohnert Yacht System Hawai Inc* 4 Haw.App. 190, 664 P.2d 738 (1983); *Crawford v Buckner* 839 S.W. 2d 754 (1992); *Kuzmiak v Brookchester* 33 N.J. Super 575, 11, A. 2d 425 (1955); *Sclobohm v Spa Petite Inc* 326 N.W. 2d 920 (1982); *Weaver v American Oil Co* 257 Ind. 458, 276 N.R. 2d 144 (1971); *Banfield v Louis Cat Sports, Inc* 589 So. 2d 441 (1991); *Henningsen v Bloomfield Motors, Inc* 32 N.J. 358, 161 A.2d 69 (1960)

258 Williston 1936 with 1965 *Cumulative Supplement* Vol. 6 Para 1750; Calamari and Perillo *The Law of Contracts* (1977) 268. For case law see *Kuzmiak v Brookchester* 33 N.J. Super 575, 11, A. 2d 425 (1955); *Chicago and North Western Railway Company v Rissler et al* 184 F. Supp 58 (1960).

259 Van der Merwe et al (2003) 215; Christie (1996) 204; Wille and Millen *Mercantile Law in South Africa* (1984) 34; Turpin "Contract and Imposed Terms" (1956) *SALJ* 144 at 145.

260 Kahn (1988) 31; Hahlo Vol. 98 *SA Law Journal* (1981) 70; Von Hippel "The Control of Exemption Clauses. A Comparative Study" (1967) *International and Comparative Law Quarterly* (1967) 591 at 592-593; Aronstam (1979) 1-4; Hawthorne 1995 (58) *THRHR* 163.

made which is contrary to public policy. [261]

The modern day approach is encapsulated, as follows, by the South African legal writers, namely, *Christie* [262] in dealing with the nature and effect of standard form contracts, often with exemption clauses included in them, warns:

"Obviously the law cannot stand aside and allow such traps to operate unchecked, and the courts have protected the public from the worst abuses of exemption clauses by setting limits to the exemptions they will permit and by interpreting exemption clauses narrowly. The basis on which the courts decide what is and what is not permissible is public policy." [263]

The authors *Wille and Millen* [264] also adopt a very protective approach in favour of contracting parties, where the contracting parties enter into agreements containing exemption clauses, to their prejudice. They caution:

"The courts will not uphold agreements by which persons purport to deprive themselves of legal rights generally, or to limit their future right to seek relief from the courts for any wrong committed against him." [265]

A similar view is expressed by *Rautenbach and Van der Vywer* [266] when he states:

"In die Suid-Afrikaanse deliktereg word "redelikheid" en die bonis mores as maatstawwe aangewend om die toelaatbaarheid van toestemming tot benadeling as regverdigingsgrond te beoordeel. Ook in die kontraktereg kom geen geldige kontrak tot stand indien die ooreenkoms verbied word deur 'n bestaande regsreël of strydig is met die openbare belang of goeie sedes nie." [267]

The rationale for protecting contracting parties against their own folly is expressed in the following terms:

"Hierdie beperkings dien moontlik indirek om individue teen hulle eie "swak" diskresie te beskerm, of om kontrakspartye in ongewone marksituasies op 'n meer gelyke voet te plaas, maar dit geld slegs wanneer

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261 Christie (1996) 204; Turpin (1956) 145; Wille and Millen (1984) 34; Rautenbach and Van der Vywer "Volenti non fit iniuria en Grondwetlike Waarborge" *TSAR* (1993) 637.

262 Christie (1996) 204 relying on the principle enunciated in the dictum of *Morrison v Angelo Deep Gold Mines Ltd* 1905 TS 975 779.

263 Christie (1996) 204.

264 *Mercantile Law in South Africa* (1984) 34.

265 Wille and Millen *Mercantile Law in South Africa* (1984) 34.

266 "Volenti non fit iniuria en Grondwetlike Waarborge" *TSAR* 1993 at 637.

267 Rautenbach and Van der Vywer "Volenti non fit inuiria en Grondwetlike Waarborge" *TSAR* (1993) 639.

toestemming of ooreenkomste tot die voordeel van al die betrokkenes sou strek. Daar word dus perke geplaas op individuele kontrakteervryheid en beskikkingsbevoegdhede oor regte wat deur die deliktereg beskerm word ter beskerming van algemene openbare belange. Dit vorm die kerntema van die publiekreg en in die besonder van 'n handves van regte."

Freely translated: The following emphasis is placed on the protection afforded to contractants in certain circumstances:

"Reasonableness and the boni mores are used in South African Law of Delict as a measure to determine the admissibility of volenti fit non iniuria as defence. The same applied to the Law of Contract in that no valid contract comes into being of which the agreement is prohibited by an existing legal norm or it is recorded as contrary to public policy. The underlying reason thereof is probably indirectly to protect individuals against their own weak discretions they may exercise and furthermore to place contractual parties on equal footing in the market place. This however is only applicable where consent of the one contracting party or the agreement as such will be advantaged to one of the contracting parties. Restrictions are thus placed on individual contractual freedom where public policy so demands as it is enshrined in the Bill of Rights." [268]

Turpin [269] with regard to agreements and imposed terms, inclusive of exemption clauses, comments as follows on the nature and effect of these types of agreements:

"Accessory and limiting contractual terms is, in these cases, not the subject of negotiation or agreement between the parties, but form part of a detailed and invariable proposal (which may or may not be the offer) to which the other party must accede in toto or not at all."

He continues to state:

"The consensual basis of contract has to a great extent been undermined by this development, which reduces consensus ad idem to a general acceptance of the proposition as a whole; in a great many cases a contracting party is quite unaware of the existence or nature of terms printed on a form or ticket, which may well be binding upon him in law."

Commenting on the effect of imposed terms in contract the writer adds:

"The danger of this development is plain and has often been pointed out. The supplier is able to impose unfair terms upon the consumer which deprive the latter of reasonable rights of compensation, or otherwise oust the protection of the common law." [270]

Our legal writers have also, throughout the years, paid attention to the norms and values

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268 Rautenbach and Van der Vyver "Volenti non fit iniuria en Grondwetlike Waarborge" *TSAR* (1993) 637 at 647-648.

269 "Contracts and Implied Terms" 1956 *SALJ* 144.

270 Turpin "Contracts and Imposed Terms" 1956 *SALJ* 144 at 145.

impacting on the courts in their judicial decision-making process. One of the aspects, one which the courts encounter quite frequently, is that contractually or delictually, what norms and values influence public policy?

The general norm or criterion to be employed in determining delictually, whether a particular infringement of interests is unlawful, is the legal convictions of the community, the *boni mores*. [271] Equally, the general norm or criterion to be employed in determining contractually, whether an agreement or a clause, alternatively, a provision in the contract is one public policy forbids the enforcement of, is that of the general sense of justice of the community, the *boni mores*, manifested in public opinion. [272]

As public policy is a question of fact, not law, [273] our courts, when called upon to decide an issue of public policy, do so by balancing the interests of the parties concerned. [274] When doing so, the court must weigh the conflicting interests of the defendant and the plaintiff, in light of all the relevant circumstances and in view of all pertinent factors, in order to decide whether the infringement of the plaintiff's interests was reasonable or unreasonable. [275]

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271 See Neethling Potgieter and Visser (2001) 37-38; See further Van der Walt and Midgley (1997) 55-57; Boberg (1984) et seq.; Neethling (1998) 67-70; Van Heerden and Neethling (1995) 122-124; Van der Merwe and Olivier (1989) 58 et seq.; Neethling "Die Reg Aangaande Onregmatige Mededinging sedert 1983" (1991) *THRHR* 218-219; Van Dyk "Die Bewys van boni mores" 1975 *THRHR* 383.

272 Christie (2001) 19-20; See further Van der Merwe et al (2003) 176-178. The writer expresses the view that although *contra bonos mores* or contrary in good morals is sometimes used inter changeably with public interest or policy, it does not introduce an additional criterion. The writer opines that *"they are all relevant in this context as they provide a basis upon which a decision on the question of illegality is based in law."*

273 For a discussion on the unanimity of the concepts "boni mores" (good morals) and "legal convictions of the community" see Neethling (1998) 67ff; Van der Merwe and Olivier (1989) 58 et seq.; Van der Walt and Midgley (1997) 55. Van der Merwe et al (2003) 176-178. From their writings it emerged that the concept *boni mores* does not merely mean "good morals" as it is not a public moral criterion. In this context *boni mores* concerns the legal convictions of the community which serve as a yardstick to establish whether or not the community regards a particular act to be delictually wrongful or in a contractual setting, agreements which public opinion forbids the enforcement thereof. Likewise, although public policy and public interest may appear to be two distinct concepts, the former being the expression of the goals of a society on an abstract level, and the latter signifies the more concrete expression of the values and norms which are realized when policy is implemented. Van der Merwe et al (2003) 177 suggest that the distinction, however, cannot be absolute as policy helps to determine and shape the interests worthy of recognition and in the public weal whereas the recognition of particular interests eventually influences and shapes policy.

274 See Christie (2001) 19; See further Aquilius "Immorality and Illegality in Contract" (1941) 58 *SALJ* 337 346; Joubert *General Principles of the Law of Contract* (1987) 133; Christie *Bill of Rights Compendium* (2001) 3H-10

275 See Neethling et al (2001) 39 who is of the view that *"the application of the boni mores criterion essentially entails the ex post facto balancing or weighing up of, on the one hand, the interests which the defendant actually promoted by his act, and on the other, those which he actually inflicted."*

Although there is no *numerus clauses* as to the factors involved, various factors may play a role in the process of determining the reasonableness of the defendant's conduct in a contractual setting. These include the concept of good faith, contractual freedom and sanctity of contracts, the principles of equity, fairness and reasonableness, unconscionableness, moral and ethical issues, foreign law, the values underlying the Constitution and the Bill of Rights.

Each of these factors and their influence will be discussed independently in this thesis.

To counter this, *Turpin* [276] suggests:

"Imposition of unfair terms can be most effectively countered by legislation, itself importing compulsory terms into contracts of a certain class, or even authorising the courts to disregard terms of an unjust or unreasonable character." [277]

The question that needs to be answered is when can it be said that a contract, or provisions of a contract, are against public policy? It has been suggested before, that when a court is confronted to make a policy decision, it follows that a judge, hearing the matter, is required to perform a balancing act between conflicting sets of norms and values and, in so doing, reflect the wishes and perceptions of the people which accords, also, society's notions of what justice demands. [278]

Although, it is submitted, there is no *numerus clausus* as to which clauses are deemed to be against public policy, the following clauses have been identified by our legal writers to be against public policy and void namely, a clause exempting a debtor from liability for fraud, and so is, a clause which excludes liability for an intentional breach of contract. [279]

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276 "Contracts and Imposed Terms" 1956 *SALJ* 144 at 145.

277 Turpin "Contracts and Imposed Terms" 1956 *SALJ* 144 at 145.

278 See Corbett "Aspects of the role of policy in the evolution of our common law" 1987 104 *SALJ* 52 67-68 who states some norms and values are *"in part a heritage from the pat but to some extent too, they are the product of the influences of inter alia the interaction between people, the influence of other communities and the sayings and writings of philosophers, the thinkers, the minders, which have universal human appeal."* He adds that judges are also influenced by *"concepts of natural law, by international law norms and other comparable systems of jurisprudence."* .The concept justice is referred to in *Jaibhay v Cassim* 1939 AD 537 544 as *"the doing of simple justice between man and man."* See also *Sasfin (Pty) Ltd v Beukes* 1989 (1) SA 1 (AD). See further Neels "Die Aanvullende en Beperkende Werking van Redelikheid en Billikheid in die Kontraktereg" *TSAR* 1999 4. 685 690.

279 For clauses exempting a contracting party from liability for fraud see Van der Merwe et al (2003) 215; Kerr (1998) 404-405; Christie (1996) 205-206 relying on the dictum of *Wells v SA Alumenite Co* 1927 AD 69 72; Lubbe and Murray (1988) 240 425; O'Brien *TSAR* 2001-3 597 at 599-600. For clauses excluding liability for intentional breach of contract see Christie (1996) 205-206; Van der Merwe et al (2003) 215; Lubbe and Murray (1988) 240-

Whether an exemption clause, in respect of an injury or the death of a patient, exempting the hospital, doctor or health care worker from liability for his/her/its negligent conduct, ought to be declared null and void as contrary to public policy, to a large extent forms the centre of this research. It is noted by some legal writers including *Strauss*, [280] *Strauss and Strydom*, [281] and more recently, *Naude and Lubbe*, [282] *Cronje-Retief*, [283] *Van Heerden*, [284] *Jansen and Smith*, [285] *Hawthorne*, [286] *Grove* [287] and *Carstens and Kok*, [288] that these types of clauses should not afford any party to a contract, who is liable for a negligent act causing damages to a patient, to escape liability.

For that reason, the writers argue, the said clauses should be declared to be contrary to public policy and void.

12.2.2.1.2 Case Law

In, as far back as, 1905, in the landmark decision of *Morrison v Angelo Deep Gold Mines, Ltd,* [289] Innes CJ, in an Appellate Division (as it was known then) case, ruled that waiver of liability is an acceptable practise in the South African Law of Contract. But, the learned Judge found that there are exceptions to the general rule, including contracts against public policy, when he stated:

425; O'Brien *TSAR* 2001-3 597 at 602.

280 *Doctor, Patient and the Law* (1991) 324.

281 *Die Suid-Afrikaanse Geneeskundige Reg* (1969) 105-106.

282 "Exemption clauses - A rethink occasioned by Afrox Health Care Bpk v Strydom" (2005) 122 *SALJ* 441 at 459. The legal writers argue that by virtue of medical ethics and in particular, the fundamental importance of the standard of care which forms the essence of the contract as well as the unequal bargaining position between patient and hospital or doctor, public policy dictates that exclusionary clauses exempting liability arising from negligent conduct are contrary to public policy.

283 "The legal liability of hospitals" (2000) *Unpublished LLD Thesis Orange Free State University* (2000) 474.

284 "Exclusion of liability in private hospitals in South Africa" (2003) *De Rebus* 47.

285 "Hospital Disclaimers" (2003) *Journal for Juridical Science* 280, 220.

286 "Closing the open norms in the Law of Contract" 2004 67 (2) *THRHR* 294, 295; "The End of bona fides" (2003) 15 *SA Merc, LJ* 271, 277, 35.

287 "Die Kontraktereg, altruisme, keusevryheid en die Grondwet (2003) 35 *De Jure* 134.

288 "An Assessment of the use of disclaimers by South African hospitals in view of Constitutional demands, Foreign law and medico-legal considerations (2003) 8 *SAPR/PL* 430, 441.

289 1905 (AD) 775.

"Now it is a general principle that a man contracting without duress, without fraud, and understanding what he does, may freely waive any of his rights. There are certain exceptions to that rule, and certainly the law will not recognise any arrangement which is contrary to public policy. That is a principle of the Roman-Dutch as well as of the English Law, and it seems to me that it must be common to every system of jurisprudence."

But, cautions the learned Judge: *"In some cases the operation of the rule is clear; but there are others in which it needs careful application. As was said by an English judge years ago: "Public policy is an unruly horse, and when, once you get astride of it you never know where it will carry you."* There is much truth in that homely remark; and the doctrine must be applied with great care and circumspection,

The court consequently held that public policy requires the observance of a statute, that being the case: *"Where a duty is imposed by common law, the result of its non-observance may be waived by the person interested unless public policy prevents his so doing. I cannot see that the same rule should not apply where the liability arises from the neglect of a duty imposed by statute."* [290]

The principle enunciated in the case of *Morrison v Angelo Deep Gold Mines, Ltd* [291] was restated in the case of *S.A. Railways and Harbours v Conradie,* [292] which involved an indemnity clause contained in a contract to carry goods at owner's risk.

As defined in standard conditions and terms of statutory regulations Innes CJ held:

"As pointed out in Morrison v Angelo Deep (1905 T.N. 775) any person may as a general rule waives rights conferred by law solely for his own benefit, even when such rights are conferred by statute. The rule is subject in certain exceptions, the only one relevant to the present enquiry being that rights cannot be waived where public policy requires their observance; because in such a case public as well as private interests are concerned. But I can see no reason for excluding the operation of the general rule merely because the rights waived relate to legal procedure. Statutory provisions concerning procedure in civil cases, which do not affect the jurisdiction of the Court, may be waived by those for whose sole benefit they were enacted." [293]

Our courts have also had no difficulty in prohibiting exemption from liability for fraud. In this regard, Innes CJ expressed himself as follows, in *Wells v SA Alumenite Co*: [294] *"On grounds*

290 *Morrison v Angelo Deep Gold Mines, Ltd* 1905 (AD) 775 at 779, 782.

291 1905 (AD) 775.

292 1921 (AD) 137.

293 *S.A. Railways and Harbours v Conradie* 1921 (AD) 837.

294 1927 AD 69 at 72.

of public policy the law will not recognise an undertaking by which one of the contracting parties binds himself to condone and submit to the fraudulent conduct of the other. The courts will not lend themselves to the enforcement of such a stipulation; for to do so would be to protect and encourage fraud." [295]

In the Wells case the alleged misrepresentation was made by the company's salesman.

The question may be begged, whether then, on grounds of public policy, our courts will recognise an undertaking and give effect to a clause exempting an employer from liability for theft by its employee?

In the case of *Government of the Republic of South Africa v Fibre Spinners and Weavers (Pty) Ltd,* [296] Wessels ACJ held that: *"Not being an insurer, defendant is not liable in law to compensate plaintiff for loss or damage in respect of the property in question caused by vis. major or casus fortuitous."* But adds Wessels ACJ, *"it is liable to compensate plaintiff (1) if the loss or damage is caused by its own wilful wrongdoing or negligent conduct, or (2) possibly by the wilful wrongdoing (e.g. theft) or negligent conduct on the part of the servants, acting in the scope and within the course, of their employment as such."* [297]

The issue again arose in the case of *Goodman Brothers (Pty) Ltd v Rennies Group Ltd,* [298] in which the respondent, on appeal, sought to rely on a clause exempting the respondent from liability for the handling of goods, including watches, unless `special arrangements' were made beforehand. The principal issue was whether the exemption clause absolved the respondent from liability for loss, even for theft by the respondent's employees. The appellant, on appeal, sought to rely on the principle adopted in the case of *Wells v South African Alumenite Co* 1927 AD 69, that the law would not, on grounds of public policy, recognise an undertaking in which one of the contracting parties bound itself to condone the fraudulent conduct of the other.

Cloete J (Streicher J concurring) subsequently held that the ambit in the dictum in *Wells v South African Alumenite Co* 1927 AD 69 should not be confined to fraudulent conduct,

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295 *Wells v SA Alumenite Co* 1927 (AD) 69 at 72.

296 1978 (2) SA 794 (A).

297 *Government of the Republic of South Africa v Fibre Spinners and Weavers (Pty) Ltd* 1978 (2) SA 794 (A).

298 1997 (4) SA 91 (WLD) at 97.

narrowly defined, but extended to any deliberately dishonest conduct (such as theft) by a contracting party. But, the court found that the respondent, who agreed to deliver goods to the appellant, was entitled to contract out of the liability for the dishonesty of his servants, entrusted by him with the performance of his contractual duty, save for an instance where `a special arrangement' had been put in place, in which even the respondent would have been able to protect himself against the dishonesty of his employees by taking out fidelity insurance or taken additional precautions.

Cloete J distinguished between the case of theft, by an employee, of goods that have been entrusted to his employer and fraudulent misrepresentation inducing someone to act, when the judge stated:

"The position is, however, different in the case of theft by an employee of goods that have been entrusted to his employer. Like the fraud, the theft by the servant is not a theft by the employer; but unlike the fraudulent misrepresentation, the theft is not for the benefit of the employer but for the benefit of the employee. To allow the employer to rely on a clause excluding liability in the case of a theft by an employee would not encourage theft. The reason is obvious: it is, ex hypothesi, the dishonest employee, and not the contracting party who stipulated for the exemption clause, who will benefit, and there is no greater risk of a theft being committed because the employer has stipulated for an exemption clause than there would be had he not done so."

Cloete J concluded that *"there seems no reason in public policy why one's customers should be prohibited from knowingly accepting any lesser risk. If two contracting parties can, as in the Fibre Spinners and Weavers case, validly agree to exempt the one from liability for the dishonesty of his employees in exchange for arranging a policy of insurance which would indemnify the other for the consequences of a theft by the former's employees, I see no reason in principle or public policy why contravening parties could not simply agree without more on the exemption of the one from such liability and leave it to the other to take out a policy of insurance, should he wish to do so."* [299]

It has also been held by the South African courts that a clause which excludes liability for an intentional breach of contract, is against public policy. [300] But there are cases in which South African courts have expressed the view that a party could exempt himself from liability *"even for his own wilful default."* [301]

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299 *Goodman Brothers (Pty) Ltd v Rennies Group Ltd* 1997 (4) SA 91(W) 99 E-G.

300 *Galloon v Modern Burglar Alarms (Pty) Ltd* 1973 (3) SA 647 (C) 650 *H and Micor; SA Shipping (Pty) Ltd v Treger Golf and Sports (Pty) Ltd* 1977 (2) SA 709 (W) 713.

301 *East London Municipality v South African Railways and Harbours* 1951 4 SA 466 (E) 490; *Hughes v SA Fumigation Co (Pty) Ltd* 1961 3 SA 799 (C) 805; *Government of the Republic of South Africa v Fibre Spinners and Weavers (Pty) Ltd* 1978 2 SA 794 (A) 803.

The question may be begged, what criteria the courts use in determining whether a contract or provisions of a contract are against public policy?

In the case of *Ismail v Ismail,* [302] the Appellate Division (as it was known then) quoted, with approval, the dictum that crystallized from *Hurwitz v Taylor* 1926 TPD at 86, 91, which dealt with this aspect. The dictum reads:

"A contract is against public policy if it is prejudicial to the public welfare; in deciding whether a contract should be enforced or not, the Courts have the power to look not only at the contract itself but also to the consequences which might flow from such contract or class of contracts. " ..... the determination of what is contrary to the so-called `policy of law' necessarily varies from time to time. Many transactions are upheld now by our courts which a former generation would have avoided as contrary to the supposed policy of the law. The rule remains, but its application varies with the principles which for the time being guide public opinion." [303]

Then followed the *locus classicus* on the liability of contracts contrary to public policy namely *Sasfin (Pty) Ltd v Beukes,* [304] in which Smalberger JA, at page 8-9, sets out the position enunciated by our academic writers, namely:

"Writers generally seem to classify illegal or unenforceable contracts (apart from those contrary to statute) into contracts that are contra bonos mores and those contrary to public policy (see e.g. De Wet and Yeats Kontraktereg en Handelsreg 4th ed at 80; Wille (op cit at 321); Joubert (ed) Law of South Africa vol. 5 Para 151). Some, like Wessels (op cit), include an additional classification, viz. those contrary to the common law. These classifications are interchangeable, for as `Aquillius' in 1941 SALJ at 344 puts the matter, `in a sense all illegalities may be said to be immoral and all immorality and illegality contrary to public policy.' That the principles underlying contracts contrary to public policy and contra bonos mores may overlap also appears from the judgement of this Court in Ismail v Ismail 1983 (1) SA 1006 (A) at 1025G." [305]

The court then quoted, with authority, the case of *Eastwood v Shepstone,* [306] in which morality played a role in deciding whether transactions were against public policy, when Innes J stated:

"Now this court has the power to treat as void and to refuse in any way to recognise contracts and transactions which are against public policy or contrary to good morals. It is a power not to be hastily or rashly exercised, but when once it is clear that any arrangement is against public policy, the court would be wanting in its duty if it hesitated to declare such an arrangement void. What we have to look to is the tendency of the proposed transaction, not it's actually proved result."

302 1983 (1) SA 1006 (A).

303 *Ismail v Ismail* 1983 (1) SA 1006 (A) 1006.

304 1989 (1) SA 1 (A).

305 *Sasfin (Pty) Ltd v Beukes* 1989 (1) SA 1 (A) 8C-9B.

306 1902 TS 294.

Smallberger then cautions:

"No court should therefore shrink from the duty of declaring a contract contrary to public policy when the occasion so demands. The power to declare contracts contrary to public policy should, however, be exercised sparingly and only in the clearest of cases, lest uncertainty as to the validity of contracts result from an arbitrary and indiscriminate use of the power. One must be careful not to conclude that a contract is contrary to public policy merely because its terms (or some of them) offend one's individual sense of propriety and fairness." [307]

In the succeeding Appellate Division case of *Basson v Chilwan and Others,* [308] the court was confronted with deciding whether a contract in restraint of trade was either wholly, or partially, assailable if it damages public interest and was, therefore, in conflict with public policy. In finding the restraint of trade clause to be unenforceable, the court held:

"'n Ooreenkoms is in sy geheel of ten dele aanvegbaar as dit die openbare belang skaad en aldus teen die openbare beleid indruis. 'n Bepaling van hierdie aard wat 'n werknemer of vennoot na beëindiging van die kontrak aan bande probeer lê - en dis al geval wat hier in oënskou geneem moet word - druis teen die openbare beleid in as die uitwerking van die belemmering onredelik sou wees. Die redelikheid al dan nie van die belemmering word beoordeel aan die hand van die breëre belange van die gemeenskap, enersyds, en van die kontrakterende partye self, andersyds. Wat die breëre gemeenskap betref is daar twee botsende oorwegings: ooreenkomste moet gehandhaaf word (al bevorder dit ook onproduktiwiteit); onproduktiwiteit moet ontmoedig word (al verongeluk dit ook 'n ooreenkoms) (vgl Sunshine Records (Pty) Ltd v Frohling and Others 1990 (4) SA 782 (A) te 794D-E). Wat die partye self betref, is 'n verbod onredelik as dit die een party verhinder om hom, na beëindiging van hul kontraktuele verhouding, vryelik in die handels- en beroepswêreld te laat geld, sonder dat 'n beskermingswaardige belang van die ander party na behore daardeur gedien word. So iets is op sigself strydig met die openbare beleid. Origens mag 'n beperking wat inter partes redelik is nietemin, vir 'n rede wat nie aan die partye eie is nie, die openbare belang beskaad. En bes moontlik ook omgekeerd." [309]

In a full bench decision of *Standard Bank of SA Ltd v Wilkinson,* [310] the Cape Provincial Division, when deciding whether the provisions in a surety-ship agreement; or the whole of the agreement, were contrary to public policy, considered the following principal considerations:

"While the courts will not hesitate to refuse to recognise a contract which is against public policy or contrary to good morals and declare it void, it is a power which they should not hastily or rashly exercise (see Eastwood v Shepstone 1902 TS 294 at 302 per Innes CJ; Kuhn v Karp 1948 (4) SA 825 (T) at 839(. It should be exercised sparingly and only in the clearest of cases (see Sasfin at 9B) and where the impropriety of the transaction and the element of public harm are manifest (see Botha (now Griesel) and another v Finanscredit (Pty) Ltd 1989 (3) SA 773 (A) at 783A-B)"

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307 *Sasfin (Pty) Ltd v Beukes* 1989 (1) SA 1 (A) 9d-9f.

308 1993 (3) SA 742 (A).

309 *Basson v Chilwan and Others* 1993 (3) SA 742 (A).

310 1993 (3) SA 822 (C).

Another factor which weighed heavily with the court in the *Standard Bank v Wilkinson case* was considered at page 830 of the judgement namely:

" ..... That public policy favours the utmost freedom of contract and requires that commercial transactions should not be unduly trammelled by restrictions on that freedom (see Sasfin at 9E-F). As Innes CJ said in the Law Union Rock case supra at 598:

`Public policy demands in general full freedom of contract; the right of men freely to bind themselves in respect of all legitimate subject-matters.'

The court then repeated the much quoted dictum of Jessel MR in *Printing and Numerical Registering Co v Sampson* (1875) LR 19 Eq. 462 at 465:

"If there is one thing which more than another public policy requires, it is that men of full age and competent understanding shall have the utmost liberty of contracting and that their contracts, when entered into freely and voluntarily, shall be held sacred and shall be enforced by courts of justice."

Consequently, the court laid down the following principle in deciding this matter:

"It is this freedom of contract and the voluntary acceptance by a surety of the burdens of surety ship that bring us to the conclusion that it is only when a surety ship agreement or some of its terms are clearly inimical to the interests of the community as a whole that it or they should be declared to be objectionable." [311]

In a subsequent decision, the Cape Provincial Division, in the case of *Absa Bank t/a Bankfin v Louw en andere,* held that a provision in a deed of suretyship whereby the surety renounced the benefits conferred by the *Prescription Act* 68 of 1969 in respect of the prescription of the principal debt and of the obligations of the surety, was contrary to public policy and invalid. A factor considered in this case by Conradie J and Louw J is: *"..... The absence of specific bargaining where the waiver of prescription is contained in a standard form contract: and possible inequality of bargaining power which does not serve a specific and justifiable commercial purpose hence contrary to public policy."* [312]

See, however, a contrary view expressed by the Supreme Court of Appeal in the case of *De Jager en Andere v Absa Bank Bpk,* [313] in which the court relied on the principle of contractual freedom which negates the allegation that the agreement without knowledge of the completion of a prescription provision, offended against public policy.

311 *Standard Bank of SA Ltd v Wilkinson* 1993 (3) SA 822 (C).

312 *Absa Bank t/a Bankfin v Louw en Andere* 1997 (3) SA 1085 (C).

313 2001 (3) SA 537 (SCA).

In the case of *Afrox Health Care Bpk v Strydom*, [314] Brand J, following the dictum of *Sasfin (Pty) Ltd v Beukes* 1989 (1) SA 1 (A), recognised that a contractual provision contrary to public policy because of its unreasonableness, is invalid and unenforceable. But, cautions the judge, following the dictum of Smalberger AJ in the Sasfin case *"the power to declare contracts contrary to public policy should, however, be exercised sparingly and only in the clearest of cases, warranty as to the validity of contracts result from an arbitrary and indiscriminate use of the power."*

Brand JA, in considering the effect of an exclusionary clause in a hospital clause exonerating a hospital and its staff from professional liability, stated:

"One must be careful not to conclude that a contract is contrary to public policy merely because its terms (or some of them) offend one's individual sense of property and fairness. In the words of Lord Atkin in Fender v St John Mildmay 1938 AC 1 (HL) at 12:

"The doctrine should only be invoked in clear cases in which the harm to the public is substantially incontestable, and does not depend upon the idiosyncratic inferences of a few judicial minds ..... "

In grappling with this often difficult problem it must be borne in mind that public policy generally favours the utmost freedom of contract, and requires that commercial transactions should not be unduly trammelled by restrictions on that freedom." [315]

This case, in all its facets, will be discussed more fully in Chapter 14.

In a subsequent case, decided in the same year, the Supreme Court of Appeals, in the case of *De Beer v Keyser and Others,* [316] grappled with a clause in a micro-lending contract which required the lender to hand over a bank card and to disclose his/her personal identification number (PIN) and the question of whether it did not infringe on public policy? Nugent AJA, delivering the judgement, first and foremost emphasized the consensual theory in contract and the importance of executing contracts when entered into, when he stated:

"[12] It has often been said that a court should not be astute to destroy an agreement that the parties have seriously entered into in the belief that it was capable of implementation. In Soteriou v Retco Poyntons (Pty) Ltd 1985 (2) SA 922 (A) at 931G-I this Court said the following: F

`The Courts are "reluctant to hold void for uncertainty any provision that was intended to have legal effect"

314 2002 (6) SA 21 SCA at 33.

315 *Afrox Health Care Bpk v Strydom* 2002 (6) SA 21 SCA 34.

316 2002 (1) SA 827 (SCA).

(Brown v Gould (1972) Ch 53 at 56-8)"

As to the courts approach to contracts that are contrary to public policy, the court repeats the much used dictum of Smalberger JA, in *Sasfin (Pty) Ltd v Beukes* 1989 (1) SA 1 (A) at 869, when holding that:

"[22] There might well be circumstances in which an agreement, unobjectionable in itself, will not be enforced because the object it seeks to achieve is contrary to public policy. Nevertheless a court should be cautious when it performs its role as arbiter of public policy. In Sasfin (Pty) Ltd v Beukes 1989 (1) SA 1 (A) at C9B E Smalberger JA said:

`No court should therefore shrink from the duty of declaring a contract contrary to public policy when the occasion so demands. The power to declare contracts contrary to public policy should, however, be exercised sparingly and only in the clearest of cases, lest uncertainty as to the validity of contracts result from an arbitrary and indiscriminate use of the power. One must be careful not to D conclude that a contract is contrary to public policy merely because its terms (or some of them) offend one's individual sense of propriety and fairness. In the words of Lord Atkin in Fender v St John-Mildmay 1938 AC 1 (HL) at 12 (1937) 3 ALL ER 402 at 407B-C),

"the doctrine should only be invoked in clear cases in which the harm to the public is substantially incontestable, and does not depend E upon the idiosyncratic inferences of a few judicial minds" (see also Olsen v Standaloft 1983 (2) SA 668 (ZS) at 673G), Williston On Contracts 3rd ed Para 1630 expresses the position thus:

"Although the power of courts to invalidate bargains of parties on grounds of public policy is unquestioned and is clearly necessary, the impropriety of the transaction should be convincingly established in order to justify the exercise of the power."'F

As to the practise of drawing upon the debtor's bank account in collection of the debt, the court held:

"[27] the practice of drawing upon the debtor's bank account in collection of the debt does not constitute parate executie nor does it H share its objectionable features. Moreover, it is implicit in the authority that is granted by borrowers in the present case that the card may be used only to withdraw what is lawfully due. In the event that the indebtedness is disputed it is open to the borrower to countermand the authority or to seek the intervention of a court and there is no question of the judicial process being circumvented. It is commonplace for debtors to authorise their creditors to satisfy their debts by withdrawing money directly from the debtor's bank account, as, for example, in the case of a debit order. The distinction in the present case is only that the authority is capable of being abused. Fraud is capable of occurring in many circumstances and, in my view; the practice that is now in issue is not contrary to public policy." [317]

Disappointingly, the court again stressed that once an agreement has been concluded and regardless of how unconscionable a term or contract may be bargains should be upheld as *"..... Contracts are not concluded on the supposition that there will be litigation; and that the Court should strive to uphold - and not destroy - bargains.' C*

317 *De Beer v Keyser and Others* 2002 (1) SA 827 (SCA) at 839.

Since the *Afrox Healthxcare Bpk judgement,* [318] as well as the *De Beer case,* [319] the Supreme Court of Appeals, on two occasions, mooted that, in time, the legal position with regard to exclusion clauses may very well change, either judicially or legislatively. In the first case, the *Johannesburg Country Club v Stott and Another,* [320] the facts can be briefly stated as the following, namely: The late Mr Stott was a member of the appellant, the Johannesburg Country Club. So was his wife. The respondent represented the deceased estate. While playing golf on the sixth fairway at the club on 4 March 2000, he apparently sought shelter under a cover of some sorts during a rainstorm. Lightning struck and he was severely injured and subsequently passed away on 24 March. Mrs Scott was seeking to hold the club liable for her loss, alleging that he had been killed as a result of the negligence of the club. At this juncture, the grounds of negligence are immaterial. Her main claim for R5, 9m was a dependant's claim but she also claimed R20 000.00 for funeral and burial expenditures.

The club had rules, as clubs generally do. To these rules Mr and Mrs Scott bound themselves when they joined the club, she in 1994 and he much earlier. The rules contained an exemption clause, in terms of the club rules. The club, in a special plea, relied on the exemption clause. Mrs Scott opposing the special plea, apart from denying that the exemption clause did not indemnify the club, pleaded that she was not bound by the exemption clause because she had been unaware of it.

The court *a quo* per Kirk-Cohen J, in the TPD, acceded to a request to decide the special plea as a separate issue and, after hearing evidence, dismissed the special plea with costs. The court *a quo* subsequently granted the necessary leave to appeal to the Supreme Court of Appeals.

The issue, to be decided by the Supreme Court of Appeals, was whether an exemption clause exonerating the Appellant club from liability was valid or not.

The relevant clause, contained in the rules of the club, which all members were obliged to accept when joining the club, read as follows:

"DAMAGE TO OR LOSS OF PROPERTY, AND INJURY TO PERSONS

318 2002 (6) SA 21 (SCA).

319 2002 (1) SA 827 (SCA.)

320 2004 (5) SA 511 (SCA).

(a) *Members shall pay for the replacing or repairing (as the Committee may determine of any article, or property of the Club, which shall be broken or damaged by them or their guests.*

(b) *The Club shall in no circumstances whatsoever be liable for any loss of or damage to the property of any member or guests brought onto the premises of the Club whether occasioned by theft or otherwise, nor shall the Club be held responsible or in any way liable for personal injury or harm however caused to members or their children or their guests on the Club premises and/or grounds."*

The court, per Harms JA, deciding the issue, commenced by looking at the approach adopted by the South African courts, to the interpretation of exemption clauses. Harms JA relied on three cases decided in the Supreme Court of Appeals. In the case of *First National Bank of SA Ltd v Rosenblum and another* [321] Marais JA stated:

"Before turning to a consideration of the term here in question, the traditional approach to problems of this kind needs to be borne in mind. It amounts to this: In matters of contract the parties are taken to have intended their legal rights and obligations to be governed by the common law unless they have plainly and unambiguously indicated the contrary. Where one of the parties wishes to be absolved either wholly or partially from an obligation or liability which would or could arise at common law under a contract of the kind which the parties intend to conclude, it is for that party to ensure that the extent to which he, she or it is to be absolved is plainly spelt out. This strictness in approach is exemplified by the cases in which liability for negligence is under consideration. Thus, even where an exclusionary clause is couched in language sufficiently wide to be capable of excluding liability for negligent failure to fulfil a contractual obligation or for a negligent act or omission, it will not be regarded as doing so if there is another realistic and not fanciful basis of potential liability to which the clause could apply and so have a field of meaningful application. (See South African Railways and Harbours v Lyle Shipping Co Ltd 1958 (3) SA 416(A) at 419D-E)"

The court subsequently also referred to the case of *Durban's Water Wonderland (Pty) Ltd v Botha and Another* 1999 (1) SA 982 (SCA) 989, in which Scott JA stated:

"Now against this background it is convenient to consider first the proper construction to be placed on the disclaimer. The correct approach is well established. If the language of a disclaimer or exemption clause is such that it exempts the proferens from liability in express and unambiguous terms, effect must be given to that meaning. If there is ambiguity, the language must be construed against the proferens. (See Government of the Republic of South Africa v Fibre Spinners and Weavers (Pty) Ltd 1978 (2) SA 794 (A) at 804C). But the alternative meaning upon which reliance is placed to demonstrate the ambiguity must be one to which the language is fairly susceptible; it must not be `fanciful' or `remote' (cf. Canada Steamship Lines Ltd v Regem (1952) 1 ALL ER 305 (PC) at 310C-D."

To the question of whether the dependant's claim may be signed away by Mr Stott having exempted the club from such liability, the court found, with reference to the case of *Jameson's Miners v Central South African Railways;* [322] it was not possible to forego the autonomous claims of dependants.

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321 2001 (4) SA 189 (SCA) Para 6; *Van der Westhuizen v Arnold* 2002 (6) SA 453 (SCA) Para 37-38.

322 1908 TS 575.

In so far as the actual exemption clause referred to above was concerned, the court held that the clause fell into two parts for consideration. The first part, it was held, applied to property brought onto the premises and whether the members or their guests are bound by the clause. To this end, the court found the clause to be ineffective, in that, guests are not bound by the exclusion since they are not parties to the agreement. Nor is any member of the club's underwriter, who undertakes liability in its stead, towards his/her guest.

In so far as the second part was concerned, the court held that the provision was also ineffective, in that the clause did not deal with the claim of a dependant spouse who was not a club member. The words `personal injury', the court held, was also unrelated to a dependant's claim.

Recognising the validity of exclusionary clauses, the court found that, had the late Mr Stott survived the lightning strike, his claim would, no doubt, have been met by the exclusionary clause.

Although the court left open the question of the validity of an exclusion clause excluding liability for damages for negligence causing the death of another, the court made the following remarks. Harms JA with reference to the cases of *S v Makwanyane*; [323] *Mohamed v President of the Republic of South Africa*; [324] *Ex parte Minister of Safety and Security*; *In re S v Walters* [325] 2002 (4) SA 613 (CC) stated: *"It is arguable that to permit such exclusion would be against public policy because it runs counter to the high value the common law and, now the Constitution place on the sanctity of life."*

Harms JA continued that, although the Supreme Court of Appeals in *Afrox Health Care Bpk v Strydom,* [326] left open for the conclusion as afore suggested, the court referred to the English, Welsh and Irish position in which the legislature intervened by declaring exemptions unlawful, including, death, as well as, personal injuries referred to in *the Afrox Healthcare Bpk. case*.

It appears therefore, that Harms supports such a notion as expressed by English Law. See,

323 1995 (3) SA 391 (CC).

324 2001 (3) SA 893 (CC).

325 2002 (4) SA 613 (CC).

326 2002 (6) SA 21 (SCA).

however, the dissenting view expressed by Marais JA in the same judgement.

The Supreme Court of Appeals, in a later judgement in the case of *Napier v Barkhuizen,* [327] considered whether a time-bar clause in short term insurance contracts were unconstitutional? The facts briefly stated included the following: The respondent (plaintiff) insured his 1999 BMW 328i motor vehicle for R181 000, with a syndicate of Lloyd's Underwriters of London, represented in South Africa by the appellant (defendant).

The Policy provided:

"CLAIMS PROCEDURE AND REQUIREMENTS

5.2.5 If we reject liability for any claim made under this Policy we will be released from liability unless summons is served ..... within 90 days of repudiation."

On 24 November 1999 the vehicle was involved in an accident. The plaintiff informed the insurer of the incident timeously, but, on 7 January 2000, it rejected liability. The plaintiff served summons on the defendant more than two years later, on 8 January 2002. The defendant's plea relied on the time-bar clause. The plaintiff's replication invoked the Constitution. He pleaded that the time-bar constituted a limitation period which was contrary to public interest, on the grounds that it afforded the insured an unreasonably short period, after repudiation, to institute action; it was a drastic provision, which infringed the common law right of an insured to invoke the courts; it served no useful or legitimate purpose, and, in breach of s34 of the Bill of Rights, it deprived the insured of his right to have a justifiable dispute decided in a court of law.

The court, per Cameron JA, with reference to *Brisley v Drotsky,* [328] which developed important principles in the law of contract when judged against the Constitution and endorsed in the case of *Afrox Healthcare Ltd v Strydom,* [329] affirmed that the common law of contract is subject to the Constitution. Courts are therefore, obliged to take fundamental constitutional values into account, in developing the law of contract.

But, cautions the court, the Constitution does not confer upon judges a general jurisdiction to declare contracts invalid because of what they perceive to be unjust, or contrary to good

327 2006 (4) SA 1 (SCA); 2006 (9) BCLR 1011 (SCA).

328 2002 (4) SA 1 (SCA) Paras 88-95.

329 2002 (6) SA 21 (SCA).

faith. But the court re-asserted that the courts will invalidate agreements offensive to public policy.

The court continued to state that public policy now derived from the constitutional values of human dignity, the achievement of equality and the advancement of human rights and freedoms.

With reference to the *Afrox Healthcare decision*, the court held that; although the Supreme Court of Appeals rejected a constitutional challenge to a clause excluding liability for negligently caused injury, the court, nevertheless, affirmed that inequality of bargaining power could be a factor in striking down a contract on public policy and constitutional grounds. But, found the court in the Afrox Healthcare case, *"there was no evidence whatsoever to indicate that when the contract was concluded, the plaintiff was in fact in a weaker bargaining position'.*

The court also referred to the case of *Johannesburg Country Club v Stott and another,* [330] wherein, it was held, that the contractual exclusion of liability for negligent causes of death, could be unconstitutional.

The court further warned that *"judges should concentrate with care, particularly when it is required of them to impose upon individual conceptions of fairness and justice on parties' individual arrangements."*

In this case the court was again critical of the lack of evidence of the plaintiff's bargaining position in relation to the insurer.

The court found that; in the absence of such evidence, a court cannot establish whether his constitutional rights to dignity and equality had been infringed, so as to invalidate the term.

Consequently, the court stated, there was also nothing to suggest that the plaintiff did not conclude the contract with the insurer freely and within the exercise of his constitutional right to equality and freedom. The appeal was consequently upheld.

This matter has, since, also found its way into the Constitutional Court. The majority

330 2004 (5) SA 511 (SCA) Para 12.

judgement, per Ngcobo J in the case of *Barkhuizen v Napier,* [331] supported the principles laid down by the Supreme Court of Appeals in the cases of *Afrox Healthcare Bpk v Strydom*[332] and *Napier v Barkhuizen,* [333] referring to the Napier case, Ngcobo J states that although historically, the principles of contractual freedom and *pacta sunt servanda* have played a major role in contract law, the court does not believe these principles represent a sacred cow that should trump all other considerations. The court, consequently, considered the constitutional values of equality and dignity which may be decisive, especially when the matter of the parties' bargaining positions is an issue in a contractual dispute.

The court continued to add that *"all law, including the common law of contract, is now subject to constitutional control".* The court went on to add that the application of the principle *pacta sunt servanda* was subject to constitutional control.

The court also considered the continued value of public policy in solving contractual disputes. Although Ngcobo J conceded that determining the content of public policy *"was once fraught with difficulties",* public policy today is greatly influenced by the South African Constitution and the values which underlie it. The values of the court include, *inter alia,* human dignity, the agreement of equality and the advancement of human rights and freedoms and the rule of law. Therefore, whether a term in a contract is contrary to public policy is now, according to the court, determined by reference to the values that underlie our constitutional democracy, as expressed by the provisions of the *Bill of Rights*. Ngcobo J finds that a term in a contract that is inimical to the values enshrined in the Constitution is contrary to public policy and is, therefore, unenforceable.

Turning to public policy and the right of access to the courts, the court stated that courts have long held that a term in a contract which deprives a party of the right to seek judicial redress is contrary to public policy. The court consequently quoted from the well-known Appellate Division case (as the Supreme Court of Appeal was known then) of *Schierhout v Minister of Justice* [334] in which it was stated:

"If the terms of an agreement are such as to deprive a party of his legal rights generally, or to prevent him from seeking redress at any time in the Courts of Justice for any future injury or wrong committed against him, there

331 2007 (5) SA 323 (CC).

332 2002 (6) SA 21 (SCA); (2002) 4 ALL SA 125 (SCA).

333 2006 (4) SA 1 (SCA); 2006 (9) BCLR 1011 (SCA).

334 1925 AD 417.

would be good ground for holding that such an undertaking is against the public law of the land." [335]

Turning to Section 34 of the *Constitution,* which guarantees the right to seek the assistance of courts, the court stated that Section 34 gave expression to the foundational value by guaranteeing, to everyone, the right to seek the assistance of a court. Turning to the time-bar clause, the court concluded that it was apparent from the clause it did not deny the Applicant the right to seek judicial redress; it simply required him to seek judicial redress within the prescribed period, failing which the Respondent was released from liability.

The court also held that limitations are a common feature both in our statutory and contractual terrain. The court then continued to add:

> *"[48] I can conceive of no reason either in logic or in principle why public policy would not tolerate time limitation clauses in contracts subject to the considerations of reasonableness and fairness."*

The court continued to add:

"In general, the enforcement of an unreasonable or unfair time limitation clause will be contrary to public policy."

The court then formulated a test for determining whether the objective terms of an agreement were inconsistent with public policy by including the unequal bargaining power.

If, therefore, it was found that the objective terms were not inconsistent with public policy, on their face, the further question would then arise, which was, whether the terms were contrary to public policy, in the light of the relative situation of the contracting parties?
The court consequently, with reference to the *Afrox case*, recognised that, should the relative situation of the contracting parties include unequal bargaining power, an injustice may be caused unless such contractual provisions are pronounced to be contrary to public policy.

The court also placed a premium on the fairness in contract, as well as the principle of good faith which, the court found, underlies contractual relations. But, the court found, good faith was not a self-standing rule, it merely served as an underlying value that was given expression through existing rules of law. The majority judgement ultimately held that there

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335 *Schierhout v Minister of Justice* 1925 AD 417 at 424. See also *Nino Bonino v De Lange* 1906 TS 120 at 123-124.

was no admissible evidence that the contract was not freely concluded, nor that the parties stood in an unequal bargaining situation with each other.

But, it is especially the ingenious arguments by Sacks J, in a minority judgement, that deserve mentioning, his views regarding consumer protection and the ills that standard form contracts bring with them, aligns with the international trends in contract law.

Sachs J's main contentions regarding the use of standard form contracts include, these type of contracts are drafted in advance by the supplier of goods and services and presented to the consumer on a "take it or leave it" basis, often with the mere imposition of well without mutual consent to an agreement been reached.

Referring to the legal status of standard form contracts, Sachs J, with reference to the dictum of Davis J in the case of *Mort NO v Henry Shields-Chiat,* [336] in which it was held:

"Like the concept of boni mores in our law of delict, the concept of good faith is shaped by the legal convictions of the community. While Roman-Dutch law may well supply the conceptual apparatus for our law, the content with which concepts are filled depends on an examination of the legal conviction of the community - a far more difficult task. This task requires that careful account be taken of the existence of our constitutional community, based as it is upon principles of freedom, equality and dignity. The principle of freedom does, to an extent, support the view that the contractual autonomy of the parties should be respected and that failure to recognise such autonomy could case contractual litigation to mushroom and the expectations of contractual parties to be frustrated."

But the principles of equality and dignity direct attention in another direction. Parties to a contract must adhere to a minimum threshold of mutual respect in which the `unreasonable and one-sided promotion of one's own interest at the expense of the other infringes the principle of good faith to such a degree as to outweigh the public interest in the sanctity of contracts'. The task is not to disguise equity or principle but to develop contractual principles in the image of the Constitution.....

In short, the constitutional State, which was introduced in 1994, mandates that all law should be congruent with the fundamental values of the Constitution. Oppressive, unreasonable or unconscionable contracts can fall foul of the values of the Constitution. In accordance with its constitutional mandate the courts of our constitutional community can employ the concept of boni mores to infuse our laws of contract with this concept of bona fides. (Reference omitted)"

commented that *"a strong case can be made out for the proposition that clauses in a standard form contract that are unreasonable, oppressive or unconscionable are in general inconsistent with the issues of an open and democratic society that promotes human dignity, equality and freedom."*

336 2001 (1) SA 464 (C).

Sachs J recognizes that, although the doctrine of sanctity of contract and the maxim *pacta sunt servanda* have, through judicial and text-book repetition, mesmerized many jurists in the legal world, but, because of consumer protection struggles, scholarly critiques, legislative interventions and creating judicial reasoning, the said doctrines no longer stands imperiously on a jurisprudential pedestal.

The new Constitutional order prevents such elevation. In this regard Sachs J places great emphasis on fair dealings between contracting parties and to ensure that standards of fairness are maintained in an open and democratic society.

Sachs J held that the activity of insurance contracts is an area of considerable public concern, in that these type of contracts have become a virtual necessity for many vehicle owners. Great faith is placed, by the public, in the *"solvency, efficiency, probity and integrity of the insurers"* according to Sachs J. He puts it further that *"insurance thus has become a necessity for large sections of the community - it is not a personal indulgence."*

Sachs J goes on to say that public interests promote fair dealings in insurance contracts, as to *"protect relatively vulnerable individuals contracting with large business firms...."*

In the minority judgement, Sachs J also held that similarly to other cases [337] litigated on in recent years, in which exemption clauses are sought to be struck down because of their extortious character, in this matter, the clause in the present case and signed by Mr Barkhuizen, was buried in a voluminous add-on document.
The bargain struck between the parties was contained in a letter accompanied by a schedule. The court, per Sachs J, also held that there was nothing to indicate that Mr Barkhuizen's attention was drawn to the tense(time)-bar clause.

The court consequently concluded that, in the eyes of the community, there would be potential unreasonableness, leading to a possible finding of violation of public policy.

The strongest factor indicated for such conclusion is the one-sided terms of the bargain.

Sachs J also took a very robust approach to the standard effects which standard form

337 The court refer to the cases of *Afrox Healthcare Bpk v Strydom* 2002 (6) SA 21 (SCA); (2002) 4 ALL SA 125 (SCA) at Para 4; *Brisley v Drotsky* 2002 (4) SA 1 (SCA); 2002 (12) BCLR 1229 (SCA) at Para 69.

contracts have in their very nature varying from the *"computer literate owner of a relatively new BMW ....."* to *"the owner of the jalopy close to a scrap yard ....."*

He also concludes that not only do the indigent and the illiterate remain ignorant of the contents of some of these documents, but, even the more sophisticated, the rich. In their capacity, rich or poor, both have rights to fair treatment in the new Constitutional order, Sachs J added.

The court, in the minority judgement per Sachs J, then looked at the writings of *Maine* [338] and *Atiyah*, [339] two protagonists of contractual freedom who placed great value on the principles of consent and consensus, as manifested by the conduct of the contracting parties.

But, as Fridman [340] explained, with greater state interests in contract law, notwithstanding, private arrangements in contract, the emphasis changed from actual consensus to real consensus. Society, according to Fridman, started to demand just results instead of the traditional maintenance of the agreement.

Sachs J, consequently, also looked at public policy in the South African Law and emphasized the much quoted dictum of Innes CJ in *Eastwood v Shepstone* [341] and quoted, as such, by the majority in the Supreme Court of Appeal in *Sasfin (Pty) Ltd v Beukes,* [342] in which it was held:

"Now this Court has the power to treat as void and to refuse in any way to recognise contracts and transactions which are against public policy or contrary to good morals. It is a power not to be hastily or rashly exercised; but when once it is clear that any arrangement is against public policy, the Court would be wanting in its duty if it hesitated to declare such an arrangement void. What we have to look to is the tendency of the proposed transaction, not it's actually proved result."

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338 *Ancient Law: It's Connection with the Early History of Society and its Relation to Modern Ideas* (Oxford University Press, London (1861) at 140. The writer demonstrates the emergence of the concept of contract as a means of organizing a relationship between people and warns that with regard to standardized contracts parties have often very little choice but to enter into such a contract.

339 *The Rise and Fall of Freedom of Contract* (Claredon Press Oxford, 1985) at 731.

340 *The Law of Contract in Canada* 4ed (Carsell, Scarborough 1999).

341 1902 TS 294 at 302.

342 1989 (1) SA 1 (A).

The court went on to add that no court should, therefore, shrink from the duty of declaring void a contract, contrary to public policy when called for, when it stated:

"The power to declare contracts contrary to public policy should, however, be exercised sparingly and only in the clearest of cases, lest uncertainty as to the validity of contracts result from an arbitrary and indiscriminate use of the power. One must be careful not to conclude that a contract is contrary to public policy merely because its terms (or some of them) offend one's individual sense of propriety and fairness." [343]

But, notwithstanding, the fact that public policy generally favours the utmost freedom of contract and requires that commercial transactions should not be unduly trammelled by restrictions on that freedom, Sachs J quoted the important decision of *Jajbhay v Cassim,* [344] in which Stratford CJ stated: *"public policy should properly take into account the doing of simple justice between man and man".* [345]

In the minority judgement, Sachs J also dealt with the aid public policy serves to bring when a court adjudicates a term that inhibits access to the courts. In this regard, Sachs J quotes the dictum of Cachalia AJA in the case of *Bafana Finance Mabopane v Makwakwa and Another,* [346] in which it was said:

"That a court neither may nor enforce an agreement because the objective it seeks to achieve is contrary to public policy is firmly part of our law. And in this determination `public policy' is anchored in the founding constitutional values which include human dignity, the achievement of equality and the advancement of human rights and freedoms.

Our Courts have had no difficulty in declaring contracts contrary to public policy where their tendency is to restrict or prevent a person from vindicating his or her rights in the courts. Thus in Schierhout v Minister of Justice Kotze JA stated:

`If the terms of an agreement are such as to deprive a party of his legal rights generally, or to prevent him from seeking redress at any time in the Courts of Justice for any future injury or wrong committed against him, there would be good ground for holding that such an undertaking is against the public law of the land.'

There can be no doubt that the tendency of the clause (in the present matter) is to deprive the respondent of his right to approach the court for redress from his parlous financial position. To deprive or restrict anyone's right to seek redress in court, as the cases cited above make clear, is offensive to one's sense of justice and is inimical to

343 *Sasfin (Pty) Ltd v Beukes* 1989 (1) SA 1 (A) at 9 B.C.

344 1939 AD 537.

345 *Jajbhay v Cassim* 1939 AD 537 at 544.

346 2006 (4) SA 581 (SCA).

the public interest." [347]

The court, per Sachs J in the minority judgement, also identified objective factors, which may have provided pointers to what public policy required with regard to standard form contracts, in general, as well as terms limiting access to court. Looking at international trends, the writings of, especially, *Collins* [348] find favour with Sachs J. *Collins,* in this regard, states that one of the foremost general challenges for legal regulation of markets, during the twentieth century, was to limit the advantages which businesses could obtain against consumers by using standard form contracts.

Sachs J, subsequently also quoted the findings of the *South African Law Commission* [349] with regard to the use of public policy in nullifying unfair contract terms, when it stated:

"Public policy is more sensitive to justice, fairness and equity than ever before. It added that:

"With the rise of the movement towards consumer protection in the early seventies, it became the generally accepted view in most Western countries that neither specific legislation dealing with certain types of contract nor the traditional techniques of control through `interpretation' of contractual terms were sufficient, and that legislative action was required to deal with contractual unconscionability on a more general level. Such laws have been enacted in Denmark, Sweden, Norway, France, and the Federal Republic of Germany, the Netherlands, and Australia as well. They are all based on the principle of good faith in the execution of contracts." [350]

Sachs J also looked at the legislation other countries had introduced, as a means to protect the consumers against the ills which standard form contracts have brought with them.

Moreover, the court quoted Article 3 of the European Council Directive on *Unfair Terms in Consumer Contracts,* [351] which provides:

"A contractual term which has not been individually negotiated shall be regarded as unfair if, contrary to the requirement of good faith, it causes a significant imbalance in the parties' rights and obligations arising under the contract, to the detriment of the consumer."

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347 *Bafana Finance Mabopane v Makwakwa and Another* 2006 (4) SA 581 (SCA) Paras 9,11,2001.

348 *The Law of Contract* 3ed (Butterworth, London 1997) 2-3.

349 The South African Law Commission "Unreasonable Stipulations in Contracts and the Rectification of Contracts" *Project 47 (April 1998)* at Para 1, 44.

350 *Unfair Contract Terms Act* 1977 and *The Unfair Terms in Consumer Contracts Regulations* 1999 which implements the Council Directive 93/13/EEC on *Unfair Terms in Consumer Contracts, Council Directive* 93/13/EEC OJ L 095/29 (5 April 1993).

351 *Council Directive* 93/13/EEC OJ L 095/29 (5 April 1993).

Sachs J also quoted the work of *Nassar* [352] on the role that good faith plays in long-term international commercial transactions, in which standards of proper conduct are sought. The author in this regard stated:

"Acknowledging a duty to co-operate, in situations where it is thought to best serve the contractual relationship and its goals, moves the contractual model away from a classical conceptualization, where individuals are free to conduct their businesses as they please, their agreements being the only self-imposed limitation, towards a relational one. Under the latter conceptualization, one is expected to conduct his affairs in conformity with an existing set of values, or what one may call a code of conduct. As is the case with the general standard of good faith, reasonableness, as opposed to honesty, requires sincere efforts to further the contractual relationship and achieve its goals. By falling short of the behavioural standards required under the circumstances, one can wind up in breach of his contractual obligations, regardless of whether one has acted in bad faith, that is, dishonesty. The criterion to test the reasonableness of questioned activity is whether the conduct conforms to reasonable business judgement. A party's motivations for his conduct do not affect the determination of the standard of good faith performance."

With regard to real consensus and the lack thereof where standard form contracts are involved, Sachs J quoted, as authority, the *Hong Kong Law Commission,* [353] which summed up the position as follows:

"As Lord Atkin put it, `finality is a good thing but justice is better'. Certainty is a pragmatic rather than a principled consideration craved by lawyers so that they can advise their clients upon their rights. We do not belittle certainty, but we do not feel it is paramount. Certainty in this context is sometimes sought to be justified by the principle of sanctity of contract that a party must abide by his agreement. This assumes of course that a piece of paper signed by that party is truly his agreement. But in reality that party has not genuinely consented to the terms on that paper, which are in standard form and have not been read (or been expected to be read) by him, let alone been the subject of negotiation. The principle of sanctity of contract carries conviction only if there is a contract in the sense of a full-hearted agreement which is the result of free and equal bargaining. Unfortunately, in modern life, there is rarely the time or the opportunity for such bargaining; it has been replaced by the convenient form and the standard clause."

With regard to proposed statutory reform, in South Africa, on consumer protection, Sachs J looked at the *South African Law Commission's* recommendations [354] for the need to legislate against contractual unfairness, unreasonableness, unconscionable-ness or oppressiveness, as well as the resistance to the recommendations, *inter alia*, that they would

lead to uncertainty in contract law, he remarked that strong evidence had emerged that

352 *Nassar Sanctity of Contracts Revisited: A Study in the Theory and Practice of Long-term International Commercial Transactions* (Marthinus Nijhof, Dordrecht 1995) at 167-8 quoted in the SALRC Report (see above).

353 *Law Reform Commission Hong Kong* "Report on Sale of Goods and Supply of Service" at 37-8 quoted in the SALRC Report above at Para 2.2.2.8.

354 See the *South African Law Reform Commission Report* above at Para 1.27.

"public policy has moved radically away from automatic application of standard form contracts towards a more balanced approach in keeping with contemporary constitutional values."

The court also held that: *"What public policy seeks to achieve is the reconciliation of the interests of both parties to the contract on the basis of standards that acknowledge the public interest without unduly undermining the scope for individual volition."*

Quoting, with approval, the dictum of Cameron JA in the *Napier case,* in which the court underlined the principle that:

"The courts will invalidate agreements offensive to public policy, and will refuse to enforce agreements that seek to achieve objects offensive to public policy. Crucially, in this calculus `public policy' now derives from the founding constitutional values of human dignity, the achievement of equality and the advancement of human rights and freedoms, non-racialism and non-sexism." [355]

The above seem to place a duty on the courts to develop the common law.

The minority judgement, per Sachs J, dissenting from the majority judgement and disagreeing with the result of the Supreme Court of Appeal, concluded that public policy, now animated by Section 34 of the Constitution, gave a litigant the right of access to court. This approach, together with consumer protection, point to the direction the courts should take in future. In instances as is the position in this case, where clause 5.2.5, lies in obscurity in the small print, and not brought to the attention of Barkhuizen, offends against public policy in the new constitutional dispensation. It can therefore, not be enforced.

12.2.2.1.3 Legal Opinion

Both the South African legal writers and the courts have, over decades, recognized the role public policy has played in the South African Law of Contract, especially where exemption clauses and impropriator clauses are used. [356]

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355 *Napier v Barkhuizen* 2006 (4) SA 1 (SCA); 2006 (9) BCLR 1011 (SCA) Para 7.

356 For legal writings see Van der Merwe et al *Contract - General Principles* (2003) 215; Christie *The Law of Contract* (1996) 204; Wille and Millen *Mercantile Law in South Africa* (1984) 34; Turpin "Contract and Imposed Terms" (1956) *SALJ* 144 at 145; Kahn *Contract and Mercantile Law* (1988) 31; Hahlo "Unfair Contract terms in Civil Law Systems" Vol. 98 *SA Law Journal* (1981) 70. For case law see *Eastwood v Shepstone* 1902 TS 294; *Morrison v Anglo Deep Gold Mines Ltd* 1905 (AD) 775; *SA Railways and Harbour v Conradie* 1921 (AD) 137; *Wells v SA Alumenite Co* 1927 (AD) 69; *Government of the Republic of South Africa v Fibre Spinners and Weavers (Pty) Ltd* 1978 (2) SA 794 (A); *Goodman Brothers (Pty) Ltd v Rennies Group Ltd* 1997 (4) SA 91 (WLD); *Ismael v Ismael* 1983 (1) SA 1006 (A); *Sasfin (Pty) Ltd v Beukes* 1989 (1) SA 1 (A); *Basson v Chilwan and Others* 1993 (3) SA 742 (A); *Standerd Bank of SA Ltd v Wilkinson* 1993 (3) SA 822 (c) 837; *Absa Bank t/a Bankfin v Louw en Andere*

Public policy, on the one hand, when measured against the background of the doctrine of freedom of contract, promotes the ethos that contracts freely entered into, should be enforced. In this regard, it has been stated before that, courts should be slow to interfere with the enforcement of these contracts or terms of the agreements. [357]

Despite the promotion of the fore stated ethos, it has been widely accepted that under certain circumstances, such as the presence of, *inter alia,* duress, fraud, where traps are set for contracting parties to act to their detriment, or agreements in which contracting parties deprive themselves of legal rights, or limit their future right to seek relief from the courts, the courts will not stand aside and allow contracting parties to act to their detriment. Such arrangements have been pointed out, by the South African legal writers and courts alike, as contrary to public policy and unenforceable. [358]
It is especially with regard to agreements and imposed terms, inclusive of exemption clauses, that legal writers have shown great concern, so much so, that some legal writers have sought to bring about a new ethos.

Some of the primary reasons advanced for the change in direction from a pure freedom to contract ethos, to an ethos of intervention, where the terms are unfair and sometimes unconscionable, are firstly, to protect individuals against their own weak discretions they may exercise, especially, where an unequal bargaining power exists between the parties [359]

1997 (3) SA 1085 (C); *Afrox Health Care Bpk v Strydom* 2002 (6) SA 21 (SCA); *De Beer v Keyser and Others* 2002 (1) SA 827 (SCA); *Brisley v Drotsky* 2002 (4) SA 1 (SCA); *The Johannesburg Country Club v Stott and Another* 2004 (5) SA 551 (SCA); *Napier v Barkhuizen* 2006 (4) SA 1 (SCA); 2006 (9) BCLR 1011 (SCA); *Barkhuizen v Napier* 2007 (5) SA 323 (CC).

357 Kahn *Contract and Mercantile Law* (1988) 31; Hahlo "Unfair Contract Terms in Civil Law Systems" Vol. 98 *SA Law Journal* (1981) 70; Von Hippel "The Control of Exemption Clauses. A Comparative Study" (1967) *International and Comparative Law Quarterly* (1967) 591 at 592-593; Aronstam *Consumer Protection Freedom of Contract and The Law* (1979) 1-4; Hawthorne "The Principle of Equality in the Law of Contract" 1996 (58) *THRHR* 163; Christie *The Law of Contract* (2001) 400; For case law see *Eastwood v Shepstone* 1902 TS 294; *Morrison v Anglo Deep Gold Mines Ltd* 1905 (AD) 775; *SA Railways and Harbour v Conradie* 1921 (AD) 137; *Sasfin (Pty) Ltd v Beukes* 1989 (1) SA 1 (A); *Standard Bank v Wilkinson* 1993 (3) SA 822 (C); *Afrox Health Care Bpk v Strydom* 2002 (6) SA 21 (SCA); *De Beer v Keyser and Others* 2002) 1) SA 827 (SCA); *Brisley v Drotsky* 2002 (4) SA 1 (SCA); *Napier v Barkhuizen* 2006 (4) SA 1 (SCA); 2006 (9) BCLR 1011 (SCA); *Barkhuizen v Napier* 2007 (5) SA 323 (CC).

358 Christie *The Law of Contract* (1996) 204; Turpin "Contracts and Imposed Terms" (1956) *SALJ* (44) 145; Wille and Millen *Mercantile Law in South Africa* (1984) 34; Rautenbach and Van der Vywer "Volenti non fit iniuria en Grondwetlike Waarborge" *TSAR* (1993) 637. 639. For case law see *Morrison v Anglo Deep Gold Mines Ltd* 1905 (AD) 775; *SA Railways and Harbour v Conradie* 1921 (AD) 137; *Goodman Brothers (Pty) Ltd v Rennies Group Ltd* 1997 (4) SA 91 (WLD); *Basson v Chilwan and Others* 1993 (3) SA 742 (A); *Standard Bank of SA Ltd v Wilkinson* 1993 (3) SA 822 (C) 837; *Absa Bank t/a Bankfin v Louw en Andere* 1997 (3) SA 1085 (C); *Afrox Health Care Bpk v Strydom* 2002 (6) SA 21 (SCA) 33.

359 Christie *The Law of Contract* (1996) 204; Rautenbach and Van der Vywer "Volenti non fit iniuria en Grondwetlike

and secondly, the general sense of justice of the community, the *boni mores*, manifested in public opinion. [360]

Although the legal writers and the courts have recognized, as stated earlier, a new ethos of intervention where contract terms are unfair, unreasonable or unconscionable, by invoking public policy, the courts have been slow in developing new heads of public policy. The South African courts have closely followed the British Courts in declaring that the power to declare contracts, or terms of contracts, contrary to public policy, should be done sparingly and only in the clearest of cases or, put differently, be applied with great care and circumspection. [361]

Although there are no *numerus clausus* as to which clauses are deemed to be against public policy, our legal writers, and the courts, have identified that a clause exempting a contracting party from liability for fraud, or a clause which excludes liability for an intentional breach of contract, are deemed to be against public policy. [362]
The position with regard to whether an exclusionary clause exempting a contracting party from liability for negligence, or a clause which excludes liability for gross negligence are deemed to be against public policy, appears to be fairly settled. From what appears *supra* a clause excluding liability for negligence is, also, not against public policy. [363]

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waarborge" *TSAR* (1993) 637; Turpin "Contracts and Imposed Terms" 1956 *SALJ* 144, 145. For case law see *Absa Bank t/a Bankfin v Louw en Andere* 1997 (3) SA 1085 (C); See the minority judgement of Sachs J in *Barkhuizen v Napier* 2007 (5) SA 323 (CC).

360 Christie *The Law of Contract* (2001) 19-20; Van der Merwe et al *Contract - General Principles* (2003) 176-178. For case law see *Hurwitz v Taylor* 1926 (TPD) 86, 91; *Ismail v Ismail* 1983 (1) SA 1006 (A); *Sasfin (Pty) Ltd v Beukes* 1989 (1) SA 1(A); *Basson v Chilwan and Others* 1993 (3) SA 742 (A).

361 *Morrison v Anglo Deep Gold Mines Ltd* 1905 (AD) 775; *Eastwood v Shepstone* 1902 (TS) 294; *Sasfin (Pty) Ltd v Beukes* 1989 (1) SA 1 (A); *Standard Bank of SA Ltd v Wilkinson* 1993 (3) SA 822 (C) 837; *Afrox Health Care Bpk v Strydom* 2002 (6) SA 21 SCA 33; *De Beer v Keyser and Others* 2002 (1) SA 827 (SCA); *Brisley v Drotsky* 2002 (4) SA 1 (SCA); *Napier v Barkhuizen* 2006 (4) SA 1 (SCA); 2006 (9) BCLR 1011 (SCA); *Barkhuizen v Napier* 2007 (5) SA 323 (CC).

362 For clauses exempting a contracting party from liability for fraud see Van der Merwe et al *Contract - General Principles* (2003) 215; Kerr *The Principles of the Law of Contract* (1998) 404-405; Christie *The Law of Contract* (1996) 205-206 relying on the dictum of *Wells v SA Alumenite Co* 1927 AD 69 72; Lubbe and Murray *Farlam and Hathaway Contract: Cases, Materials and Commentary* (1988) 240 425; O'Brien "The Legality of Contractual Terms exempting a contract from liability arising from his own servant's gross negligence or dolus *TSAR* (2001) 200 1-3 599. For clauses excluding liability for intentional breach of contract see Christie *The Law of Contract* (1996) 205-206; Van der Merwe et al *Contract - General Principles* (2003) 215; For case law see *Wells v SA Alumenite Co* 1927 (AD) 69; *Government of the Republic of South Africa v Fibre Spinners and Weavers (Pty) Ltd* 1978 (2) SA 794 (A); *Goodman Brothers (Pty) Ltd v Rennies Group Ltd* 1997 (4) SA 91 (WLD).

363 For the position of our courts, see the cases of *Government of the Republic of South Africa v Fibre Spinners and Weavers (Pty) Ltd* 1978 (2) SA 794 (A). The principle adopted in this case was reconfirmed in *First National Bank*

But, despite recognition given to the validity of exemption clauses exonerating a contracting party from liability for loss or damage caused by gross negligence, the South African courts have not upheld this principle without placing some limit to the rule. The courts work with a restrictive interpretation. [364]

Whether an exemption clause, contained in a contract with a private hospital, excluding liability for negligence, causing damages, by the nursing staff of the hospital was valid and not contrary to public policy, has formed the subject of much debate since the controversial decision of *Afrox Healthcare Bpk v Strydom* 2002 (6) SA 21 (SCA). In this case the court held that such an agreement was valid and not contrary to public policy. Also, that there was no legal duty upon admission of the patient for the hospital staff to bring to the patient's attention the exemption clause. The court, however, left open the question of whether negligence included gross negligence, as the respondent had not relied on gross negligence on the part of the appellant's nursing staff in his pleadings. In a succeeding judgement, the Supreme Court of Appeals, in the case of *Johannesburg Country Club v Stott and Another* [365] intimated that it would be radical to exclude liability, for damages, for negligence causing the death of another. To this end, the court also suggested that the law governing exemption clauses is in need of adaptation and hinted at legislative intervention, albeit in an obiter comment. This aspect forms the core focal point of the research of this thesis and will be discussed comprehensively in Chapter 14.

12.2.2.2 England

12.2.2.2.1 Legal Writings

Generally exemption clauses are regulated by the *Unfair Contractual Terms Act* 1977. A discussion under this head is not indicated. However, for completeness, I shall briefly deal with the position of public policy in the English Law of Contract.

It is generally accepted, in the English Law of Contract, that public policy imposes certain

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of South Africa Ltd v Rosenblum and Rosenblum Unreported case No 392/99 delivered on 1 June 2001 (SCA). This is also the position in *SAR&H v Lyle Shipping Co Ltd* 1958 (3) SA 416 (A); *Booysen v Sun International (Bophuthatswana) Ltd* 1998 SA (W) 1 (Unreported).

364 For the position of our courts see *SAR&H v Lyle Shipping Co Ltd* 1958 (3) SA 416 (A); *Essa Divaris* 1947 (1) SA 753 (A); *Government of the Republic of South Africa v Fibre Spinners and Weavers* 1978 (2) SA 794 (A); *Durban's Water Wonderland (Pty) Ltd v Botha and Another* 1999 (1) SA 982 (SCA); *First National Bank of SA Ltd v Rosenblum and Another* 2001 (4) SA 189 (SCA) quoted with approval in *Johannesburg Country Club v Stott and Another* 2004 (5) SA 511 (SCA); *Booysen v Sun International (Bophuthatswana) Ltd* 1998 SA (W) 1 Unreported.

365 2004 (5) SA 511 (SCA).

limitations upon the freedom of persons to contract. [366] Public policy impacts widely on the illegality of contracts. This may arise by statute or by virtue of the principle of common law. It is especially public policy influences at common law which need to be discussed. English Law, through the courts especially, use the single word `illegality' to cover the multitude of instances where the law, for some reason of public policy, under statutory prohibition or at common law, interfere with one or both of the parties' rights under the contract, to which he or she would otherwise be entitled to. [367] As the nature and effect of contracts tainted by illegality under statutory prohibition was previously discussed, the nature and effect of contracts contrary to public policy will be looked at.

It is generally accepted, by the English legal writers, that the categories of public policy which may invalidate a contract are not cast in stone. [368] It is also generally recognized that new heads of public policy should not, at every instance, be developed but, a rather cautious approach needs to be adopted. [369] The current state of the law, in this regard, in England is summed up by the author *Beale* [370] as follows: *"there is some doubt as to whether the courts can create new heads of public policy rather than merely apply existing doctrines to new situations. This is an area where the precedents hunt in packs of two. Broadly speaking, there are two conflicting positions that have been referred to as the `narrow view' and the `broad view'. According to the former, the courts cannot create new heads of public policy, whereas the latter countenances judicial law-making in this area."* There is agreement that, on the one hand, the courts may extend existing public policy to new situations; however, on the other hand, there is also reluctance on the part of the courts to create completely new heads of public policy. This is especially so as a result of the existence of governmental bodies, charged with the specific task of law reform and a more activist legislature in England. [371] Part of the reasoning in curbing the extension of the heads of public policy is said to be that it is not the function of the courts to create new

366 Beatson *Anson's Law of Contract* (2002) 348; McKendrick *Contract Law Text, Cases and Materials* (2005) 837; Koffman and MacDonald *The Law of Contract* (2004) 432.

367 Beatson *Anson's Law of Contract* (2002) 348; McKendrick *Contract Law Text, Cases and Materials* (2005) 837-838.

368 McKendrick *Contract Law Text, Cases and Materials* (2005) 843.

369 McKendrick *Contract Law Text, Cases and Materials* (2005) 843.

370 *Chitty on Contracts* (2004) Para 16-004 quoted in McKendrick *Contract Law Text, Cases and Materials* (2005) 843.

371 Beale, *Chitty on Contracts* (2004) quoted in McKendrick *Contract, Law Text, Cases and Materials* (2005) 843.

law, but rather to interpret and enforce existing principles, one of which is to uphold the public interest of freedom of contract and to interfere, as little as possible, on the ground of public policy. [372]

The school of thought, espousing this thinking, believe parliament is better equipped to formulate new heads of public policy. [373]

Another school of thought has, however, since the second half of the twentieth century, begun to advocate the ability and competency of the courts to develop new heads of public policy. Some subject matters, for example, restraint of trade, are more susceptible to having the canons of public policy applied to the situation, in developing the heads of public policy. [374]

But there are certain contracts, which are clearly identified, which the courts will not enforce because they are contrary to public policy. They include, *inter alia*: agreements to commit a crime, agreements to commit a civil wrong or fraud, contracts of indemnity, agreements which injure the State in relations with other States, agreements which tend to injure good government or public service, agreements which tend to prevent the course of justice or tend to abuse the legal process, agreements contrary to good morals, agreements affecting the principles of marriage. The effect of these types of contracts is this, where there are statutory prohibitions and a certain type of contract is expressly prohibited, these types of contracts are void and unenforceable. [375]

There are also contracts at common law which are not expressly or impliedly prohibited by statute, which, depending on the impropriety, would be void and unenforceable. In others, public policy does not require that such a person should be completely denied a remedy. In those instances, the courts would be prepared to sever the illegal part of the contract from that which is legal, and enforce the legal part alone. [376]

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372 Beatson *Anson's Law of Contract* (2002) 353.

373 McKendrick *Contract Law Text, Cases and Materials* (2005) 843.

374 Beatson *Anson's Law of Contract* (2002) 353.

375 Beatson *Anson's Law of Contract* (2002) 353-365; Koffman and MacDonald *The Law of Contract* (2004) 249-352.

376 Beatson *Anson's Law of Contract* (2002) 355; McKendrick *Contract Law Text, Cases and Materials* (2005) 862ff; Koffman and MacDonald *The Law of Contract* (2004) 432-453.

12.2.2.2.2 Case Law

Although English Law, as was discussed earlier, is fairly settled on the validity of exclusionary clauses, especially, with the introduction of the *Unfair Contractual Terms Act* 1977, public policy has and continues to act as a factor influencing the validity of exclusionary clauses. But, despite its influence, more particularly, due to the changing values of society, the English courts have been slow to create new heads of public policy. Although discussed earlier, it needs to be repeated that as early as 1824, in the case of *Richardson v Mellish,* [377] Burroughs J criticized the application of the doctrine of public policy, by describing the maxim as:

"A very unruly horse, and when once you get astride it you never know where it will carry you. It may lead you from the sound law." [378]

The courts also expressed the view that it was not the function of the courts to create new law, but to interpret and elucidate existing principles. Again, as far back as 1891, in the case of *Re Mirans*, [379] Cave J, handing down the judgement, suggested:

"Judges should be trusted (more) as interpreters of the law than as expounders of what is called public policy." [380]

The courts have not only emphasized the rationale for the restricting application of the maxim but have also left it to parliament to formulate new heads of public policy. In the case of *Janson v Driefontein Consolidated Mines Ltd*, [381] Lord Halsbury denied that any court has the power to invent a new head of policy. His reasoning is encapsulated in the following passage when he stated:

"A rule of law, once established, ought to remain the same till it is annulled by the Legislature, which alone has the power to decide on the policy or expedience of repealing laws, or ensuring them to remain in force."

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377 (1824) 2 Bing 229.

378 *Richardson v Mellish* (1824) Bing 229 at 252. This dictum has been repeated and followed over centuries. The rationale for the rule was put as follows by the presiding Judge in Pearson J in *Public Health Trust v Brown* (1980) So 2d 1048 at 1086 namely: *"I am confident that the majority recognizes that any decision based upon notions of public policy is one about which reasonable persons may disagree."* This was repeated more recently in *McFarlane v Tayside Health Board* (2000) 2 A.C. 59 at 100-101.

379 (1891) 1 QB 594.

380 *In Re Mirams* (1891) 1 Q.B. 594 at 595. See also *Mogul Steamship Co v McGregor Gow and Co.* (1892) A.C. 25 at 45.

381 (1902) A.C. 484.

To allow otherwise Lord Halbury stated would result in for example *" ..... a judge would be in full liberty to depart tomorrow from the precedent he has himself established today, or to apply the same decisions to different, or different decisions to the same circumstances, as his notions of expedience might dictate."* [382]

Although the fore stated may have been the position in early times in the English Law of Contract, it is so, that by the second half of the twentieth century, the courts adopted a very positive function whereby the courts would use public policy to invalidate unfair or unconscionable contracts. Greater faith was expressed in the ability of Judges to handle matters of public interests, where public policy was often used. Lord Denning M.R. confirmed this in the judgement of *Enderby Town F.C. Ltd v The Football Association Ltd* [383] when he stated:

"All these are cases where the judges have decided, avowedly or not, according to what is best for the public good. I know that over 300 years ago Hobart CJ said that `public policy is an unruly horse'. It has often been repeated since. So unruly is the horse, it is said, that no judge should ever try to mount it, let it run away with him. I disagree. With a good man in the saddle, the unruly horse can be kept in control. It can jump over obstacles. It can leap the fences put up by factious and come down on the side of justice, as indeed was done in Nagle v Feilden. It can hold a rule to be invalid although it is contained in a contract." [384]

The English courts have also expressed their view that some flexibility is clearly desirable in matters of public policy, which cannot remain immutable. [385] For that reason, there is sufficient authority in English case law that the law needs to adapt, where changes occur in economical, social and moral conditions in society. It was put, as follows, by Lord Haldane in the case of *Rodriquez v Speyer Bros,* [386] namely:

"What the law recognises as contrary to public policy turns out to vary greatly from time to time." [387]

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382 *Janson v Driefontein Consolidated Mines Ltd* (1902) A.C. 484 at 491. Cf.; *Texaco Ltd v Mulberry Filling Station Ltd* (1972) 1 W.L.R. 814 at 827; *Geismar v Sun Alliance and London Insurance* (1978) Q.B.383 at 389; *Nickerson v Barraclough* (1981) Ch. 426; *Deutsch Schachybau- ad Tiefbokgesellesschaft mbH v Ras AL Khaima National Oil Co* (1980) 1 A.C. 295 at 316.

383 (1971) CA 215.

384 *Enderby Town F.C. Ltd v The Football Association Ltd* (1971) C.A. 215.

385 *Nagle v Feilden* (1966) 2 Q.B. 637 at 650.

386 (1919) A.C. 59.

387 *Rodriquez v Speyer Bros* (1919) A.C. 59.

But, certain aspects of public policy are more susceptible to change than others, for example, agreements in restraint of trade [388] have, on a number of occasions, undergone modification. Other clauses in contracts which clearly discriminate on the grounds of sex have also been regarded as contrary to public policy, by the English courts. [389] In the case of *Thai Trading Co v Taylor* [390] the Court of Appeal was however prepared to hold that:

"In the light of modern developments, it could no longer be regarded as contrary to public policy for a solicitor to agree to waive all or part of his fee if he lost, provided that, if he won, he did not attempt to recover an amount in excess of his ordinary disbursements and profit costs, British Waterways Board v Norman (1994) 26 H.L.R. 232 and Aratra Potato Co Ltd v Taylor Joynson Garrett (1995) 4 ALL E.R. 695 disapproved."

The court goes on to state:
"*It was in the public interest that solicitors act for deserving clients without means and it was wrong to suggest that a solicitor's professional integrity would be compromised if he was permitted to enter into an agreement for a contingency fee. That thinking was reflected in the 1990 Act, but further legislation would be required in order to permit a solicitor to accept a contingency fee upon winning which was greater than his ordinary costs and disbursements."* [391]

But, despite the court's attempts to keep their powers to formulate new heads of public policy, the legislature, as suggested in the *Janson v Driefontein Consolidated Mines Ltd* [392] matter very much stepped in enacting the *Unfair Contract Terms Act* 1977 and the *Unfair Terms in Consumer Contracts Regulations* 1994 to influence the courts, where they had previously failed, to curb the unfair consequences which exclusionary clauses had brought with them.

What prompted the British, as was previously discussed, to appoint the Law Commissions to investigate the unfair consequences of exclusionary clauses, is said to be the inconsistent application in the rules of construction, by the courts. The Commissions, consequently, recommended that public policy dictated some stricter form of control for exclusionary clauses.

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388 *Nordenfelt v Maxim Nordenfelt* (1894) A.C. 535, 565; *Mason v Provident Clothing and Supply Co Ltd* (1913) A.C. 724; *Esso Petroleum Co Ltd v Harper's Garage (Stourport) Ltd* (1968) A.C. 269 HC; *Schoeder Music Publishing Co Ltd v MaCaulay* (1974) 1 W.L.R. 1308.

389 See *Nagle v Feilden* (1966) 2 QB 633. In this case the court held that the practice of the Jockey Club in refusing trainer's licenses to women was against public policy.

390 (1998) Q.B. 781 (1998) 3 ALL E.R. 65.

391 *Thai Trading v Taylor* (1998) Q.B. 781 (1998) 3 ALL E.R. 65.

392 (1902) A.C. 484, 491.

12.2.2.2.3 Legal Opinion

It is generally accepted, in the English law of contract, that public policy imposes certain limitations upon the freedom of persons to contract. [393] Public policy impacts widely on the illegality of contracts, both in the statutory law, as well as common law spheres. [394]

It is generally accepted that the categories of public policy which may invalidate a contract, or contractual provisions, are not cast in stone. [395] But, at that same time, the jurisprudence in England leans heavily towards not unduly extending the existing heads of public policy. In fact, both the legal writers and the English courts have, and continue, to advocate a cautious approach when considering whether to extend the heads of public policy. [396]

Another raging debate which hit the shores of England was to what extent should the courts involve themselves in developing new heads of public policy? Two schools of thought have emerged. One school of thought has advocated that the courts should not create new heads of public policy, but rather, interpret and enforce existing principles, one of which is to uphold the public interest of freedom of contract and to interfere as little as possible on the grounds of public policy. [397]

Both the legal writers and the courts in England have suggested that parliament is best suited to be charged with the task of bringing about law reform, more particularly, to create new heads of public policy. [398]

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393 Beatson *Anson's Law of Contract* (2002) 348; McKendrick *Contract Law Test, Cases and Materials* (2005) 837; Koffman and MacDonald *The Law of Contract* (2004) 432.

394 Beatson *Anson's Law of Contract* (2002) 348; McKendrick *Contract Law Text, Cases and Materials* (2005) 897-838.

395 McKendrick *Contract Law Test, Cases and Materials* (2004) 843.

396 Beale *Chitty on Contracts* (2004) Para 16-004 quoted in McKendrick *Contract Law Text, Cases and Materials* (2005) 843.

397 For the reasoning of the legal writers see Beale *Chitty on Contracts* (2004) quoted as authority in McKendrick *Contract Law Test, Cases and Materials* (2005) 843. The English courts as far back as 1891 in the case of *Re Mirans* (1891) 1 QB 594 per Cave J suggested: *"Judges should be trusted (more) as interpreters of the law than as expounders of what is called public policy."*

398 Beatson *Anson's Law of Contract* (2002) 353; McKendrick *Contract Law Text, Cases and Materials* (2005) 843. Lord Halsbury in the case of *Janson v Driefontein Consolidated Mines Ltd* (1902) A.C. 484 opines that the legislature is in the best position to decide on public policy. To allow the courts to usurp this function would result in a risk been run that Judges may willy-nilly depart from a precedent set by them because of a chance in circumstances. This may result in uncertainty.

The other school of thought advocated, relies upon the ability and competency of the courts to develop new heads of public policy. An area of contract law in which this is best illustrated is that of the modification of the restraint of trade clause in contract. [399] The rationale for bestowing the competency on the courts has been motivated on the basis that the existing heads of public policy should not remain immutable and the law ought, therefore, to adapt where changes occur in economical, social and moral conditions in society. [400]

But, notwithstanding the attempts by the courts to develop new heads of public policy, the legislature trumped them when promulgating the *Unfair Contract Terms Act* 1977 and the *Unfair Terms in Consumer Contracts Regulations* 1994. Where the courts had previously shown inconsistency in curbing the ills that exclusionary clauses brought with them, legislation, has now been put in place to provide some stricter form of control over exclusionary clauses.

12.2.2.3 UNITED STATES OF AMERICA

12.2.2.3.1 Legal Writings

The general position with regard to the recognition and the influence of public policy was more fully described supra. What needs to be emphasized, however, is that the enforcement and maintenance of contracts in the absence where it can clearly be shown that contracts are clearly contrary to the public interests, or that it contravenes some established interest of society, or is against good morals, takes preference over the invalidation of contracts. [401]

The aforementioned general principle is extended to the position of contracts containing

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399 Beatson *Anson's Law of Contract* (2002) 353. In so far as the English courts' attitude is concerned, it is especially, Lord Denning MR in the case of *Enderby Town Football Club Ltd v The Football Association Ltd* (1971) CA 215 who lead the charge in claiming Judges are best suited in dealing with public policy issues and to develop public policy. Referring to the `unruly horse' claimed by Borroughs J in *Richardson v Mellish* (1824) 2 Bing 229 Lord Denning believes `with a good man in the saddle, the unruly horse can be kept in control'. That Lord Denning claims forms part of the competency of the English judges.

400 Lord Haldane in the case of *Rodriquez v Speyers Bros* (1919) A.C. 59 expresses the opinion that public policy is very much influenced by changes and circumstances which `vary from time to time'. An example hereof is clearly illustrated by the following cases which concerned themselves with number of modifications brought about in the restraint of trade clauses. See *Nodenfelt v Maxim Nordenfelt* (1894) A.C. 535, 565; *Mason v Provident Clothing and Supply Co Ltd* (1913) A.C. 724; *Esso Petroleum Co Ltd v Harper's Garage (Stourport) Ltd* (1968) A.C. 269 HC; *Schroeder Music Publishing Co Ltd v MaCaulay* (1974) 1 W.L.R. 1308. Another area in which the courts developed the heads of public policy is that of the contingency fee arrangement between the solicitor and client. See *Thai Trading Co v Taylor* (1998) QB 781 (1998) ALL E.R. 65.

401 Calamari and Perillo (1977) 169; Jaegar (1953) Para 1630.

exclusionary clauses or exculpatory clauses and the influence public policy brings to bear on invalidity and unenforcement of these types of clauses and sometimes the contract as a whole.

An attempt therefore to exempt a contracting party from liability for future conduct save for a future intentional tort or for a future wilful act or one of gross negligence is valid and enforceable. [402]

But there are instances which the legal writers recognise when public policy plays a role in influencing the validity of exclusionary clauses whether or not such a contract is invalid as violative of public policy depends on a complexity of considerations which the legal writers recognise.

One of the first considerations identified by them is that contracts of this nature are not favoured and should be strictly construed against the party relying on these types of exculpatory or exclusionary clauses. Therefore unless these types of clauses are expressed in clear, explicit or unequivocal terms, they will not be construed in favour of the contracting party relying on them. [403]

But, notwithstanding the general principles, the legal writers do recognise a second consideration, namely, public policy which not permits parties to a contract to establish by agreement amongst themselves, consequences volatile of a duty of care, or where an exemption provision or exculpatory clause is prohibited by statute or governmental regulation. [404]

The rationale for recognizing the prohibition against exculpatory clauses in the foretasted circumstances is founded upon the idea namely to discourage negligence and by making wrongdoers pay for the damages which they cause. In addition, it serves to protect those in need of essential services from being exploited by those who have the power to drive hard bargains. [405]

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402 Jaegar (1953) Para 1750 A; Calamari and Perillo (1977) 172, 268-269.

403 Calamari and Perillo (1977) 268-269; Jaegar (1953) Para 1750A.

404 Calamari and Perillo (1977) 269; Jaegar (1953) Para 1750A.

405 Calamari and Perillo (1977) 270; Jaegar (1953) Para 1751.

A third consideration concerns the determination of the circumstances in which public policy will cause exemption or exculpatory clauses to be invalid and unenforceable. Factors identified by the legal writers influencing the validity of contracts exempting from liability for negligence due to public policy include the nature and subject matter of the agreement, the relations of the parties and the presence or absence of equality of bargaining power. [406]

The nature and subject matter of the agreement in turn, in the general sense, is not void due to public policy save for instances where the agreement is prohibited by statute or where the public interest is involved. In those instances, it is, therefore, permissible for a party to contract to absolve him or herself from liability for future negligence. [407]

Public interest, on the other hand, involves the performance of a legal duty or a duty of public service or where a public interests, is involved. In this regard, any attempt to exempt a contracting party from liability for negligence in violation of a legal duty, or a duty of public service, or where the public interest is involved, will be void and unenforceable against public policy. [408]

The relations of the parties are a determinant in invalidating a contract or exculpatory provisions. Some relationships are such in nature that once entered into, they involve a status requiring of one of the contracting parties greater responsibility than that required of the ordinary person. Examples thereof can be found in the relationship of landlord and tenant, hospital/doctor and patient, common carriers and public users, the railways and public users, air transportation and public users, warehousemen and public users, garage keepers and public users, innkeepers and public patrons. These types of relationships are controlled or regulated by their common law duty of due care and/or statutory regulations, or the relationship involves public service with the accompanying duties. Any attempt to exempt or exculpate a contracting party from any damages that flow from the consequences of their actions in exercising their duties, or a bargain exempting the public utility from its duties, is invalid and unenforceable. [409]

The relative bargaining powers and the presence or absence of the equality of bargaining

406 Calamari and Perillo (1977) 270; Jaegar (1953) Para 1791.

407 Calamari and Perillo (1977) 270.

408 Calamari and Perillo (1977) 271-272; Jaegar (1953) Para 1751.

409 Calamari and Perillo (1977) 271-272; Jaegar (1953) Para 1751.

power may also be considered in testing the validity of a contract protecting one against liability for his, or her, own negligence. [410]

Therefore, a contractual provision undertaking to exculpate a party from his or her own negligence will not be sustained where he or she enjoys a bargaining power superior to that of the other party to the contract, so that the effect of the contract is to put the other party at the mercy of such party's negligence. [411] Contracts, or exculpatory clauses, most greatly affected by the presence of the inequality of bargaining power of the one contracting party, include the agreements entered into between the landlord and tenant, hospital and patient, common carriers and other public utilities and public users. [412]

The legal writers also acknowledge that unconscionable agreements, as recognized by the Uniform Commercial Code and designed to establish a broad business ethic, are invalid on public policy claims where they impair the integrity of the bargaining process. [413]

12.2.2.3.2 Case Law

It is generally accepted in the different jurisdictions in America and ranging over a significant period of time, that exculpatory clauses or exclusionary clauses, as they are also more commonly known, are, *per se,* not against public policy. In other words, parties are permitted to agree, in advance, that the contracting party shall not be liable for the consequences of conduct which would otherwise be negligent. [414]

The rationale for this general rule is founded on the principle that public policy is said to

410 Calamari and Perillo (1977) 271; Jaegar (1953) Para 1751.

411 Calamari and Perillo (1977) 271; Jaegar (1953) Para 1751.

412 Jaegar (1953) Para 1751; Calamari and Perillo (1977) 272-275.

413 Jaegar (1953) Para 1763A.

414 *Marshall v Blue Springs Corp* 641 N.E. 2d 92, 95 (Ind. Ct. App 1994); *American Health Fitness Centre of Fort Wayne Inc* 694 N.E. 2d 957 (1998); *Allan v Snow Summit Inc* 51 Cal.App. 4th 1358, 59 Cal Rptr. 2d 813 (1996); *Chicago Great Western Railway Company v Farmers Produce Company* 164 F.Supp. 532 (1958); *Smith d/b/a Smith Construction Company v Sea Board Coast Line Railroad Company* 639 F.2d 1235 (1981); *Ciofalo v Vic Tanny Gyms Inc.* 10 N.Y. 2d 297-98, 177 N.E. 2d 927, 220 N.Y.S. 2d (1961); *Messersmith v American Fidelity Co* 232 N.Y. 161, 133 N.E. 432 (1921); *Kuzmiak et al v Brookchester Inc* 33 N.J. Super 595, 111 A.2d 425 (1955); *Chasen v Trailmobile Inc* 215 Tenn 87, 384 S.W. 2d 1 (1964); *Chicago and North Western Railway Company v Rissler* 184 F.Supp. 98 (1960); *Occidental Savings and Loan Association v Venco Partnership* 206 NEB 469, 293 N.W. 2d 843 (1980); *Equitable Loan and Security Co et al* 44 S.E. 320 (1903); *Crawford v Buckner* 839 S.W. 2d 754 (1992); *Schlobohm v Spa Petite Inc* 326 N.W. 2d 920 (1982); *Leidy v Deseret Enterprises Inc d/b/a Body Shop Health et al* 252 Pa.Super 162, 381 A.2d 164 (1977); *Russell v Martin* 88 So. 2d 315 (1956); *Banfield v Louis Cat Sports Inc* 589 So. 2d 441 (1991); *Tucker and Sons Inc v GTE Directories Sales Corporation* 253 NEB 458, 571 N.W. 2d 64 (1997).

encourage the freedom of contract in general. [415]

It is especially in private, voluntary transactions, in which one party, for consideration, agrees to shoulder a risk, which the law would otherwise have placed upon the other party, that the courts do not invoke public policy to protect the contracting parties. [416]
But the courts have also not been unreluctant at times, to declare exculpatory clauses or exception clauses invalid and unenforceable as against public policy when the situation arises. [417]

In this regard, it is well settled that the law will not sustain an exculpatory clause which protects against fraud, contravenes public policy, is prejudicial to the public welfare, is contrary to good morals, or relieves one of a duty imposed by law for the public benefit. [418]

Consequently, the circumstances in which the American courts will declare these types of clauses against public policy will be looked at briefly. This is done in light of the fact that American courts have, on occasions, remarked that public policy is a term not easily defined for it is not static and the field of application is an ever increasing one. [419] Further, courts have also expressed the view that the phrase `public policy' is a vague and variable

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415 *Printing and Numerical Registering Co v Sampson* 19 L.R. Esq. 462, 465 (1875); *Chasen v Trailmobile Inc* 215 Tenn. 87, 384 S.W. 2d 1 (1964); *Chicago and North Western Railway Company v Rissler* 184 F.Supp 98 (1960); *Occidental Savings and Loan Association v Venco Partnership* 206 NEB 469, 293 N.W. 2d 843 (1980); *Banfield v Cat Sports Inc* 589 So. 2d 441 (1991); *Tucker and Sons Inc v GTE Directories Sales Corporation* 253 NEB 458, 57, N.W. 2D 64 (1997).

416 *Allan v Snow Summit Inc* 51 Cal. App 4t 1358, 59 Cal. Rptr 2d 813 (1996); *McCatee v Newhall Land and Farming Co* 169 Cal. App. 3d 1031, 1034 (1985) quoting from *Tunkl v Regents of the University of California* 60 Cal 2d 92 101 32 Cal Rptr 33, 383 P. 2d 441 (1963); *Weaver v American Oil Co* 257 Ind. 458, 276 N.E. 2d 144 (1971); *Globe Home Improvement Co v Perth Amboy Inc* 116 N.J.L. 168, 170, 182 A. 641 A.L.R. 1068 (1936) quoted in *Mayfair Fabrics v Henley* 48N.J. 483, 226 A.2d 602 (1967); *McCutcheon v United Homes Corp* 79 Wash. 2d 443, 486, P.2d 1093 (1971); *Levine v Shell Oil Company and Visconti* 28 N.Y. 2d 205, 269 N.E. 2d 799, 321 N.Y.S. 2d 81 (1971); *Kuzmiak et al v Brookchester Inc* 33 N.J. Super 575, 111 A. 2d 425 (1955); *Chicago and North Western Railway Company v Rissler* 184 F.Supp. 98 (1960); *Ciofalo et al v Vic Tanney Gyms Inc* 10 N.Y. 2d 294, 177 N.E. 2d 925, 220 N.Y.S. 2d 962; *Kirshenbaum v General Outdoor Adv Co* 258 N.Y. 495, 180 N.E. 247; *Banfield v Louis* 589 So 2d 441 (1991); *Crawford v Buckner* 839 S.W. 2d 754 (1992); *Leidy v Deseret Enterprises Inc d/b/a Body Shop Health Spa et al* 252 Pa.Super 162, 381 A. 2d 164; *Roos v Kimel et al* 55 Cal.App. 4t 473, 64 Cal. Rptr 2d 177 (1997).

417 *United States v United States Cartridge Co* 198 F.2d 456 (1952); *Equitable Loan and Security Co et al v Waring et al* 44 S.E. 320 (1903); *Henningsen v Bloomfield Motors Inc* 32 N.J. 358, 161 A, 2d 89.

418 *United States v United States Cartridge Co* 198 F.2d 456 (1952); *Equitable Loan and Security Co et al v Waring et al* 44 S.E. 320 (1903); *Henningsen v Bloomfield Motors Inc* 32 N.J. 358, 161 A, 2d 89.

419 *Henningsen v Bloomfield Motors Inc* 32 N.J. 358, 161 A.2d 69 (1960).

term, with no fixed rules by which the term `public policy' can be defined, leaving it loose and free of definition. [420]

For that reason the American courts have also on occasions held the courts should not lightly or without sufficient compelling reasons pronounce exclusionary clauses to be void due to their repugnancy to public policy. [421] Neither should the rules which hold a contract void against public policy is unduly extended. [422]
But, notwithstanding the restrictions placed upon declaring exclusionary clauses void due to public policy, American courts have identified many factors which have influenced the courts in declaring exclusionary clauses or exculpatory clauses void and unenforceable due to public policy.

The courts have as a general rule held that an attempted exemption from liability for future intentional tort or wilful act or gross negligence is void and against public policy. [423]

So is a bargain for exemption from liability for the consequences of a wilful breach of duty illegal and unenforceable and against public policy. [424]

Where a statute was passed for the protection of the public, any attempt to exempt a contracting party from liability in conflict with the provisions of the statute, will not be enforced by the courts as such an agreement will be held to be against public policy. [425]
Likewise, where the contracting parties stipulate for the protection against liability for

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420 *Kuzmiak v Brookchester Inc* 33 N.J. Super 575, 111 A. 2d 425 (1955); the court in *Russel v Martin* 88 So. 2d 315 (1956) coined the phrase that *"public policy is a fickle concept ..... free from fixed rules to define it ....."*.

421 *Occidental Savings and Loan Association v Venco Partnership et al* 206 NEB 469, 293, N.W. 2d 843 (1980); It was stated in *Equitable Loan and Security Co et al v Waring et al* 44 S.E. 320 (1903) that it must be executed by the courts *"only in cases free from doubt."* See also *Tucker and Sons Inc v GTE Directories Sales Corporation* 253 NEB 458; 571 N.W. 2d 64 (1997); *Banfield v Louis CAT Sports Inc* 589 So 2d 441 (1991).

422 *Occidental Savings and Loan Association v Venco Partnership et al* 206 NEB 409, 293 N.W. 2d 843 (1980).

423 *Kuzmiak v Brookchester Inc* 33 N.J. Super 575, 111 A. 2d 425 (1955); *Schlobohm v Spa Petite Inc* 32 N.W. 2d 920 (1982); *Jones v Drissel Colo* 623 P.2d 370, 376 (1981); *Winterstein v Wilcom* 16 MD.App 130, 136, 293 A. 2d 821, 824-25 (1972).

424 *Chicago and North Western Railway Company v Rissler et al* 184 F.Supp 98 (1960).

425 *Powell v American Health Fitness Centre of Fort Wayne Inc* 694 N.E. 2d 757 (1998); *Chicago Great Western Railway Company v Farmers Produce Company* 164 F.Supp. 532 (1958); *Smith d/b/a Smith Construction Company v Sea Board Coast Line Railroad Company* 639 F. 2d 1235 (1981).

negligence in the performance of a legal duty or a duty of public service or a public duty is owed, the court will not come to the rescue of the contracting party who wishes to escape liability. The courts have frequently found these types of contracts to be against public policy. [426]

It has also been stated by the courts that public policy finds expression in the constitution, the statutory law and in judicial decisions. [427]

The courts have also considered the relationship between the contracting parties in determining whether an attempt to exempt one of the contracting parties from liability for personal injuries, arising out of negligence of that party would violate public policy. In so doing the courts have looked at the services provided by the contracting party seeking exculpation. Should the services provided be regarded as essential and suitable for public regulation, alternatively, important to the public, the effect thereof may very well affect public policy. [428]

In this regard the courts have considered a wide range of relationships between contracting parties, including the participation in recreational or sporting activities. [429]

The relationship between landlord and tenant in terms of an agreement of lease; [430] the

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426 *Hunter v American Rental Inc* 189 Kan 615, 371 P2d 131 (1962); *Desert Ship Co Inc et al v Drew Farmers Supply Inc* 248 Ark 858, 454 S.W. 2d 307 (1970); *Smith d/b/a/ Smith Construction Co v Seaboard Coast Line Railway Company* 639 F.2d 1235 (1981); *Mayfair Fabrics v Henley* 48 N.J. 483, 226 A.2d 602 (1968); *Krohnert v Yacht Systems Hawaii Inc* 4 Haw App. 190, 664 P.2d 238 (1983); *Chicago and North Western Railway Company v Rissler et al* 184 F. Supp. 98 (1960); *Banfield v Louis Cat Sports Inc* 589 So. 2d 441 (1991); *Crawford v Buckner et al* 839 S.W. 2d 754 (1992).

427 *Henningsen v Bloomfield Motors Inc* 33 N.J. 358, 161 A. 2d 69 (1960); *Banfield v Louis Cat Sports Inc* 589 So. 2d 441 (1998); *Cohen Trust et al v Stern and Merit Financial Corporation* 297 ILL App. 3d 220, 696, N.E. 2d 743, 231, Ill Dec 441 (1998); *Hoyt v Hoyt* 213 Tenn. 117, 372 S.W. 2d 300 (1963).

428 *Banfield v Louis Cat Sports Inc* 589 So. 2d 441 (1991). In this regard the courts have held that the services provided herein can hardly be termed essential. See also *Schlobohm et al v Spa Petite Inc* 325 N.W. 2d 920; *Contra Leidy v Deseret Enterprises Inc d/b/a Body Shop Health Spa* 252 Pa. Super 162, 381 A. 2d 164 (1977). It is however in the hospital/doctor-patient contracts containing exclusionary clauses that courts have concentrated prominently on the services rendered and especially whether the services are essential to the public or in conformity of a regulation concerning health and welfare of the public. See in this regard the cases of *Belshaw v Feinstein and Levin* 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* 469 F. Supp 914 (1979); *Emory University v Porubiansky* 24 Ga. 391, 282 S.E. 2d 903 (1981); *Olson v Molzen* 558 S.W. 2d 42 (1977); *Tunkl v Regents of University of California* 383 P. 2d 441; *Cudnik v William Beaumont Hospital* 207 Mich App. 378, 525 N.W. 2d 891 (1995).

429 Courts do not generally hold that exculpatory clauses in these types of contracts are against public policy. *Banfield v Louis Cat Sports Inc et al* 589 So. 2d 441; *Allan v Snow Summit Inc* 51 Cal App. 4th 1358 59 Cal Rptr 2d 813 (1998); *Ciofalo v Vic Tanny Gyms Inc* 10 N.Y. 2d 294, 177 N.E. 2d 925, 205 2d 962 (1961).

430 These types of contracts are generally held to be violating public policy as a residential lease concerns a business

hospital/doctor and patient relationship,[431] and commercial relationships[432] have all been part of the required relationship. Other factors considered by the courts include agreements injurious to the public or contravening some settled social interest; [433] the agreement entered into was an unconscionable one; [434] and the consequences thereof fall greatly below the standard established by law. [435]

12.2.2.3.3 Legal Opinion

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of a type generally thought suitable for public regulation. See *Crawford v Buckner et al* 839 S.W. 2d 754 (1992); *McCutcheon v United Homes Corp* 99 Wash 2d 443, 486 P.2d 1093 (1971); *Kuzmiak et al v Brookchester Inc* 33 N.J. Super 575, 111 A. 2d 425 (1955).

431 These type of contracts are generally held to be violating public policy as the *Olson v Molzen* 558 S.W. 2d 429 (1977); Services provided are essential and suitable for public regulation. *Belshaw v Feinstein and Levin* 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* 469 F. Supp 914 (1979); *Emory University v Porubiansky* 248 Ga. 391, 282 S.E. 2d 903 (1981); *Tunkl v Regents of University of California* 383 P.2d 441 (1963); *Cudnick v William Beaumont Hospital* 207 Mich. App. 378, 525 N.W. 2d 891 (1995). But *contra* the position of *Health Spa* agreements. See *Scholobohm et al v Spa Petite Inc* 326 N.W. 2d 920 (1982); *Powell v American Health Fitness Centre of Fort Wayne Inc* 694 N.E. 2d 757 (1998). See however *Leidy v Deseret Enterprises Inc* 252 Pa Super 112 381 A.2d 165 (1977).

432 These types of contracts are generally not against public policy provided they are clear, definite and unambiguous and equal bargaining is present. See *Graham v Chicago Rock Island and Pacific Railroad Company* 431 F.Supp. 444 (1976); *Sunny Isles Marina Inc v Adulami et al* 706 So. 2d 920 (1998); *Foster v Matthews* 714 So. 2d 1215 (1998); *Smith v Choe et al* 242 A.D. 2d 188, 674 N.Y.S. 2d 17 (1998); *Central Alarm of Tucson v Ganem* 116 A2. 74, 567 P.2d 1203 (1977); *Chicago Great Western Railway Company v Farmers Produce Company* 164 F. Supp 532 (1958); *Dessert Seed Co Inc et al v Drew Farmers Supply Inc* 248 858, 454, S.W. 2d (1970); *Smith d/b/a Smith Construction Company v Seaboard Coast Line Railroad Company* 639 F.2d 1235 (1981); *Messrsmith v American Fidelity Co* 232 N.Y. 161, 133 N.E. 432 (1921); *Levine et al v Shell Oil Company and Visconti* 28 N.Y. 2d 205, 209 N.E. 2d 799, 321 N.Y.S. 2d 81; *Krohnert v Yacht Systems Hawaii Inc* 4 Haw App. 190, 664 P.2d 728 (1983); *Chicago and North Western Railway Company v Rissler* 184 F.Supp. 98 (1960).

433 *Russel v Martin* 88 So. 2d 35 (1986); *Kuzmiak et al v Brookchester Inc* 33 N.J. Supra 575, 111 A.2d 425; *Tucker and Sons Inc v GTE Directories Sales Corporation* 253 N.E.B. 458, 571 N.W. 21 64 (1997); *Banfield v Louis Cat Sports Inc* 589 So. 2d 441 (1991).

434 *Weaver v American Oil Co* 257 Ind. 458, 276 N.E. 2d 144 (1971); *Henningsen v Bloomfield Motors Inc* 32 N.J. 358, 161 A. 2d 69 (1960); *Williams v Walker-Thomas Furniture Co* 350 F.2d 445 (1965); *Mayfair Fabrics v Henley* 48 N.J. 483, 226 A. 2d 602 (1967); *McCutcheon v United Homes Corp* 79 Wash 2d 493, 486 P.2d 1093; *Levine et al v Shell Oil Company and Visconti* 28 N.Y. 2d 205, 269 N.E. 2d 799, 321 N.Y.S. 2d 81 (1981); *Kuzmiak et al v Brookchester Inc* 33 N.J. Super 579, 111 A.2d 425 (1955); *Krohnert v Yacht Systems Hawaii Inc* 4 Haw App. 190, 664 P.2d 738 (1983).

435 *Belshaw v Feinstein and Levin* 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* 469 F.Supp 914 (1979); *Emory University v Porubianski* 248 Ga. 391, 282 S.E. 2d 903 (1981); *Olson v Molzen* 555 S.W. 2d 429 (1977); *Tunkl v Regents of University of California* 383 P.2d 441 (1963); *Cudnick v William Beaumont Hospital* 207 Mich App. 378, 525 N.W. 2d 891 (1995).

Public policy plays a significant role in the United States of America in keeping exclusionary clauses in check. On the one end of the scale, the American courts have throughout consistently held that public policy encourages the utmost freedom of contract in general. [436] For that reason, it is especially in private, voluntary transactions that the American courts, with regard to exclusionary or exculpatory clauses, have acknowledged that one of the contracting parties may validly shoulder a risk by agreeing to exclude liability in a contract. [437]

But the courts have also shown a willingness at times to declare exculpatory clauses or exemption clauses invalid and unenforceable as against public policy when the situation arises. [438] But, warns the courts, when using public policy in declaring exclusionary clauses to be void due to their repugnancy to public policy, this should not be done lightly or without sufficient compelling reasons, neither, warn the courts, should the heads of public policy be unduly extended. [439]

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436 *Printing and Numerical Registering Co v Sampson* 19 L.R. Eq. 462, 465 (1875); *Chasen v Trailmobile Inc* 215 Tenn. 87, 384 S.W. 2d 1 (1964); *Chicago and North Western Railway Company v Rissler* 184 F.Supp. 98 (1960); *Occidental Savings and Loan Association v Venco Partnership* 206 NEB 469, 293 N.W. 2d 843 (1980); *Banfield v Cat Sports Inc* 589 So. 2d 441 (1991); *Tucker and Sons Inc v GTE Directories Sales Corporation* 253 NEB 458, 57, N.W. 2d 64 (1997).

437 Jaeger *A Treatise on the Law of Contracts* (1953) Para 1750A; Calamari and Perillo *The Law of Contracts* (1977) 172, 268-269 hold the view that save for future intentional tort or for a future willful act or one of gross negligence contracting parties are quite entitled to exempt one of the contracting parties from liability for future conduct, in other words ordinary negligence. For the position adopted by the courts, see the cases of *Marshall v Blue Springs Corp* 641 N.E. 2d 92, 95 (Ind. Ct. App 1994); *American Health Fitness Centre of Fort Wayne Inc* 694 N.E. 2d 957 (1998); *Allan v Snow Summit Inc* 51 Cal.App. 4th 1358, 59 Cal Rptr. 2d 813 (1996); *Chicago Great Western Railway Company v Farmers Produce Company* 164 F.Supp. 532 (1958); *Smith d/b/a Smith Construction Company v Sea Board Coast Line Railroad Company* 639 F.2d 1235 (1981); *Ciofalo v Vic Tanny Gyms Inc.* 10 N.Y. 2d 297-98, 177 N.E. 2d 927, 220 N.Y.S. 2d (1961); *Messersmith v American Fidelity Co* 232 N.Y. 161, 133 N.E. 432 (1921); *Kuzmiak et al v Brookchester Inc* 33 N.J. Super 595, 111 A.2d 425 (1955); *Chasen v Trailmobile Inc* 215 Tenn. 87, 384 S.W. 2d 1 (1964); *Chicago and North Western Railway Company v Rissler* 184 F.Supp. 98 (1960); *Occidental Savings and Loan Association v Venco Partnership* 206 NEB 469, 293 N.W. 2d 843 (1980); *Equitable Loan and Security Co et al* 44 S.E. 320 (1903); *Crawford v Buckner* 839 S.W. 2d 754 (1992); *Schlobohm v Spa Petite Inc* 326 N.W. 2d 920 (1982); *Leidy v Deseret Enterprises Inc d/b/a Body Shop Health et al* 252 Pa.Super 162, 381 A.2d 164 (1977); *Russell v Martin* 88 So. 2d 315 (1956); *Banfield v Louis Cat Sports Inc* 589 So. 2d 441 (1991); *Tucker and Sons Inc v GTE Directories Sales Corporation* 253 NEB 458, 571 N.W. 2d 64 (1997).

438 *United States v United States Cartridge Co* 198 F.2d 456 (1952); *Equitable Loan and Security Co et al v Waring et al* 44 S.E. 320 (1903); *Henningsen v Bloomfield Motors Inc* 32 N.J. 358, 161 A, 2d 89.

439 *Occidental Savings and Loan Association v Venco Partnership et al* 206 NEB 469, 293, N.W. 2d 843 (1980); It was stated in *Equitable Loan and Security Co et al v Waring et al* 44 S.E. 320 (1903) that it must be executed by the courts *"only in cases free from doubt."* See also *Tucker and Sons Inc v GTE Directories Sales Corporation* 253 NEB 458; 571 N.W. 2d 64 (1997); *Banfield v Louis CAT Sports Inc* 589 So 2d 441 (1991). The writers Calamari and Perillo *The Law of Contracts* (1977) 268-269; Jaeger *A Treatise on the Law of Contracts* (1953) Para 1751 also warn that in construing these type of clauses it is only in the clearest of cases i.e. where unequal terms are present where the court ought to interfere.

But, both the American legal writers and the courts have developed clear guidelines as to when contracts containing exclusionary clauses should be declared invalid, as violative of public policy. Firstly, public policy should be used to invalidate this type of clauses where the consequences agreed upon are violative of a duty of care, or where an exemption provision or exculpatory clause is prohibited by statute or governmental regulation. [440] Secondly, the nature and subject matter of the agreement, the relations of the parties and the presence or absence of equality of bargaining power, are all factors which will determine the validity or invalidity of exclusionary or exculpatory clauses due to public policy. [441]

The relations of the parties, in particular, are a determining factor of invalidating a contract or exculpatory provision. Some relations are such in nature that once entered into, this will result in a greater responsibility being bestowed on the care-giver or service provider than the ordinary person. [442] The courts do not generally hold that exculpatory clauses arising from an agreement between contracting parties, participating in recreational or sporting activities, are against public policy. [443] But, in relationships between landlord and tenant in

440 Calamari and Perillo *The Law of Contracts* (1977) 270; Jaeger *A Treatise on the Law of Contracts* (1953) Para 1751 recognize the rationale for this guideline to be founded upon the idea to discourage negligence and to make wrongdoers pay for the damages which they cause. It also protects those who rely upon essential services from exploitation. The American courts are emphatic that where a statute was passed for the protection of the public providing for the duty of care, any attempt to exempt a contracting party from liability in conflict with the provisions of the statute, the courts will not enforce such an agreement as they are against public policy. See in this regard *Powell v American Health Fitness Centre of Fort Wayne Inc* 694 N.E. 2d 757 (1998); *Chicago Great Western Railway Company v Farmers Produce Company* 164 F.Supp. 532 (1958); *Smith d/b/a Smith Construction Company v Sea Board Coast Line Railroad Company* 639 F. 2d 1235 (1981).

441 Calamari and Perillo *The Law of Contracts* (1977) 270; Jaeger *A Treatise on the Law of Contracts* (1953) Para 1751 hold the view that the nature and subject matter of the agreement in the general sense of the word is not void due to public policy save for instances where the agreement is prohibited by statute or where it violates public interest. Public interest, on the other hand, according to the legal writers, involves the performance of a legal duty, or a duty of public service. For that reason, any attempt to exempt a party from liability for negligence in violation of such legal duty, or duty of service, or is violative of public interest, will be void and unenforceable against public policy. The American courts in the cases that follow are supportive of this view. *Hunter v American Rental Inc* 189 Kan 615, 371 P2d 131 (1962) *Dessert Seed Co Inc et al v Drew Farmers Supply Inc* 248 Ark 858, 454 S.W. 2d 307 (1970); *Smith d/b/a/ Smith Construction Co v Seaboard Coast Line Railway Company* 639 F.2d 1235 (1981); *Mayfair Fabrics v Henley* 48 N.J. 483, 226 A.2d 602 (1968); *Krohnert v Yacht Systems Hawaii Inc* 4 Haw App. 190, 664 P.2d 238 (1983); *Chicago and North Western Railway Company v Rissler et al* 184 F. Supp. 98 (1960); *Banfield v Louis Cat Sports Inc* 589 So. 2d 441 (1991); *Crawford v Buckner et al* 839 S.W. 2d 754 (1992).

442 The relations signalled out by the legal writers Calamari and Perillo *The Law of Contracts* (1977) 270; Jaeger *A Treatise on the Law of Contracts* (1953) Para 1751 include that of landlord and tenant, hospital/doctor and patient, common carriers and public users, the railways and public users, air transportation and public users, innkeepers and public patrons.

443 *Banfield v Louis Cat Sports Inc* 589 So. 2d 441 (1991); *Allan v Snow Summit Inc* 51 Cal App. 4th 1358 59 Cal Rptr 2d 813 (1998); *Ciofalo v Vic Tanny Gyms Inc* 10 N.Y. 2d 294, 177 N.E. 2d 925, 205 2d 962 (1961).

terms of a lease, the hospital/doctor and patient relationship, common carriers and public users and all other public service involving public users, including, innkeepers and public patrons, where their relationships are controlled or regulated by their common law duty of due care and/or statutory regulations, or the accompanying duties which flow from a public service, the courts will declare any attempt to exempt or exculpate a party from exercising their duties, to be against public policy and invalid. [444]

The relative bargaining position of the contracting parties, especially in certain instances, is a factor which heavily influences the American courts in testing the validity, or invalidity, of a contract or contractual provision excluding liability for own negligence. In commercial contracts where the bargaining position of the parties is equal, the American courts do not readily interfere with the agreement between the contractual parties, when freely entered into. However, where the contracting parties are in an unequal bargaining position and the weaker party is at the mercy of the stronger party, the courts will not enforce such contracts. [445]

12.2.3 Status and Bargaining Power of the Contractants

12.2.3.1 SOUTH AFRICA

12.2.3.1.1 Legal Writings

The status and bargaining power of the contracting parties have, in the South African Law of Contract, until recently, not received much attention. Perhaps, the influence of the

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444 This is the position advocated by the American legal writers, including Calamari and Perillo *The Law of Contracts* (1977) 270; Jaeger *A Treatise on the Law of Contracts* (1953) Para 1751. For landlord and tenant relationships see *Crawford v Buckner et al* 839 S.W. 2d 754 (1992); *McCutcheon v United Homes Corp* 79 Wash. 2d 443, 486, P.2d 1093 (1971); *Kuzmiak et al v Brookchester Inc* 33 N.J. Super 575, 111 A. 2d 425 (1955). For the hospital/doctor and patient relationship see *Olson v Molzen* 558 S.W. 2d 42 (1977); Services provided are essential and suitable for public regulations. *Belshaw v Feinstein and Levin* 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* 469 F. Supp 914 (1979); *Emory University v Porubiansky* 24 Ga. 391, 282 S.E. 2d 903 (1981); *Tunkl v Regents of University of California* 383 P. 2d 441; *Cudnik v William Beaumont Hospital* 207 Mich. App. 378, 525 N.W. 2d 891 (1995); But *contra* the position of *Health Spa* agreements see *Schlobohm et al v Spa Petite Inc* 325 N.W. 2d 920 (1982); *Powell v American Health Fitness Centre of Fort Wayne Inc* 694 N.E. 2d 757 (1998); See however *Leidy v Deseret Enterprises Inc d/b/a Body Shop Health Spa* 252 Pa. Super 162, 381 A. 2d 164 (1977).

445 The legal writers Calamari and Perillo *The Law of Contracts* (1977) 270; Jaeger *A Treatise on the Law of Contracts* (1953) Para 1751 signal out the relationship of landlord and tenant, hospital and patient, common carriers and other utilities and public users to be affected by unequal bargaining positions. The American courts regards such agreements to be unconscionable and do not hesitate to declare them invalid and unenforceable as contrary to public policy. See in this regard *Weaver v American Oil Co* 257 Ind. 458, 276 N.E. 2d 144 (1971); *Henningsen v Bloomfield Motors Inc* 32 N.J. 358, 161 A, 2d 69 (1960); *Williams v Walker-Thomas Furniture Co* 350 F.2d 445 (1965); *Mayfair Fabrics v Henly* 48 N.J. 483, 226 A. 2d 602 (1967); *McCutcheon v United Homes Corp* 79 Wash. 2d 443, 486, P.2d 1093 (1971); *Levine v Shell Oil Company and Visconti* 28 N.Y. 2d 205, 269 N.E. 2d 799, 321 N.Y.S. 2d 81 (1971); *Kuzmiak et al v Brookchester Inc* 33 N.J. Super 575, 111 A. 2d 425 (1955); *Krohnert v Yacht Systems Hawaii Inc* 4 Haw App. 190, 664 P.2d 738 (1983).

doctrine of freedom to contract and the enforcement of contracts is attributable thereto.

Hence, very little has been written about this subject in the past.
The extension of the usage of standard form contracts in the various spheres of society, incorporating exemption clauses, not only brought about both advantages and disadvantages, they have also caused these types of contracts to be scrutinised more closely by our legal writers and the courts, at times.

More discourse has taken place, in legal writings and court judgements, in more recent years. Moreover, the status and bargaining power of contracting parties, when entering standard form contracts, especially those containing exemption clauses, have also more frequently formed the subject matter of discussions.

Generally, the advantages and disadvantages expressed by the legal writers include the following, namely: The advantages are said to include cost-saving through a pre-printed contract, as opposed to a tailor-made, individualised contract which is expensive. A well-drafted contract also clarifies the legal relationship of the parties, reducing the prospect of litigation. [446]

On the other hand, the disadvantages include, *inter alia,* the unfairness in terms, particularly, exemption or forfeiture terms; ignorance by the average customer of the meaning of the terms; the imposition of oppressive contractual provisions on those who have an inferior bargaining power by those contractants who have a superior bargaining power. Moreover, those with an inferior bargaining power are, because of their needs for such goods and services, obliged to accept the imposition of such contractual provisions. [447]

The inequality of bargaining power has often been exploited by monopolies in which the stronger, use abusive methods to exploit economically weaker co-contractants. In this regard, oppressive or unreasonable terms can easily escape the notice of the weaker contracting party; alternatively, the weaker party to the contract is left in a so-called `take it or leave it' position, where, because of the needs, the weaker contractant is obliged to

446 Kahn (1988) 34; Van der Merwe et al (2003) 225; See also Bhana and Pieterse 2005 *SALJ* 865, 885.

447 Kahn (1988) 34; Aronstam (1979); Van der Merwe et al (2003) 22ff; See also Bhana and Pieterse 2005 *SALJ* 865, 885.

enter into the agreement with the co-contractant. [448]

More recently, the South African legal writers have started to look more critically at the effect of especially, contractual transactions, where one of the contracting parties transacts from an overwhelming position of strength, at the expense of the weaker contracting party, often the most ignorant members of society.

In this regard, the doctrine of sanctity of contract and contractual autonomy has not escaped severe criticism at times. In the first instance, *Hawthorne* [449] and *Tladi* [450] argue that contractual autonomy, which entails that any person with contractual capacity is free to determine whether, with whom and on which terms to contract, is premised on the contracting parties possessing equal bargaining power, but, in reality, the contracting parties very seldom have equal bargaining power, thus contractual autonomy is, therefore, based on an erroneous premise. [451]

In the second instance, where harsh and oppressive standard-form contracts are upheld in the name of `the sanctity of contract', the effect thereof is to facilitate an abuse of power, by the party in a stronger bargaining position over the weaker contracting party. [452]

Bhana and Pieterse [453] convincingly argue that where contracting parties stand in an unequal bargaining position and often deprived of any real freedom of choice or negotiation when contracting, it can hardly be said that consensus is the end-product of the negotiating. For that reason the writers argue:

"The reality of unequal bargaining power undermines the very notion of freedom, along with the substance of consensus underlying pacta sunt servanda."

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448 Van der Merwe et al (2003) 225; Aronstam (1979) 22-23; *House of Assembly Debates* Vol. 33 COL 38 26 (29 March 1971) quoted by Aronstam (1979) 23-24.

449 "The Principle of Equality in the Law of Contract" 1995 *THRHR* 157.

450 "Breathing Constitutional values into the Law of Contract" 2002 *De Jure* 306.

451 Hopkins *TSAR* (2003-1) 150, 152-153. For a contrary view see Jordaan (2004) *De Jure* 58, 59-60. The author holds the view the contractual autonomy has correctly been recognised as a Constitutional value and cannot just be negated. Public policy remains the only mechanism to limit contractual autonomy.

452 Hopkins *TSAR* (2003-1) 150, 152-153.

453 "Towards a reconciliation of Contract Law and Constitutional values: Brisley and Afrox Revisited" 2005 *SALJ* 865, 885.

And further in relation to the sanctity of contract:

"The principle of sanctity of contract is therefore discordant with a material inequality of bargaining power; it is inclined to facilitate an abuse of power by the stronger party against the more vulnerable party; and in this way it endorses social inequality."

From a Constitutional law perspective, the writers also suggest that contract law should be developed to *"establish a new balance between the dictates of the market place and pacta sunt servanda on the other hand and the interests of vulnerable or weak contracting parties on the other". It is further suggested by them that unequal bargaining power be viewed as a factor influencing (or vitiating) consumers. This they suggest further, would develop contract law and take care of the inequalities prevalent in the South African society. One has to associate oneself with their thinking as not only will this put us in step with the rest of universal thinking, this gives the South African legal order to perhaps develop economic duress and undue influence to "accommodate instances of the improper use of strong bargaining power to procure a contract".* [454]

Hopkins [455] also holds the view that tolerating the unequal bargaining power between contracting parties, is to make it easier for powerful private institutions, like banks and insurance companies, to *"infringe upon the fundamental human rights of the weakest and most ignorant members of our society."* [456]

What is called for, by many writers, is legal reform to avert the economic and social discrimination that takes place against vulnerable consumers, who are particularly susceptible to an abuse of power by monopolies, in superior bargaining positions. [457]

More recently, in what has become a very controversial judgement, in the case of *Afrox v Strydom*, [458] the Supreme Court of Appeals is criticized by many legal writers for the lack of

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454 Bhana and Pieterse "Towards a reconciliation of contract law and Constitutional values: Brisley and Afrox Revisited" 2005 *SALJ* 865, 885.

455 "Standard-form Contracts and the evolving idea of Private Law Justice: A Case of Democratic Capitalist Justice v Natural Justice" *TSAR* (2003-1) 150, 152-153.

456 Hopkins "Standard-form contracts and the evolving idea of Private Law Justice: A Case of Democratic Capitalist Justice v Natural Justice" *TSAR* (2003-1) 150, 152-153.

457 Hopkins *TSAR* (2003-1) 150, 152-153.

458 2002 (6) SA 21 (SCA).

consideration shown by the court towards a patient who is admitted to a hospital, often for a serious illness, trauma or surgery and who stands in an unequal bargaining position with the hospital. The patient is often incapable of negotiating the terms of his or her admission. The patient is often also of the view that he or she has no choice but to sign the admission form, including the terms contained therein. Often the terms contain an exclusionary clause exempting the hospital and staff from any form of liability `howsoever caused', often to the patient's detriment, as he or she is left without a remedy to sue the hospital or staff.

Many writers criticise the effect of the judgement. Commencing with the stance taken by the writers *Van der Merwe et al,*[459] when they write:

"An exemption clause may fail for lack of consensus between the parties. If there is consensus, the clause will be invalid where one of the parties has abused the other party's circumstances to such proportions that consensus has in effect been improperly obtained." [460]

Other writers, including *Van den Heever*, [461] *Jansen and Smith*, [462] *Hawthorne*, [463] *Tladi*, [464] *Naude and Lubbe*, [465] all argue that the Supreme Court of Appeals in *Afrox v Strydom* 2002 (6) SA 21 (SCA) erred in not considering the imbalance of the bargaining position of the patient (whose is substantially weaker) and that of the hospital (which is substantially stronger), often leaving the patient or his or her family members (signing on behalf of the patient) signing the admission form, including adverse terms, without worrying about the fine print. Often, owing to severe illness, stressful and traumatic circumstances, the patient or family members are more concerned about themselves (the patient) or their loved ones (family members) that they, will sign anything to get medical assistance. It is persuasively argued by the legal writers that it cannot be said that these types of contracts had been freely entered into and that consensus had been reached to bring about a valid agreement.

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459 *Contract - General Principles* (2003) 274-275.

460 Van der Merwe et al *Contract - General Principles* (2003) 274-275.

461 "Exclusion of Liability of Private Hospitals in South Africa" *De Rebus* (April 2003) 47-48.

462 "Hospital Disclaimers: Afrox Health Care v Strydom (2003) *Journal for Juridical Science* 28(2) 210, 217-218.

463 "Closing of the Open Norms in the Law of Contract" 2004 67 (2) *THRHR* 294 at 301.

464 "One step forward, two steps back for constitutionalising the Common Law: Afrox Healthcare v Strydom" (2002) 17 *SAPR/L* 473 at 477.

465 "Exemption Clauses - A rethink occasioned by Afrox Healthcare Bpk v Strydom" The South African Law Journal (2005) 122 *SALJ* 441 at 460.

It is also argued by especially, *Tladi*, [466] that *"when people go to hospitals in need of medical care, they are not in a position to negotiate their contract. It seems unconscionable to use this inability to bargain to exclude all liability, save intention, as the clause in question purports"*. He goes on to state that *"..... freedom of contract, when abused by the stronger party to achieve unreasonable and unjust contracts, undermines the values of equality and dignity that are supposed to permeate our constitutional dispensation."* [467]

It is also persuasively argued, by *Naude and Lubbe*, [468] that a contract to obtain medical care is not akin to a commercial transaction. What is affected here is the `patient's bodily inviolability' and not merely `his patrimonial interest'.

Where the patient's bodily inviolability is threatened by a term that excludes the essence of a contract designed to protect it, the writers argue that it would be objectionable, in principle, resulting in an imbalance between the parties. Because of the Supreme Court of Appeal's perceived lack of protection in cases of unequal bargaining, leading to unjust or unconscionable results what has been suggested as a means to curtail the said exploitation is the introduction of statutory intervention. [469]

12.2.3.1.2 Case Law

The South African case law, unlike its counter-parts in England and America, is not very rich in case law when dealing with the status and the bargaining power of contracting parties. But there are cases which have highlighted the inequality of the contracting parties and the oppression brought about. In this regard, Claassen JP, almost 50 years ago, in the case of *Linstrom v Venter*, [470] remarked:

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466 "One step forward, two steps back for constitutionalising the Common Law: Afrox Health Care v Strydom" (2002) 17 *SAPR/PL* 473 at 477.

467 Tladi "One step forward, two steps back for constitutionalising the Common Law: Afrox Health Care v Strydom (2002) 17 *SAPR/PL* 473 at 477.

468 "Exemption Clauses - A rethink occasioned by Afrox Healthcare Bpk v Strydom" (2005) 122 *SALJ* 441 at 460.

469 Van der Merwe et al (2003) 225-226; Kotz (1986) SALJ 405 at 408-409; Delport (Dec 1979) *De Rebus* 641; Van Loggerenberg (1987) *Inaugural and Emeritus address* 7; Steyn "The inclusion of `Additional' terms or `Standard terms and conditions' in a Contract: The significance of the `ticket' cases, *caveat subscriptor* and the application of the reliance theory" (2004) 16 *SALJ*; Naude and Lubbe (2005) 122 *SALJ* 441 at 462; Jansen and Smith (2003) *Journal for Juridical Science* 28(2) 210 at 220; See also Lewis "Fairness in South African Contract Law" (2003) 120 *SALJ* 330 at 349.

470 1957 (1) SA 125 (SWA) at 127.

"The person who is unable to pay cash for a valuable article, such as a motor car, often finds his freedom of contract very limited, because so many trading firms have adopted standard forms of contract which the purchaser has to sign or remain without the article. Theoretically the prospective purchaser is free to offer terms and refuse counter offers, but in practice he usually has to sign the seller's printed form of contract in order to obtain the desired article. Such contracts are designed for the protection of the seller and their terms are often of an oppressive nature."

In the case of *Western Bank Ltd v Sparta Construction Company* [471] the court again raised its concern with standardized contracts in which it is not always easy to determine, with accuracy, the rights and obligations the contract created. Coetzee J recommended a minimum printing *"size to protect weaker contractants."*

But, although the Supreme Court of Appeal in the case of *Afrox Healthcare Bpk v Strydom* [472] recognized that unequal bargaining power is indeed a factor which, together with other factors, plays a role in consideration of public policy, the court, due to insufficient evidence, failed to find that there was an unequal bargaining position between the hospital and the patient. The principle enunciated in the *Afrox case* was most recently supported in the Constitutional Court dictum of *Barkhuizen v Napier* [473] in which it was held that *"this is recognition of the potential injustice that may be caused by inequality of bargaining power"*. The court also found that *"the relative situation of the contracting parties is a relevant consideration in determining whether a contractual term is contrary to public policy"*. The court endorses this as *"this is an important principle in a society as unequal as ours"*. But the court found there was no admissible evidence that the contract was not freely concluded and that there was unequal bargaining power between the parties.

But it is Sachs J in a dissenting judgement who states that *"by holding a person to one-sided terms of a bargain to which he or she apparently did not agree"* would be unreasonable in the eyes of the community.

12.2.3.1.3 Legal Opinion

Owing to the influence of the doctrine of freedom of contract and the sanctity of contract, the status and bargaining power of the contracting parties have not received much attention by the South African legal writers not the South African courts. Although not much attention had been given, nonetheless, more recently especially in instances involving

471 1975 (1) SA 839 (W); See also *Linstrom v Venter* 1957 (1) SA 125 (SWA) at 127.

472 2002 (6) SA 21 (SCA); (2002) 4 ALL SA 125 (SCA) at Para 18.

473 2007 (5) SA 323 (CC).

contracts containing exemption or exclusionary clauses, more discourse, have taken place about their invalidity. One of the disadvantages of standardized contracts containing exemption clauses, highlighted by the South African legal writers, amounts to this, often these type of contracts are entered into through the ignorance of the average customer who occupies an inferior bargaining position in relation to the stronger contracting party. The former is often obliged to accept such contractual provisions, notwithstanding, the unfairness in the contract or contractual provisions. [474] The status of especially monopolistic organizations and their superior bargaining position have impacted negatively on the fairness of contract. Through the exploitative practises of the stronger, the inequality of bargaining power has often been exploited in that the weaker party is forced to enter into contracts on a `take it or leave it' basis. These contract or contractual provisions frequently contain oppressive or unreasonable terms often escaping the notice of the weaker contracting party. [475] Some 50 years ago the inequality of bargaining caused the South West African court (as it was known then) to remark that *"..... such contracts are designed for the protection of the seller and their terms are often of an oppressive nature".* More recently, after the Supreme Court of Appeals matter of *Afrox Healthcare Bpk v Strydom* in which Brandt JA held that unequal bargaining power is but one of the factors which a court, together with other factors may weigh up to assess public interests, much criticism has been expressed that the court did not find the hospital was in a stronger position when the patient entered into an agreement to his detriment. In the main, the following reflect the strongest arguments. [476] [477]

The principle enunciated in the *Afrox case* regarding the unequal bargaining position of the contracting parties was received with approval in a most recent Constitutional Court decision of *Barkhuizen v Napier*. [478] The court recognizes that a potential injustice may result if the inequality between the contracting parties is ignored, during the negotiating stage, when agreement is reached. The court also concludes that, especially in a society

474 Kahn *Contract and Mercantile Law* (1988) 34; Aronstam *Consumer Protection, Freedom of Contract and The Law* (1979); Van der Merwe et al *Contract: General Principles* (2003) 225.

475 Van der Merwe et al *Contract: General Principles* (2003) 2005; Aronstam *Consumer Protection, Freedom of Contract and The Law* (1979) 22-23; *House of Assembly Debates* Vol. 33 COL 38 26 (29 March 1971) quoted by Aronstam (1979) 23-24.

476 *Linstrom v Venter* 1957 (1) SA 125 (SWA) at 127 The principle was repeated some 20 years later in the case of *Western Bank Ltd v Sparta Construction Company* 1975 (1) SA 839 (W).

477 2002 (6) SA 21 (SCA).

478 2007 (5) SA 323 (CC).

such as ours, where people are, generally, on an unequal footing, it is paramount that, in determining whether a contractual term is contrary to public policy, that the court looks at the relative situation of the contracting parties when the agreement is reached. See especially, the dissenting judgement of Sachs J, regarding the unfairness and unreasonableness of such an agreement.

Contractual autonomy is wrongly prescribed on the assumption that the contracting parties possess equal bargaining power. *Hawthorne* [479] and *Tladi* [480] in this regard argue that in reality, the contracting parties very seldom have equal bargaining power.

Whilst harsh and oppressive standard-form contracts are upheld in the name of `the sanctity of contract', *Hopkins* [481] argue that the effect thereof is to facilitate an abuse of power by the party in a stronger bargaining position over the weaker contracting party. *Hopkins*, [482] relying on the unconstitutionality which these exploitative agreements bring, claims that to allow the big powers such as banks and insurance companies to unabatedly carry on would result in an infringement of fundamental human rights of the weakest and most ignorant members of society.

Besides the banks and insurance companies, the South African legal writers, post the case of *Afrox v Strydom;* [483] have also considered the inequality of bargaining power between hospitals and patients, in which patients are often required to sign admission forms containing exclusionary clauses which are to the detriment of the patient.

The main focus of criticism shown by the legal writers against the court's decision, include,

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479 "The Principle of Equality in the Law of Contract" 1995 *THRHR* 157.

480 "Breathing Constitutional values into the Law of Contract" 2002 *De Jure* 306. See further the writings of Hopkins "Standard-form contracts and the evolving idea of Private Law Justice: A Case of Democratic Capitalist Justice v Natural Justice" *TSAR* (2003-1) 150, 152-153. For a contrary view see Jordaan "The Constitution's impact on the Law of Contract in Perspective" (2004) *De Jure* 58, 59-60. The author holds the view the contractual autonomy has correctly been recognised as a Constitutional value and cannot just be negated. Public policy remains the only mechanism to limit contractual autonomy.

481 "Standard-form contracts and the evolving idea of Private Law Justice: A Case of Democratic Capitalist Justice v Natural Justice" *TSAR* (2003-1) 150, 152-153.

482 "Standard-form contracts and the evolving idea of Private Law Justice: A Case of Democratic Capitalist Justice v Natural Justice" *TSAR* (2003-1) 150, 152-153.

483 2002 (6) SA 21 (SCA).

the following: *Van der Merwe et al* [484] convincingly argue that given the patient's condition, when admitted, resultant from illness, trauma or surgery and given the unequal bargaining position between the hospital and patient, to allow this would result in the authorization of improperly obtained agreements being reached without consensus being reached between the contracting parties. It is especially *Tladi* [485] who persuasively argues that it is unconscionable to use one's inability to bargain by excluding one's liability. The writer also convincingly argues that when the doctrine of freedom of contract is abused by the stronger contracting party to achieve unreasonable and unjust contracts, would result in the undermining of the values of equality and dignity permeating the Constitutional dispensation. Because of the lack of consideration shown by the Supreme Court of Appeals in the Afrox case in cases of inequality of bargaining between the parties, it has been widely suggested that statutory intervention is indicated as means to curtail continued exploitation. [486]

More recently, in the case of *Afrox Healthcare Bpk v Strydom*, [487] the Supreme Court of Appeals was confronted with, *inter alia,* the question of whether an exclusionary clause, excluding a private hospital for damages caused by negligent conduct of its nursing staff (where the respondent contended, *inter alia,* that the clause was contrary to the public interest, based upon the unequal bargaining positions of the parties at the conclusion of the contract) was invalid.

The court consequently held that the inequality of bargaining power between the parties to a contract, *per se,* does not justify the inference that a provision in a contract, which is to

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484 *Contract - General Principles* (2003) 274-275; The same views are expressed by 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, 217-218; Hawthorne "Closing of the Open Norms in the Law of Contract" 2004 67 (2) *THRHR* 294 at 301; Tladi "One step forward, two steps back for constitutionalising the Common Law : Afrox Healthcare v Strydom (2002) 17 *SAPR/L* 473 at 477; Naude and Lubbe "Exemption Clauses - A rethink occasioned by Afrox Healthcare Bpk v Strydom" (2005) 122 *SALJ* 441 at 460.

485 "One step forward, two steps back for constitutionalising the Common Law: Afrox Healthcare v Strydom" (2002) 17 *SAPR/L* 473 at 477.

486 Van der Merwe et al *Contract: General Principles* (2003) 225-226; Kotz (1988) *SALJ* 405 at 408-409; Delport (Dec 1979) *De Rebus* 641); Van Loggerenberg (1987) 7 *Inaugural and Emeritus address*; Steyn "The inclusion of `Additional' terms or `Standard terms and conditions' in a contract: The significance of the `ticket' cases, caveat subscriptor and the application of the reliance theory" (2004) 16 *SALJ*; Naude and Lubbe (2005) 122 *SALJ* 441 at 462; Jansen and Smith (2003) *Journal for Juridical Science* 28(2) 210 at 220; See also Lewis "Fairness in South African Contract Law" (2003) 120 *SALJ* 330 at 349.

487 2002 (6) SA 21 (SCA).

the advantage of the stronger contracting party, is necessarily against public interests, when it stated:

"(12) Wat die eerste grond betref spreek dit eintlik vanself dat 'n ongelykheid in die bedingingsmag van die partye tot 'n kontrak op sigself nie die afleiding regverdig dat 'n kontraksbeding wat tot voordeel van die `sterker' party is, noodwendig teen die openbare belang sal wees nie."

But the court does provide that the unequal bargaining power of one of the contracting parties is a factor which the court, together with other factors, may weigh up to assess public interests. The court, however, stated that, in this case, the respondent did not provide any evidence that indicated that the hospital, at the time of entering the agreement, was in a stronger position. In this regard the court stated:

"Terselfdertyd moet aanvaar word dat ongelyke bedingingsmag wel 'n faktor is wat, tesame met ander faktore, by oorweging van die openbare belang 'n rol kan speel. Desondanks is die antwoord op die respondent se beroep op hierdie faktor in die onderhawige saak, dat daar hoegenaamd geen getuienis is wat daarop dui dat die respondent tydens kontraksluiting inderdaad in 'n swakker bedingingsposisie as die appellant verkeer het nie." [488]

The writer also, convincingly, argues that when the doctrine of freedom of contract is abused by the stronger contracting party, to achieve unreasonable and unjust contracts, this would result in the undermining of the values of equality and dignity permeating the Constitutional dispensation.

Because of the lack of consideration shown by the Supreme Court of Appeals in Afrox, in cases of inequality of bargaining between the parties, it has been widely suggested, that statutory intervention may be the answer as means to curtail the continued exploitation. [489] of, especially, the weaker contracting parties.

For the criticism lodged, by the South African legal writers, on this aspect, see the discussion above.

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488 *Afrox Healthcare Bpk v Strydom* 2002 (6) SA 21 (SCA) Para 12 at 35.

489 Van der Merwe et al *Contract: General Principles* (2003) 225-226; Kotz (1986) *SALJ* 405 at 408-409; Delport (Dec 1979) *De Rebus* 641; Van Loggerenberg (1987) 7 *Inaugural and Emeritus address*; Steyn "The inclusion of `Additional' terms or `Standard terms and conditions' in a Contract: The significance of the `ticket' cases, *caveat subscriptor* and the application of the reliance theory' (2004) 16 *SALJ*; Naude and Lubbe (2005) 122 *SALJ* 441 at 462; Jansen and Smith (2003) *Journal for Juridical Science* 28(2) 210 at 220; See also Lewis "Fairness in South African Contract Law" (2003) 120 *SALJ* 330 at 349.

12.2.3.2 ENGLAND

12.2.3.2.1 Legal Writings

The status and bargaining power of contracting parties has been a topic of wide debate amongst English legal writers, over a significant period of time. This is so, as, at the heart of contract law, lay the related ideas of agreement, promise and bargaining. The contract is derived from an agreement between the parties to it, whereas, the agreement itself, is seen as coming about through the interlocking mechanism of an offer from one party, duly accepted by the other. The offer and acceptance phase of the agreement is, sometimes, preceded by the bargaining phase between the contracting parties. [490]

Although the classical period did not pay any attention to the doctrine that contracts of exchange require equality, [491] nonetheless, with the introduction of standard form contracts in the nineteenth century, the law became more concerned with the genuiness of agreement, as reached between contractants possessing unequal bargaining strength. [492]

Some of the main, troublesome features of the standard form contracts include: most contracts ceased to consist of individually negotiated or custom-made terms and contractants often find themselves without a bargaining position as their choice was often restricted to `taking it' or `leaving it'. The terms of the agreement were often imposed by one party, and the other had no choice but to accept them or go without. [493]

Standard form contracts often included exemption clauses, which often provided that the organisation was not to be liable, in virtually any circumstances whatsoever. These terms, often, were not negotiated and the imposition of such exemption clauses may have been harmful to the consumer, in that the consumer's normal contractual rights were diminished with no other benefit made available. [494]

One of the driving forces behind recognizing the concern over agreements emanating from the unequal bargaining strength of the parties was the `consumer welfarism' ethos. The

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490 Tillotson (1995) 8; Atiyah (1995) 15.

491 Gordley *The Philosophical Origins of Modern Contract Doctrine* (1991) 147.

492 Tillotson (1995) 8; Atiyah (1995) 15-16, 25.

493 Atiyah (1995) 16; Deutsch (1977) 1-4; The Law Commission and The Scottish Law Commission *Exemption Clauses Second Report* (1975) 57, 60.

494 Atiyah (1995) 16; Poole *Textbook on Contract Law* (2004) 198.

philosophies of the `consumer welfarism' ethos are described as follows:

"Consumer-welfarism stands for reasonableness and fairness in contracting. More concretely this is reflected in a policy of consumer protection and a pot-pourri of specific principles. For example, consumer-welfarism holds that contracting parties should not mislead one another, that they should act in good faith, that a strong party should not exploit the weakness of another's bargaining position, that no party should profit from his own wrong or be unjustly enriched, that remedies should be proportionate to the breach, that contracting parties who are at fault should not be able to dodge their responsibilities, and so on. Crucially, consumer-welfarism subscribes to the paternalistic principle that contractors who enter into bad bargains may be relieved from their obligations where justice so requires." [495]

From the aforementioned philosophies the following ideas arise: The exploitation of the weak, the poor and the vulnerable ought to be countered through the protection by the law. In this regard, judicial intervention in a multitude of ways, including, interference in contracts, the prohibition of some kind of contracts or some kind of contractual terms were called for. What were also called for by concerned sources were legislative interventions. [496]

Although the English courts, responsible for handling the common law of contract, were rarely willing to develop principles requiring them to interfere with contracts freely entered into, even while one of the parties was manifestly much weaker than the other and incapable of looking after his own interests, [497] a drive remained amongst some lawyers, academic writers, philosophers for the small consumer, the weak contracting party, who found himself bound by an unfair or harsh contract. This drive eventually led to the introduction of legislation in England, by the middle of the twentieth century, including the *Trade Description Act* 1968 and the *Unfair Contract Terms Act* 1977. [498]
Consequently, it has been stated by the legal writers, that both the courts and legislature have become increasingly sensitive to the imposition of unfair contract terms, on members

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495 Tillotson (1995) 44 quoting Adams and Brownsword (2000) 129; Furmston (1986) 23; Yates (1982) 267.

496 Atiyah (1995) 20, 25; Yates (1982) 268.

497 Atiyah (1995) 25-26 sums up the position as follows: Until the introduction of the legislative measures *"the courts did, in a limited way, try to help the weaker party to a contract. The courts by a less open means, for instance, by employing suitable terms, or by a benevolent process of controlling of the terms which existed in the contract."*

498 Atiyah (1995) 25-26; Furston (1986) 23; Waddams "Unconscionability in Contracts" *The Modern Law Review* Vol. 39 (July 1976) No 4 convincingly argues: *" ..... legislation, like judicial decisions, reflects the needs of a society, and the fact that the need for control of agreements has become so pressing in particular cases as to prompt legislative intervention argues, to my mind, in favour, rather than against the need for general control."* Tollotson (1995) 105 describe the rationale for statutory intervention in which he states: *"Statutory intervention often stems from the need for Parliament to restore some semblance of balance to the contractual relationship in question. Where freedom of contract has degenerated into freedom to oppress owing to an imbalance of economic power between the parties, the legislature has tended to move in on behalf of the weaker party by way of statutorily implied contractual terms."*

of the public, by persons who abuse their `superior' bargaining power. [499]

Although the `inequality of bargaining power', alternatively, `abuse of bargaining power', has seldom been recognised in English Law as a so called `free floating' common law defence, such as for example, incapacity, illegality, deceit, misrepresentation, mistake, duress and undue influence, nonetheless, the legal writers have absorbed the `inequality of bargaining power' into the notion of unconscionability which, together with fundamental breach and reasonableness, have emerged as a means of dealing especially with unfair terms in exemption clauses. [500]

It is, therefore, possible in English law, to strike down a contract (or a clause) on `unconscionable' grounds, in, what is known in legal terminology, that one party has extracted a grossly unfair bargain, by taking advantage of the other in some unfair way. [501]

12.2.3.2.2 Case Law

The concept of `inequality of bargaining power' and accompanying remedies are not new phenomena in English case law. Traces of their existence date back to the early 1800's, in which era, the principle of equity went much further than the common law, in relieving, weaker parties from their contractual obligations. General protection was afforded to; *inter alia,* infants, drunkards, as well as those of weak intellect, which went beyond the class of people generally described as lunatics. [502] Relief was also given to parties dealing with each other, but who did not stand on equal footing. [503]

As far back as 1873 Lord Selborne in the case of *Earl of Aylesford v Morris* [504] addressed the issue of unfair bargains as follows:

"The arbitrary rule of equity as to sales of reversions was an impediment to fair and reasonable, as well as to unconscionable bargains."

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499 Chin Nyuk-Yin (1985) 132; Poole (2004) 375 placed the key ingredients for the doctrine of unconscionable-ness in unfairness and taking advantage of an unequal bargaining position.

500 Chin Nyuk-Yin (1985) 132-133; Peden (1982) 9-10, 18; Yates (1982) 279; Atiyah (1995) 300; O'Sullivan and Hilliard (2004) 386-388.

501 Atiyah (1985) 300.

502 *Blackford v Christian* (1829) 1 KNAPP 73.

503 *Bawtree v Watson* (1834) 3 MY. @ K 339, 341.

504 (1873) 8 CH APP 484.

In this case Lord Selbourne LL referred to the dictum of Lord Hardwicke in *Earl of Chesterfield v Janssen* 2 Ves Sen 125, 157 which provides:

"There is always fraud presumed or inferred from the circumstances or conditions of the parties contracting - weakness on one side, usury on the other side, or extortion, or advantage taken of that weakness. There has been always an appearance of fraud from the nature of the bargain.

Fraud does not here mean deceit or circumvention; it means an unconscientious use of the power arising out of these circumstances and conditions, and when the relative position of the parties is such as prima facie to raise this presumption, the transaction cannot stand unless the person claiming the benefit of it is able to repel the presumption by contrary evidence, proving it to have been in point of fact fair, just, and reasonable."

Lord Selbourne goes on to state:

"Whatever weight there may be in any such collateral considerations, they could hardly prevail, if they did not connect themselves with an equity more strictly and directly personal to the Plaintiff in each particular case. But the real truth is, that the ordinary effect of all the circumstances by which these considerations are introduced, is to deliver over the prodigal helpless into the hands of those interested in taking advantage of his weakness, and we so arrive in every such case at the substance of the conditions which throw the burden of justifying the righteousness of the bargain upon the party who claims the benefit of it." [505]

Besides concentrating on the so called `catching of bargains' the relief extended by the court also extended to whether the parties were contracting on equal footing. In the case of *Wood v Abrey* [506] Leach V.C. set out the position as follows:

"A court of equity will inquire whether the parties really did meet on equal terms, and if it be found that the vendor was in distressed circumstances, and that advantage was taken of that distress, it will avoid the contract." [507]

Referring to the potential unequal bargaining power involving the poor and ignorant Kay J in *Fry v Lane* [508] stated the position as follows:

"The result of the decisions is that where a purchase is made from a poor and ignorant man at a considerable undervalue, the vendor having no independent advice, a court of equity will set aside the transaction. This will be done even in the case of property in possession and a fortiori if the interest be reversionary. The circumstances of poverty and ignorance of the vendor and absence of independent advice throw upon the purchaser, when the transaction is impeached, the onus of proving, in Lord Selborne's words, that the purchase was `fair, just and

505 *Earl of Aylesford v Morris* (1873) 8 CH App 484.

506 (1818) 3 MADD. 417.

507 *Wood v Abrey* (1818) 3 MADD. 417 at 423.

508 (1888) 40 CH.D. 312.

reasonable.'" [509]

As far back as 1903, in a maritime case of *The Port Caledonia and the Anna,* [510] the court considered the potential unequal bargaining between the two contractants when it considered the following question:

"What was the position of the two persons who made the agreement? The position was this. One man was in a position to insist upon his terms and the other man had to put up with it. He could not help himself. He says in his letter to his owners. `He demanded 1000l, to take me away. I offered him 100l, or to leave it to the owners, but he would not agree, so I agreed to give 1000l rather than foul the Anna'."

Based on the fairness of bargain, the court found that the agreement entered into between the parties:

"..... was an inequitable, extortionate, and unreasonable agreement ....." [511]

There was a time in England however, when it had generally been accepted that the courts should confine the granting of relief to cases where the contract was entered into under duress or undue influence. Where a person took advantage of a simple minded or otherwise weaker party, a mere inequality of bargaining power was not recognised as a sufficient ground for granting relief. Since the well known dictum of Lord Denning M.R. in *Lloyds Bank Ltd v Bundy* [512] and the statements of a handful of cases that followed, the English courts however showed a willingness to develop a more general doctrine at common law permitting relief against harsh or unfair contracts where there is a significant inequality of bargaining power between the parties. In the *Bundy case*, the Court of Appeal held, in a case where a relationship of confidentiality existed between the bank and its customer, that the court could intervene to prevent the relationship being abused.

The facts of the case included the following: B, an elderly farmer, and his only son, had been customers of the bank for many years. The son founded a company which banked at the same bank. In 1966, B guaranteed the company's overdraft for $1,500 and charged his farm to the bank to secure that sum. Subsequently the overdraft was increased and the

509 *Fry v Lane* (1888) 40 CH.D. 312.

510 (1903) P184, Probate Division.

511 *The Port Caledonia and the Anna* (1903) P184, Probate Division.

512 (1975) 1 Q.B. 326.

bank sought further security. In May 1969, B, having taken legal advice, signed a further guarantee in favour of the bank for $5,000 and a further charge for $6,000. In December 1969, the bank manager visited B and indicated to him that continuance of the company's overdraft facility was dependent upon B executing in favour of the bank a further guarantee for $11,000 and a further charge for $3,500. The bank manager did not advise B to seek independent advice, and B signed the required guarantee and charge without such advice.

The court took account of the fact that the customer's signing of a guarantee and a legal charge in favour of the bank involved a conflict of interest which could have resulted in the customer losing his sole remaining asset to the bank and being left destitute in his old age, and that he had no independent advice as to the wisdom of what he was doing. The court concluded that the bank had broken its fiduciary duty of care and therefore the guarantee and charge should be set aside for undue influence.

In the course of his judgement Lord Denning M.R. acknowledged that the courts will not generally interfere merely because a contract is harsh, but maintained that there was a general principle underlying the exceptions.

Consequently, Lord Denning based his decision in favour of Mr Bundy on a broader principle than that adopted by the other members of the Court of Appeal. He identified this as `inequality of bargaining power'. By virtue of this, he claimed:

"Gathering all together, I would suggest that through all these instances there runs a single thread. They rest on `inequality of bargaining power.' By virtue of it, the English law gives relief to one who, without independent advice, enters into a contract upon terms which are very unfair or transfers property for a consideration which is grossly inadequate, when his bargaining power is grievously impaired by reason of his own needs or desires, or by his own ignorance of infirmity, coupled with undue influences or pressures brought to bear on him by or for the benefit of the other. When I use the word `undue' I do not mean to suggest that the principle depends on proof of any wrongdoing. The one who stipulates for an unfair advantage may be moved solely by his own self-interest, unconscious of the distress he is bringing to the other. I have also avoided any reference to the will of the one being `dominated' or `overcome' by the other. One who is in extreme need may knowingly consent to a most improvident bargain, solely to relieve the straits in which he finds himself. Again, I do not mean to suggest that every transaction is saved by independent advice. But the absence of it may be fatal. With these explanations, I hope this principle will be found to reconcile the cases."

And:

"As a matter of common fairness, it is not right that the strong should be allowed to push the weak to the wall." [513]

513 *Lloyds Bank Ltd v Bundy* (1975) 1 Q.B. 326 at 339.

The principle enunciated by Lord Denning in Bundy was expressed although qualified in other cases.

In *A Schroeder Music Publishing Co Ltd v Macaulay* [514] the House of Lords considered an agreement between a young songwriter and a music publishing company in the company's standard form whereby the company acquired the songwriter's exclusive services for a period of five years and full copyright in all musical works composed by him during that period, but without undertaking any obligations to publish or promote his work. Such contracts are normally judged under the restraint of trade doctrine, which requires the restraint to be reasonable in the interests of the parties and the public. However, the judgements of Lord Diplock and Lord Reid added further refinements to the straight application of the restraint of trade doctrine, and their judgements are significant in two respects.

The court recognised the distinction between freely negotiated contracts (whether of standard form or otherwise) and contracts of adhesion, offered on a "take it or leave it" basis, and suggested that the use of the latter calls for vigilance on the part of the courts to see that they are not used to drive unconscionable bargains. Second, in order to determine whether the restraint imposed by the company upon the songwriter was fair, Lord Diplock adopted the following test (at pp 1315-1316): "Was the bargain fair? ..... The test of fairness is, no doubt, whether the restrictions are both reasonably necessary for the protection of the legitimate interests of the promisee and commensurate with the benefits secured to the promisor under the contract. For the purpose of this test all the provisions of the contract must be taken into consideration."

Lord Diplock continued his passionate plea by submitting the contract was unconscionable because they were not the subject of negotiation between the parties. The policy behind unconscionable-ness, according to Lord Diplock, is to *"protect weaker parties from being forced into unfair bargains by those who are in stronger bargaining positions."* [515]
Subsequently, in *Clifford Davis Management Ltd v W.E.A. Records Ltd* [516] the Court of Appeal again refused to enforce standard form publishing agreements with a musical group. The case was concerned with certain one-sided agreements that two song-writers had

514 (1974) 1 W.L.R. 1308.

515 *Schroeder Music Publishing v Macauly* (1974) 3 ALL ER 616 at 623.

516 (1975) 1 W.L.R. 61.

entered into with their original manager, Clifford Davids, who was also a music publisher, and who later turned himself into a company, Clifford Davis Management Ltd. The writers broke with their manager in 1974 and worked under new management, making a record album in the United States. The American firms who made it, wished to release the album in the United Kingdom through their United Kingdom subsidiaries. The plaintiff brought an action to prevent this, claiming copyright in the album, which they said had been assigned to them, against the makers and the distributors, through their English subsidiaries. They were granted an interlocutory injunction. This injunction was discharged by the Court of Appeal which found that there was a prima facie case that the agreements were unenforceable; each composer remained bound to the publisher for five years, who could extend this period at his option for another five years. When either composer wrote a work, he or she was bound to submit it to the publisher, who at once became entitled to the copyright throughout the world. The publisher was not bound to publish any of the works, and had the right for six months to reject a work, and pay only for the copyright therein. The publishers might also assign the copyright to a third party at their absolute discretion.

The court subsequently found that the terms of the contract were manifestly unfair and that the copyright in the works was transferred for a grossly inadequate consideration. The bargaining power of each composer was gravely impaired by the position in which they were placed vis. a vis. the manager, who had brought undue influence or pressure on the composers, who had no lawyer or legal adviser. Browne L.J. delivered a concurring judgement, also finding the contracts unenforceable for inequality of bargaining power.

Other cases in which, limited signs were displayed that the courts might be prepared to recognise a general right of intervention to prevent the weaker party from being exploited by the stronger party, include, *Alec Lobb (Garages) Ltd v Total Oil (Great Britain) Ltd.* [517] In this case, the plaintiffs sought to set aside an agreement of lease on the grounds that it was a restraint of trade, and that it was as a result of an unequal bargaining process.

Referring to the legal position Dillon LJ held:

"The whole emphasis is on extortion, or undue advantage taken of weakness, an unconscientious use of the power arising out of the inequality of the parties' circumstances, and on unconscientious use of power which the court might in certain circumstances be entitled to infer from a particular, and in these days notorious, relationship unless the contract is proved to have been in fact fair, just and reasonable. Nothing leads me to suppose that the course of the development of the law over the last 100 years has been such that the emphasis on unconscionable conduct or unconscientious use of power has gone and relief will now be granted in equity in a case such as the

517 (1985) 1 W.L.R. 173 CA.

present if there has been, unequal bargaining power, even if the stronger has not used his strength unconscionably." [518]

But, the attempt by Lord Denning to create and develop a `free floating' general doctrine at common law, in the form of `inequality of bargaining power', which will assist in obtaining relief against harsh or unfair contracts or contract terms, was short-lived as the House of Lords, in *National Westminster Bank P/L v Morgan,* [519] saw no need for a general doctrine of inequality of bargaining power. In this case, Lord Scarman, being very critical of Lord Denning's dictum in Bundy, stated:

"Lord Denning MR (in Bundy) believed that the doctrine of undue influence could be subsumed under a general principle that English courts will grant relief where there has been `inequality of bargaining power'. He deliberately avoided reference to the will of one party being dominated or overcome by another. The majority of the court did not follow him; they based their decision on the orthodox view of the doctrine as expounded in Allcard v Skinner, 36 Ch D 145. The opinion of the Master of the Rolls, therefore, was not the ground of the court's decision, which was to be found in the view of the majority, for whom Sir Erich Sachs delivered the leading judgement. Nor has counsel for the respondent sought to rely on Lord Denning MR'2 general principle and in my view, he was right not to do so. The doctrine of undue influence has been sufficient developed not to need the support of a principle which by its formulation in the language of the law of contract is not appropriate to cover transactions of gift where there is no bargain. The fact of an unequal bargain will, of course, be a relevant feature in some cases of undue influence. But it can never become an appropriate basis of principle of an equitable doctrine which is concerned with transactions `not to be reasonably accounted for on the ground of friendship, relationship, charity, or other ordinary motives on which ordinary men act' (Lindly LJ in Allcard v Skinner at 185). And even in the field of contract I question whether there is any need in the modern law to erect a general principle of relief against inequality of bargaining power. Parliament has undertaken the task, and it is essentially a legislative task, of enacting such restrictions upon freedom of contract as are in its judgement necessary to relieve against the mischief; for example, the hire purchase and consumer protection legislation, of which the Supply of Goods (Implied terms) Act 1973, Consumer Credit Act 1974, Consumer Safety Act 1978, Supply of Goods and Services Act 1982 and Insurance Companies Act 1982 are examples. I doubt whether the courts should assume the burden of formulating further restrictions." [520]

More recently the English courts are prepared to take into consideration inequality of bargaining power in determining the fairness of a contract, but not as an independent ground for setting aside a contract. This occurred in the case of *Director General of Fair Trading v First National Bank P/L,* [521] in which Lord Bingham expresses himself as follows:

"A term falling within the scope of the regulations is unfair if it causes a significant imbalance in the party's rights and obligations under the contract to the detriment of the consumer in a manner or to an extent which is contrary to the requirement of good faith. The requirement of significant imbalance is met if a term is so weighted in favour

518 *Alec Lobb (Garages) Ltd v Total Oil (Great Britain) Ltd* (1985) 1 W.L.R. 173 CA.

519 (1985) AC 686.

520 *National Westminster Bank P/C v Morgan* (1985) AC 686 at 707-708.

521 (2001) UKHL 52 (2002) 1 AC 481.

of the supplier as to tilt the parties' rights and obligations under the contract significantly in his favour. This may be by the granting to the supplier of a beneficial option or discretion or power, or by the imposing on the consumer of a disadvantageous burden or risk or duty. "The illustrative terms set out in Schedule 3 to the regulations provide very good examples of terms which may be regarded as unfair, whether a given term is or is not to be so regarded depends on whether it causes a significant imbalance in the parties' rights and obligations under the contract."

He goes on to state:

"Fair dealing requires that a supplier should not, whether deliberately or unconsciously, take advantage of the consumer's necessity, indigence, lack of experience, unfamiliarity with the subject matter of the contract, weak bargaining position or any other factor listed in or analogous to those listed in Schedule 2 of the regulations." [522]

In the case of *Boustany v Pigott* [523] the court, per Lord Templeman, in his dictum laid down the following requirements before it can be said an agreement is an unconscionable bargain which should be declared null and void:

"(1) It is not sufficient to attract the jurisdiction of equity to prove that a bargain is hard, unreasonable or foolish; it must be proved to be unconscionable in the sense that `one of the parties to it has imposed the objectionable terms in a morally reprehensible manner, that is to say, in a way which affects his conscience Maitiservice Bookbinding v Marden (1979) Ch 84, 110.

(2) `Unconscionable' relates not merely to the terms of the bargain but to the behaviour of the stronger party, which must be characterised by some moral culpability or impropriety: Lobb (Alec) (Garages) Limited v Total Oil (Great Britain) Limited (1983) 1 WLR 87, 94.

(3) Unequal bargaining power or objectively unreasonable terms provide no basis for equitable interference in the absence of unconscientious or extortionate abuse of power where exceptionally, and as a matter of common fairness, it was not right that the strong would be allowed to push the weak to the wall. Lobb (Alec) (Garages) Limited v Total Oil (Great Britain) Limited (1985) 1 WLR 173 188

(4) A contract cannot be set aside in equity as `an unconscionable bargain' against a party innocent of actual or constructive fraud. Even if the terms of the contract are unfair in the sense that they are more favourable to one party than the other (Contractual imbalance), equity will not provide relief unless the beneficiary is guilty of unconscionable conduct: Hart v O'Connor (1985) AC 1000 applied in Nichols v Jessup (1986) NZLR 226.

(5) In situations of this kind it is necessary for the plaintiff who seeks relief to establish unconscionable

522 *Director General of Fair Training v First National Bank* (2001) UKHL 52; (2002) 1 AC 481.

523 (1995) 69 P and CR 298, Privy Council.

conduct, namely that unconscientious advantage has been taken of his disabling condition or circumstances: per Mason J in Commercial Bank of Australia Ltd v Amadio (1983) 46 ALR 402, 413." [524]

12.2.3.2.3 Legal Opinion

The status and bargaining power of contracting parties is a factor which has huge significance in the English law of contract. The reason there-for stems from the fact that the ideas of agreement, the promise reached by the contracting parties, often through bargaining, lies at the heart of English contract law. [525] It is especially with the production of standard term contracts that greater attention was given to the genuiness of agreement reached between the contracting parties, who often stood in an unequal bargaining position with each other. [526] Because individually negotiated, or custom-made terms, made way for standard terms, in which the weaker contracting party was often without bargaining power and obliged to accept terms on a `take it or leave it' basis, the English courts often came to the rescue of the weaker contracting party. [527] It was especially the courts of equity that sought to stamp out the so-called `catching of bargains' and the exploitation of the poor and vulnerable. [528] But, it was especially with the creation of consumer protection organizations, that consumer-welfarism came strongly to the fore. A new consumer-welfarism ethos was introduced. The main philosophy imbedded therein included; reasonableness and fairness in contracting, the contracting parties ought to contract in good faith; stronger contracting parties ought not to exploit the weaker contracting parties in the bargaining process etc.

Furthermore, no contracting party ought to profit from his/her/its own wrong. The contracting party who is at fault should, therefore, not dodge his/her/its responsibility. [529]

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524 *Boustany v Pigott* (1995) 69 P@CR 298, Privy Council.

525 Tillotson *Contract Law in Perspective* (1995) 8; Atiyah *An Introduction to the Law of Contract* (1995) 15.

526 Tillotson *Contract Law in Perspective* (1995) 8; Atiyah *An Introduction to the Law of Contract* (1995) 15-16, 25.

527 Atiyah *An Introduction to the Law of Contract* (1995) 16; Deutsch *Unfair Contracts* (1977) 14; The Law Commission and The Scottish Law Commission *Exemption Clauses Second Report* (1976) 57, 60. The English Courts, as early as 1834, in the case of *Bawtree v Watson* (1834) 3 MY and K 339, 341, were prepared to grant relief to a contracting party who stood on an unequal footing to that of the other contracting party and who acted to his/her detriment. This protection was also afforded the weaker party in the well-known English case of *Earl of Aylesford v Morris* (1873) 8 CH App 484 wherein the weaker was protected against an unconscionable bargaining where advantage was taken of someone's weakness in the bargaining places.

528 *Wood v Abbey* (1818) 3 MADD, 417; *Fry v Lane* (1888) 40 CHD 3.

529 Tillotson *Contract Law in Perspective* (1995) 44 quoting Adams and Brownsword Understanding Contract (2000)

An area of great impetus included standard form contracts containing exemption clauses. These contracts often brought harmful consequences or results for the consumer; *inter alia* the consumer's normal contractual rights were diminished. [530] Although the English courts as far back as 1903 in the case of *The Port Caledonia and the Anna*, [531] promoted the idea of consumer welfarism by emphasizing the fairness of bargain and the unreasonable consequences which inequitable contracts bring, in time however, even just before the introduction of legislative intervention in 1977, the English courts, in the well-known case of *Lloyds Bank Ltd v Bundy* [532] and the handful of cases that followed, [533] attempted to develop more general doctrine at common law permitting relief against harsh or unfair contracts where a significant inequality of bargaining power was present. But, the court emphasizes, courts will not, generally, interfere merely because a contract is harsh. Identifying the concept `inequality of bargaining power' as a principle of contract law, the court stated as a matter of common fairness, it is not right that the strong `should be allowed to push the weak to the wall'.

Although the English courts, to a limited extent, had come to the rescue of the weaker parties, incapable of looking after their own interests, there was still reluctance by the English courts to interfere with contracts freely entered into. [534] The inconsistency of the English courts to protect the weaker, that stood in an unequal bargaining position led to pressure groups, including academics, philosophers and lawyers as well as consumer bodies pushing for law reform in England. The drive eventually led to legislative reform, with the introduction of, especially, the *Unfair Contract Terms Act* 1977. The rationale for legislative intervention and the influence of public interests in introducing legislation is convincingly described by the English legal writers. [535]

29; Furmston *Law of Contract* (1986) 23; Yates *Exclusion Clauses in Contract* (1982) 267.

530 Atiyah *An Introduction to the Law of Contract* (1995) 16; Poole *Textbook on Contract Law* (2004) 198.

531 (1903) 184, Probate Division.

532 (1975) 1 Q.B. 326.

533 *A Schroeder Music Publishing Co Ltd v MaCauly* (1974) 1 W.L.R. 1308; *Clifford Davis Management Ltd v W.L.A. Regras Ltd* (1975) 1 W.L.R. 61.

534 Atiyah *An Introduction to the Law of Contract* (1995) 25-26 sums up the position as follows: Until the introduction of the legislative measures *"the courts did, in a limited way, try to help the weaker party to a contract. The courts by a less open means, for instance, by employing suitable terms, or by a benevolent process of controlling of the terms which existed in the contract."*

535 Atiyah *An Introduction to the Law of Contract* (1995) 25-26; Furston *Law of Contract* (1986) 23; Waddams "Unconscionability in Contracts" *The Modern Law Review* Vol. 39 (July 1976) No 4 convincingly argues: *" ..... legislation, like judicial decisions, reflects the needs of a society, and the fact that the need for control of*

But, notwithstanding, the legislative intervention in which the courts have become increasingly sensitive to the imposition of unfair contract terms by contracting parties who abuse their superior bargaining power, [536] the inequality of bargaining power has seldom been recognized in English law as the so-called `free floating' common law defence. [537] What the English courts have done however is to strike down a contract (or a clause in a contract) on `unconscionable' ground in legal terminology which include the taking advantage of the weaker contracting party in an unfair way. [538]

12.2.3.3 UNITED STATES OF AMERICA

12.2.3.3.1 Legal Writings

The status of the contracting parties, especially, the relationship of the parties and the presence or absence of equality of bargaining power, are factors influencing the validity of exemption clauses or exculpatory clauses in contracts, in the United States of America. [539] So, a contractual provision undertaking to exculpate or exempt a contracting party from his or her own negligence will not be sustained where the party, who relies upon the exemption, enjoys a bargaining power superior to that of the other contracting party, who

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agreements has become so pressing in particular cases as to prompt legislative intervention argues, to my mind, in favour, rather than against the need for general control." Tillotson *Contract Law in Perspective* (1995) 105 describe the rationale for statutory intervention in which he states: *"Statutory intervention often stems from the need for Parliament to restore some semblance of balance to the contractual relationship in question. Where freedom of contract has degenerated into freedom to oppress owing to an imbalance of economic power between the parties, the legislative has tended to move in on behalf of the weaker party by way of statutory implied contractual terms."*

536 Chin Nyuk-Yin *Excluding Liability in Contracts* (1985) 132-133; Peden *The Law of Unjust Contracts* (1982) 9-10, 8; Yates *Exclusion Clauses in Contracts* (1982) 279; Atiyah *An Introduction to the Law of Contract* (1995) 300: Sullivan and Hilliard *The Law of Contract* (2004) 386-388.

537 Chin Nyuk-Yin *Excluding Liability in Contracts* (1985) 132-133; Peden *The Law of Unjust Contracts* (1982) 9-10, 8; Yates *Exclusion Clauses in Contracts* (1982) 279; Atiyah *An Introduction to the Law of Contract* (1995) 300: Sullivan and Hilliard *The Law of Contract* (2004) 386-388.

538 Atiyah *An Introduction to the Law of Contract* (1985) 300. The English courts have been divided since the introduction of the *Unfair Contract Terms Act* 1977 as to the role of unequal bargaining as a free floating defence. Whereas in *Alec Lobb (Garages) Ltd v Total Oil (Great Britain) Ltd* (1985) 1 W.L.R. 173 CA the courts seems to support the attempt by Lord Denning in accomplishing this in the case of *Lloyds Bank Ltd v Bundy* (1975) 1 Q.B. 326. This was rejected by the House of Lords in *National Westminster Bank P.L v Morgan* (1985) AC 686 who saw no need for a general doctrine of inequality of bargaining power. Contra however, a more recent English decision in the case of *Director General of Fair Trading v First National Bank P/L* (2001) UKHL 52 (2002) 1 AC 481 in which the court came out strongly that courts should consider the inequality of bargaining power in determining the fairness of a contract, although not as an independent ground for setting aside a contract. In the case of *Boustany v Pigott* (1995) 69 PandCR 298 Privy Council the court also laid down the requirement *inter alia* to consider the inequality of bargaining power to determine an unconscionable bargain.

539 Calamari and Perillo *The Law of Contracts* (1977) 290; Calamari and Perillo *The Law of Contracts* (1987) 399 suggest that the status of the parties are often decisive on the issue of unconscionable-ness.

suffers damages and where the former party puts the latter contracting party at the mercy of such party's negligence. [540]

It is especially with the issue of unconscionable provisions, which often find themselves at the centre of exclusionary clauses or exculpatory clauses, in which an aggrieved party is ignorant of the risk involved, or ignorant of the contract terms which transfer that risk, without offering alternative terms, that the status of the parties is decisive in determining whether the exculpatory clause or exemption clause, *per se,* or the written contract as a whole, is unenforceable. [541]

This situation often arises where a gross, overall one-sidedness in the bargaining power takes place. In this way, one of the contracting parties bargains from a superior bargaining position often, at the expense of the other contracting party. The latter is confronted with a lack of meaningful choice in that, the written agreement is offered to him or her on a "take it or leave it" basis. What also transpires in these situations is that the stronger contracting party takes control of the negotiations, often exploiting the weaker party's ignorance, feebleness, unsophistication as to the terms of the agreement. [542]

Besides the procedural aspect that influences the validity of the exculpatory or exemption clauses through the presence of unconscionable-ness in the bargaining process, the American writers have also recognized that, because unconscionable-ness is founded on the principles of moral philosophy and ethics, substantive unconscionable-ness as to the nature of the provisions of the written agreement, or the nature of the contract *per se,* may also invalidate the provisions of the contract or the contract as a whole. [543]

The nature of the clause or the written agreement *per se,* in turn, is also influenced by the status and relationship between the parties.

The American legal writers, whilst concerned about the necessity to recognise the importance of preserving the integrity of agreements and the fundamental right of parties to deal with one another and to bargain with each other in concluding agreements, are equally

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540 Calamari and Perillo *The Law of Contracts* (1977) 271.

541 Calamari and Perillo *The Law of Contracts* (1987) 406-407.

542 Calamari and Perillo *The Law of Contracts* (1987) 407; Hillman *The Richness of Contract Law* (1997) 133.

543 Calamari and Perillo *The Law of Contracts* (1987) 406.

concerned with the protection of the uneducated and often illiterate individual who is the victim of gross inequality of bargaining power, usually the poorest members of the community. [544]

For that reason the writers encourage effective legal armour to protect and safeguard the prospective victim from the harshness of an unconscionable contract. [545] In this regard, the American legal writers have acknowledged the paternalistic efforts made by the courts in alleviating one of the contracting parties from the effects of a bad bargain. [546]

Equally, the legal writers acknowledge the attempt by the legislature in formulating the *Uniform Commercial Code* in its effort to have unconscionable agreements declared unenforceable, by the courts, where the agreement, or part of the agreement, is contrary to conscience. In this regard the Section 2-302 of the Code provides:

> "(1) If the court as a matter of law finds the contract or any clause of the contract to have been unconscionable at the time it was made the court may refuse to enforce the contract, or it may enforce the remainder of the contract without the unconscionable clause, or it may so limit the application of any unconscionable clause as to avoid any unconscionable result.
> (2) When it is claimed or appears to the court that the contract or any clause thereof may be unconscionable the parties shall be afforded a reasonable opportunity to present evidence as to its commercial setting, purpose and effect to aid the court in making the determinations." [547]

The effect of the adoption of the *Uniform Commercial Code* is that the courts may, therefore, refuse to enforce an agreement on the ground that it is unconscionable.

The relationship between the contracting parties may very well influence the validity of certain contractual provisions, if not the contract as a whole. Where the parties are in a certain relationship, for example, the relationship between the hospital and other caregiver and patient; the landlord and tenant in a lease relationship; a relationship involving public service between say common carriers by sea and rail, air transportation, warehousemen, garage keepers and the public, the bargain which exempts or exculpates the stronger contractual party from future liability to the detriment of the weaker contractual party

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544 Jaegar *A Treatise on The Law of Contracts - Williston on Contracts* (1972) Para 16 32 B.

545 Jaegar *A Treatise on the Law of Contracts - Williston on Contracts* (1972) Para 1632 B regards "*unconscionability as an amorphous concept designated to establish a broad business ethic"*. See also Hillman *The Richness of Contract Law* (1997) 129 ff.

546 Jaegar *A Treatise on the Law of Contracts - Williston on Contracts* (1972) Para 1632.

547 S2-302 *The Uniform Commercial Code.*

would be invalid by virtue of their relationship.
The nature of the relationship between the said parties is such that, once entered into, they involve a status requiring of a party a greater responsibility than that required of the ordinary person. [548]

Part of the responsibility includes the standard of care and skill to be exercised by the service provider. [549] It is especially, in the hospital/other care-giver - patient relationship, that the law expects of the former to exercise due diligence and care in compliance with its/his/her common law duty derived from judicial decisions, as well as statutory obligations derived from professional canons of ethics, licensing laws and regulations set up by the professional organizations to whom they belong. [550]

Because the relationship is regarded as a special legal relationship, the bond between them is affected with a public interest. Any attempt, therefore, to absolve the hospital/care-giver from liability arising from a deviation from this standard of care, will involve public interest and be regarded as obnoxious. [551]

The same can be said, albeit to a lesser extent, in the relationship of landlord and tenant, where the bond between them is also regulated by statute and the common law. [552]

Although in some instances exculpatory clauses in lease agreements, between the landlord and tenant, in which the landlord seeks to escape liability for simple negligence, the legal writers do not support such exculpation where the conduct by the landlord violates public interests. [553]
In so far as the other role players are concerned, where there is a relationship involving public service, a bargain exempting the public utility from its duties in conflict with public interest is equally unenforceable, due to their common law duty of due care infringement

548 Jaegar *A Treatise on the Law of Contracts - Williston on Contracts* (1972) Para 1751.

549 Jaegar *A Treatise on the Law of Contracts - Williston on Contracts* (1972) Para 1751.

550 Waltz and Inbau *Medical Jurisprudence* (1971) 17ff, 42ff; Furrow et al *Health Law* (1995) 237 ff; Morris and Moritz *Doctor and Patient and The Law* (1971) 135; Sanbar *Legal Medicine* (1995) 7, 62-63, 208-209; Holder *Medical Malpractice* (1975) 40ff; Kramer and Kramer *Medical Malpractice* (1983) 8ff.

551 Jaegar *A Treatise on the Law of Contracts - Williston on Contracts* (1972) Para 1751.

552 Jaegar *A Treatise on the Law of Contracts - Williston on Contracts* (1972) Para 1751.

553 Jaegar *A Treatise on the Law of Contracts - Williston on Contracts* (1972) Para 1751.

and statutory obligations not been carried out or complied with. [554]

12.2.3.3.2 Case Law

The American case law attaches significant weight to both the status of the contracting parties and the nature of their relationship in determining the validity of an agreement entered into. More especially, the status of the contracting parties and the nature of their relationship are often being used in American case law as criteria for determining whether a clause in an agreement or the contract as a whole is against public policy.

For that reason then, the American courts distinguish between private voluntary transactions, entered into between the parties concerned and agreements entered into affecting the public, be that in the form of a public duty, be that in the form of public interest.

A general principle has therefore been established in American case law namely:

"There is no public policy which opposes private voluntary transactions in which one party, for a consideration, agrees to shoulder a risk which the law would otherwise have placed upon the other party." [555]

On the other hand, the American courts, as was seen earlier, display no hesitation in invoking public policy in instances where one contracting party seizes the opportunity to capitalize on the situation, often to the detriment of the other contracting party. Exculpatory or exclusionary clauses in contract are often used as a mechanism to further the interests of, especially, the stronger contracting party. For that reason the courts have stepped in and by considering the status and the nature of the relationship between the

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554 Jaegar *A Treatise on the Law of Contracts - Williston on Contracts* (1972) Para

555 *McAtee v Newhall Land and Farming Co* (1985) 169 Cal. App. 3d 10311, at p. 1034 (216 Cal.Rptr. 465) quoting from *Tunkl v Regents of the University of California* (1963) 60 Cal 2d 92, at p. 101 (32 Cal.Rptr 33, 383 p.2d 441. See further *Kurashige v Indian Dunes, Inc* (1988) 200 Cal.App. 3d 606, 612, 246 Cal.Rptr 310; *Allan v Snow Summit Inc* 51 Cal. App. 4th 1358, 59 Cal. Rptr. 2d 813; *Ciofalo v Vic Tanny Gyms Inc* 10 N.Y. 2d 294, 177 N.E. 2d 925, 220 N.Y.S. 2d 962 (1961); *Express Health and Beauty Spa Inc v Turner* 503 S.W. 2d 188 (Tenn. (1973); *Mayfair Fabrics v Henley* 48 N.J. 483, 226A 2d 602 (1967); *Weaver v American Oil Co* 257 Ind. 458, 276 N.E. 2d 144 (1971); *McCutcheon v United Homes Corp* 79 Wash. 2d 443, 486 P. 2d 1093 (1971); *Henningsen v Bloomfield Motors Inc* 32 N.J. 358, 161A. 2d 69 (1960); *Kuzmiak v Brookchester Inc* 33 N.J. Super 575, 111A. 2d 425 (1955); *Krohnert v Yacht Systems Hawaii Inc* 4 Haw. App. 190, 664 P. 2d 738 (1983); *Chazen v Trail Mobile Inc* 215 Tenn. 87, 384 S.W. 2d 1 (1964); *Chicago and North Western Railway Company v Rissler et al* 184 F.Supp. 98 (1960); *Banfield v Louis, Cat Sports Inc et al* 589 So. 2d 441 (1991); *Crawford v Buckner et al* 839 S.W. 754 (1992); *Leidy v Desert Enterprises Inc d/b/a Body Shop Health Spa* 252 Pa. Super 162, 381 A. 2d 164 (1977); *Rooz v Kimmel et al* 55 Cal. App. 4th 473, 64 Cal.Rptr 2d 177 (1997); *Zeit v Foley* 264 S.W. 2d 267 (1954); *Twin City Pipe Line Co et al v Harding Glass* 283 U.S. 303, 51 S.Ct 476 (1931); *New York Life Ins Co. v Durham* 166 F.2d 874 (1948); *Lazenby v Universal Underwriters Insurance Company* 214 Tenn. 639, 383, S.W. 2d 1 (1964).

contracting parties, the courts have been able to pronounce on the validity of contracts, especially, where the one party excuses the other from the consequences of his own acts of negligence.

Apart from the private voluntary transactions referred to above, the status of the contracting parties is influenced by the following factors, namely: whether the agreement arises from a public service contract; [556] whether the agreement affects public interest; [557] whether the exculpatory agreements was entered into in a recreational or sport context. [558]

It is clear from the American case law that, whereas contracts containing exculpatory clauses in public service agreements [559] and contracts involving public interests [560] will not be enforced and declared void as against public policy, the same approach is not adopted in contracts involving recreational and sporting activities. [561]

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556 *Central Alarm of Tucson v Canem* 116 Ariz. 74, 567 P.2d 1203 (1977); *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); *Schoblobohm v Spa Petite Inc* 326 N.W. 2d 920, 923 Minn. (1982); *Henningsen v Bloomfield Motors Inc* 32 N.J. 358, 161 A. 2d 69 (1960); *Chicago and North Western Railway Company v Rissler et al* 184 F. Supp. 98 (1960); *Banfield v Louis Cat Sports Inc* 589 So. 2d 441 (1991); *Crawford v Buckner* 839 S.W. 2d 754 (1992); *Leidy v Deseret Enterprises Inc d/b/a Body Shop Health Spa et al* 252 Pa. Super 162, 381 A.2d 164 (1999); *Anderson v Blair* 80 So. 31 (1918); *Trotter v Nelson* 684 N.E. 2d 1150 (1997); *Krohert v Yacht Systems Hawaii Inc et al* 4 Haw App 190, 166 P.2d 738 (1983).

557 *Allan v Snow Summit Inc* 51 Cal. App. 4th 1358, 59 Cal.Rptr. 2d 813 (1996); *Hunter v American Rentals Inc* 189 Kan. 615, 371 P.2d 131 (1962); *Dessert Seed Co Inc v Drew Farmers Supply Inc* 248 Ark. 858, 454 S.W. 2d 307 (1970); *Mayfair Fabrics v Henley* 48 N.J. 483, 226 A. 2d 602 (1968); *McCutcheon v United Homes Corp* 79 Wash. 2d 443, 486 P. 2d 1093 (1971); *Kuzmiak et al v Brookchester Inc* 33 N.J. Super 575, 111 A 2d 425 (1955); *Krohnert v Yacht Systems Hawaii Inc* 4 Haw. App 190, 664, P. 2d 738 (1983); *Ciofalo v Vic Tanny Gyms Inc* 10 N.Y. 2d 294, 177 N.E. 2d 925, 220 N.Y.S. 2d 962 (1961); *Globe Home Improvement Co v Perth Amboy Chamber of Commerce Credit Rating Bureau Inc* 116 N.J. 168, 182 A. 641 (1930); *Banfield v Louis Cat Sports Inc* 589 So. 2d 441 (1991); *Crawford v Buckner et al* 839 S.W. 754 (1992); *Schlobohm v Spa Petite Inc* 326 N.W. 2d 920, 923 Minn. (1982); *Leidy v Deseret Enterprises Inc d/b/a Body Shop Health Spa et al* 282 Pa Super 162, 381 A.2d 164 (1997); *Rooz v Kimmel et al* 55 Cal. App. 4t 473, 64 Cal. Rptr 2d 177 (1997); *Styles v Lyon* 86 A. 564 (1913); *Trotter v Nelson* 684 N.E. 2d 1150 (1997).

558 *Allan v Snow Summit Inc* 51 Cal. App. 4th 1358, 59 Cal.Rptr. 2d 813 (1996); *Ciofalo v Vic Tanny Gyms Inc* 10 N.Y. 2d 294, 177 N.E. 2d 925, 220 N.Y.S. 2d 962 (1961); *Express Health and Beauty Spa, Inc v Turner* 503 S.W. 2d 188 Tenn. (1973); *Banfield v Louis Cat Sports Inc* 589 So. 2d 441 (1991).

559 *Allan v Snow Summit Inc* 51 Cal. App. 4th 1358, 59 Cal.Rptr. 2d 813 (1996); *Ciofalo v Vic Tanny Gyms Inc* 10 N.Y. 2d 294, 177 N.E. 2d 925, 220 N.Y.S. 2d 962 (1961); *Express Health and Beauty Spa, Inc v Turner* 503 S.W. 2d 188 Tenn. (1973); *Banfield v Louis Cat Sports Inc* 589 So. 2d 441 (1991).

560 *Allan v Snow Summit Inc* 51 Cal. App. 4th 1358, 59 Cal.Rptr. 2d 813 (1996); *Ciofalo v Vic Tanny Gyms Inc* 10 N.Y. 2d 294, 177 N.E. 2d 925, 220 N.Y.S. 2d 962 (1961); *Express Health and Beauty Spa, Inc v Turner* 503 S.W. 2d 188 Tenn. (1973); *Banfield v Louis Cat Sports Inc* 589 So. 2d 441 (1991).

561 *Allan v Snow Summit Inc* 51 Cal. App. 4th 1358, 59 Cal.Rptr. 2d 813 (1996); *Ciofalo v Vic Tanny Gyms Inc* 10 N.Y. 2d 294, 177 N.E. 2d 925, 220 N.Y.S. 2d 962 (1961); *Express Health and Beauty Spa, Inc v Turner* 503

The nature of the legal relationship between the parties, in certain instances, is such that, once entered into, the courts recognise that they involve a status requiring of one party a greater responsibility than that required of the ordinary person. A greater responsibility is bestowed upon certain classes of people which include the standard of care and skill to be exercised by certain service providers.

In this regard, it is especially in the hospital/other care-giver patient relationship that the law expects of the hospital or care-giver to exercise due diligence and care in complying with its/his/her common law duty, as well as the statutory obligations derived from professional canons of ethics, licensing laws and regulations set up by the State or professional organizations to whom they belong. [562]

Because the bond between the hospital/other care-giver and the patient is a special legal relationship, the public interest is affected by any adverse conduct by the former. [563] Any attempts, therefore, to absolve the hospital/care-giver from liability arising from a deviation from this standard of care, will involve the public interest and be regarded by the courts as unenforceable and void as against public policy. [564]

By virtue of the nature of the relationship between the landlord and tenant, it also involves a status requiring of the landlord, in instances, to display a greater responsibility, especially where public interest so dictates. Likewise, the bond between them is also regulated by statute and the common law. [565]

S.W. 2d 188 Tenn. (1973); *Banfield v Louis Cat Sports Inc* 589 So. 2d 441 (1991).

562 *Belshaw v Feinstein and Levin* 258 Cal App. 2d 711, 65 Cal. Rptr 788 (1968); *Ash v New York University Dental Centre* 164 A.D. 2d 366, 564 N.Y.S. 2d 308; *Tatham v Hoke* 469 F. Supp 914 (1979); *Emory University v Porubianski* 248 Ga. 391, 282 S.E. 2d 903 (1981); *Olson v Molzen* 555 S.W. 2d 429 (1977); *Tunkl v Regents of University of California* 383 P. 2d 441 (1963); *Cudnik v William Beaumont Hospital* 207 Mich. App. 378, 525 N.W. 2d 891 (1995).

563 *Belshaw v Feinstein and Levin* 258 Cal App. 2d 711, 65 Cal. Rptr 788 (1968); *Ash v New York University Dental Centre* 164 A.D. 2d 366, 564 N.Y.S. 2d 308; *Tatham v Hoke* 469 F. Supp 914 (1979); *Emory University v Porubianski* 248 Ga. 391, 282 S.E. 2d 903 (1981); *Olson v Molzen* 555 S.W. 2d 429 (1977); *Tunkl v Regents of University of California* 383 P. 2d 441 (1963); *Cudnik v William Beaumont Hospital* 207 Mich. App. 378, 525 N.W. 2d 891 (1995).

564 *Belshaw v Feinstein and Levin* 258 Cal App. 2d 711, 65 Cal. Rptr 788 (1968); *Ash v New York University Dental Centre* 164 A.D. 2d 366, 564 N.Y.S. 2d 308; *Tatham v Hoke* 469 F. Supp 914 (1979); *Emory University v Porubianski* 248 Ga. 391, 282 S.E. 2d 903 (1981); *Olson v Molzen* 555 S.W. 2d 429 (1977); *Tunkl v Regents of University of California* 383 P. 2d 441 (1963); *Cudnik v William Beaumont Hospital* 207 Mich App. 378, 525 N.W. 2d 891 (1995).

565 *Crawford v Buckner et al* 839 S.W. 2d 754 (1992); *McCutcheon v United Homes Corp* 99 Wash 2d 443, 486 P.2d 1093 (1971); *Kuzmiak et al v Brookchester Inc* 33 N.J. Super 575, 111 A. 2d 425 (1955).

These types of contracts are generally held to be violating public policy, as a residential lease concerns a business of a type generally thought suitable for public regulation. Any attempt, therefore, by the landlord, who may seek to escape liability for negligence by making use of exculpatory clauses, are generally not supported by the courts, especially where the conduct by the landlord violates public interests. [566]

In so far as the other players, who also make use of exculpatory clauses to escape liability for their negligent acts, are concerned, the courts will not step in and protect any of the contracting parties where the agreement is based on a private contract, voluntarily entered into between the parties concerned. An example hereof is to be found in contracts involving sporting and recreational activities. In this regard the courts have held that in considering their status, the services provided can hardly be termed essential. [567]
Another class of contract which, by their very nature and the status of the contracting parties, will not draw sympathy from the courts, despite the presence of exculpatory clauses in the contract, is that of commercial contracts. [568]

But, where there is a relationship involving public service, for example, common carriers by sea or rail, air transportation, public parking or garage keeping, municipal services, the parties by virtue of their status, as such, will not escape the courts sanction by executing a bargain exempting the public utility from its duties in conflict with public interest. Such agreements are equally unenforceable due to their common law, duty of due care, infringement or statutory obligations not being carried out or complied with. [569]

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566 *Crawford v Buckner et al* 839 S.W. 2d 754 (1992); *McCutcheon v United Homes Corp* 99 Wash 2d 443, 486 P.2d 1093 (1971); *Kuzmiak et al v Brookchester Inc* 33 N.J. Super 575, 111 A. 2d 425 (1955).

567 *Banfield v Louis, Cat Sports Inc et al* 589 So. 2d 441 (1991); For sporting activities see also *Ciofalo et al v Vic Tanney Gyms Inc* 10 N.Y. 24 294, 177 N.E. 2d 925, 220 N.Y.S. 2d 962 (1961); *Schoblobohm v Spa Petite Inc* 325 N.W. 2d 920, 923 Minn. (1982); *Leidy v Deseret Enterprises Inc d/b/a Body Shop Health Spa et al* 282 Pa Super 162, 381 A.2d 164 (1977); For recreational services: See also *Allan v Snow Summit Inc* 51 Cal. App. 4th 1358, 59 Cal.Rptr. 2d 813 (1996).

568 *Graham v Chicago Rock Island and Pacific Railroad Company* 431 F.Supp. 444 (1976); *Sunny Isles Marina Inc v Adulami et al* 706 So. 2d 920 (1998); *Foster v Matthews* 714 So. 2d 1215 (1998); *Smith v Choe et al* 242 A.D. 2d 188, 674 N.Y.S. 2d 17 (1998); *Central Alarm of Tucson v Ganem* 11 A2.74, 567 P. 2d 1203 (1977); *Chicago Great Western Railway Company v Farmers Produce Company* 164 F. Supp 532 (1958); *Dessert Seed Co Inc et al v Drew Farmers Supply Inc* 248 858, 454, S.W. 2d (1970); *Smith d/b/a Smith Construction Company v Seaboard Coast Line Railroad Company* 639 F.2d 1235 (1981); *Messersmith v American Fidelity Co* 232 N.Y. 11, 133 N.E. 432 (1921); *Levine et al v Shell Oil Company v Visconti* 28 N.Y. 2d 205, 209 N.E. 2d 799, 321 N.Y.S. 2d 81; *Krohnert v Yacht Systems Hawaii Inc* 4 Haw App. 190, 664 P.2d 728 (1983); *Chicago and North Western Railway Company v Rissler* 184 F. Supp 98 (1960).

569 *Hunter v American Rental Inc* 189 Kan. 15, 371 P.2d 131 (19); *Dessert Seed Co Inc et al v Drew Farmers Supply Inc* 248 Ark 858, 454 S.W. 2d 307 (1970); *Smith d/b/a Smith Construction Company v Seaboard Coast Line Railroad Company* 639 F.2d 1235 (1981); *Mayfair Fabrics v Henley* 48 N.J. 483, 226 A. 2d 02 (1968) P.2d

12.2.3.3.3 Legal Opinion

The status of the contracting parties; the relations of the parties; and the presence or absence of the equality of bargaining power, are strong influencing factors which may sway the American courts in declaring contracts or contractual provisions containing exemption clauses or exculpatory clauses invalid. [570]

In so far as the status of the parties is concerned, the American courts clearly distinguish between private voluntary transactions and agreements entered into affecting the public, be that in the form of a public duty, be that in the form of public interest. In the former instance, it has, repeatedly, been stated that public policy dictates that private voluntary transactions containing exclusionary or exculpatory clauses, in which the party agrees to shoulder the risk, are not invalid.

On the other hand, the American courts will not hesitate in invoking public policy in instances where, the agreement arises from a public service contract; [571]or, where the agreement affects public interest. [572] The nature of the legal relationship between the

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138 (1983); *Chicago and North Western Railway Company v Rissler et al* 184 F. Supp. 98 (1960); *Banfield v Louis Cat Sports Inc* 589 So. 2d 441 (1991); *Crawford v Buckner et al* 839 S.W. 2d 754 (1992).

570 Calamari and Perillo (1977) 290; Calamari and Perillo *The Law of Contracts* (1987) 399 suggest that the status of the parties are often decisive on the issue of unconscionable-ness.

571 *McAtee v Newhall Land and Farming Co* (1985) 169 Cal. App. 3d 10311, at p. 1034 (216 Cal.Rptr. 465) quoting from *Tunkl v Regents of the University of California* (1963) 60 Cal 2d 92, at p. 101 (32 Cal.Rptr 33, 383 p.2d 441. See further *Kurashige v Indian Dunes, Inc* (1988) 200 Cal.App. 3d 606, 612, 246 Cal.Rptr 310; *Allan v Snow Summit Inc* 51 Cal. App. 4th 1358, 59 Cal. Rptr. 2d 813; *Ciofalo v Vic Tanny Gyms Inc* 10 N.Y. 2d 294, 177 N.E. 2d 925, 220 N.Y.S. 2d 962 (1961); *Express Health and Beauty Spa Inc v Turner* 503 S.W. 2d 188 (Tenn. (1973); *Mayfair Fabrics v Henley* 48 N.J. 483, 226A 2d 602 (1967); *Weaver v American Oil Co* 257 Ind. 458, 276 N.E. 2d 144 (1971); *McCutcheon v United Homes Corp* 79 Wash. 2d 443, 486 P. 2d 1093 (1971); *Henningsen v Bloomfield Motors Inc* 32 N.J. 358, 161A. 2d 69 (1960); *Kuzmiak v Brookchester Inc* 33 N.J. Super 575, 111A. 2d 425 (1955); *Krohnert v Yacht Systems Hawaii Inc* 4 Haw. App. 190, 664 P. 2d 738 (1983); *Chazen v Trail Mobile Inc* 215 Tenn. 87, 384 S.W. 2d 1 (1964); *Chicago and North Western Railway Company v Rissler et al* 184 F.Supp. 98 (1960); *Banfield v Louis, Cat Sports Inc et al* 589 So. 2d 441 (1991); *Crawford v Buckner et al* 839 S.W. 754 (1992); *Leidy v Desert Enterprises Inc d/b/a Body Shop Health Spa* 252 Pa. Super 162, 381 A. 2d 164 (1977); *Rooz v Kimmel et al* 55 Cal. App. 4th 473, 64 Cal.Rptr 2d 177 (1997); *Zeit v Foley* 264 S.W. 2d 267 (1954); *Twin City Pipe Line Co et al v Harding Glass* 283 U.S. 303, 51 S.Ct 476 (1931); *New York Life Ins Co. v Durham* 166 F.2d 874 (1948); *Lazenby v Universal Underwriters Insurance Company* 214 Tenn. 639, 383, S.W. 2d 1 (1964).

572 *Central Alarm of Tucson v Canem* 116 Ariz. 74, 567 P.2d 1203 (1977); *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); *Schoblobohm et al v Spa Petite Inc* 326 N.W. 2d 920, 923 Minn. (1982); *Henningsen v Bloomfield Motors Inc* 32 N.J. 358, 161 A. 2d 738 (1960); *Chicago and North Western Railway Company v Rissler et al* 184 F. Supp.78 (1960).

parties which arises from the types of agreements entered into will also be an influencing factor where the courts are called upon to consider whether a contract of contractual provision containing an exemption or exclusionary clause, is valid or not. Contracting parties, when occupying certain positions, for example, hospital and patient, landlord and tenant, common carriers, sea or rail, air transportation, public parking, municipal services are said to acquire, with their status, greater responsibility than that required of the ordinary person, especially, when public interest so dictates. [573]
The responsibility includes the observance of a standard of care and skill to be exercised by the service provider in compliance with statutory obligation or licensing laws etc. [574]

In the hospital-patient relationship, the law expects of the hospital to exercise due diligence and care in complying with their common law, as well as statutory obligations, derived from professional canons of ethics, licensing laws and regulations. [575] Any attempt therefore, to absolve the hospital from liability arising from a deviation from this standard of care, will involve public interest and be regarded as obnoxious and invalid. As such, an attempt will be regarded as against public policy. [576]

The same principle is applied, to a lesser extent, to the relationship of landlord and tenant, where the bond between them is also regulated by public statute and the common law. Any attempt, therefore, by the landlord to seek to escape liability for violation of public

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573 *Allan v Snow Summit Inc* 51 Cal. App. 4th 1358, 59 Cal.Rptr. 2d 813 (1996); *Hunter v American Rentals Inc* 189 Kan. 615, 371 P.2d 131 (1962); *Dessert Seed Co Inc v Drew Farmers Supply Inc* 248 Ark. 858, 454 S.W. 2d 307 (1970); *Mayfair Fabrics v Henley* 48 N.J. 483, 226 A. 2d 602 (1968); *McCutcheon v United Homes Corp* 79 Wash. 2d 443, 486 P. 2d 1093 (1971); *Kuzmiak et al v Brookchester Inc* 33 N.J. Super 575, 111 A 2d 425 (1955); *Krohnert v Yacht Systems Hawaii Inc* 4 Haw. App 190, 664, P. 2d 738 (1983); *Ciofalo v Vic Tanny Gyms Inc* 10 N.Y. 2d 294, 177 N.E. 2d 925, 220 N.Y.S. 2d 962 (1961); *Globe Home Improvement Co v Perth Amboy Chamber of Commerce Credit Rating Bureau Inc* 116 N.J. 168, 182 A. 641 (1930); *Banfield v Louis Cat Sports Inc* 589 So. 2d 441 (1991); *Crawford v Buckner et al* 839 S.W. 754 (1992); *Schlobohm v Spa Petite Inc* 326 N.W. 2d 920, 923 Minn. (1982); *Leidy v Deseret Enterprises Inc d/b/a Body Shop Health Spa et al* 282 Pa Super 162, 381 A.2d 164 (1997); *Rooz v Kimmel et al* 55 Cal. App. 4t 473, 64 Cal. Rptr 2d 177 (1997); *Styles v Lyon* 86 A. 564 (1913); *Trotter v Nelson* 684 N.E. 2d 1150 (1997).

574 Jaeger *A Treatise on the Law of Contracts - Williston on Contracts* (1972) Para 1751.

575 Waltz and Inbau *Medical Jurisprudence* (1971) 17ff, 42ff; Furrow et al *Health Law* (1995) 237ff; Morris and Moritz *Doctor and Patient and The Law* (1971) 13; Sanbar *Legal Medicine* (1995) 7, 62-63, 208-209; Holder *Medical Malpractice* (1975) 40ff; Kramer and Kramer *Medical Malpractice* (1983) 8ff.

576 Jaeger *A Treatise on the Law of Contracts - Williston on Contracts* (1972) Para 1751. For case law see *Belshaw v Feinstein and Levin* 258 Cal App. 2d 711, 65 Cal. Rptr 788 (1968); *Ash v New York University Dental Centre* 164 A.D. 2d 366, 564 N.Y.S. 2d 308; *Tatham v Hoke* 469 F. Supp 914 (1979); *Emory University v Porubianski* 248 Ga. 391, 282 S.E. 2d 903 (1981); *Olson v Molzen* 555 S.W. 2d 429 (1977); *Tunkl v Regents of University of California* 383 P. 2d 441 (1963); *Cudnik v William Beaumont Hospital* 207 Mich. App. 378, 525 N.W. 2d 891 (1995).

interest or a public duty would be invalid. [577]

The relationship involving public service, for example, common carriers by sea or rail, air transportation, public parking, municipal services, innkeepers and the public, also bring with them, by virtue of their status, greater responsibility, especially where public interest is affected. Any attempt to exempt their liability, by incorporating an exculpatory clause in a contract or contractual provision, will not escape the court's sanction and will be declared invalid. [578]

It is also clear from the legal writers, as well as case law, that where the agreement is a private contract, for example, a contract involving sporting and recreational activities, voluntarily entered into between the parties, in which the one party seeks to be exempted for liability for negligence, the courts will not invalidate such a contract or contractual provision. The main consideration there-for is that the service provider can hardly be termed essential. [579] The same can be said about commercial contracts. The American courts have said, over and over, that, despite the incorporation of exculpatory clauses in the contract, where it is a commercial contract, this will not draw sympathy from the courts. [580]
In so far as the bargaining positions of the parties are concerned, the American position is quite clear. Although the American legal writers and the courts are concerned about the necessity of recognising the importance of preserving the integrity of agreements and the

577 Jaeger *A Treatise on the Law of Contracts - Williston on Contracts* (1972) Para 1751. For case law see *Crawford v Buckner et al* 839 S.W. 2d 754 (1992); *McCutcheon v United Homes Corp* 99 Wash 2d 443, 486 P.2d 1093 (1971); *Kuzmiack et al v Brookchester Inc* 33 N.J. Super 575, 111 A. 2d 425 (1955).

578 Jaeger *A Treatise on the Law of Contracts - Williston on Contracts* (1972) Para 1751. For case law see *Crawford v Buckner et al* 839 S.W. 2d 754 (1992); *McCutcheon v United Homes Corp* 99 Wash 2d 443, 486 P.2d 1093 (1971); *Kuzmiack et al v Brookchester Inc* 33 N.J. Super 575, 111 A. 2d 425 (1955).

579 *Banfield v Louis, Cat Sports Inc et al* 589 So. 2d 441 (1991); For sporting activities see also *Ciofalo et al v Civ Tanney Gyms Inc* 10 N.Y. 24 294, 177 N.E. 2d 925, 220 N.Y.S. 2d 962 (1961); *Schoblobohm v Spa Petite Inc* 325 N.W. 2d 920, 923 Minn. (1982); *Leidy v Deseret Enterprises Inc d/b/a Body Shop Health Spa et al* 282 Pa Super 162, 381 A.2d 164 (1977); For recreational services: See also *Allan v Snow Summit Inc* 51 Cal. App. 4th 1358, 59 Cal.Rptr. 2d 813 (1996).

580 For case law see *Graham v Chicago Rock Island and Pacific Railroad Company* 431 F.Supp. 444 (1976); *Sunny Isles Marina Inc v Adulami et al* 706 So. 2d 920 (1998); *Foster v Matthews* 714 So. 2d 1215 (1998); *Smith v Choe et al* 242 A.D. 2d 188, 674 N.Y.S. 2d 17 (1998); *Central Alarm of Tucson v Ganem* 11 A2.74, 567 P. 2d 1203 (1977); *Chicago Great Western Railway Company v Farmers Produce Company* 164 F. Supp 532 (1958); *Dessert Seed Co Inc et al v Drew Farmers Supply Inc* 248 858, 454, S.W. 2d (1970); *Smith d/b/a Smith Construction Company v Seaboard Coast Line Railroad Company* 639 F.2d 1235 (1981); *Messersmith v American Fidelity Co* 232 N.Y. 11, 133 N.E. 432 (1921); *Levine et al v Shell Oil Company v Visconti* 28 N.Y. 2d 205, 209 N.E. 2d 799, 321 N.Y.S. 2d 81; *Krohnert v Yacht Systems Hawaii Inc* 4 Haw App. 190, 664 P.2d 728 (1983); *Chicago and North Western Railway Company v Rissler* 184 F. Supp 98 (1960).

fundamental right of parties to bargain, with each other, in concluding agreements, they are equally concerned with the protection of the uneducated and often illiterate individuals, who stand in an unequal bargaining position with superior monopolies. [581]

Often the American courts are said to have taken up a paternalistic role in alleviating one of the contracting parties from the effects of a bad bargain. [582] It is especially in instances where superior contracting parties use exemption or exculpatory clauses to escape liability, to the detriment of the weaker contracting party, often the uneducated, the poor, that courts have often gone to the rescue of the uneducated and the poor and relied on the inequality of the bargaining power of the contracting parties to denounce such clauses. [583] Besides the judicial intervention, the American legislature also stepped in, formulating the *Uniform Commercial Code* in its effort to have unconscionable agreements, often arising from the unequal bargaining position of the contracting parties, declared unenforceable. [584]

For that reason, as previously stated, the American legal system has put legal armour together to protect and safeguard the prospective victim from the harshness of the effect of the contract.

12.2.4 Public Interest

12.2.4.1 SOUTH AFRICA

12.2.4.1.1 Legal Writings

Public interest is accepted, amongst South African legal writers, as a factor influencing the validity of exemption clauses. An exemption clause which contravenes or induces the contravention of a fundamental principle of justice, to the prejudice of the interests of the public, should, according to the legal writers, be struck down. [585]

It is especially where public interest may be violated through the entrapment of an unwary

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581 Jaeger *A Treatise on the Law of Contracts - Williston on Contracts* (1972) Para 16 32 B.

582 Jaeger *A Treatise on the Law of Contracts: Williston on Contracts* (1972) Para 1632 B regards *"unconscionability as an amorphous concept designated to establish a broad business ethic."* See also Hillman *The Richness of Contract Law* (1997) 129ff.

583 Calamari and Perillo *The Law of Contracts* (1987) 407; Hillman *The Richness of Contract Law* (1997) 133. For case law see in particular the cases of *Henningsen v Bloomfield Motors Inc* 32 NJ 358, 161 A. 2d 69 (1960); *Weaver v American Oil Co* 257 Ind. 458, 276 N.E. 2d 144 (1971).

584 S2-302 *The Uniform Commercial Code.*

585 Van der Merwe et al *Contract: General Principles* (2003) 215.

customer that, it has been advocated before the law cannot stand aside and allow such traps to operate unchecked. For that reason, limits are set for exemption clauses. [586] Agreements which are to the detriment of the state, which obstruct or defeat the administration of justice, or which restrict someone's freedom to act or to be economically active, are said to be contrary to public interest. [587] In certain instances public interests will also include acts contrary to good morals or immoral. [588]

12.2.4.1.2 Case Law

The South African courts, as far back as 1905, in the case of *Morrison v Angelo Deep Gold Mines, Ltd,* [589] besides recognizing public policy and statutory duties as factors influencing the validity of waivers in contracts, also attached significant weight to public interest as a factor influencing the so-called "contracting out" cases.

In a concurring judgement, but emphasizing his special views, Mason J stated:

" ..... That the permission to contract out may make employers careless of the safety of their servants, so that such permission is against public interest."

He continued to express strong views against the idea of allowing 'contracting out' where it was contrary to a statutory duty when he stated:

"..... The arrangement necessarily contravenes or tends to induce contravention of some fundamental principle of justice or of general or statutory law, or that it is necessarily to the prejudice of the interest of the public." [590]

The position enunciated in the Morrison case, was repeated in the case of *SA Railways and Harbours v Conradie,* [591] in which the court emphazised public interests.
In the case of *Wells v SA Alumenite Co,* [592] Innes CJ had no difficulty in prohibiting

586 Christie *The Law of Contract* (1996) 204.

587 Van der Merwe et al *Contract: General Principles* (2003) 177.

588 Van der Merwe et al *Contract: General Principles* (2003) 177; Aquilius 'Immorality and Illegality in Contract" (1941) *SALJ* 346; Lubbe and Murray *Farlam and Hathaway on Contract* (1988) 240-248.

589 1905 (AD) 775.

590 *Morrison v Angelo Deep Gold Mines, Ltd* 1905 (AD) 775 at 784-785.

591 1921 (AD) 137 at 147.

592 1927 (AD) 69 at 72; See also *Rosenthal v Marks* 1949 (TPD) 172 at 180; *Government of the Republic of South*

exemption from liability for fraud on the grounds of public policy and it being against public interest. The rationale for such approach is not to protect and encourage fraud. This position was restated, much later, in the controversial decision of *Afrox Healthcare Bpk v Strydom* [593] in which Brand JA stated:

"(10) Die feit dat uitsluitingsklousules as 'n spesie in beginsel afgedwing word, beteken uiteraard nie dat 'n bepaalde uitsluitingsklousule nie deur die Hof as strydig met die openbare belang en derhalwe as onafdwingbaar verklaar kan word nie. Die bekendste voorbeeld van 'n geval waar dit wel gebeur het, is waarskynlik die beslissing in Wells v South African Alumenite Company 1927 AD 69 op 72 waarvolgens 'n kontraksbeding wat aanspreeklikheid vir bedrog uitsluit, as strydig met die openbare belang en derhalwe ongeldig verklaar is.

Die maatstaf wat aangewend word met betrekking tot uitsluitingsklousules verskil egter nie van die wat geld vir ander kontraksbedinge wat, na bewering, weens oorwegings van openbare belang ongeldig is nie. Die vraag is telkens of the handhawing van die betrokke uitsluitingsklousule of ander kontraksbeding, hetsy weens uiterste onbillikheid, hetsy weens ander beleidsoorwegings, met die belange van die gemeenskap strydig sal wees." [594]

12.2.4.1.3 Legal Opinion

Public interest is a factor recognised by both the South African legal writers and the Courts. It influences the validity of exemption clauses. Moreover, an exemption clause which contravenes or induces the contravention of a fundamental principle of justice, to the prejudice of the interests to the public, should, accordingly, be struck down as invalid. [595]

The rationale for the recognition of this factor is founded on the enhancement of the safety of the public and the protection of the unwary customer. [596]

12.2.4.2 ENGLAND

12.2.4.2.1 Legal Writings

Public interests and reasonableness are very closely interwoven in the English Law of Contract. It is, especially in contracts in restraint of trade and contracts which place undue restrictions or hardship on one or both of the contracting parties, where those public

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Africa v Fibre Spinners 1978 (2) SA 784 at 803.

593 2002 (6) SA 21 (SCA) at 34.

594 *Afrox Healthcare Bpk v Strydom* 2002 (6) SA 21 (SCA) at 34.

595 Van der Merwe et al *Contract: General Principles* (2003) 215; For case law see *Morrison v Angelo Deep Gold Mines Ltd* 1905 (AD) 775; *SA Railways and Harbours v Conradie* 1921 (AD) 133 at 147; *Wells v SA Alumenite Co* 1927 (AD) 69 at 92; *Rosenthal v Marks* 1944 (TPD) 172 at 180; *Afrox Healthcare Bpk v Strydom* 2002 (6) SA 21 (SCA) at 34.

596 Van der Merwe et al *Contract: General Principles* (2003) 215; For case law see *Morrison v Angelo Deep Gold Mines Ltd* 1905 (AD) 775; *SA Railways and Harbours v Conradie* 1921 (AD) 133 at 147; *Wells v SA Alumenite Co* 1927 (AD) 69 at 92; *Rosenthal v Marks* 1944 (TPD) 172 at 180; *Afrox Healthcare Bpk v Strydom* 2002 (6) SA 21 (SCA) at 34.

interests play a role. [597]

There was an era in English Law, when cases in which a restraint had been placed on one of the contracting parties, had been held void as not being reasonable and in the interests of the public interests. They were, however, not common. More recently, however, certain types of agreements, such as those involving cartels and other forms of restrictive trading agreements, have also been recognized as contrary to public interests. [598]

Although the doctrine of freedom of contract is still greatly recognised, in that, as a general rule, agreements freely entered into, between traders who are directly capable of deciding, for themselves, what is reasonable in their own interests, will be upheld, the real issue when looking at, for example, the validity of a restraint, is to decide whether the maintenance of the restraint is detrimental to the interest of the public. [599]

It is also suggested by *Beatson* [600] that even in cases which have to be decided on the basis of reasonableness between the parties, the courts are likely to consider the interest of the community to ascertain whether a restraint should, as between the parties, be held to be unenforceable or not. Where the restraint is likely to prejudice the public it is likely to be held to be invalid. [601]

Public interest may very well determine whether a covenant in a contract of employment between the parties to the agreement is fair, or not. [602]
Cartel agreements are, like all other agreements in restraint of trade in English Law, *prima facie* void at common law. Before they are justified as being reasonable, it must be shown that they are in the interests of the parties and of the public. [603]

12.2.4.2.2 Case Law

597 Beatson Anson's (2002) 371ff; Treitel (2003) 462ff; Stone (1998) 241; Stone (2004) 372.

598 Beatson (2002) 371; Treitel (2003) 462.

599 Beatson (2002) 371; Treitel (2003) 462.

600 Beatson (2002) 371-372.

601 Treitel (2003) 462.

602 Beatson (2002) 375ff; Treitel (2003) 465ff.

603 Beatson (2002) 377.

The English position with regard to the courts declaring contracts to be in violation of public interests appeared to be very sparse in the early nineteen hundreds. It was then stated by the Privy Council, in 1913 in the case of *Att.Gen of Commonwealth of Australia v Adelaide Steamship Co*, [604] that *"if the court is satisfied that the restraint is reasonable as between the parties this onus (of proving injury to the public) will be no light one."* [605]

But, it was especially in the 1960's, that the English courts changed their attitude in relation to certain types of agreements. Restrictive trading agreements [606] and cartel agreements [607] were singled out for denouncement because of the importance of the interests of the public. [608]

In one of the cases concerning first restrictive agreements, *Wyatt v Kreglinger and Fernsen,* [609] the plaintiff's pension was made contingent upon his not taking any part in the wool trade. The Court of Appeal held that this stipulation was void, irrespective of whether it was reasonable as between the parties, because it was contrary to the public interest.

One of the leading cases involving public interests and restrictive trading agreements, was that of *Esso Petroleum Co Ltd v Harper's Garage (Stourport) Ltd*. [610] This case concerned the sale and purchase of two garages for the sale of petrol. The agreement contained a restraint of trade clause, prohibiting the buyer from selling another brand of petrol.

The purchaser commenced to sell another brand of petrol and, when sued, pleaded that both transactions were in unreasonable restraint of trade.

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604 (1913) A.C. 781.

605 *Att. Gen of Commonwealth of Australia v Adelaide Steamship Co* (1913) A.C. 781 at 797.

606 *Esso Petroleum Co Ltd v Harper's Garage (Stourport) Ltd* (1968) A.C. 269; *Faccenda Chicken Ltd Ltd v Fowler* (1987) EH 117 AT 137; *Officer Angels Ltd v Rainer-Thomas and O'Connell* (1991) I.R.L.R. 214 at 221; *M and S Drapers v Reynolds* (1957) 1.W.L.R. 9; *Home Countries Dairies Ltd v Skelton* (1970) 1.W.L.R. 516; *Wyatt v Kreglinger and Fernall* (1933) KB 793.

607 *Eastham v Newcastle, United Football Club Ltd* (1964) CH 413 at 432; *Buckley v Tutty* (1971) 46 A.L.J.R. 23; *Greig v Insole* (1978) 1 W.L.R. 302.

608 *Esso Petroleum Co Ltd v Harper's Garage (Stourport) Ltd* (1968) A.C. 269 at 300-1, 318-9, 321; *Dickson v Pharmaceutical Society of Great Britain* (1970) A.C. 403 at 441; *Alec Cobb (Garages) Ltd v Total Oil (Great Britain) Ltd* (1985) 1 W.L.R. 173 at 191.

609 (1933) 1 K.B. 793.

610 (1968) A.C. 269.

Lord Reid, in considering the law applicable to restrictive trading agreements, acknowledged that:

" ..... In some cases where the court has held that a restraint was not in the interests of the parties it would have been more correct to hold the restraint was against the public interest."

Considering the interests of the parties concerned and weighing that against public interest, the court stated:

"It appears that the garage owners were not at a disadvantage in bargaining with the large producing companies as there was intense competition between these companies to obtain these ties. So we can assume that both the garage owners and the companies thought that such ties were to their advantage, and it is not said in this case that all ties are either against the public interest or against the interests of the parties. The respondent's case is that the ties with which we are concerned are for too long periods."

Approving restrictive practises in certain cases Lord Hodson, in the same case, held:

" ..... it is the only justification, if the restriction is reasonable - reasonable, that is, in reference to the interests of the parties concerned and reasonable in reference to the interests of the public, so framed and so guarded as to afford adequate protection to the party in whose favour it is imposed, while at the same time it is in no way injurious to the public." [611]

The House of Lords held that the agreement, for four years and five months on the first garage, was (despite its onerous covenants) reasonable in the interests of the parties, since it was reasonably required to protect Esso's legitimate interest in securing the continuity of their selling outlets, their system of distribution, and the stability of their sales, it was also not contrary to the public interest. But, the agreement, for 21 years on the second garage, was longer than was necessary to protect Esso's interests and was therefore unreasonable.
In *Dickson v Pharmaceuticals Society of Total Oil (Great Britain) Ltd* [612] the question of public interests again came to the fore. In this case, the society passed a resolution to the effect that new pharmacies should be situated only in areas that are physically distinct and be limited to certain specified services and that the range of services in existing pharmacies should not be extended, except as approved by the society's council. The purpose was, clearly, to stop the development of new fields of trading in conjunction with pharmacy. One of the members of the society sought a declaration that the resolution was *ultra vires* the society and void. The Appeal Court dismissed the appeal on grounds, *inter alia*, that:

611 *Esso Petroleum Co Ltd v Harper's Garage (Stourport) Ltd* (1968) A.C. 269 at 300-1, 318-9.

612 1990 A.C. 403.

"(1) the resolution was ultra vires and void as being insufficiently related to the main objects of the society, and;

(2) The resolution was ultra vires and void as being in unreasonable restraint of trade, members of the society having long engaged in trading activities."

Public interests were also recognized as being an important factor in the case of *Alex Lobb (Garages) Ltd v Total Oil (Great Britain) Ltd*. [613] This case involved a 21-year tie in a solus agreement contained in a lease involving an oil company and a business for the purpose of a garage and petrol filling station business. The business eventually sought to set aside the agreement on the grounds that it was in restraint of trade and that it was an unconscionable bargain. The Appeal Court refused to strike down the 21-year tie since the premises were already, before the case, subject to a valid three year tie to which the tenant had previously agreed, it not being unreasonable and against public interest.

Public interests also, to a large extent, formed the subject matter in the case of *A Schroeder Music Publishing Co Ltd v Macauly,* [614] in which a music company caused to get composers to sign contracts, containing restrictions on the composers extending over a period of five years, during which they had to submit all their compositions to the publishers, whilst the latter was under no obligation to promote their work. The court held that the restriction imposed on the composers was unreasonable and accordingly invalids as it went beyond the restriction of the publisher's interest and operated harshly on the other party. Lord Reid, in this case referring to public interests, described the legal position as follows: *"The public interest requires in the interests both of the public and of the individual that everyone should be free so far as practicable to earn a livilihood and give to the public the fruits of his particular abilities."* [615]

A case of striking importance regarding charter agreements, involving public interests in agreements between employees and professional sportsmen imposing restrictions upon the re-employment of employees, came under the spotlight in, firstly, *Eastham v Newcastle United Football Club Ltd*. [616] In that case, the plaintiff was a professional footballer,

613 (1985) 1 W.L.R. 173.

614 (1974) 1 W.L.R. 1308.

615 *A Schroeder Music Publishing Co Ltd v Macauly* (1974) 1 W.L.R. 1308 at 1313.

616 1964 CH 413.

registered with a league club, Newcastle United. He had asked to be transferred, but his club had given him notice of retention and refused to release him. He refused to sign again with his club and sought, inter alia, declarations that the rules of the Football Associated, relating to the retention and transfer of football players, including, the plaintiff, and the regulations of the Football League relating to retention and transfer, were not binding on him. He argued that they unreasonable being restraint of trade. He also claimed, in a declaration that the refusal of the directors of Newcastle United to release him from its retention list, or alternatively, to put him on its transfer list, was unreasonable. Wilberforce J, delivering the judgement, held, among other things, first, that the retention provisions, which operated after the end of the employee's employment, substantially interfered with his right to seek employment and therefore operated in restraint of trade; secondly, they were in unjustifiable restraint of trade and *ultra vires*; thirdly, that the court could only declare it void if it was a matter of public interest; and, fourthly, that it was a case in which the court could and should grant the plaintiff the declarations sought.

Similarly, in another case, of *Greig v Insole,* [617] the Chancery division was confronted with a declaration sought to challenge restraint of trade agreements involving the employment agreements of professional cricketers. The International Cricket Council and the TCCB, a body controlling county cricket in England, sought to bar cricketers who had contracted with a promoter to play cricket in a private series of matches known as the Kerry Packer series. This included international cricketers such as Tony Greig, Mike Proctor and John Snow, who sought the declaration. They attacked the validity of the alterations of the rules, initiated by the ICC and TCCB after the cricketers contracted with Kerry Packer, in banning the cricketers from playing in associations' matches. Slade J, who delivered the judgement, was asked to decide whether the action by the ICC and TCCB was reasonable, justifying the ban?

Slade J, consequently, held void, as being unreasonable, the restraint of trade resolutions of the ICC and the TCCB. Following the judgement of Wilberforce J in Eastham v New Castle United Football Club Ltd) 1964) CH 413, Slade J held, *inter alia,* that the ICC and TCCB were custodians of the public interest. Turning, however, to public interest, Slade J found that:

"First and foremost, to deprive, by a form of retrospective legislation, a professional cricketer of the opportunity of making his living in a very important field of his professional life, is in my judgement prima facie both a serious and unjust step to take."

And further: *"I do not think that, on my fair and objective basis, players who had already*

617 (1978) 1 W.L.R. 302.

contracted with World Series Cricket can be said to have deserved the sanction that was imposed against them,"

The learned judge continued:

"Secondly, the public will be deprived of a great deal of pleasure, if it is to be deprived of the opportunity of watching these talented cricketers play in those many official Test Matches which do not clash with World Series Cricket matches, ..."

Consequently Slade J found:
*"In my judgement, therefore, the ICC has not discharged the onus which falls upon it showing that the ban is reasonable and justifiable. Accordingly I answer question (D) above by holding that subject to the provisions *356 of the Act of 1974 the new rules of the ICC are ultra vires and void as being in unreasonable restraint of trade."* [618]

12.2.4.2.3 Legal Opinion

English law of contract does recognise the vital role public interests play, when contracts which place undue restrictions or hardship on one or both of the contracting parties, are challenged. [619]

In this regard, both legal writings [620] and the case law, [621] have made major contributions in giving direction as to how public interests ought to be utilized when the validity of these type of contracts are challenged.

Although English Law does, still, attach great weight to the doctrine of freedom of contract, nonetheless, it has been recognized that, in certain circumstances, the law cannot stand back and allow parties to suffer unreasonably through harsh and oppressive terms in

618 *Greig v Insole* (1978) 1 W.L.R. 302 at 355-356.

619 Beatson *Anson's Law of Contract* (2002) 371ff; Treitel *The Law of Contract* (2003) 462ff; Stone *Principles of Contract Law* (1998) 241; Stone *The Modern Law of Contract* (2004) 372; *Esso Petroleum Co Ltd v Harper's Garage (Southport) Ltd* (1968) A.C. 269 at 300-1, 318-9; *Alex Lobb (Garages) Ltd v Total Oil (Great Britain) Ltd* (1985) W.L.R. 173; *Schroeder Music Publishing Co Ltd v McCauly* (1974) 1 W.L.R. 1308; *Eastman v New Castle United Football Club Ltd* (1964) CH 413; *Greig v Insole* (1978) 1 W.L.R. 302.

620 Beatson *Anson's Law of Contract* (2002) 371ff; Treitel *The Law of Contract* (2003) 462ff; Stone *Principles of Contract Law* (1998) 241; Stone *The Modern Law of Contract* (2004) 372.

621 *Esso Petroleum Co Ltd v Harper's Garage (Stourport) Ltd* (1968) A.C. 269 at 300-1, 318-9; *Alex Lobb (Garages) Ltd v Total Oil (Great Britain) Ltd* (1985) W.L.R. 173; *Schroeder Music Publishing Co Ltd v McCauly* (1974) 1 W.L.R. 1308; *Eastman v New Castle United Football Club Ltd* (1964) CH 413; *Greig v Insole* (1978) 1 W.L.R. 302.

contracts. Public interests, so it is often said, dictate that where these contracts or contract terms are likely to prejudice the public, the courts ought to step in and afford public protection. [622]

It is especially, in restraint of trade clauses restricting trade and cartel agreements that the courts have not been loathe using public interests to denounce the harshness and unreasonableness of contracts or contract terms. [623]

12.2.4.3 UNITED STATES OF AMERICA

12.2.4.3.1 Legal Writings

A further exception to the contractual freedom of parties to a contract is the rule that an agreement which violates public interests is invalid and unenforceable. [624]

The general rule, recognized by the American writers though, is that in cases where the public interest or some statutory prohibition are not involved, it is permissible for a party to contract to absolve himself or herself from liability for future negligence. [625]

But, where parties stipulate for protection against liability for negligence in the form of an exculpatory clause which involves the performance of a legal duty, or a duty of public service, or where a public interest is involved, or a public duty is owed, or public interest requires the performance thereof, the courts will not come to the rescue of the party who attempts to exonerate him or her-self. In these instances an attempt to exempt a contracting party from liability for negligence will be invalidated by the courts. [626]

Although the concept "public interest" has not been defined by the American legal writers, nonetheless, several factors have been identified by them, which, if present, influence the

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622 Beatson (2002) 371-372ff; Treitel (2003) 462ff.

623 *Esso Petroleum Co Ltd v Harper's Garage (Stourport) Ltd* (1968) A.C. 269; *Faccenda Chicken Ltd Ltd v Fowler* (1987) EH 117 AT 137; *Officer Angels Ltd v Rainer-Thomas and O'Connell* (1991) I.R.L.R. 214 at 221; *M and S Drapers v Reynolds* (1957) 1.W.L.R. 9; *Home Countries Dairies Ltd v Skelton* (1970) 1.W.L.R. 516; *Wyatt v Kreglinger and Fernall* (1933) KB 793; *Eastham v Newcastle, United Football Club Ltd* (1964) CH 413 at 432; *Buckley v Tutty* (1971) 46 A.L.J.R. 23; *Greig v Insole* (1978) 1 W.L.R. 302; *Alex Lobb (Garages) Ltd v Total Oil (Great Britain) Ltd* (1985) W.L.R. 173; *Schroeder Music Publishing Co Ltd v McCauly* (1974) 1 W.L.R. 1308.

624 Calamari and Perillo (1977) 270-271; Jaegar (1957) 1751.

625 Calamari and Perillo (1977) 270.

626 Calamari and Perillo (1977) 270.

validity of exculpatory clauses exempting a contracting party from future liability to another.

The factors identified are, among others, the relationship between the parties. Where certain relationships are present, the very essence of the nature of the relationship requires of one of the contracting parties greater responsibility than that required of the ordinary person entering into a contract. [627] Typical relationships affected by this expectation are the hospital/doctor-patient relationship in which their responsibility, especially, from the hospital or doctor's side, is very much foreshadowed by licensing regulations. In this regard, public regulation dictates that before an institution, such as a hospital, is awarded a license to operate, it has to be shown that the hospital is suitable to operate as such and that its services are a crucial necessity for public use and that it is willing to serve the public. [628]

From such licensing regulations arise the legal duty or a duty of public service involving a public interest, as aforementioned, wherein, the hospital is obliged to perform those duties in accordance with the pre-defined standards which hospitals are obliged to adhere to. [629] Any attempt to contract against its own negligence, in violation of legal duty or duty of public service owed, impacting negatively on the standard set, is regarded, by the legal writers, as falling into the category of agreements affecting the public interest. [630]

The rationale for preventing the patient from trading off his or her common law right to sue, on the ground of public interest, is said to be based on the vulnerability of patients, the anxious state patients often find themselves in when entering the hospital and the superior position occupied by the hospital in the hospital-patient relationship. [631]

Other relationships identified which involve a special legal relation in which public interest is involved include; the relationship of landlord and tenant. In this relationship, the landlord, at common law and/or in terms of a statute, has to keep the premises safe and free of injury or damages. also resulted in duties being imposed upon the landlord to protect the tenant free from injury or damages. Others include innkeepers and others who are dealing with the

627 Jaegar (1957) 1751.

628 Jaegar (1957) 1751.

629 Calamari and Perillo (1977) 270; Waltz and Ibau (1971) 17-18.

630 Calamari and Perillo (1977) 270-271; Jaegar (1957) 1751; Furow et al (1995) 257.

631 Furrow et al (1995) 257; Jaegar (1957) 1751.

general public and where business is affected with a public interest. [632]

Other relationships of a more general nature, but where there is a relationship involving public service, including common carriers by sea and rail, air transportation, are also affected by the principles governing the unenforceability of exculpatory provisions affecting public utility. [633]

12.2.4.3.2 Case Law

The American courts have recognized public interests as one of the factors influencing the validity of exclusionary clause. The American judiciary in this regard has greatly been influenced by the case of *Tunkl v Regents of the University of California* 60 Cal.2d 92, 32 Cal. Rptr. 33, 383 P,2d 441 (1963), which held that exculpatory clauses affecting the public interest are invalid. Not only has this case been quoted as authority and followed with approval in other cases involving hospital/doctor-patient relationships, [634] but also in other types of relationships of a more general nature, including but not limited to, sport and recreational, [635] lease agreements between landlord and tenants, [636] agreements in terms of which one or both contracting parties owe a duty of care and to maintain a standard of practise; [637] But, in the sport and recreational exculpatory agreements, as well as more general exculpatory agreements, the courts have had no problems in upholding exculpatory clauses, as they are found not to implicate the public interest. [638]

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632 Calamari and Perillo (1977) 271; Jaegers (1957) 1751.

633 Calamari and Perillo (1977) 271-273; Jaeger (1957) 1751.

634 *Belshaw v Feinstein and Levin* 258 Cal App. 2d 711, 65 Cal. Rptr 788 (1968); *Ash v New York University Dental Centre* 164 A.D. 2d 366, 564 N.Y.S. 2d 308; *Olson v Molzen* 555 S.W. 2d 429 (1977); *Smith v Hospital Authority of Walker, Dade and Catoosa Cos*. 160 Ga App 387, 287 S.E. 2d 99 (1981); *Meiman v Rehabilitation Centre Inc* 444 S.W. 2d 78 (Ky.App 1969); *Cudnik v William Beaumont Hospital* 207 Mich App. 378, 525 N.W. 2d 891 (1995).

635 *Allan v Snow Summit Inc* 51 Cal. App. 4th 1358, 59 Cal.Rptr. 2d 813 (1996); *Banfield v Louis Cat Sports Inc* 589 So. 2d 441 (1991); *Schoblobohm v Spa Petite Inc* 325 N.W. 2d 920, 923 Minn. (1982); *Leidy v Deseret Enterprises Inc d/b/a Body Shop Health Spa et al* 282 Pa Super 162, 381 A.2d 164 (1977).

636 *Mayfair Fabrics v Henley* 48 N.J. 483, 226 A. 2d 602 (1968); *McCutcheon v United Homes Corp* 79 Wn.2d 443, 486 P.2d 1093 (1971); *Crawford v Buckner et al* 839 S.W. 2d 754 (1992).

637 *Krohnert v Yacht Systems Hawaii Inc* 4 Haw.App. 190, 664 P.2d 738 (1983).

638 *Allan v Snow Summit Inc* 51 Cal. App 4th 1358, 54 Cal Rptr. 2d 813 (1996); *Globe Home Improvement Co v Perth Amboy Inc* 116 N.J.L. 168, 170, 182 A, 641, 102 A.L.R. 1068 (1936); *Mayfair Fabrics v Henley* 48 N.J. 483, 226, A.2d 602 (1968); *McCutcheon v United Homes Corp* 79 Wash. 2d 443, 486 P.2d 1093 (1971).

There is no clear definition as to the true meaning of the term "the public interest". In this regard the California court in *Tunkl v Regents of University of California* 60 Cal. 2d 92, 383 P.2d 441, 32 Cal. Rptr. 33 (1963) found that its determination cannot be ascertained by reference to any neat formula or within the four corners of a formula.

Various factors have crystallized from the court's judgements found in many jurisdictions in America, over a long period of time, commencing with the case of *Tunkl v Regents of University of California* [639] in which the court identified the following factors:

"(A) it concerns a business of a type generally thought suitable for public regulation.

(b) The party seeking exculpation is engaged in performing a service of great importance to the public, which is often a matter of practical necessity for some members of the public.

(c) The party holds himself out as willing to perform this service for any member of the public who weeks it, or at least for any member coming within certain established standards.

(d) As a result of the essential nature of the service, in the economic setting of the transaction, the party involving exculpation possesses a decisive advantage of bargaining strength against any member of the public of seeks his services.

(e) In exercising a superior bargaining power the party confronts the public with a standardized adhesion contract of exculpation, and makes no provision whereby a purchaser may pay additional reasonable fees and obtain protection against negligence.

(f) *Finally, as a result of the transaction, the person or property of the purchaser is placed under the control of the seller, subject to the risk of carelessness by the seller or his agents. 32 Cal.Rptr. at 37-38, 383 P.2d at 445-446."* [640]

Types of services thought to be subject to public regulations included common carriers; [641] hospitals and doctors; [642] public utilities; [643] innkeepers; [644] public warehouse men

639 60 Cal. 2d 92, 383 P.2d 441, 32 Cal Rptr. 33 (1963).

640 *Tunkl v Regents of University of California* 60 Cal. 2d 92, 383 P.2d 441, 32 Cal.Rptr. 33 (1963.)

641 *First Financial Insurance Co v Purolator Security Inc*, 69 Ill.App.3d 413, 418, 26 Ill.Dec.393, 388 N.E. 2d 17, 21 (1979); *LaFrenz v Lake County Fair Board*, 172 Ind.App. 389, 393, 360 N.E. 2d 605, 608 (1977); *Winterstein v Wilcom*, 16 Md.App. 130, 136, 293 A.2d 821, 824 (1972); *Ciofalo v Vic Tanny Gyms Inc* 10 N.Y. 2d 294, 296, 220 N.Y.S. 2d 962, 964, 177 N.E. 2d 925, 926 (1961); *Leidy v Deseret Enterprises Inc* 252 Pa.Super, 162, 168, 381 A2d 164, 167 (1977); *Moss v Fortune* 207 Tenn. 426, 429, 340 S.W. 2d 902, 904 (1960); *Hunter v American Rentals Inc* 189 Kan. 615, 371 P.2d (1962); *Mayfair Fabricks v Henley* 48 N.J. 483, 226 A.2d 602 (1968); *Kuzmniak v Brockchester Inc* 33 N.J. Super 575, 111 A.2d 425 (1955); *Crawford v Buckner et al* 839 S.W. 2d 754 (1992).

642 *Tunkl v Regents of University of California* 60 Cal 2d 92, 383 P.2d 441, 32 Cal. Rptr. 33 (1963); *Belshaw v Feinstein* 258 Cal App. 2d 711, 65 Cal Rptr. 788 (1968); *Olson v Molzen* 558 S.W. 2d 429 (Tenn. 1977); *Leidy et al v Deseret Enterprises Inc d/b/a Body Shop Health Spa et al* 252 Pa. Super 162, 381 A.2d 164 (1977).

employers. [645] The supply of goods and services in compliance with a public duty [646] services of great importance to the public include the service provided by the landlord to the tenant including to ensure for a safe environment; [647] services provided by hospitals and other caregivers to patients. [648]

Sporting and recreational activities have, however, not been regarded by the American Courts of great public interest. [649]

Where a party holds himself as willing to perform a service for the public, a public duty arises by law, which compels the contracting party to perform according to certain standards. [650]

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643 *LaFrenz v Lake County Fair Board* 172 Ind.App 389, 393, 360 N.E. 2d 605, 608 (1977); *Winterstein v Wilcom* 16 Md.App 130, 136, 293 A.2d 821, 824 (1972); *Ciofalo v Vic Tanney Gyms Inc* 10 N.Y. 2d 294, 296-97, 220 N.Y.S. 2d 962, 964, 177 N.E. 2d 925, 926 (1961); *Leidy v Deseret Enterprises Inc* 252 Pa.Super, 162, 168, 381 A.2d 164, 167 (1977); *Mayfair Fabrics v Henley* 48 N.J. 483, 226, a.2D 602 (1968).

644 *Lafrenz v Lake County Fair Board*, 172 Ind.App. 389, 393, 360 N.E. 2d 605, 608 (1977); *Winterstein v Wilcom*, 16 Md.App. 130, 136, 293 A.2d 821, 824 (1972).

645 Johnson v Fargo 98 A.D. 436, 90 N.Y.S. 725 (App.Div.1904) affd. 184 N.Y. 379, 77 N.E. 388 (1906); See also First Financial Insurance Co v Purolater Secutiry Inc 69 III.App.3d 413, 418, 26 III.Dec 393, 388 N.F. 2d 17, 21 (1979); Leidy v Deseret Enterprises Inc 252 Pa.Super 162, 168, 381 A.2d 164, 167 (1977).

646 Dessert Seed Inc et al v Drew Farmers Supply Inc 248 Ark 858, 454, S.W. 2d 307; Smith d/b/a Smith Construction Co v Seaboard Coast Line Rail Road Company 639 F.2d 1235 (1981); Schlobohm v Spa Petite Inc 326 N.W. 2d 920, 923 (1982); Levine et al v Shell Oil Company et al 28 N.Y. 2d 205, 269 N.E. 2d 799, 321 N.Y.S. 2d 81 (1971); Hunter v American Rentals Inc 189 Kan 615, 371 P.2d 131 (1962); Krohert v Yacht Systems Hawaii et al 4 Haw. App. 190, 664, P.2d 738 (1983).

647 Kuzmiak v Brockchester 33 N.J. Super, 575, 111 A.2d 425 (1955); Mayfair Fabrics v Henley 48 N.J. 483; 226 A.2d 602 (1968); McCutheon v United Homes Corp 79 Wash 2d 443, 486 P.2d 1093 (1971); Boyd v Smith 372 Pa 306, 94 A.2d 44 (1953).

648 Where these types of services are provided the services must comply with minimum standards of professional care in compliance with the regulations laid down in acquiring licenses for doctors and hospitals. Tunkl v Regents of University of California 60 Cal. 2d 92, 32, Cal. Rptr. 33, 383 P.2d 441, 6 A.L.R. 3d 693 (1963); Olson v Molzen 558 S.W. 2D 429 (1977); Leidy et al v Deseret Enterprises Inc d/b/a Body Shop Health Spa 252 Pa. Super 162, 381 A.2d 161 (1977); Emory University v Porubiansky 248 Ca. 391, 382, S.E. 2d 903 (1981).

649 Banford v Louis Cat Sports Inc et al 589 So. 2d 441 (1991); Schlobohm et al v Spa Petite Inc 326 N.W. 2d 920 (1982); Ciofalo v Vic Tanny Gyms Inc 110 N.Y. 2d 294, 297-98, 220 N.Y.S. 2d 962, 964, 177 N.E. 2d 925, 927 (1961).

650 Tunkl v Regents of University of California 60 Cal. 2d 92, Cal. Rapt 33, 383 P.2d 441, 6 A.L.R. 3d 69 (1963); Chicago Great Western Railway Company v Farmers Produce Company et al 164 F. Supp 532 (1958); Hunter v American Rentals Inc 189 Kan. 615, 371 P.2d 131 (1962); Rohnert v Yacht Systems Hawaii Inc 4 Haw. App. 190, 664, P.2d 738 (1983); Ash et al v New York University Dental Centre 164 A.D. 2d 366, 564 N.Y.S. 2d 308 (1990).

The principle of unequal bargaining in a contractual relationship involving exculpatory clauses has influenced the courts, in the past, to pronounce that those types of clauses are against public interests. [651]

12.2.4.3.3 Legal Opinion

A further challenge to the doctrine of freedom of contract in the American Law of Contract is the recognition of public interests.

It is especially contracts involving disclaimers, exclusionary clauses or indemnity clauses, which most greatly involve public interests when courts are asked to denounce the validity of these types of clauses. [652]

The position, generally, in America concerning indemnity clauses etc is this, where the public interest or some statutory prohibition is not involved, parties are at liberty to contract to absolve himself/herself/itself from liability for future negligence. [653] This one finds, especially, in sport and recreational exculpatory agreements, as well as more general exculpatory agreements. [654]

Where however, the contracting parties stipulate for protection against liability for

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651 Tunkl v Regents of University of California 60 Cal. 2d 92, 32 Cal Rptr. 33, 383 P.2d 441, 6 A.L.R. 3d 69 (1963); Kuzmiak v Brockchester 33 N.J. Super 575, 111. A. 2d 425 (1955); Mayfair Fabrics v Henley 48 N.J. 483, 226 A.2d 602 (1968); McCutcheon v United Homes Corp 79 W.N. 2d 443; 486 P.2d 1093 (1971); Krohnert v Yacht Systems Hawaii Inc et al 4 Haw. App. 190, 664, P.2d 738 (1983); Banfield v Louis Cat Sports Inc et al 589 So. 2d 441 (1991); Crawford v Buckner et al 839 S.W. 2d 954 (1992); Schlobohm et al v Spa Petite Inc 326 N.W. 2d 920 (1982); Tatham v Hoke 469 F. Supp 914 (1979); Cudnik v William Beaumont Hospital 207 Mich. App. 378, 525 N.W. 2d 891 (1995); Olson v Molzen 558 S.W. 2d 429 (1977).

652 Calamari and Perillo The Law of Contracts (1977) 270; Jaeger Willison on Contracts (1957) 1751. Cases involving hospital/doctor-patient relationships include: Belshaw v Feinstein and Levin 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 (1990); Olson v Molzen 558 S.W. 2d 429 (1977); Smith v Hospital Authority of Walker, Dade and Catoosa Cos. 160 Ga App 387, 287 S.E. 2d 99 (1981); Meiman v Rehabilitation Centre Inc 444 S.W. 2d 78 (Ky.App 1969); Cudnik v William Beaumont Hospital 207 Mich. App. 378, 525 N.W. 2d 691 (1995); Tunkle v Regents of the University of California 60 Cal. 2d 92, 32 Cal Rptr 33, 383 P.2d 441 (1963). Cases involving sport and recreational activities include: Allan v Snow Summit Inc 51 Cal. App 4th 1358, 59 Cal Rptr, 2d 813 (1996); Banfield v Louis Cat Sports Inc et al 589 So. 2d 441 (1991); Scholobohm et al v Spa Petite Inc 326 N.W. 2d 920 (1982); Leidy v Deseret Enterprises Inc d/b/a Body Shop Health Spa et al 252 Pa. Super 162, 381 A.2d 164 (1977). Cases involving lease agreements between landlord and tenant include: Mayfair Fabrics v Henley 48 N.J. 483, 226A.2d 602 (1968); McCutcheon v United Homes Corp 79 Wn. 2d 443, 486 P.2d 1093 (1971); Crawford v Buckner et al 839 S.W. 2d 754 (1992). Cases involving a duty of care being owed to maintain a standard of practice include: Krohnert v Yacht Systems Hawaii Inc 4 Haw.App. 190, 664, P.2d 738 (1983).

653 Calamari and Perillo The Law of Contracts (1977) 270.

654 Allan v Snow Summit Inc 51 Cal. App 4th 1358, 59 Cal Rptr, 2d 813 (1996); Globe Home Improvement Co v Perth Amboy Inc 116 N.J.L. 168, 170, 182 A. 641, 102 A.L.R. 1068 (1936); Mayfair Fabrics v Henley 48 N.J. 483, 226, A.2d 602 (1968); McCutcheon v United Homes Corp 79 Wash. 2d 443, 486 P.2d 1093 (1971).

negligence by using exculpatory clauses, which involves the performance of a legal duty, or a duty of public service, or where a public interest is involved, or a public duty is owed, or the public interest requires the performance thereof, both the legal writers and the courts alike, will not come to the rescue of the party who attempts to rescue himself/herself/itself. Contracts or provisions of the contracts are under the circumstances invalidated by the courts. The rationale for this approach is found in the fact that a party who holds himself/herself/itself willing to perform a service for the public, a public duty arises by law, which compels the contracting party to perform according to certain standards. [655]

It is especially, from the very essence of the nature of the relationship, for example, the hospital/doctor-patient relationship, that the relations between the contracting parties are governed by licensing regulations which in turn, dictate greater responsibility by the service providers towards the beneficiaries. Service providers are also expected then to adhere to pre-defended standards. For that reason, any attempt to contract against its own negligence in violation of a legal duty or duty of public service owed is viewed as affecting the public interests and looked upon with disdain by the courts. [656]

12.2.5 STATUTORY DUTY

12.2.5.1 SOUTH AFRICA

12.2.5.1.1 Legal Writings

The South African legal writers hold the view that where an exemption clause is aimed at or tends to induce the contravention of a general or statutory law, it will be struck down by the South African courts because it is contrary to public policy. [657]

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655 Calamari and Perillo The Law of Contracts (1977) 270; Tunkl v Regents of the University of California 60 Cal. 2d 92, 32 Cal, Rptr. 33, 383 P, 2d 441 (1963); Belshaw v Feinstein and Levin 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 (1990); Olson v Molzen 558 S.W. 2d 429 (1977); Smith v Hospital Authority of Walker, Dade and Catoosa Cos. 160 Ga App. 387, 287 S.E. 2d 99 (1981); Meiman v Rehabilitation Centre Inc 444 S.W. 2d 78 (Kiap. 1969); Cudnik v William Beaumont Hospital 207 Mich. App. 378, 525 N.W. 2d 691 (1995); Allan v Snow Summit Inc 51 Cal. App 4th 1358, 59 Cal Rptr, 2d 813 (1996); Banfield v Louis Cat Sports Inc et al 589 So. 2d 441 (1991); Scholobohm et al v Spa Petite Inc 326 N.W. 2d 920 (1982); Leidy v Deseret Enterprises Inc d/b/a Body Shop Health Spa et al 252 Pa. Super 162, 381 A.2d 164 (1977). Mayfair Fabrics v Henley 48 N.J. 483, 226A.2d 602 (1968); McCutcheon v United Homes Corp 79 Wn. 2d 443, 486 P.2d 1093 (1971); Crawford v Buckner et al 839 S.W. 2d 754 (1992). Chicago Great Western Railway Company v Farmers Produce Company et al 164F.Supp. 532 (1958); Krohnert v Yacht Systems Hawaii Inc 4 Haw.App. 190, 664, P.2d 738 (1983); Hunter v American Rentals Inc 189 Kan 615, 371 P.2d 131 (1962).

656 Calamari and Perillo The Law of Contracts (1977) 270; Tunkl v Regents of the University of California 60 Cal. 2d 92, 32 Cal, Rptr. 33, 383 P, 2d 441 (1963); Belshaw v Feinstein and Levin 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 (1990); Olson v Molzen 558 S.W. 2d 429 (1977); Smith v Hospital Authority of Walker, Dade and Catoosa Cos. 160 Ga. App. 387, 287 S.E. 2d 99 (1981); Meiman v Rehabilitation Centre Inc 444 S.W. 2d 78 (Ky.App. 1969); Cudnik v William Beaumont Hospital 207 Mich. App. 378, 525 N.W. 2d 691 (1995); Tunkl v Regents of the University of California 60 Cal. 2d 92, 33 Cal Rptr 33 383 P.2d 441 (1963).

657 See Van der Merwe et al (2003) 215 with reference to *Morrison v Angelo Deep Gold Mines Ltd* 1905 TS 775

In so far as statutory duties in medical and health services are concerned, it is trite that certain regulations govern the duties of and set standards for, health care providers, including hospitals. These regulations were first published at the instance of the Minister of Health, in 1980, by virtue of the powers vested in him. The regulations regulate the reasonable degree of care and skill which has to be exercised by private hospitals and set out obligations to practice under that standard, which is conditional to the maintenance of a license held by the licensure.

One of the relevant regulations, namely, 25(23) reads: *"All services and measures generally necessary for adequate care and safety of patients are maintained and observed."* [658]

The fore stated regulations clearly set out the nature of the contractual relationship between the private hospital and the patient. In this regard, the nature of the said relationship should be examined in the light of the strong policy of the State to protect the health of its citizens and to regulate those professions that it licenses.

It is this strong State interest in the health and health care of its citizens, which gives the State the right to regulate the medical profession. Furthermore, the right to practise medicine is a conditional right, which is subordinate to the State's power and duty to allow one, who procures a licence, to practise medicine. It is against this background, wherein the validity of a care provider to relieve himself or itself by contract of the duty to exercise reasonable care, will be investigated.

12.2.5.1.2 Case Law

In one of the first cases involving exclusionary clauses, namely, *Newman v East London Town Council* [659] the court was confronted in deciding whether an exculpatory clause used by the municipality, in which the municipality sought to exclude its liability contractually, notwithstanding, the fact that the municipality, through its employees were negligent in causing the plaintiff (Appellant) harm, despite the foreseeable danger in reconstructing a road. It was also common cause that the independent contractor was guilty of several acts

779; Christie (1996) 204-205; Turpin "Contract and Implied Terms" *SALJ* (1956) 144 at 157; Van Dorsten "The Burden of Proof and Exemption Clauses" 1984 (47) *THRHR* 36 at 52.

658 Published in terms of *Government Gazette R2948 No 6832* on the 1st February 1980 and subsequently *republished - R6928* on 3 April 1980; R2687 No 12642 on 16 November 1990; *R434 No 14653 on March 1993.*

659 1895 (EDC) 61.

of negligence. The Town Council had precluded itself, however, from any possible liability as a result of the contractors work, by means of an exemption clause in their contract with the contractor.

As to the negligent act of the contractor and the liability of council, the court, per De Villiers CJ, found:

"But assuming that the negligent acts of the contractor were not the acts of the defendants, the obvious question arises, why did they not adopt some precautions against such negligent acts? I can well understand the doctrine that a person who employs an independent contractor upon works which, in the ordinary course, would entail no danger to the public, is not liable for incidental injuries caused by the contractor's negligence. But when, as in the present case, the work is to be performed upon and near a public road, and it may reasonably be anticipated that, without the precautions, the safety of the public using the road will occasionally be endangered by the carelessness of the workmen, it is surely an act of negligence to order the work without the precautions."

To this the judge added:

"After authorising the reconstruction of the road without taking any precautions to avert dangers which might reasonably have been foreseen, and which they apparently did foresee they cannot shelter themselves behind the terms of their contract."

The Appeal Court subsequently held that the council, in this case, could not contract out of liability where there was a public duty to guard against foreseeable harm. De Villiers CJ held that *"..... council cannot shield itself from liability by saying they had not in fact taken measures to ensure the safety of the public."*

The court continued: *" ..... it is their duty to contract that the work shall be done in such a manner and under such conditions as to protect the public against the dangers necessarily involved; and failure so to contract makes the municipality liable for damages caused by the absence of such precautions, even if the work be entrusted to a contractor under conditions which make him an independent contractor."* [660]

In the same case Buchanan J, held:

"When a municipality contract for the execution of a work which necessarily involves danger, it is their duty to contract that the work shall be done in such a manner and under such conditions as to protect the public against the dangers necessarily involved, and failure so to contract makes the municipality liable for damage caused by the absence of such precautions, even if the work be entrusted to a contractor under conditions which make him an independent contractor ..... the duties of fencing and lighting remain in the municipality, and they are liable for

660 *Newman v East London Town Council* 1895 EDC 61 at 68.

damages caused by the absence of these." [661]

And Upington J, held:

In my opinion, that was the direct consequence of the negligence of the defendants." [662]

The appeal was allowed by all three judges. In terms of the employer's breach of his own duty, which induced his own negligence, the Town Council was therefore held directly liable for the (negligent) performance of the independent contractor in spite of an explicit contractual exemption clause.

In a subsequent judgement, by the Appellate Division (as it was known then), in the case of *Dukes v Marthinusen,* [663] the court was also tasked to decide the liability of the employer, for acts of the servant, where there is a public duty.

The court, per Stratford ACJ, held that the employer's liability must result `*from the breach of a duty owed by the employer to the person injured as a consequence of such breach*". [664] In other words, it's the employer's own personal duty of which there must be breach.

Next, the honourable judge introduced the test concerning the employer's fault:

"Thus the test in this case narrows down to the question whether the demolition of these buildings abutting on the highway was a dangerous operation in the sense that public safety was imperilled by it unless precautions were taken to obviate that peril. If the answer is in the affirmative, the law casts upon the author of the operation the duty to take those precautions, and the breach of that duty is called culpa or negligence."

The judge concluded that in such circumstances it was the duty of the employer to ensure that precautions were taken. The `employer's' failure to do so was negligent for which consequences she was held liable. [665]

The appeal was dismissed. The employer was held liable in terms of a fault-based direct liability for breach of her own duty which was induced by her own fault or negligence and

661 *Newman v East London Town Council* 1895 EDC 61 at 79.

662 *Newman v East London Town Council* 1895 EDC 61 at 82.

663 1937 AD 12.

664 *Dukes v Marthinusen* 1937 AD 12.

665 *Dukes v Marthinusen* 1937 AD 12.

resulted in the death of a passer-by.

Subsequently, in the case of *Crawhall v The Minister of Transport and Another,* [666] the court also dealt with the duty of an authority (The Minister of Transport) to safeguard the public against foreseeable harm.
In this case the plaintiff had fallen over a barricade which the independent contractor had erected whilst working on the floor of an airport. Plaintiff instituted an action for damages for personal injuries she had sustained, against the first defendant, the Minister of Transport who, in law, was deemed to be `the lawful occupier of the Jan Smuts air terminal building at the material time, and an occupier of premises is under a duty to take reasonable care, to see that persons who can be expected to be on those premises, are not injured in consequence of the dangerous condition of those premises. Action was also instituted against the second defendant, who was the independent contractor employed by the first defendant.

The court consequently found a legal duty exists, which was owed by the occupier to the public:

"But if work has to be done on premises to which the public have access, and that work can reasonably be expected to cause damage unless proper precautions are taken, the duty of the occupier to see that those precautions are taken and that the premises are safe persists, whether he does the work himself or through his own servants or delegates it to an independent contractor." [667]

It is submitted that although the *Dukes and Crawhall cases* did not deal with the effect of exclusionary clauses where a duty was owed to the public, as was the case in the Newton matter, nonetheless, the legal duty emphasized in the fore stated cases does emphasize that courts will not readily allow wrongdoers to shelter themselves behind the terms of their contracts.

This position was also followed in the Appellate Division (as it was known then) case of *Morrison v Angelo Deep Gold Mines, Ltd,* [668] in which the respondent sought to escape liability by getting the appellant to sign a standard contract of employment which contained an indemnity clause, in which the following were provided, *inter alia*: *"And the employed*

666 1963 (3) SA 614 (T).

667 *Crawhall v The Minister of Transport and Another* 1963 (3) SA 614 (T); See also the case of *Langley Fox Building Partnership (Pty) Ltd v De Valence* 1991 (1) SA 1 (A).

668 1905 (AD) 775.

hereby further agrees for the consideration aforementioned to free and discharge the Company of all and from all and any claim or liability in respect of any injury or injuries received whilst in the employ of the said Company."

In this case, the plaintiff brought an action against the defendant for damages arising from injuries he had sustained as a result of an accident in the Angelo Deep Mine. It was common cause between the parties that the accident had taken place. The plaintiff, in his claim for damages relied, *inter alia,* on, negligence and the failure of the company to comply with the provisions of certain mining regulations.

Besides the general denial of negligence, the defendant also relied upon a special allegation that the plaintiff contracted to accept the amount due under a certain accident policy, in lieu of any compensation for injuries received whilst in the service of the company. The court, per Innes CJ, held, as a general rule, that any person may waive rights conferred by law solely for his benefit. But, held the court*" where public as well as individual interests are concerned, where public policy requires the observance of a statute, then the benefit of its provisions cannot be waived by the individual, because he is not the only person interested."*

The court also held *"where a duty is imposed by common law, the result of its non-observance may be waived by the person interested unless public policy prevents his so-doing."*

Consequently the court held *"I cannot see that the same rule should not apply where the liability arises from the neglect of a duty imposed by statute."*
The court however, found that in this case, where *"..... A man has contracted to accept one scale of compensation instead of another in respect of a claim arising from the non-observance of statutory regulations, and I cannot see that public policy forbids such an arrangement."* [669]

It was held by Innes CJ that the contract was not invalid, as being against public policy.

The legal position with regard to exemption clauses and announced by the court is this, provided the contract is concluded without duress, without fraud and the arrangement between the parties is not contrary to public policy, the presence of an arrangement

669 *Morrision v Angelo Deep Gold Mines Ltd* 1905 (AD) 775 at 782.

intended to contravene or which *"tends to induce contravention of some fundamental principle of justice or of general or statutory law ..... ",* will invalidate an indemnity clause. [670]

12.2.5.1.3 Legal Opinion

Both the South African legal writers and the courts alike, share the legal opinion that no institution should escape legal liability by incorporating an exculpatory clause in a contract, the aim of which, is to attempt to escape liability, where, there is a statutory duty present, in which, an institution, for example, a municipality or a mine, is expected to provide measures to ensure the safety of the public. The effect thereof, is that the exculpatory or indemnity clause will be invalid. [671]

12.2.5.2 ENGLAND

12.2.5.2.1 Legal Writings

The promulgation of the *Unfair Contract Terms Act* 1977 and the *Unfair Terms in Consumer Contracts Regulations* 1999 in English Law, have certainly brought about statutory control of exemption clauses. [672]

It has been suggested, by the legal writers, that the purpose of the *Unfair Contract Terms Act* 1977 *"is to limit, and in some cases to take away entirely, the right to rely on exemption clauses in certain situations."* [673]

It is especially the control over contract terms that exclude or restrict liability for `negligence', which includes a failure to exercise reasonable care and skill in the performance of a contract, which are of importance to this study. To this end, I shall briefly concentrate on the legal effect of exclusionary clauses when it comes to negligent acts and where attempts are made to exclude liability.

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670 *Morrison v Angelo Deep Gold Mines Ltd* 1905 (AD) 775 at 779.

671 For legal writings see Van der Merwe et al *Contract: General Principles* (2003) 215; Christie *The Law of Contract* (1996) 204-205; Turpin "Contract and Implied Terms" *SALJ* (1956) 144 at 157; Van Dorsten "The Burden of Proof and Exemption Clauses" 1984 (47) *THRHR* 30 at 56; Cronje-Retief *The Legal Liability of Hospitals* (2000) 440-441. For case law see *Newman v East London Town Council* 1895 EDL 61 at 68; *Morrison v Anglo Deep Gold Mines Ltd* 1905 (AD) 775.

672 Beatson (2002) 185; Koffman and MacDonald (2004) 216; McKendrick (2005) 460ff.

673 Beatson Anson's (2002) 185; Koffman and MacDonald (2004) 217 also suggest that the Unfair Contract Terms Act 1977 *"clearly interferes with freedom of contract"* where exemption clauses are objectionable.

Before the nature and effect of the statutory control which the *Unfair Contractual Terms Act* 1977 seeks to bring with it, is briefly discussed, it is important to highlight the aim of exclusionary clauses in excluding negligence. *McKendrick* [674] suggests that the aim of these types of clauses is to negate the existence of the duty of care. Put differently, the aim thereof is to prevent a duty of care from arising. The introduction of the *Unfair Contract Terms Act* 1977 brought about a control mechanism in England to counter the practise which existed there prior, namely, the negation of the existence of the duty of care.

In this regard, it is of paramount importance to consider, briefly, the relevant sections, as contained in the *Act*. [675]

Before the scope and the relevant sections are outlined, it is indicated that consideration should first be given to the meaning of the term `negligence'.

It means the breach:

(a) of any obligation, arising from the express or implied terms of a contract, to take reasonable care or exercise reasonable skill in the performance of the contract;

(b) of any common law duty to take reasonable care or exercise reasonable skill (but not any stricter duty);

(c) of the common duty of care imposed by the *Occupier's Liability Act* 1957 or the *Occupier's Liability Act (Northern Ireland)* 1957.

Negligence, in this context, according to *McKendrick,* [676] includes or encompasses both contractual negligence i.e., breach of a contractual duty to exercise reasonable care and tortuous negligence, i.e. liability which has arisen in tort rather than contract.

Sec 2 [677] on the other hand provides:

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674 *Contract Law Text, Cases and Materials* (2005) 462.

675 *Unfair Contract Terms Act* 1977.

676 *Contract Law Text, Cases and Materials* (2005) 462.

677 S1 (1) of the *Unfair Contract Terms Act* 1977.

"(1) A person cannot by reference to any contract term or to a notice given to persons generally or to particular persons exclude or restrict his liability for death or personal injury resulting from negligence.

(2) In the case of other loss or damage, a person cannot so exclude or restrict his liability for negligence except in so far as the term or notice satisfies the requirement of reasonableness.

(3) Where a contract term or notice purports to exclude or restrict liability for negligence a person's agreement to or awareness of it is not of itself to be taken as indicating his voluntary acceptance of any risk."

From the above it is clear that any attempt to exclude liability for death or personal injury caused by negligence is ineffective. The courts in this regard are given no choice in the matter. The Act so provides that it is not possible to exclude liability for such losses in the case of other loss or damage a term or notice which purports to exclude liability in negligence is applied only if it satisfies the requirement of reasonableness. The section also prevents the party sued from relying on the terms or notice for the purpose of establishing the defence of *volenti non fit iniuria*. Therefore reliance cannot be placed on the term or notice in order to establish that the contractant consented to the risk of suffering injury. [678]

In so far as the test for `reasonableness' is concerned, Sec 11-(1) provides:

"In relation to a contract term, the requirement of reasonableness for the purposes of this Part of this Act, section 3 of the Misrepresentatrion Act 1967 and section 3 of the Misrepresentation Act (Northern Ireland) 1967 is that the term shall have been a fair and reasonable one to be included having regard to the circumstances which were or ought reasonably to have been, known to or in the contemplation of the parties when the contract was made. „[679]

Schedule 2 of the Act provides for certain guidelines of circumstances to be taken into account when determining reasonablenss namely:

"(a) the strength of the bargaining position of the parties relative to each other, taking into account (among other things) alternative means by which the customer's requirements could have been met;

(b) whether the customer received an inducement to agree to the term, or in accepting it had an opportunity of entering into a similar contract with other persons, but without having to accept a similar term;

(c) whether the customer knew or ought reasonably to have known of the existence and extent of the term (having regard, among other things, to any custom of the trade and any previous course of dealing between the parties);

(d) where the term excludes or restricts any relevant liability if some condition is not complied with, whether it was reasonable at the time of the contract to expect the compliance with the condition would be practicable;

678 McKendrick (2005) 460ff; Koffman and MacDonald (2004) 219.

679 Sec 11(1) of the *Unfair Contractual Terms Act* 1977.

(e) *whether the goods were manufactured, processed or adapted to the special order of the customer."* [680]

The *Unfair Terms in Consumer Contracts Regulations* 1999 [681] were also promulgated as a measure to control by statute, unfair and unconscionable bargains and to curb the exploitation of contractants who are in a disadvantageous position. [682]

A commanding difference between these regulations and that of the provisions of the *Unfair Contract Terms Act* 1977 is found in the fact that the regulations are not restricted to exemption and limitation clauses, but, subject to all the terms of a contract between a seller or supplier of goods or services and a consumer, which have not been `individually negotiated' to a requirement of fairness. [683] It is especially, the protection of consumers against unfair surprise in standardized contracts or `small print contracts' that the regulations aim to work at. [684]

The regulations serve as legislative control on exemption clauses, where the terms in the clause are unfair and contrary to good faith. [685]
A term is said to be unfair where, contrary to the requirement of good faith, it causes a significant imbalance in the parties' rights and obligations arising under the contract, to the detriment of the consumer. [686]

Britain has also introduced other legislative intervention to counter the exclusion or restriction of liability, *inter alia,* for misrepresentation, [687] cases involving consumer credit, [688] consumer safety, [689] defective premises, [690] package holidays, [691] carriage by land, [692]

680 Schedule 2 of the *Unfair Contractual Terms Act* 1977.

681 *EC Directive on Unfair Terms in Consumer Contracts* (93/12/EC) 1999.

682 Beatson (2002) 200; Koffman and MacDonald (2004) 216; McKendrick (2005) 507.

683 Beatson (2002) 200.

684 McKendrick (2005) 502.

685 Beatson (2002) 187, 201-202.

686 Reg 5(1) of the *Unfair Terms in Consumer Contracts Regulations* 1999.

687 Section 3 of the *Misrepresentation Act* 1967 as amended by Section 8 of the Unfair Contract Terms Act 1977.

688 *Consumer Credit Act* 1974 s.173 (1).

sea, [693] or air, [694] insurance [695] and employment. [696]

12.2.5.2.2 Case Law

The English courts have also acknowledged that the enactment of the *Unfair Contract Terms Act* 1977 serves as a mechanism for controlling exemption clauses. The courts have held that reliance can be placed on the provisions of the *Unfair Contract Terms Act* 1977, especially where clauses in a contract between two contracting parties exclude or limit one of the contracting parties' liability, or excluding or limiting any right or remedy that would otherwise be available. In the case of *Stewardt-Gill Ltd v Horattio Myer and Co Ltd,* [697] the contracting parties included a clause, in the agreement, which purported to restrict a right or remedy otherwise available. Moreover, the clause in question purported to prevent the buyer from withholding payment by reason of a set-off or counterclaim, in the event of a breach of contract by the supplier. The supplier tried to avoid the clause falling within the ambit of the *Unfair Contract Terms Act* 1977. The Court of Appeal held to the contrary and found the clause excluded the buyer's right to set-off its claims against the seller's claim for the price and also excluded the procedural rules applicable to a set-off.

The House of Lords in the case of *Johnson and Another v Moreton,* [698] in an agricultural lease agreement dispute, regulated by a statute namely the *Agricultural Holdings Act* 1948, was tasked to pronounce on the validity of a clause in a written contract whereby the tenant waived his right to serve a counter-notice in response to a notice to quit served by his landlord on him. The court consequently looked at the legal position. As a general rule,

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689 *Consumer Protection Act* 1967 Part 1.

690 *Protective Premises Act* 1972 s.6 (3).

691 *Package Travel, Package Holidays and Package Tours Regulations* (S1.1992 No 3295) reg.15.

692 *Carriage of Goods by Road Act* 1965; *Carriage of Passengers by Road Act* 1974; *Carriage by Air and Road Act* 1979; *Public Passengers Vehicles Act* 1981, *International Transport Conventions Act* 1983.

693 *Carriage of Goods by Sea Act* 1924, Act III 8; *Carriage of Goods by Sea Act* 1971.

694 *Carriage by Air Act* (1961); *Carriage by Air and Road Act* 1979.

695 *Industrial Assurance Acts* 1923 and 1968; *Road Traffic Act* 1988, s.148; *Transport Act* 1980, s.60.

696 *Employment Rights Act* 1996, the latest consolidation of legislation concerning individual employment.

697 (1992) 1 QB 600.

698 (1980) A.C. 37.

the court held that a person may contract not to exercise or to waive a right conferred by statute. But, emphasized the court, the general rule was subject to exceptions which included any violation of the duty to the public and societal interest. Although the court undoubtedly attached weight to the sanctity of the freedom to contract and the sanctity of a contract once it had been made in proclaiming: *"..... there should be freedom of contract and that contracts freely entered into should be enforceable,"* nonetheless, the court, with reference to *Graham v Ingleby* (1948) 1 Exch 651 per Pollock C.B. at P.655, in which it was stated: *" ..... an individual cannot waive a matter in which the public have an interest"* held *"a party can only renounce a right conferred by statute if it is been conferred exclusively for his benefit and there is no element of public interest."* Where a mischief cannot be regulated by private agreement between parties and therefore parliament has stepped in and made provision for its regulation then parties cannot contract out of the statutory remedy. Consequently the court held that the provisions of the *Agricultural Holdings Act* 1948 are unenforceable as the tenant could not by agreement deprive himself of that option in advance.

In the case of *Smith v Eric S Bush,* [699] the House of Lords also relied on the *Unfair Contract Terms Act* 1977 in invalidating a disclaimer clause in a mortgage valuation, which stipulated that the valuation was provided without any acceptance of responsibility, because it purported to prevent any duty of care from arising.

The Court of Appeal, in the case of *Johnstone v Bloombury Health Authority,* [700] relied on the *Unfair Contractual Terms Act* 1977 in deciding whether an express term precluding or limiting an employer (a doctor) from claiming damages from the health authority, was against public interest or not. The facts, briefly stated, in this case included: The plaintiff doctor was employed by the defendant health authority, as a senior house officer, under a contract which, by clause 4(b), stipulated that his hours of duty should consist of a standard working week of 40 hours and an additional availability on call up, to an average of 48 hours a week, over a specified period. The plaintiff, in compliance with the contract, worked some weeks in excess of 88 hours and, as a result of working those hours with inadequate sleep, he became ill. In March 1989, he brought an action against the defendants, seeking, *inter alia*, a declaration that he should not be required to work in excess of 72 hours a week and damages for personal injuries and loss allegedly suffered as a result of breach, by the defendants, of their duty to take reasonable care for the plaintiff's

699 (1990) 1 AC 831.

700 (1992) QB 333.

safety. In July 1989, the master, on the defendant's summons, ordered that those parts of the writ and statement of claim relating to the requirement to work in excess of 72 hours be struck out as being an abuse of process.

On appeal the court held, notwithstanding the plaintiff's obligations under clause 4(b): *"the duty owed by the defendants as a statutory health authority to members of the public and their responsibility for the training of doctors make it a matter of public policy that the defendants should not by the use of onerous contractual terms jeopardise these public functions. The courts will not readily enlarge the ambit of public policy in the law of contract: See Fender v St John-Mildmay (1938) A.C. 1. But the categories are not closed, and there is sufficient analogy between the alleged facts and Horwood v Millar's Timber and Trading Co. Ltd (1917) 1 K.B. 305 to support a public policy argument. If in cases like Horwood and Kind v Michael Faraday and Partners Ltd (1939) 2 K/B/ 753 the courts were prepared to protect individuals from the "servile incidents" of a contract, a fortiori they should do so where the injury is, in part, to the public."*

Stuart-Smith C.J. in handing down the judgement, when having regard to the operation of Section 2 of the *Unfair Contract Terms Act* 1977 stated: *"..... the court is concerned with the substance and not the form of the contractual provision. In Phillips Products Ltd v Hyland (Note) (1987) 1 W.L.R. 649, 666, Slade L.J. said: "In applying section 2(2), it is not relevant to consider whether the form of a condition is such that it can aptly be given the label of an `exclusion' or `restriction' clause. There is no mystique about `exclusion' or `restriction' clauses. To decide whether a person `excludes' liability by reference to a contract term, you look at the effect of the term. You look at its substance."*

The court consequently held that there was a statutory duty on the health authority to take care in ensuring that the plaintiff does not work excessive hours and in so doing, exposing the plaintiff to forcible harm. Accordingly, the plaintiff's claim could not be precluded or limited by clause 4(l) and the claim for relief should not be struck out.

12.2.5.2.3 Legal Opinion

The English law of contract, with the promulgation of legislative intervention in the form of the *Unfair Contract Terms Act* 1977 and the *Unfair Terms in Consumer Contracts Regulations* 1999, have introduced statutory control as a mechanism to limit and curb the use of exemption clauses. [701] The English legal writers have suggested that the *Unfair*

[701] Beatson *Anson's Law of Contract* (2002) 185; Koffman and MacDonald *The Law of Contract* (2004) 216; McKendrick *Contract Law Text, Cases and Materials* (2001) 460ff.

Contract Terms Act 1977 clearly interferes with the doctrine of freedom of contract, especially where the exemption clause is objectionable. [702] It is also in instances where one of the contracting party's attempts to negate the existence of the duty of care, that the *Unfair Contract Terms Act* 1977 serves as a mechanism to curb the attempt. [703]

The *Unfair Contract Terms Act* 1977, in particular, places a total prohibition on any attempt to exclude or restrict liability for death or personal injury resulting from negligence. [704] However, in other instances, in the case of loss or damage, a person can exclude or restrict his liability for negligence where the term or notice satisfies the requirement of reasonableness. [705] Whereas, in the first instance, the court is given no choice to pronounce in this matter, in the second instance the court is regarded as having discretion, provided the contracting party relying on the clause satisfies the court that his/her/its conduct was reasonable. [706]

Certain guidelines are laid down by the *Unfair Contract Term Act* 1977 as to what constitute reasonableness. They include *inter alia* the strength of the bargaining position of the parties; whether the customer was induced into acting; whether the contractant had knowledge of the term etc. [707]
The English courts have on a number of occasions acknowledged that the enactment of the *Unfair Contract Terms Act* 1977 serves as a mechanism for controlling exemption clauses. [708]

The House of Lords in the case of *Johnson and Another v Moreton* [709] held that as a general rule, a person may contract not to exercise or to waive a right conferred by a

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702 Beatson *Anson's Law of Contract* (2002) 185; Koffman and MacDonald *The Law of Contract* (2004) 217.

703 McKendrick *Contract Law Text, Cases and Materials* (2005) 482.

704 Sec 2(1) of the *Unfair Contract Terms Act* 1977.

705 Sec 2(2) of the *Unfair Contract Terms Act* 1977.

706 McKendrick *Contract Law Text, Cases and Materials* (2005) 460ff; Koffman and MacDonald *The Law of Contract* (2004) 219. The writers hold the view that where the first instance is applicable, Sec 2(1) prevents a party from relying on a defense of *volenti non fit iniuria* or that the contracting party consented to the risk of suffering injury.

707 Schedule 2 of the *Unfair Contract Terms Act* 1977.

708 See the case of *Stuewardt-Gill Ltd v Horatio Meyer and Co Ltd* (1992) 1 QB 600. The court found the clause excluding the buyer's right to set off claims against the seller was objectionable and ineffective.

709 (1980) A.C. 37.

statute. The court however emphasizes that the general rule is subject to exceptions, *inter alia,* any violation of the duty to the public and societal interest. The court held that no rights may be waived where the public have an interest, nor can a party contract out of a statutory remedy. The court in the case of *Johnstone v Bloombury Health Authority* (1992) QB 333, relied on the *Unfair Contract Terms Act* 1977 in deciding whether an express term precluding or limiting an employee (a doctor) from claiming damages from the health authority is against public interest or not. Because there was a statutory duty on the health authority to take care in overseeing that the plaintiff does not work excessive hours, this right to claim for damages could not be excluded by way of an indemnity clause.

12.2.5.3 UNITED STATES OF AMERICA

12.2.5.3.1 Legal Writings

The violation of a statutory duty is one of the factors the American courts take into consideration in determining whether conduct, in general, is against public policy. For that reason it is a recognized principle in the law of contract that the Constitution, statutes and judicial decisions of a State are sources of information for the determination of its public policy. [710]

Public policy is therefore viewed, *inter alia,* in the light of legislative acts. [711]

From what was previously stated, in general, a contract which is not prohibited by statute, considered by judicial decision, or contrary to the public morals, contravenes no principle of public policy. However, where a contract or contractual provision is prohibited by statute, the consideration would include the theory that such a contract or contractual provision would be injurious to the public or contravene some established interest in society.

For that reason, waivers of liability and other attempts at exculpating hospitals and other health care providers from liabilities arising from their negligent acts are treated with disfavour as it infringes public safety and welfare. [712]

For that reason they will be declared void and unenforceable due to public policy. [713]

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710 Calamari and Perillo (1977) 166.

711 Calamari and Perillo (1977) 168; Jaeger (1953) Para 1630.

712 Calamari and Perillo (1977) 272-273.

713 Jaeger (1953) Para 1751.

Contracts for exemption from liability for negligence are equally void and unenforceable where it is violative of a statute or governmental regulation. [714]

Certain public operations bestow upon the contracting parties a legal duty or duty of public service which they have to perform in compliance with a statutory duty, provided for by a legislative enactment. For example, generally, a common carrier may not exempt itself from liability for negligence in the performance of its public duties and the terms of the statute may preclude it from contracting against liability thereon specified. Any attempt by one of the contracting parties to shield himself/itself from liability would be void and unenforceable as against public policy. [715]

Likewise, the relationship of landlord and tenant dictate that its ingredients are regulated by statute. Apart from statute, the relationship is also governed by the common law. Any attempt to immunize one of the contracting parties from liability for his/its negligent act in violation of any statutory provisions or the common law, would be void and unenforceable as against public policy. [716]

The legal position according to the legal writers is the same for contracts for immunity in violation of a statute or the common law involving the railways, air transportation, telegraph companies, municipalities, warehouseman, garage keepers, parking space operators, innkeepers and the same where there is a relationship involving public service, in which the service provider is expected to maintain a standard of due care, in terms of a statutory enactment or the common law. The legal writers hold the view that any bargain exempting the public utility from its statutory duties are common law duties. [717]
The relationship between the medical profession and the general public, with regard to health services, is regulated by professional canons of ethics, licensing laws, regulations set up by professional organizations and different states, standards written into statutory enactments or professional organizations, the common law standards of professional conduct inferred by the courts in medical malpractice and private legal actions. [718]

714 Calamari and Perillo (1977) 269.

715 Jaeger (1953) Para 1751.

716 Jaeger (1953) Para 1751.

717 Waltz and Inbau (1971) 17.

718 Waltz and Inbau (1971) 17.

It is especially the licensing of hospitals and medical practitioners and the regulations designed by statutory enactment, as well as professional organizations, which are designed to protect the public from incompetent and unethical practitioners and inferior services provided by hospitals and other care givers, that set minimum standards of conduct and the usage of related facilities. [719]

As was seen earlier, waivers of liability and other attempts at exculpating hospitals and other health care providers from liability, arising from their negligent acts, are treated with disfavour. [720]

12.2.5.3.2 Case Law

American case law have by the very nature of the status of the contracting parties, and certain classes of contracts which create a relation out of which certain duties arise which, concerns albeit public welfare, public good, public interests and the like, come out strongly against those contracting parties who wish to escape their legal duty by inserting exculpatory clauses in contracts. More especially, this arises where the status of the parties and their relationship is governed by some or other statute or statutory regulation; or, where a prohibition against certain conduct, is placed by common law. The status of the contracting parties and classes of contracts most greatly affected include, firstly, that of landlord and tenant. [721]

Secondly, generally a common carrier may not exempt itself from liability for negligence in the performance of its public duties and the terms of a statute regulating their conduct may, very well, preclude it from contracting against liability therein specified. [722]

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719 Waltz and Inbau (1971) 17-18.

720 Furrow et al (1995) 256.

721 *Chicago Great Western Railway Company v Farmers Produce Company* 164 F. Supp 532 (1958); *McCutcheon v United Homes Corp* 79 Wash 2d 443, 486 P.2d 1093 (1971). In this case the court held that to allow a common law duty to be infringed would mean it not *"only lowers the standard imposed by the common law, it effectively destroys the landlord's affirmative obligation or duty towards the tenants' welfare or safety."*; *Kuzmiak et al v Brookchester Inc* 33 N.J. Super 575, 111 A. 2d 425 (1955); *Crawford v Buckner et al* 839 S.W. 2d 754 (1992).

722 *Chicago and N.W.R Co v Davenport et al* 205 F.2d 589 (1953). In this case it was held that the provisions of Intestate Commerce Act apply to the industry and common carriers, acting as such, cannot by contract; relieve itself from liability for the negligence of itself, or its servants, as it would be a violation of the statutory regulations governing the industry. See also *Eddings v Collins Pine Co et al* 140 F. Supp 622 Cal. (1956).

Other contracts which fall into this category include that of public utilities, [723] innkeepers, [724] public warehousemen employees [725] and services involving extra hazardous activities. [726] It is especially, in instances where hospital/medical practitioners and other medical caregiver services, being offered to the general public, that the courts have regarded these type of services as being *inter alia* subject to public regulation and involving a particular sensitive area of public interest. [727] The services provided and the standards excepted to be maintained are regulated by the *Health and Safety Code*. [728]

The rationale for this prohibition is stated by the courts as *"the greater the threat to the general safety of the community, the greater the restriction or the party's freedom to contractually limit the party's liability."* [729]

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723 *Chicago @ N.W.R. Co v Davenport et al* 205 F.2d 589 (1953). In this case it was held that the provisions of Intestate Commerce Act apply to the industry and common carriers acting as such cannot, by contract, relieve itself from liability for the negligence of itself or its servants as it would be a violation of the statutory regulations governing the industry. See also *Eddings v Collins Pine et al* 140 F.Supp. 622 Cal (1956); *First Financial Insurance Co v Purolator Security Inc*, 69 Ill.App.3d 413, 418, 26 Ill.Dec.393, 388 N.E. 2d 17, 21 (1979); *LaFrenz v Lake County Fair Board*, 172 Ind.App. 389, 393, 360 N.E. 2d 605, 608 (1977); *Winterstein v Wilcom,* 16 Md.App. 130, 136, 293 A.2d 821, 824 (1972); *Ciofalo v Vic Tanny Gyms Inc* 10 N.Y. 2d 294, 296, 220 N.Y.S. 2d 962, 964, 177 N.E. 2d 925, 926 (1961); *Leidy v Deseret Enterprises Inc* 252 Pa.Super, 162, 168, 381 A2d 164, 167 (1977); *Moss v Fortune* 207 Tenn. 426, 429, 340 S.W. 2d 902, 904 (1960); Annot, 175 A.L.R. 8 (1948). The prohibition against exculpatory clauses does not apply when the common carrier acts in a different capacity. See *Checkley v Illinois Central Railway Co*. 257 Ill 491, 100 N.E. 941 (1913) (lessor); *Speltz Grain and Coal Co v Rush* 236 Minn. 1. 51 N.W. 2d 641 (1952) (lessor).

724 *LaFrenz v Lake County Fair Board* 172 Ind.App. 389, 393, 360 N.E. 2d 605, 608 (1977); *Winterstein v Wilcom* 16 Md.App. 130, 136, 293 A.2d 821, 824 (1972); *Ciofalo v Vic Tanny Gyms Inc* 10 N.Y. 2d 294, 296-97, 220 N.Y.S. 2d 962, 964, 177 N.E. 2d 925, 926 (1961); *Leidy v Deseret Enterprises Inc* 252 Pa.Super, 162, 168, 381 A.2d 164, 167 (1977).

725 *Lafrenz v Lake County Fair Board*, 172 Ind.App. 389, 393, 360 N.E. 2d 605, 608 (1977); *Winterstein v Wilcom*, 16 Md.App 130, 136, 293 A.2d 821, 824 (1972).

726 *Johnson v Fargo* 98 A.D. 436, 90 N.Y.S. 725 App.Div. (1904) affd. 184 N.Y. 379, 77 N.E. 388 (1906); See also *First Financial Insurance Co v Purolater Security Inc* 69 Ill.App.3d 413, 418, 26 Ill.Dec 393, 388 N.F. 2d 17, 21 (1979); *Leidy v Deseret Enterprises Inc* 252 Pa.Super 162, 168, 381 A.2d 164, 167 (1977).

727 *Tunkl v Regents of University of California* 60 Cal 2d 92, 383 P.2d 441, 32 Cal. Rptr. 33 (1963); *Ash v New York Univ. Dental Centre*, 164 A.D. 2d 366, 564 N.Y.S. 2d 308 (1990); *Smith v Hosp Authority of Walker, Dade and Catoosa Cos*. 160 Ga.App. 387, 287 S.E. 2d 99 (1981); *Meiman Rehabilitation Centre Inc* 444 S.W. 2d 78 (KvApp. 1969).

728 S1400-1421, 32000-32508 See *Tunkl v Regents of University of California* 60 Cal 2d 92, 383 P.2d 441; See also *Olson v Molzen* 558 S.W. 2d 429 Tenn. (1977); *Emory University v Ponubiansky* 208 Ga. 391, 282 S.E. 2d 903 (1981); See also the established code of professional and personal conduct in terms of the N.C.G.S. SS90-1 to 90-21.5 (1975) in terms of North Carolina Law referred to in *Tatham v Hoke* 449 F.Supp 914 (1979) in respect of medical practitioners.

729 *Roy Tucker and Sons Inc v GTE Directories Sales Corporation* 253 NEB 458, 571 N.W. 2d 64 (1997); *Continental Corporation v Gowdy et al* 283 Mass. 204, 186 N.E. 244 (1933); *Eichelman v National Insurance Company* 55 Pa 558, 711 A. 2d 1006 (1998); *Sproul v Cuddy et al* 131 Cal. App. 2d 85, 280 P. 2d 158 (1955); *Anderson v Reed* 270 P. 854 (1928).

12.2.5.3.3 Legal Opinion

The violation of a statutory duty is one of the factors which ultimately determine whether conduct is against public policy. For that reason, where a contract is prohibited by statute, the consideration or thing to be done if it has the tendency to injure the public or contravene some established interest in society, they will be declared void and unenforceable due to public policy. [730]

There are public operations in America which bestow upon the contracting parties a legal duty or duty of public service which compel compliance with a statutory duty. Examples thereof can be deduced from the relationship between the contracting parties, including a common carrier and users, landlord and tenant, the railways and users, the medical profession and the general public etc. [731]

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730 Calamari and Perillo *The Law of Contracts* (1977) 168-171; Jaeger *A Treatise on the Law of Contracts* (1993) Para 1630, 1750A. For Case Law see generally *Powell v American Health Fitness Centre of Fort Wayne, Inc* 694 2d 797 (1998); *Chicago Great Western Railway Company v Farmers Produce Company et al* 164 F. Supp 532 (1958); *Dessert Seed Co Inc et al v Drew Farmers Supply Inc* 248 858, 454, S.W. 2d (1970); *Smith d/b/a Smith Construction Company v Seaboard Coast Line Railroad Company* 639 F.2d 1235 (1981); *Kuzmiak et al v Brookchester Inc* 33 N.J. Super 575, 111 A. 2d 425 (1955); *Banfield v Louis, Cat Sports Inc et al* 589 So. 2d 441 (1991); *Crawford v Buckner et al* 839 S.W. 2d 754 (1992); *Schoblobohm v Spa Petite Inc* 326 N.W. 2d 920, 923 Minn. (1982); *Leidy v Deseret Enterprises Inc d/b/a Body Shop Health Spa et al* 282 Pa Super 162, 381 A.2d 164 (1977); *Cohen Insurance Trust et al v Stein et al* 297 ALL App 3d 220, 696 N.E. 2d 743, 231, Ill NEC 447 (1998) *Zeits v Foly* 264 S.W. 2d 267 (1954); *Globe Home Improvements Co v Perth Amboy Chamber of Commerce Credit Rating Bureau* 116 N.J.L. 168, 182 A 641 (1936); *Continental Corporation v Foundy et al* 283 Mass. 244, 186 N.E. 244 (1933); *Zeitz v Folley* 264 S.W. 2d 267 (1954); *Vic v Patterson* 158 Cal. App 2d 414, 322 P.2d 548 (1958); *Wilson v Builders Transert Inc* 370 S.C. 287, 498 S.E. 2d 674 (1998).

731 Calamari and Perillo *The Law of Contracts* (1977) 168; Jaeger *A Treatise on the Law of Contracts* (1993) Para 1630; Waltz and Inbau *Medical Jurisprudence* (1971) 17. For the relationship between landlord and tenant see *Chicago Great Western Railway Company v Farmers Produce Company* 164 F. Supp 532 (1958); *McCutcheon v United Homes Corp* 79 Wash 2d 443, 486 P.2d 1093 (1981). In this case the court held that to allow a common law duty to be infringed would mean it not *"only lowers the standard imposed by the common law, it effectively destroys the landlord's affirmative obligation or duty towards the tenants' welfare or safety." Kuzmiak et al v Brookchester Inc* 33 N.J. Super 575, 111 A.2d 425 (1955); *Crawford v Buckner et al* 839 S.W. 2d 754 (1992). For the relationship between common carriers and users see *Chicago and N.W.R. Co v Davenport et al* 205 F.2d 589 (1953). In this case it was held that the provisions of Intestate Commerce Act apply to the industry and common carriers, acting as such, cannot by contract, relieve itself from liability for the negligence of itself or its servants, as, it would be a violation of the statutory regulations governing the industry. See also *Eddings v Collins Pine Co et al* 140 F. Supp 622 Cal. (1956). For public utility contracts see *Chicago and N.W.R Co v Davenport et al* 205 F.2d 589 (1958). In this case it was held that the provisions of Intestate Commerce Act apply to the industry and common carriers, acting as such, cannot by contract, relieve itself from liability for the negligence of itself or its servants, as, it would be a violation of the statutory regulations governing the industry. See also *Eddings v Collins Pine Co et al* 140 F. Supp 622 Cal (1956); For public interests contracts see *Chicago and N.W. Ry Co v Davenport et al* 205 F.2d 589 (1953) in this case it was held that the provisions of intestate corporate act apply to the industry and common carriers acting as such cannot by contract, relieve itself from liability for the negligence of itself or its servants as it would be a violation of the statutory regulation governing the industry. See also *Eddings v Collins Pine Co et al* 140 F.Supp 622 Cal (1956); *First Financial Insurance Co v Purolator Security Inc*, 69 Ill.App.3d 413, 418, 26 Ill.Dec.393, 388 N.E. 2d 17, 21 (1979); *LaFrenz v Lake County Fair Board*, 172 Ind.App. 389, 393, 360 N.E. 2d 605, 608 (1977); *Winterstein v Wilcom*, 16 Md.App. 130, 136, 293 A.2d 821, 824 (1972); *Ciofalo v Vic Tanny Gyms Inc* 10 N.Y. 2d 294, 296, 220 N.Y.S. 2d 962, 964, 177 N.E. 2d 925,

It is especially the medical profession which is regulated by professional canons of ethics, licensing laws, regulations set up by professional organizations, which prescribe the conduct of hospitals and/or doctors and set professional standards. The regulations designed by statutory enactments are said to be designed to protect the public against incompetent and unethical practitioners and inferior services provided. [732]

For that reason, waivers of liability and other attempts at exculpating hospitals and other health care providers from liabilities, arising from their negligent acts, are treated with disfavour as they infringe public safety and welfare. [733]

12.3 Summary and Conclusion

From Chapter 5 it emerged that exclusionary clauses have a deep-seated history. The adoption of exclusionary clauses in contract has featured very prominently, not only in commercial, but also in other spheres, including hospital contracts. Generally, exclusionary clauses have as their foundation the principle of the freedom to contract and the sanctity of contract. Although, since the founding of consumer affairs agencies or bodies, in which the ills that standardized contracts, incorporation exclusionary clauses bring with them, have been exposed, nonetheless, the influence of exclusionary clauses continue to be felt universally and, in particular, in the jurisdictions selected for the research undertaken in this thesis.

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926 (1961); *Leidy v Deseret Enterprises Inc* 252 Pa.Super, 162, 168, 381 A2d 164, 167 (1977); *Moss v Fortune* 207 Tenn. 426, 429, 340 S.W. 2d 902, 904 (1960); The prohibition against exculpatory clauses does not apply when the common carrier acts in a different capacity. See *Checkley v Illinois Central Railway Co* 257 Ill 491, 100 N.E. 941 (1913) (lesser); *Speltz Grain and Coal Co v Rush* 236 Minn. 1 51 N.W. 2d 641 (1952) (lessor); For the relationship between hospitals/doctors and patients see *Tunkl v Regents of University of California* 60 Cal 2d 92, 383 P.2d 441, 32 Cal. Rptr. 33 (1963); *Belshaw v Feinstein* 258 Cal App. 2d 711, 65 Cal Rptr. 788 (1968); *Olson v Molzen* 558 S.W. 2d 429 (Tenn. 1977); *Leidy et al v Deseret Enterprises Inc d/b/a Body Shop Health Spa et al* 252 Pa. Super 162, 381 A.2d 164 (1977); *Ash v New York University Dental Centre* 164 A.D. 2d 366, 564 N.Y.S. 2d 308 (1990); *Smith v Hospital Authority of Walker, Dade and Catoosa Cos* 160 G.A. App 387, 287 S.E.E 2d 99 (1981); *Meiman Rehabilitation Centre Inc* 444 S.W. 2d 78 KV App 1969.

732 Waltz and Inbau *Medical Jurisprudence*. For the codes and case law see SS1400-1421, 32000-32508. See *Tunkl v The Regents of University of California* 383 P.2d 441; See also *Olson v Molzen* 558 S.W. 2d 429 Tenn. (1979); *Emory University v Porubiansky* 248 Ga. 391 282 S.E. 2d 903 (1981); See also the established Code of Professional and Personal conduct in terms of the N.C.G.S. ss90-1 to 90-21.5 (1975) in terms of North Carolina Law referred to in *Tatham v Hoke* 449 F. Supp 914 (1979) in respect of medical practitioners.

733 Furrow et al *Health Law* (1995) 256-258; *Holder Medical Malpractice Law* (1979) 316-317; *Tunkl v Regents of University of California* 60 Cal 2d 92, 383 P.2d 441, 32 Cal. Rptr. 33 (1963); *Belshaw v Feinstein* 258 Cal App. 2d 711, 65 Cal Rptr. 788 (1968); *Olson v Molzen* 558 S.W. 2d 429 (Tenn. 1977); *Leidy et al v Deseret Enterprises Inc d/b/a Body Shop Health Spa et al* 252 Pa. Super 162, 381 A.2d 164 (1977); *Ash v New York University Dental Centre* 164 A.D. 2d 366, 564 N.Y.S. 2d 308 (1990); *Smith v Hospital Authority of Walker, Dade and Catoosa Cos* 160 G.A. App 387, 287 S.E.E 2d 99 (1981); *Meiman Rehabilitation Centre Inc* 444 S.W. 2d 78 KV App 1969.

In time, despite the wide application of exclusionary clauses in contract, many factors have been identified by the legal writers and the courts alike in the different jurisdictions, which influence the validity and invalidity of exclusionary clauses.

Consequently, in this Chapter, a comprehensive discussion of the various factors impacting on exclusionary clauses was looked at.

Besides the traditional defences, *inter alia,* fraud, undue influence, duress, illegality and mistake influencing the validity of exclusionary clauses in standardized contracts, other factors, including, negligence, negligence in certain circumstances, public policy, the status and the bargaining power of the contracting parties, public interests and statutory duty, have also emerged as impacting on exclusionary clauses.

The legal position in all the jurisdictions selected for the research undertaken seems to be *ad idem*, namely, a clause exempting a contracting party from liability for fraud or dolus and for an intentional breach of contract, is invalid and unenforceable. In so far as a clause attempting to exclude a contracting party from liability for negligence is concerned, there are legally differing views, in the different jurisdictions, as to the legal effect of such clauses.
In South Africa, a contracting party may validly exclude liability for both ordinary negligence, as well as gross negligence. Attempts to exclude liability under those circumstances are not contrary to public policy. In South Africa, as the law stands today, post the Supreme Court of Appeals decision in *Afrox Healthcare*, a contract with a private hospital excluding liability for negligence causing damages by the nursing staff of the hospital, is valid and not contrary to public policy. The court, however, left open the question of whether the hospital may validly exclude liability for gross negligence causing damages. An in-depth discourse on the legal effect of the dictum and its comparative position with the other jurisdictions is contained in Chapter 14.

The English position since the adoption of the *Unfair Contractual Terms Act* 1977 amounts to this. Whilst English law allows contracting parties to exclude liability for negligence, provided certain requirements are complied with, including the principle of reasonableness, the Act prohibits the exclusion or restriction of liability for death or personal injury resulting from negligence.

The American common law greatly influences the validity and invalidity of exclusionary clauses, Generally, provided the contracting parties through free and negotiated assent,

agree to the terms of the agreement, including exclusionary clauses excluding liability arising from negligence, the American courts, save for certain circumstances, will not invalidate these type of contracts or contractual provisions. The following vitiate the validity of these type of clauses namely, any attempt to exempt a contracting party from statutory liability, where the clause is contrary to public interest or public policy, where the contracting parties stand on an unequal bargaining position with each other. It is especially, public interest which play a fundamental role in validating or nullifying exculpatory provisions where liability is excluded arising from negligence.

Public policy is possibly one of the factors most used by the courts, in all the jurisdictions selected, in validating or nullifying contracts or contractual provisions. Courts in the different jurisdictions have often pronounced that public policy dictates that contracts, freely entered into, must be given effect to. However, the courts have also expressed the opinion that, in certain circumstances, the law cannot stand aside and leave matters unchecked, especially where public policy is violated. In South Africa, both the South African legal writers and the courts have advanced the view that, generally, where contracting parties act contrary to public policy and to their detriment, these arrangements should not be allowed to stand. Public policy is said to be influenced by the general sense of justice of the community, the *boni mores*, manifested in public opinion. But, despite the courts showing their willingness to intervene in instances where public policy has been violated, *inter alia,* a clause exempting a contracting party from liability for fraud and also a clause which excludes liability for an intentional breach of contract, the South African courts, including the Supreme Court of Appeals, have shown a great reluctance in generally interfering with the parties' contractual arrangements. In this regard, the courts have been slow in developing new heads of public policy. The courts, at times, have suggested that, only in the clearest of cases should the courts interfere and pronounce that a contract is contrary to public policy.

English law also relies greatly on public policy especially, in the English law of contract, to place certain limitations upon the freedom of persons to contract. It is especially in contracts involving illegality, that public policy impacts widely. The illegality may arise either by statute or by virtue of the principle of common law. English law is also very conservative in developing new heads of public policy. Although it is acknowledged that the categories of public policy which may invalidate a contract are not cast in stone, the English legal writers and the courts advocate that a cautious approach needs to be adopted when developing new heads of public policy. The position in England, with the adoption of the *Unfair Contractual Terms Act* 1977, is fairly settled especially when it comes to the

invalidation of exclusionary clauses. Where courts had previously been inconsistent in declaring certain contractual provisions invalid and unenforceable, with the coming of the *Unfair Contract Terms Act* 1977, the law today is fairly settled in that contracting parties may no longer exclude liability for personal injury or death arising from negligent conduct.

Public policy is a factor which weighs heavily on the American courts in denouncing certain contracts and contractual provisions as contrary to good morals, or being a contravention of societal interests. This is the position applicable to contracts and contractual provisions, as well as the position pertaining to contracts containing exclusionary clauses or exculpatory clauses and the influence public policy brings to bear on the invalidity and unenforced-ability of these types of clauses.

It is generally accepted that public policy dictates that contracting parties are free to contract with each other and contracts, once entered into, should be honoured, particularly in private voluntarily transactions, even where one of the contracting parties shoulders the risk by agreeing to exclude liability in a contract. But, the American courts have also been willing at times, to declare exculpatory clauses or exemption clauses invalid and unenforceable as against public policy, when the need arises. But, the American courts have also cautioned that the power to declare exculpatory clauses or exemption clauses invalid and unenforceable as against public policy should not be exercised lightly or without sufficient compelling reasons, neither, warn the courts, should the heads of public policy unduly be extended. Both the American legal writers and the courts have developed clear guidelines regarding when contracts containing exclusionary clauses should be declared invalid as violative of public policy. The guidelines include where the consequences agreed upon are violative of a duty of care, or where an exemption provision or exculpatory clause is prohibited by statute or governmental regulation, for example, an agreement excluding liability for negligence between a hospital and patient, an agreement on similar terms between a landlord and tenant or public enterprises such as common carriers and public users, innkeepers and public patrons etc.

It includes further the nature and subject matter of the agreement as well as the relations of the parties and the presence or absence of equality of bargaining power. The status of the parties in certain circumstances, *inter alia,* hospitals, landlords and public service providers will bestow on the service provider a greater responsibility than the ordinary party. Their relationship with their clients, tenants, users and patrons are controlled or regulated by their common law duty of due care and/or statutory regulations on the accompanying duties which flow from public service. In this regard, the courts would also declare any attempt to

exempt or exculpate a public duty and freeing themselves from exercising their duties, to be against public policy and invalid.

The status and bargaining power of the contracting parties is another factor which impacts on the validity or invalidity of exclusionary clauses. The impact of the status and bargaining power of the contracting parties is greater in some of the jurisdictions chosen than others. The position with regard to South Africa amounts to this, whilst South African legal writers and the courts have acknowledged that the inequality of bargaining power has often been exploited by monopolies, in which the stronger use abusive methods to exploit the economically weaker contracting parties, or the less educated as well, the South African courts have been less keen than, for example, the English and American courts, to protect the exploited, notwithstanding the harsh or oppressive consequences.

This was clearly displayed as a prominent jurisprudential feature in the *Afrox case*. Post the *Afrox case*, several of the South African legal writers have strongly criticized the Supreme Court of Appeals for not placing sufficient consideration towards the patient, who stood in an unequal bargaining position with the hospital, where the patient is often incapable of negotiating the terms of his or her admission. The patient is then placed in a position where he/she signs, to their detriment, a clause exonerating the hospital from liability. The main feature of criticism, include, the infringement of fundamental human rights of the weaker contracting party. This is caused by the fact that the agreement lacked consensus in that, the agreement had not been freely entered into. Also, the abuse by the stronger party, for example, a hospital, resulting in unreasonable and unjust contracts, undermines the values of equality and dignity in our constitutional dispensation. Following this criticism, is the suggestion that, legislation or statutory intervention sometimes become necessary, to curtail any form of exploitation by a contracting party.
The status and bargaining power of contracting parties, in England, has been the subject of much debate over a significant period of time. One of the vexed arguments advanced in favour of paying attention to the unequal bargaining position of contracting parties, amounts to this, at the heart of contract law, lays the principle of agreement or consensus between the contracting parties which is preceded usually by the bargaining phase.

But, with standard form contracts individually negotiated or custom-made terms have been replaced by the agreement often been imposed by one of the parties on a `*take it or leave it*' basis. In this regard, the weaker contracting party is at the mercy of the stronger contracting party. The exemption clause may be harmful to the weaker, often uneducated, and may even include the diminishing of a person's right to claim damages. But, in time,

the consumer welfares ethos which included reasonableness and fairness in contracting, as well as, good faith in contract, influenced parliament to take legislative action. With the passing of the *Unfair Contract Terms Act* 1977, the weaker contracting party is no longer at the mercy of the stronger party as, especially, in the case of exclusionary clauses, the latter can no longer exclude its liability caused by its/his/her negligence causing personal injury or death. In other commercial contracts a party relying upon such clause to escape liability ought to have acted reasonably.

In the United States of America, the status of the contracting party, especially the relations between the two contracting parties and the presence or absence of equality of bargaining power, is a factor which has a material influence on the courts in pronouncing on the validity or invalidity of exemption or exculpatory clauses. Although, as previously stated, a contractual provision undertaking to exculpate or exempt a contracting party from his or her or its own negligence will be held to be valid in American law, such a provision will not be sustained where the party who relies upon the exemption, enjoys a bargaining power superior to that of the other contracting party, who suffers damages and where the former party puts the latter contracting party at the mercy of such party's negligence. The status of the contracting parties is also decisive in determining whether the exculpatory clause or exemption clause, *per se,* or the written contract, as a whole, is unenforceable. This is applicable, particularly, where the provisions of contracts are unconscionable. American writers often rely on principles of moral philosophy and ethics as well as substantive unconscionable-ness in denouncing these types of contractual provisions, in which the weaker contracting party's ignorance, feebleness and unsophistication are exploited by the superior party.

The American legislature, as with its compatriot in Britain, also passed legislation to curb the exploitation of the weaker contracting party by the stronger party.

The passing of the *Uniform Commercial Code* provided legal armour to protect and safeguard the prospective victim from the harshness of an unconscionable contract, often as a result of a bad bargain. The status of the contracting parties and the relationship that flow therefore, often influence the validity or invalidity of contractual provisions in America. In this regard, the relationship between hospitals and other care givers, the landlord and tenant in a lease relationship, a relationship involving public service between say common carriers by sea and rail, air transportation, garage keepers and the public have often influenced the American courts to decide that due to a bad bargain, the exemption or exculpation of the stronger contractual party from future liability to the detriment of the

weaker contractual party would be invalid by virtue of there relationship. The rationale there-for stems from the principle that arising from the status of a contracting party emerges a greater responsibility than that required of the ordinary person.

Part of their responsibility is the creation of a standard of care and skill which needs to be exercised, by the service provider, in the hospital-patient relationship, for example, the law expects of the hospital to exercise due diligence and care in compliance with its common law duty, derived from statutory obligations as well as professional canons of ethics, licensing and any regulations set up by the professional organizations to whom they belong. The courts have frequently held, in America, that any attempt to exclude such a duty of due diligence and care would be invalid and unenforceable. Their relationship is regarded as a special relationship and the bond between them is affected with a public interest, which cannot be violated. The same principle applies to the other relationships highlighted previously.

Another factor, frequently considered by the courts in the chosen jurisdictions in determining the validity or invalidity of exemption clauses, is that of public interest. In South Africa, both the legal writers and the South African courts hold the view that an exemption clause which contravenes or induces the contravention of a fundamental principle of justice, to the prejudice of public interest, will be struck down. Public interests include the defeating of the maladministration of justice and acts contrary to good morals or immorality etc. The so called `contracting out' cases, in contravention of some fundamental principle of justice or of general or statutory law, have also been held to be contrary to public interest, the consequence of which was to invalidate the contract or contractual provision.
Likewise, in English law, public interest is a factor considered by English courts in pronouncing on the validity or invalidity of contractual provisions which bring hardship to one of the contractual parties. It is, in particular, clauses in restraint of trade that English courts have frequently held are void, as in violation of public interest. Where the restraint is likely to prejudice the public, it would be held invalid and unenforceable. But, besides the restraint of trade clauses, English courts also use the public interest factor where contractual provisions are deemed to be unreasonable because of harsh and oppressive terms. Public interests are then said to dictate that these contractual provisions ought to be declared invalid. They are likely to prejudice the public. In the American law of contract, public interests, continues to play an important role in invalidating contractual provisions, including, exculpatory or exemption clauses. The general rule in the American law amounts to this, save in cases where the public interest is negatively impacted upon or provisions of

the contract is contrary to a statute, and it is permissible for a party to contract to absolve himself/herself/itself from liability for future negligence. Therefore, any attempt to exclude liability arising from negligence will not be tolerated by the courts, where an exculpatory clause involves the performance of a legal duty, or a duty of public service, or where a public interest is involved, or a public duty is owed, or public interest require the performance thereof. Such an attempt will be invalidated by the courts.

Although the concept `public interest' has not been defined by the American legal writers or the courts, several factors have been identified as impacting upon public interests, including, certain relationships resulting in greater responsibility than that required of the ordinary person entering into a contract, for example, the hospital/doctor patient relationship. The relationship is said to be regulated by licensing regulations. The public regulations, in turn, dictate that, before a hospital will be awarded a licence to operate, the service to be provided to the general public must be suitable and be a crucial necessity for public use. Included in the suitability requirement is a legal duty or a duty of public service, involving a public interest, in which the hospital is obliged to perform a pre-defined standard of due diligence and care.

Any attempt, therefore, to contract against its own negligence would be in violation of that legal duty or duty of public service and regarded as violative or contrary to public interest. The legal affect thereof is that such an exemption would be invalid and unenforceable. There are other relationships identified as well regarded as special legal relations the effect whereof has been discussed hereinbefore.

The final factor identified and discussed in this Chapter is that of statutory duty. All three jurisdictions chosen in this research share the view that, generally, where an exemption clause is aimed at or tends to induce the contravention of a general or statutory law, such a clause will be struck down because it is contrary to public policy.

In South Africa, as is the position in the other jurisdictions, many statutory duties arise from endless statutes which regulate the conduct between contracting parties. For the purpose of penetrating the kernel of the research undertaken with this thesis, which will be the subject matter in the next Chapter, it is of great importance to highlight, at this stage, that in order to obtain a licence to operate a private hospital and to maintain its operations, certain statutory regulations need to be complied with. The regulations include the duties of and the set of standards, which must be complied with in terms of their statutory obligations. The standard of conduct includes the exercise of a reasonable degree of care

and skill. The maintenance of such standards is said to be conditional to the holding of a license held by the licensee. The regulations clearly set out the nature of the contractual relationship between the private hospital and the patient. It is against this background wherein the validity of a hospital or other caregiver to relieve himself/herself/itself by contract of the duty to exercise reasonable care, will be investigated in the next Chapter. The South African courts have also, in the past, held that a municipality, for example, cannot shield itself from liability, where the exclusion of liability is in breach of a statutory duty or a public duty. Because of the inconsistency with which exemption clauses have been treated by the South African courts, it has led to a lot of uncertainty, particularly when measured against the positions adopted in England and the United States of America. The idea of limiting and, in some cases, to take away, entirely, the right to rely on exemption clauses through statutory control was given a big boost in 1988. In this year, the *South African Law Commission* proposed that parliament adopt the *Unfair Contractual Terms Bill,* which heralded in a new ethos in exercising statutory control where contracts and contractual terms are unjust or unconscionable. But, despite the recommendations, a golden opportunity was missed to bring South Africa in line with the jurisprudential position in other foreign jurisdictions. Perhaps it is time to revisit this quest. A more detailed motivation for such thinking will be covered in the next Chapter.

The position in England is well settled, in that the adoption of the *Unfair Contract Terms Act* 1977 brought about legislative control mechanisms, in the exercise of statutory control over exemption clauses which brought about harsh and oppressive consequences before. The effect of the statutory provisions in the Act is this; one may no longer exclude liability for negligence where the consequence has been personal injury or death. Any attempt to exclude liability for death or personal injury caused by negligence is ineffective. The courts are given no choice, in this matter, but to denounce such agreements.

The violation of a statutory duty is one of the factors most considered by the American courts when determining whether the conduct of a contracting party, or the consequence flowing from an agreement, is against public policy or not. Where a contract or contractual provision would have the tendency to injure the public or contravene some established interest in society, a court will not stand back without interfering. In most of these instances, courts will declare such contracts or contractual provisions void and unenforceable. Due to public policy, equally then, contracts for exemption of liability for negligence are void and unenforceable. Where it is violative of a statute or governmental regulation certain public regulations or statutory enactments bestow upon the contracting parties a legal duty or duty of public service which they have to perform in compliance,

with a statutory duty provided for by a legislative enactment. In America, the legal duty or duty of public service arises from the very nature of the status and relationship between the contracting parties. Examples hereof can be found in the landlord-tenant relationship, the hospital-patient relationship, the common carrier-public relationship. The relationship between the aforementioned parties is usually governed by statute, as well as common law. Any attempt, therefore, to immunize one of the contracting parties from liability for his/its negligent act in violation of any statutory provisions or the common law, would be void and unenforceable as against public policy. In hospital-patient relationships their relations are governed by professional canons of ethics, licensing laws as well as regulations set up by professional organizations. The regulations are designed to protect the public from incompetent and unethical practitioners, or inferior service provided by hospitals, that set the minimum standards. The rationale for the prohibition against exempting one from liability, arising from negligence in such circumstances, is founded in public safety and the principle that one ought not to benefit from your own wrongdoing.

Having comprehensively discussed the factors which impact on the validity of exclusionary clauses in this Chapter, this places one in a better position to investigate the core theme of this thesis, namely, whether a hospital or other healthcare giver can validly exclude his/her/its liability, arising from their own negligence, resulting in personal injury or death to the other contracting party. Consequently, what will be discussed in the next Chapter is, broadly, the legitimacy of exclusionary clauses in medical contracts. More specifically, what will also be discussed in the next Chapter is the application of exclusionary clauses in medical contracts, in the jurisdictions of South Africa, the United Kingdom and the United States of America. What will further be looked at is the effect of such clauses in, especially, hospital contracts. A discussion of the impact of exclusion clauses in hospital contracts will enable one to adjudicate, with greater authority, the effect of exclusionary clauses in hospital contracts, in the present context. What will be considered, further, is whether South Africa ought to change its jurisprudence in the application of exclusionary clauses in medical contracts, especially, hospital contracts.