A CRITICAL ANALYSIS OF EXCLUSIONARY CLAUSES IN MEDICAL CONTRACTS

Thesis submitted in partial fulfilment of the

requirements for the degree

Doctor Legum (LLD)

in the Faculty of Law

University of Pretoria

By

Henry Lerm

under the supervision

of

Prof Dr PA Carstens

July 2008

SUMMARY

A CRITICAL ANALYSIS OF EXCLUSIONARY CLAUSES IN MEDICAL CONTRACTS.

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

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

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

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

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

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

LIST OF KEY TERMS

Exclusionary Clauses.

Unequal bargaining position.

Public interests.

Unconcionable-ness

Status of the contracting parties.

Integrative approach.

Inalienable right.

Access to the courts.

Medical and normative ethics.

Exclusion of professional liability.

Legislative reform.

Ethos of contractual freedom versus fairness and reasonableness.

Doctor/hospital-patient relationship.

Just and fair results in contract.

Inequality in contract.

Inalienable rights in terms of the Constitution.

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ABSTRACT

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

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

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

PREFACE

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

13 Act No 108 of 1996.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

(c) May consider foreign law.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

ACKNOWLEDGEMENTS

My sincere thanks and gratitude is herewith expressed to the following persons and institutions:

- Professor P Carstens, for having been a caring, diligent and inspiring promoter. Thank you for the patience and timeless assistance you displayed. Many thanks as well for your advice and valuable inputs.

- Jean Nel and Liana Viljoen from the Oliver R Tambo Law Library, University of Pretoria, for their friendliness and assistance in finding the magnitude of materials which eventually fits into this academic puzzle.

- Marlene du Plessis from the Nelson Mandela Metropole University for her assistance and encouragement.

- To my wife, Lindsay and children, Katherine and Nicole for their patience over the many years while I was burning up the midnight oil.

- To Suzette van Tonder who helped me with this mammoth task, I salute you for your unwavering support, patience and all your effort in typing this thesis. If it was not for you and I had to rely on my own typing skills, it would have taken me another 10 years.

- To Moanina Swartbooi for rescuing me in editing the thesis. What appeared to be a mountain you made it into a plateau?

- To my other staff thanks for your unwavering support, especially, those who helped with the bibliography.

- To Cindy Deutschmann thank you for offering to help when it was most needed. Without your labour I would not be in the position to receive this prestigious award.

- Last but not least I dedicate this honour to my son, Justin, whose life was prematurely ended by two medical men. Although we are all human and our human frailties cause us to make mistakes what we must never forget is that we remain accountable for our actions.

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TABLE OF ABBREVIATIONS

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

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

Chapter 1

INTRODUCTION

1.1 General Introduction

When embarking on researching and writing this thesis, the writer had to overcome formidable challenges. Not only was the writer obliged to travel legal landscapes which included, the law of contract, the law of delict, medical law and ethics and foreign/international law, the writer also encountered along this academic journey, the changed political landscape in South Africa. Significantly, since the adoption of the final Constitution in 1997, the constitutional supremacy has brought about a renaissance on the political and legal spectrum. The new legal order in South African with its overarching constitution emphasizes values in a way that the pre 1994 legal system had not catered for. [1] The influence of this constitutional supremacy has brought about an ineffaceable impact on the understanding, nature, scope and application of the aforementioned legal landscapes, more especially, the law of contract and medical law, specifically in its common law context. [2] Both these landscapes together with the other legal landscapes feature very prominently in finding answers to one of the most controversial and hotly debated issues on the present-day medico-legal scene in South Africa, namely can a hospital or other medical care giver validly exclude their professional liability by entering into a contract with the patient which contract, contains an exclusionary clause indemnifying the hospital or other medical caregiver from their professional liability brought about by their negligent acts causing harm to the patient? Although the Supreme Court of Appeal in the much criticized case of *Afrox Healthcare Bpk v Strydom* [3] held that the elementary and

1 Currie and De Waal (2005) 7ff.

2 Carstens and Pearman (2007) 1.

3 2002 (6) SA 21 (SCA).

basic general principle was that it was in the public interest that contracts entered into freely and seriously by parties having the necessary capacity should be enforced and therefore allowed a private hospital to exploit its position of power relative to that of the patient, few issues seem to have united academic commentators as much as a jointly perceived need to have the principle laid down in the judgement, overturned. [4] Besides the bevy of journal articles which have taken issue with this controversial subject matter, until recently, [5] this subject matter received very scant attention in the textbooks. [6] Nor has any academic thesis and dissertation canvassed this subject matter with any real substance. No attempt has previously been made where foundational principles of contract law, medical law and ethics, the law of delict and statutory law in context of the Constitution have been canvassed on an integrative level as means to find answers to the subject matter in question. An integrative approach, especially, under the value-driven Constitution is followed in this dissertation in attempting to find an answer to the key question surrounding this thesis. Whereas the practice of disclaimers in hospital contracts was traditionally assessed within the framework of the law of contract, under the influence of a value-driven Constitution, any assessment of the validity of disclaimers in hospital contracts ought post-constitutionally be executed with reference to a multi-layered approach, which has as its foundation constitutional supremacy, followed by the applicable principles of common law in the legal landscapes of contractual law, the law of delict and medical law followed as well by foreign and international law, relevant legislation, interpretative case law (as a source of the positive law) and, considerations of medical ethics. In the new paradigm this multi-layered approach dictates that broader medico-legal considerations on an interdisciplinary and purposive approach must be followed. [7]

This multi-layered approach serves as an aid in the quest to find the applicable legal position which will eventually offer the solution to the problem in question. The following example

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4 The near-unanimity of scholarly opinion is contained in various journal articles including Carstens and Kok (2003) 18 *SAPR/PL* 430 18; 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. See Cronje-Retief (2000) 474; Naude and Lubbe (2005) 122 *SALJ* 444; Pearmain (2004); Bhana and Pieterse (2005) 122 *SALJ* 865 at 888; Lewis (2003) 120 *SALJ* 330; Brand *ESR Review* Vol. 3 No 2 September 2002 published by the Socio-Economic Rights Project, University of the Western Cape; Hopkins *De Rebus* (June 2007) 22, 24.

5 For the most recent comments see Carstens and Pearmain (2007) 288, 290, 320, 458-470.

6 For the old established views see Gordon, Turner and Price (1953) 153ff, 188ff; Strauss and Strydom (1967) 317ff; Strauss (1991) 305; Claassen and Verschoor (1992) 103.

7 Carstens and Kok (2003) 78 *SAPR/PL* 430 18, 449.

serves as an illustration of the foregoing premise: In the assessment of, for example, whether a hospital or other healthcare provider can validly exclude their professional liability for damages caused through their negligent acts by including in an agreement with the patient an exclusionary or exculpatory clause? The Constitution provides that *"Everyone has the right to have any dispute that can be resolved by the application of the law decided in a fair public hearing before a court or, where appropriate, another independent and impartial tribunal or forum."* [8]

In addition, an aggrieved person has a right to seek judicial redress by seeking the assistance of a court of law was imported into our common law, [9] before the advent of the constitution.

Save for the regulations [10] which control the licensing of private hospitals, the attempt by the South African Law Reform Commission [11] to introduce legislation in South Africa to legislate against unfair terms in contracts [12] and the Consumer Protection Bill [13] more

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8 In terms of Section 34 of the Constitution Act 108 of 1996 under the heading "Access to Courts."

9 cf. *Schierhout v Minister of Justice* 1925 AD 417; See also *Nino Bonino v De Lange* 1906 TS 120 at 123-4. More recently the Constitutional Court in the case of *Barkhuizen v Napier* 2007 (5) SA 323 (CC) confirmed this position.

10 The regulations were published in the Government Gazette on the 1st February 1980 No 2948 in an attempt to regulate the reasonable degree of care and skill which ought to be maintained by private hospitals in maintaining a license held by the licensure. Regulation 25(23) requires that: *"All services and measures generally necessary for adequate care and safety of patients are maintained and observed."*

11 In January 2003 the South African Law Commission was re-named the South African Law Reform Commission. The acronym SALRC will be used.

12 The SALRC "Unreasonable Stipulations in Contracts and the Rectification of Contracts" Project 47 (April 1998). The commission when considering the whole question of the reviewability of unfair terms in contracts *inter alia* exclusionary clauses expressed the view that there was a need to legislate against contractual unfairness, unreasonableness, unconscionable- ness or oppressiveness in all contractual phases. Despite the recommendations of the commission, none of the recommendations were ever implemented.

13 The Consumer Protection Bill (Government Gazette 28629 GN R489, 15 March 2006) conforms to the values, spirit and purport of the Constitution. The preamble provides that:
"The people of South Africa recognize -
That it is necessary to develop and employ innovative means to -
(a) fulfil the rights of historically disadvantaged persons and to promote their full participation as consumers;
(b) protect the interests of all consumers, ensure accessible, transparent and efficient redress for consumers who are subjected to abuse or exploitation in the marketplace; and
(c) give effect to the internationally recognised customer rights."
Section 3(1) goes on to provide that -
"The purpose of the Act is to promote and advance the social and economic welfare of consumers in South Africa by-

recently published by the Department of Trade and Industry for public comment, there is at this point in time no statutorily defined and entrenched legislation which may be utilized to counter unfair and unreasonable exclusionary or exculpatory clauses often found in private hospital contracts entered into with their patients therefore, when considering the validity of exclusionary clauses in hospital contracts a multi-layered approach needs to be adopted. Commencing with considerations of medical ethics, the hospital and its staff are ethically obliged by professional rules or codes [14] or by virtue of statutory regulations, to exercise due care and skill. [15] The general public therefore has an expectation that when they are treated by the hospital staff that they will be treated in a professional manner and in accordance with professional standards which will not cause the public harm. [16] But, a

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(a) establishing a legal framework for the achievement and maintenance of a consumer market that is fair, accessible, efficient, sustainable and responsible."

In Chapter 2, which deals with fundamental consumer rights, special attention is given to the question of notice to the consumer of clauses which provide for exemption from liability. Section 50(1) provides that any provision in an agreement in writing that purports to limit in any way liability of the supplier is of no force and effect unless:

"(a) the fact, nature and effect of that provision is drawn to the attention of the consumer before the consumer enters into the agreement;

(b) the provision is in plain language .....; and

(c) if the provision is in a written agreement, the consumer has signed or initialled that provision indicating acceptance of it." Further provisions require that the attention of the consumer be drawn to similar exemptions from liability at an early stage and in a conspicuous manner and in a form that is likely to attract the attention of an ordinarily alert consumer, having regard to the circumstances (section 50(2)(b)(i). The section dealing with determination of whether a term of a contract is unfair or unreasonable provides that a court must have regard to all the circumstances of the case and in particular, the bargaining strength of the parties relative to each other, and whether the consumer knew or ought reasonably to have known of the existence and extent of the term, having regard to any custom of trade and any previous dealings between the parties (section 58(1) (a) and (c)).

14 In order to promote ethical conduct within the medical profession, the Health Professions Council of South Africa in consultation with the professional boards, has in terms of the Health Professions Act 56 of 1974 as amended Act 89 of 1997, drawn up a code of conduct made from time to time for medical practitioners, dentists, psychologists and practitioners of supplementary health services. See Carstens and Pearmain (2007) 264ff for a discussion of the code. Likewise the Nursing Act 50 of 1978 also regulates the conduct of the nurses.

15 The regulations governing the licensing and maintaining reasonable degree of care and skill in order to promote the welfare and safety of the patients in private hospitals is set out in the publication of the Government Gazette on the 1st February 1980 No 2948, Regulation 25(23).

16 Several writers internationally, (including South Africa) have written extensively about the influence of medical ethics on the doctor/hospital-patient relationship. See Jones (1998) 18; Mason and McCall Smith (1991) 14-17; Ficarra (1995) 147ff who states that as medicine operates in an ethical climate *"it is essential that ethical principles be applied to the physician-patient interaction."* Skegg (1988) 8. For South African writings see Beauchamp and Childress (2001) 1-7, 27 hold the view that normative ethics have enjoyed a remarkable degree of continuity from the days of Hippocrates until the 20th century. According to the writers, normative ethics include the responsibility of medical practitioners to comply with *"..... standards of conduct, including moral principles, rules, rights and virtues."* A violation of these norms *"..... without having a morally good and sufficient reason"* constitute immoral or improper conduct. See also Carstens and Kok (2003) 18 *SAPR/PL* 449-451 who, with South Africa's acquired status as a constitutional state, view the role of normative medical ethics

dilemma belies the situation where a private hospital making use of an admission form containing an exclusionary clauses or waiver, enters into an agreement with a patient who freely and voluntarily signs away his/her rights to claim damages from the hospital or its staff arising from the negligence of the hospital staff. A dichotomy emerges in that on the one hand, medical ethics dictates that the conduct of the hospital staff and/or medical practitioner ought as its aim, promote the welfare and well-being of the patient and not cause the patient any harm. On the other hand, the principles of the freedom of contract and the sanctity of contract, dictate that contracts freely entered into should be upheld and not interfered with save for where public policy so demand. In assessing the validity of exclusionary clauses or waivers in hospital contracts the dilemma or conflict crystallizes: How does one harmonise or synchronise the application of exclusionary or exculpatory with the various layers or landscapes referred to earlier? Questions that need to be begged, include, should the common law, on the contractual law terrain, be developed to embed notions of fairness and justice when courts are called upon to adjudicate on the validity of exclusionary clauses or waivers? Should the doctrine of freedom of contract and the sanctity of contract be allowed to operate by our courts where the enforcement of the contractual terms, are in conflict with the constitutional values, even though the parties may have consented to them? Should the relative situation of the contracting parties be made a relevant consideration in determining whether a contractual term is contrary to public policy? To what extent should concepts of consumer protection be recognised which require that received notions of the freedom of contract and sanctity of contracts be revisited especially in our present constitutional era as means to refuse to give legal effect to imposed, onerous and one-sided terms buried in standard form contracts? Should the values that underlie our Constitution now be taken as the benchmark to measure the validity of exclusionary clauses in hospital contracts? To what extent should applicable medical ethics also play a role when adjudicating on the validity of exclusionary clauses? Is the common law to be taken as the point of departure (in so far as it is not in conflict with the Constitution), or does the Constitution reign supreme in finding the law and solving the problem? Traditionally, the practice of disclaimers in hospital contracts would have been assessed within the framework of the law of contract, it is clear, under the influence of a value-driven constitution, any assessment thereof post-constitutionally, now dictates that this is no longer the case. Broader medico-legal considerations, on an interdisciplinary and purposive approach wherein normative medical ethics and medical law play a fundamental role may be harnessed to determine the validity or the practice of exclusionary clauses or

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in the form of codes/instruments as *"a protective measure of human rights"* in that *"to do no harm"* and *"to act in the best interest of the patient."*

waivers in hospital contracts. [17]

Besides medico-legal considerations, the Constitution, with its strong socio-economic rights-base in terms of which everyone, *inter alia,* has access to healthcare services [18] and everyone has the right to approach the courts [19] has a supreme role to play in pronouncing on the validity of exclusionary clauses in hospital contracts. What about the influence of foreign and international law? To what extent should the South African courts make use of constitutional aides, more in particular, section 39 of the Constitution, where neither the common law nor statutory law gives clear direction? The law with regards to the validity of exclusionary clauses or disclaimers against liability for medical negligence, in the context of health care services, is well settled in a number of foreign jurisdictions. On a comparative level, in countries such as the United Kingdom, the United States of America and the Federal Republic of Germany these types of clauses have met with judicial and legislative resistance. [20]

The Constitutional Court if confronted to pronounce on the validity of exclusionary clauses or waivers in hospitals may very well look to foreign law in considering their validity. Besides foreign law, international law *inter alia* the Hippocratic Oath, the Declaration of Geneva (1968) and the International Code of Medical Ethics; the Declaration of Helsinki (as revised in 2000) which is at the heart of medical ethics, are equally applicable to exclusionary clauses or waivers against medical negligence in hospital contracts. [21]

The validity of exclusionary clauses/waivers against medical negligence in hospital contracts despite the Supreme Court of Appeal's decision in *Afrox Healthcare Bpk v Strydom*, [22] and

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17 See Carstens and Kok (2003) 18 *SAPR/PL* 430, 449 quoting Steyn The Law of Malpractice Liability in Clinical Psychiatry Unpublished LLM Dissertation UNISA (2003) 3-27.

18 Carstens and Pearmain (2007) 2.

19 Hopkins "Exemption clauses in contracts" *De Rebus* (June 2007) 22, 24.

20 Carstens and Kok (2003) 18 *SAPR/PL*. See also the acceptance of foreign/international law in the Constitutional Court dictum of *Carmichele v Minister of Safety and Security (Centre for applied legal studies intervening)* 2001 (4) SA 938 (CC) Para 37.

21 Carstens and Kok (2003) 18 *SAPR/PL* 430, 451 quoting with authority Mason and McCall Smith (1991) 439-446; Roth "*Medicine's ethical responsibility"* in Veatch (2d) *Cross Cultural Perspective in Medical Ethics* (1989) 150, 153; Veatch (1989) 2; Beauchamp and Childress (1994) 3.

22 2002 (6) SA 21 (SCA).

which is clearly out of step with the judicial resistance shown in other foreign jurisdictions clearly remains a complex and voluminous topic as may be observed from the nature and content of this thesis. It has become clear in the course of the journey undertaken by this thesis that the validity of exclusionary clauses/waivers in hospital contracts is a worthy subject to study, debate and writing the law as it presently stands in South Africa with regard to the validity of exclusionary clauses or waivers, makes inroads into the well-being and welfare of the patients often leading to harsh results. In this regard, and in the course of the journey reflected within this thesis one realises the significance of the need for a change in judicial course, alternatively, legislative intervention.

It is hoped that this thesis will assist in bringing about change in the field of contract law when the question of the validity of exclusionary clauses or waivers is reviewed, officially. Considerations of public policy which represent the legal convictions of the community are also taken cognisance by the law when examining for example contracts which are immoral or *contra bonos mores*. The rationale for the existence of public policy in modern times lies in the broader concept of paternalism in which the courts protect the weaker party in a contractual arrangement, especially, where public interest is affected. [23] The ever-changing context and texture of society influences public policy. [24] In this regard, what is fair and reasonable in a purely commercial context may not be fair in a medical context. Public policy may demand that in the latter instance certain conduct will not be tolerated. The principles of the ethics base, founded on the Hippocratic Oath, are said to be distillations of the *boni mores* or public policy which ought to influence judicial thinking when health care is affected.

It is against the foregoing backdrop that this introductory chapter to this thesis has been designed. It is of paramount importance to deal firstly, with the basic concept, nature and scope of exclusionary clauses in the general commercial sense and thereafter consider briefly how exclusionary clauses or waivers fit into a medical context. Secondly, there is a need to explain the title of this thesis and how it came about that the research of this nature was undertaken. This is followed by an explanation of the constitutional underpinning of this thesis with reference to the synthesis of various branches of law. The

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23 See Hawthorne "The Principle of Equality in the Law of Contract" 1995 (58) *THRHR* 167 173; Christie (2002) 3H-20-3H-21 suggests that it is especially in cases of inequality of bargaining power that public policy play a satisfactory role; See further Joubert *The Law of South Africa* (1987) 133; Hawthorne "Closing the open norms in the law of contract" (2004) 67 (2) *THRHR* 294 at 298.

24 See Christie *The Law of Contract* (2006) 400, 403; Joubert (1987) 133; Christie (2002) 3H-11.

synthesis translates into some legal and practical questions to be posed. In the final section of this chapter, the approach and methodology followed are explained.

1.2 THE CONCEPT EXCLUSIONARY CLAUSE OR WAIVER IN THE LAW OF CONTRACT

The concept "exclusionary clauses" has over time been referred to in many ways. In this regard, reference has been made to "exemption clauses"; "indemnity clauses"; "exculpatory clauses" and "waivers".

It is not a modern day concept but has its roots firmly embedded in the Roman law period. Exclusionary clauses during this period took the form of informal *pacta*. The purpose these types of clauses seem to serve included, they served as a bar to litigation and provided a defence to a debtor if sued by a creditor. In all, exclusionary clauses limited or excluded certain rights and duties of contractants during this period. [25] Exclusionary clauses in contract found their way into Roman Dutch law; [26] thereafter into Europe as early as the fifteenth century and eventually into England in the seventeenth century. [27] The rationale for the recognition of exclusionary clauses is founded in the principle of freedom of contract which in turn, is based on social, economical and political philosophies in respect of which Grotius remarked *"man's right to contract".* [28] With the advent of standard form contracts, exclusionary clauses found their way into these types of contracts so much so that in modern days these types of clauses are still firmly embedded in standard form contracts. [29] It was especially, during the nineteenth century and influenced by the so-called philosophy of *laissez-faire*, that mass produced standardized contracts with mass produced exclusionary clauses incorporated therein, spread to all forms of business enterprises,

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25 See Van Dorsten "The Nature of a Contract and Exemption Clauses" 1986 (49) *THRHR* 189, 196; Zimmerman *The Law of Obligations* (1990) 508, 563.

26 Van Dorsten 1986 (49) 189 at 197; The writer with reference to the work of Lee *Commentary on The Jurisprudence of Holland by Hugo Grotius* (1936) 1.3.1 holds the view that it was especially Grotius who advocated that agreement may be used to confirm or limit the normal incidents of a contract.

27 Aronstam *Consumer Protection, Freedom of Contract and the Law* (1979) 16-17; Holdsworth *History of English Law* (1923) 290-295.

28 Aronstam (1979) 1.

29 Aronstam (1979) 16-17 demonstrates the influence of exclusionary clauses in standard form contracts by referring to their large scale usage in charter agreements, Bill of Lading agreements and the so-called `common carrier' cases in which skippers of carriers sought to exonerate themselves from discharging their public functions *inter alia* their duties. See also McClaren "Contractual limitation of liability for negligence" *Harvard Law Review* (1914-1915) 550.

including, transport, insurance and banking as well as trade. This remains very much the position today. [30] Their usage also subsequently extended to medical agreements, especially, hospitals. [31] The effect of exclusionary clauses on the law of contract when interpreted by the courts was that judges were very reluctant during the nineteenth and early part of the twentieth century to interfere with contractual arrangements and to limit the contractual powers of the contracting parties. [32] The judges at the time were very much influenced by the philosophy of *laissez-faire*, which meant, that the law should interfere with people as little as possible and not play such a paternalistic role. [33] The position was at the time summed up by Sir George Jessel, an eminent English judge at the time in the case of *Printing and Numerical Registering Co v Sampson:*

> *"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."* [34]

In time, although the initial introduction of standardized contracts, may have been done with a noble intent, fierce competition amongst businessmen led to some businesses using exclusionary clauses in business contracts as a means of exploiting their economic power. [35] Although these type of contracts found universal favour including the jurisdictions of South Africa, the United Kingdom and the United States of America, it was the rising of consumer organizations, who countered the exploitation of especially, the weaker contracting parties, through the usage of exclusionary clauses. [36] One of the many

30 Yates *Exclusion clauses in contracts* (1982) 2; Slawson "Standard form contracts and Democratic Control of Lawmaking power" *Harvard Law Review* Vol. 84 (1971) 529 believes that in modern day, ninety-nine percent of all contracts appear in the form of standard contracts. See also Lenhoff "Contracts of adhesion and the freedom of contract: A Comparative study in the light of American and Foreign Law" *Tulane Law Review* (1962) Vol. XXXVI 482; Turpin "Contracts and Imposed Terms" *SALJ* (1956) 144.

31 Swarthout "Validity and construction of contract exempting hospital or doctor from liability for negligence to patient" *Annotations* 6 ALR 3d 704-707; Robinson "Rethinking the allegation of medical malpractice risks between patients and practitioners" *Law and Contemporary Problems* Vol. 49: No 2 (1986) 173 at 184-188 .

32 Atiyah *An Introduction to the Law of Contract* (1995) 3.

33 (1875) L.R. 19 Eq. 465.

34 *Printing and Numerical Registering Co v Sampson* (1875) L.R. 19 Eq. 465.

35 Yates (1982) 4.

36 Aronstam "Unconscionable contracts: The South African Solution (1979) 42 *THRHR* 18-19; Aronstam (1979) 23; Kötz "Controlling Unfair Contract Terms: Options for Legislative Reform" *SALJ* (1986) 405 at 413; Yates (1982) 2; Deutsch *Unfair Contracts* (1977) 3.

objections to the utilization of standardized contracts was the fact that the legal transaction entered into between the contracting parties when entering into the contract, was that the transaction was concluded without a give-and-take of bargaining between the parties, but, the weaker party often just had to adhere to the terms prescribed by the business enterprises. For that reason standardized contracts have also come to be known as "contracts of adhesion". A significant feature of these types of contracts was, and continues to be the position today, that the customer has no bargaining power, alternatively, unequal bargaining power. [37]

The era of consumerism brought about new thinking and legal jurisprudence. The legal jurisprudence was founded on morality in that man must respect man and not take advantage of his weakness. For that reason the ethos that contracts were there to honour and enforce was being challenged by the moral principle that one should not take advantage of an unfair contract. [38]

Another troublesome feature of exemption clauses in standardized contracts is the fact that business enterprises use the clause to exonerate themselves from liability in virtually "any circumstances whatsoever". Strong resistance to such attempts also followed as consumer organisations pushed for these types of clauses to be regulated. [39]

Insofar as the application of exemption clauses in the South African context is concerned, these types of clauses in, especially, standard form contracts, have never lost their application, despite criticism being launched from time to time regarding the unequal bargaining power which the parties possess when entering into these types of agreements. [40] The South African courts, influenced very much by English law, have also

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37 Aronstam (1979) 42 *THRHR* 18-19; the writer refers to these types of clauses as "take it or leave it" contracts. See also Aronstam (1979) 23; Kötz (1986) *SALJ* 405 at 413; Yates (1982) 2; Deutsch (1977) 3; Lenhoff *Tulane Law Review* Vol. XXXVI (1962) 482.

38 See Atiyah (1995) 11; Yates (1982) 405.

39 Atiyah (1995) 11-12; Borrie "Legislative and Administrative controls over standard forms of contract in England." (1995) 317 at 321; Deutsch Unfair Contracts (1977) 4; Yates (1982) 4-5.

40 For the application of exemption clauses in commercial contracts see the bevy of legal writings Van der Merwe et al (2003) 214-216, 225-226; Kerr *The Principles of the Law of Contract* (1998) 400; Christie (2006) 204-205; Delport "Exemption Clauses: The English Solution" *De Rebus* (December 1979) 641; Kahn *Contract and Mercantile Law* (1988) 33-34; Lubbe and Murray Farlam and Hathaway *Contract Cases, Materials and Commentary* (1988) 34; 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) 3 597; Turpin "Contract and Imposed Terms" *SALJ* (1956) 144; Ramsden "The Meaning of Mutual Mistake and Exemption Clauses" *SALJ* (1975) 139; Lotz "Caveat Subscriptor: Striking down exemption clauses" *SALJ* (1974) 421-424; Van Loggerenberg "Unfair

recognized exclusionary clauses in contract. [41] Principles such as the freedom of contract and the sanctity of contract have often been used by the South African courts in recognizing these types of clauses.

Although universally the different jurisdictions have accepted the use of exemption clauses, legal writers and the courts alike have sought and given protection for the public against the abuse of exemption clauses by using aides as means to set limits for their operations. The limits include *inter alia* interpreting exemption clauses narrowly and in certain instances where exemption clauses in standard form contracts are undesirable and unreasonable, to limit their effect or even striking them down in the interest of public policy. [42]

The English law [43] and the American law [44] jurisdictions have adopted similar aides to limit the effect of exclusionary clauses where the abuse of exemption clauses adversely affects the public.

In time, despite the implementation of the fore stated aides, the legislature also stepped in in the United Kingdom by enacting both the Unfair Contract Terms Act 1977 as well as the Unfair Terms in Consumer Contracts Regulations 1994 as measures to direct the courts to declare exclusionary clauses as void in certain circumstances. One of the reasons for the legislative intervention in the United Kingdom is said to have included the inconsistency the courts have shown in denouncing these clauses to be contrary to public policy. [45] Similarly, the United States of America enacted the Uniform Commercial Code 1952 and the

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exclusion clauses in contracts: A Plea for Law Reform" Emeritus lecture University of Port Elizabeth (1987) 1-5; Kahn "Standard-form Contracts" *Businessman's Law* (November 1971) 49-50; Wille and Millen *Mercantile Law of South Africa* (1984) 34; Van Dorsten "The Burden of Proof and Exemption Clauses" 1984 (47) *THRHR* 36.

41 See *Henderson v Hanekom* (1903) 20 SC 513 at 519; *Osry v Hirsch, Loubser and Co Ltd* 1922 (CPD) 53; *Wells v South African Alumenite Company* 1927 (AD) 69. See also *Burger v Central South African Railways* 1903 (TS) 571; *Mathole v Mothle 1951* (1) SA 456 (T).

42 Christie (1996) 204; Van der Merwe et al (2003) 214; Kerr (1998) 404-406; Delport *De Rebus* (December 1979) 641; Kahn (1988) 34; Lubbe and Murray (1988) 340; Aronstam (1979) 33-36; Turpin (1956) 73 *SALJ* 144; Van Loggerenberg (1987) 4-5.

43 See McKendrick *Text, Cases and Materials* (2003) 169; Stone *The Modern Law of Contract* (2003) 226; Stone *Principles of Contract Law* (1998) 169; Treitel *The Law of Contract* (2003) 221; Beatson *Anson's Law of Contract* (2002) 439; Poole *Textbook on Contract Law* (2004) 200.

44 See Williston *Contracts* (1972) Para 171 41; Von Hippel "The Control of Exemption Clauses - A Comparative Study" *International and comparative law quarterly* (Vol. 16) July 1967 591 at 599; Deutsch (1977) 20-21.

45 Poole (2004) 209.

Restatement of the Law of Contracts 1981 as means to limit exclusionary clauses where public policy so dictates. [46] Although some attempts have been made in South Africa [47] to regulate contractual provisions which are unfair, unreasonable or unconscionable, no legislation has so far been enacted to limit the use of exclusionary clauses where necessary. Exclusionary clauses or waivers as was previously stated also found their way into hospital contracts. The application of these types of clauses amount to this, when a patient is admitted to a private hospital for an operation and post-operative medical treatment, a patient or his/her family is expected to sign an admission form which contains an indemnity clause which seeks to exonerate the hospital and its staff from professional liability arising from the staff's negligence causing the patient harm. The effect of the patient entering into such an agreement with the hospital amounts *inter alia* to this, despite healthcare professionals being ethically obliged by their professional rules to take due and proper care and exercise their professions with diligence, hospitals, should they be allowed to contractually get away with it, would break with ethical traditions which have been in place since the time of Hippocrates. The practice, if condoned, could have catastrophic results for the patient. [48]

No other legal subject matter in recent times has sparked off livelier debate than reviewing the validity of exclusionary clauses in hospital contracts, pronounced in the Afrox v Strydom case. Few issues seem to have united academic commentators as much as questioning the soundness of the judgement by Brandt JA and the jointly perceived need to ensure that courts refused, on grounds of public policy, to enforce such contract terms which are clearly unfair or unconscionable. [49] The grounds relied on by the court in Afrox v

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46 Von Hippel *International and Comparative Law Quarterly* (Vol. 16) (July 1967) 591 at 599.

47 The South African Law Commission in 1998 published their findings in the Unreasonable Stipulations in Contracts and the Rectification of Contracts and drafted draft legislation in the form of the Unfair Contractual Terms Bill had as its aim the controlling of unfair, unreasonable and unconscionable contractual provisions. More recently the Consumer Protection Bill published for comment in Government Gazette 28629 GN R489, 15 March 2006 under auspices of the Department of Trade and Industry highlights the need to protect the historically disadvantaged persons and to protect the interest of consumers. The Bill of Rights focused on the curtailment of clauses exempting contracting parties from liability. The bargaining strength and notice to the other party are but two criteria to be considered when assessing the validity of exemption clauses as suggested.

48 See the discussion of Pearmain "A Critical analysis of the Health Service Delivery in South Africa" (Unpublished LLD Thesis, University of Pretoria, 2004) 701-713 on the disastrous consequences which may flow from the decision of the Supreme Court of Appeal in the case of *Afrox Healthcare Bpk v Strydom* 2002 (6) SA 21 (SCA); See also Carstens and Pearmain (2007) 458-470.

49 For the academic scholarly remarks see Carstens and Kok (2003) 78 *SAPR/PL* 430 18; 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; See Cronje-Retief (2000) 474; Naude and Lubbe (2005) 122 *SALJ* 444; Pearmain (2004); Bhana and Pieterse (2005) 122 *SALJ* 865 at 888; Lewis (2003) 120 *SALJ* 330; Brand *ESR Review* Vol. 3 No 2

Strydom; do not accord with the extensive statutory control which is being waged against standard-form contracts, including exemption clauses, in many overseas jurisdictions. [50] There is a need therefore to seek a closer alignment with the position in related legal systems. The United Kingdom in this regard has enacted the English Unfair Contract Terms Act, 1977 which provides that *"a person cannot by reference to any contract term exclude or restrict his liability for death or personal injury resulting from negligence."* Similarly, the European Community Council Directive on Unfair Terms in Consumer Contracts has caused several other European countries to prohibit the exclusion or restriction of business liability to consumers for death or personal injury by way of standard contract terms. This has been done in Germany and the Netherlands, for example. In France, and in the United Kingdom's Unfair Terms in Consumer Contracts Regulations, and in the EC Directive itself, terms excluding liability for bodily injury are not totally blacklisted as they are in Germany and the Netherlands. [51]

Although there is no case law in point whether exclusionary clauses in hospital contracts will be outlawed by the English courts, it appears however, that the legislative provisions will be followed, which will result in these type of clauses being declared invalid. The law with regard to exclusionary clauses in hospital contracts in the United States of America has also been settled. Whereas the United Kingdom would rely upon legislation to adjudicate on the validity of these types of clauses, the American law relies on their common law. The legal position in America amounts to this, while all exclusionary clauses or waivers are not, *per se*, invalid and therefore unenforceable, where they are found to involve public interest, they will not be held to be valid. As the medical profession and medical practices affect public interests, the profession and medical practices are governed by public regulations that involve health, safety and welfare as well as ethics. Any conduct that threatens standards of conduct or behaviour and in turn, curbs them from discharging their professional duties would not be tolerated. Therefore, exclusionary clauses in hospital contracts have been outlawed and are therefore invalid and unenforceable. [52]

(September 2002) published by the Socio-Economic Rights Project University of the Western Cape; Hopkins *De Rebus* (June 2007) 22, 24; See the most recent writings of Carstens and Pearmain (2007) 288, 290, 320, 458-470.

50 Naude and Lubbe (2005) 122 *SALJ* 444 at 457.

51 South African Law Commission Report on Unreasonable Stipulations in Contract and the Rectification of Contracts (Project 47, 1998); See also Jansen and Smith (2003) *Journal for Juridical Science* 28(2) 210 at 217.

52 See *Olson v Molzen* 558 California S.W. 2d 429 (Tenn. S.CT. 1977); *Meiman v Rehabilitation Centre* 444 S.W. 2d 881 (KY 1969) and the landmark case of *Tunkl v Regents of University of California* Ga. Cal 2d 92, 32 Cal RPTS 33 P. 2d 491 (1963).

As stated above, this thesis explores the legal question whether exclusionary clauses or waivers in hospital contracts in South Africa should, in the light of the decision of Afrox v Strydom still be enforced, or has the time not arrived that legal reform bring about a reversal of the decision?

1.3 EXPLANATORY NOTE ON THE NEED FOR THE RESEARCH UNDERTAKEN BY THIS THESIS

The need, for the research undertaken in this thesis, namely, a critical analysis of exculpatory clauses in medical contracts, calls for some explanation. It is to be noted that the whole idea to research the subject matter and to compile this dissertation emanated from a medical negligence case the writer was engaged with some decade ago. [53]

In this case, the St George's Hospital (Pty) Ltd in Port Elizabeth was the owner of a private hospital. The First and Second Plaintiff's in this matter were husband and wife. When the Second Plaintiff was admitted to the hospital for the purpose of having the birth of her baby induced, she was requested to sign an admission form containing an exclusionary or exculpatory clause in which she undertook not to sue the hospital or its staff for damages or loss of any nature whatsoever for any act or omission by the hospital or its staff, save for wilful default on the part of the hospital. After issuing summons on behalf of the two plaintiffs, the defendant filed a special plea in which the hospital pleaded that they had been absolved from any liability. The hospital and its staff having been absolved from liability by the second plaintiff having signed an indemnity included in the admission form. From the outset it was realized that, as very little had been written about this subject matter [54] and no South African case authority to rely on, it would be an onerous task to ward off the special plea. What was also learnt during this period was that this was the *modus operandi* of the private hospitals to scare litigants off from litigating against them. Being mindful of the arduous task that surrounded me, the writer saw fit to approach Professor Strauss at the University of South Africa for guidance. Under his very capable and able generalship writer spent ten days acquiring knowledge about the subject matter. It was especially the use of comparative legal studies and drawing from foreign jurisdictions, which eventually put writer in the position of successfully getting his opponents to withdraw their special

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53 *Huges and Hughes v The St George's Hospital (Pty) Ltd* Unreported case, case no 2368/97 decided in the South Eastern Cape Local Division.

54 At that stage, the only academic material originating from South Africa that was available was that of Gordon, Turner and Price *Medical Jurisprudence* (1953) and Strauss *Doctor, Patient and The Law: A selection of practical issues* (1991) 305.

plea. This not only caused the clients great satisfaction, it also created an awareness amongst lawyers acting on behalf of private hospitals, that their tide in intimidating litigants (often the patients) to withdraw their claims may, in future, be stemmed.

Inspired by the new find and encouraged by the broadened knowledge that writer gained in contract law and medical law and how they interface, it was further realized that a greater need existed to undertaken more extensive research and to provide an analysis and exposition of this sphere of law for the practical benefit both of those responsible for pronouncing on the validity of these type of clauses in South Africa, and, of those whose lives are affected by the often hurtful and damaging effect of these clauses.

The research undertaken and discussed in this dissertation covers a wide spectrum of themes including, various landscapes of South African law. They include: a historical overview and development of the doctor-patient relationship with great emphasis being placed on medical ethics, *inter alia,* the duty of care and legal remedies available to the patient; the contractual relationship between the doctor/hospital and the patient with specific emphasis on the nature of the agreement and the effect of such an agreement; the formalistic requirements, where applicable, is also discussed with emphasis on the formation of the contract, the terms of the agreement and the different forms of consent; the mutual duties and obligations between the doctor/hospital and patient is briefly discussed; the doctor/hospital's general duty towards the patient as founded in delict is comprehensively discussed, followed by a discussion on when the doctor/hospital's general duty of care may be limited or excluded, including, a brief discourse on the doctrine of *volenti non fit iniuria* and assumption of risk. This is followed by a discussion on a number of selected principles found in the general law of contract, including, the freedom of contract, the influence of the *caveat subscriptor* rule, the principle of fairness, the doctrines of unconscionableness and public policy. A comprehensive discussion on the influence of exclusionary clauses on the law of contract is covered, which includes the general recognition of exclusionary clauses, factors which influence exclusionary clauses *inter alia* fraud, public policy, the status and bargaining power of contractants, public interests, statutory duty. This is followed by a detailed discussion on constitutional issues surrounding the law of contract and how the Constitution impacts on exclusionary clauses in hospital contracts. Finally, the legitimacy of exclusionary clauses in medical contracts is analysed dealing firstly, with the adjudication of exclusionary clauses in hospital contracts in its present context and secondly, the proposed adjudication of exclusionary clauses in hospital contracts is laid out.

1.4 CONSTITUTIONAL "UNDERPINNING" OF THE TEXT

Law is generally shaped by the legal convictions of the community and imposes its commands in the interests of the community. [55] This position is particularly entrenched in the constitutional order in which the South African legal system finds itself in post the introduction of the Constitution [56] and its predecessor, the Interim Constitution. [57] In this regard law is created based on the fundamental beliefs and values of the society, by and for which, it is written. [58] Public policy and public interest play fundamental roles in influencing the roles of the legislature and the judiciary in creating and applying the law. [59]

The new South African legal order is anchored in the promotion of social justice [60] and the entrenchment and safeguard of human rights. [61] In this regard both the preamble [62] and the founding provisions [63] of the South African Constitution emphasize social justice and the

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55 Davis J in *Mort NO v Henry Shields-Chiat* 2001 (1) SA 464 (C) at 474J-475F and cited with approval by Olivier JA in *Brisley v Drotsky* 2002 (4) SA 1 (SCA); 2002 (12) BCLR 1229 (SCA) at Para 69 stated *"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."*

56 Constitution of the Republic of South Africa Act 108 of 1996.

57 Interim Constitution Act 200 of 1993.

58 Carstens and Pearmain (2007) 7.

59 See Currie and De Waal (2005) 9 who comment on the role of the courts when reviewing to strike down for example an Act of parliament that has as its object to `thwart the will of the ..... people'. These causes Ngcobo J to remark in the majority judgement of *Barkhuizen v Napier* 2007 (5) SA 323 (CC) Para (73): *"Public policy, it should be recalled "is the general sense of justice of the community, the boni mores, manifested in public opinion."* Quoted from *Lorimar Productions Inc and Others v Sterling Clothing Manufacturers (Pty) Ltd*; *Lorimar Productions Inc and Others v OK Hyperama Ltd and Others; Lorimar Productions Inc and Others v Dallas Restaurant* 1981 (3) SA 1129 (T) at 1152-3; and *Schultz v Butt* 1986 (3) SA 667 (A) at 679B-E. Ngcobo J in the Barkhuizen judgement Para 28 also describe the value of public policy as representing *"..... The legal convictions of the community ..... represent ..... those values that are held most dear by the society."*

60 See Currie and De Waal (2005) 2ff.

61 Currie and De Waal (2005) 2ff; The majority decision lead by Ngcobo J in the case of *Barkhuizen v Napier* 2007 (5) SA 323 (CC) makes it clear that our constitutional democracy is founded on, among other values ..... *"The values of human dignity, the achievement of equality and the advancement of human rights and freedoms and the rule of law."*

62 The preamble of the Constitution of the Republic of South Africa, 1996 states that the Constitution is adopted as the Supreme Law of the Republic *inter alia* so as to:
"Heal the divisions of the past and establish a society based on democratic values, social justice and fundamental human rights" and *"improve the quality of like of all citizens and free the potential of each person."*

63 Section 1 of the Constitution provides:
"The Republic of South Africa is one, sovereign, democratic state founded on the following values:
(a) Human dignity, the achievement of equality and the advancement of human rights and freedoms."

underlying importance of public values to law. Interestingly, the authors Carstens and Pearmain, [64] state that the underlying importance of the public values founded in the preamble of the founding provisions is not a new idea and draw an analogy with the values adopted in Roman law [65] which they believe were very much central to Roman law and especially, the law of contract. [66] The position according to Carstens and Pearmain [67] survived beyond the time of Rome as the Roman-Dutch writers also advocated for social justice and the promotion of public values. [68] There are a number of cases in South African law which have also expressed the underlying importance of public values to law. [69] More recently in the much criticized case of *Afrox Healthcare Bpk v Strydom*, the Supreme Court of Appeal, whilst accepting that unequal bargaining power is indeed a factor which, together with other factors, can play a role in considerations of the public interest, Brandt JA stated that it was not obvious on the face of it that an inequality in bargaining power between the parties does not in itself justify a conclusion that a contractual provision which

64 Ulpian declared that the basic principles of the law are to live honourably, not to harm another and to render to each his own (D26 1 1 1 0 1). Ulpian says (D26 45 1 26): *"Generaliter novimus turpes stipulationes nullius esse momenti"*. (We generally recognize that immoral stipulations have no validity). See also Papinian (Dig 28 7 15) *"Nam quae facta laedunt pietatem, existi onem, verecundiam no stram et et generaliter dixerim contra bonos mores fiunt, necfacere no posse credendum est"*. (For acts which offend our sense of duty, our reputation or our sense of shame, and if I might speak generally which are done against sound morals, it is not to be accepted that we are able to do them).

65 Carstens and Pearmain (2007) 8.

66 Carstens and Pearmain (2007) 8 suggest that the Romans created remedies such as the *exceptio doli* and the doctrine of *laesio enormis* which effectively allowed a contracting party to escape his obligations on equity grounds. See also the Digest: Paul (Dig 2 14 27 4) *"Pacta quae turpen causam continent non sunt observanda; vevoti se pacisar ne furti agard vel injuriarum, si feceris: expedit enim timere furti vel injuriarum poenam" (Pacts founded on shameful ground are not to be enforced: An example would be if I make a pact that I will not bring an action for theft or insult if you commit either of these delicts. For it is generally beneficial that there be fear of the penalty for theft or insult.*"

67 (2007) 8.

68 Carstens and Pearmain (2007) 8 quotes Grotius 3.1.42 and 43 who stated that obligations are void *"whereby something is promised which is regarded as dishonourable by municipal law and morality; as to do or omit to do anything wicked or to remit the punishment of some crime not yet committed. In like manner obligations are invalid which arise from some immoral crime or consideration"*. See also Du Plessis "Good faith and equity in the law of contract" 2002 *THRHR* 397, 405-406 where it is stated that "Prominent Roman-Dutch jurists such as Dionysius van der Keesel, Johannes Voet, Ulrik Huber and Johannes van der Linden later adopted the regulatory function of equity and applied it to the various fields of Roman-Dutch law".

69 *Robinson v Randfontein Estates GM Co Ltd* 1925 (AD) 173; *Minister van Polisie v Ewels* 1975 (3) SA 590 (A); *Administrateur Natal v Trust Bank van Afrika Bpk* 1979 (3) SA 824 (A); *Schultz v Butt* 1986 (3) SA 667 (A); *Marais v Richard* 1981 (1) SA 1157 (A); *Pakendorf v De Flaningh* 1982 (3) SA 146 (A); *Edouard v Administrator Natal* 1989 (2) SA 389 (N).

is to the advantage of the stronger party will be in conflict with the public interest. Consequently the court held that there is absolutely no evidence to show that the respondent during the conclusion of the contract was in a weaker bargaining position than that of the hospital. Brandt JA also found that it cannot *ipso facto* be found that a contractual provision in terms of which a hospital is indemnified against the negligent actions of its nursing staff to be principally contrary to the public interest. [70] Brandt JA in this regard relies on the judgement of Cameron JA in *Brisley v Drotsky* [71] in which it was stated:

"The constitutional values of dignity and equality and freedom require that the courts approach their task of striking down contracts or declining to enforce them with preceptive restraint ..... contractual autonomy is part of freedom. Shorn of its obscene excesses, contractual autonomy informs also the constitutional value of dignity."

Brandt JA relying on the dictum of Steyn CJ in *SA Sentrale Ko-op Graanmaatskappy Bpk v Shifren en Andere* [72] in which it was held: *"Die elementêre en grondliggende algemene beginsel dat kontrakte wat vryelik en in alle erns deur bevoegde partye aangegaan is, in die openbare belang afgedwing word"* stated that the constitutional nature of contractual freedom embraces in its turn the principle *pacta sunt servanda*. [73]

In the light of all the criticism the aforementioned dictum had to endure, the question can be begged, whether exclusionary clauses in medical/hospital contracts are contrary to public policy as evidenced by the constitutional values, in particular, those found in the Bill of Rights, and if so, on what basis? [74] At the heart of this issue is the fact that the South

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70 2002 (6) SA 21 (SCA).

71 2002 (4) SA 1 (SCA).

72 1964 (4) SA 760 (A).

73 The dictum of Brandt JA has been severely criticized by several South African academic writers so much so that Sachs J in the minority judgement and with reference to standardized contracts remarked in the case of *Barkhuizen v Napier* 2007 (5) SA 323 (CC) remarked: *"Few issues seem to have united academic commentators as much as a jointly perceived need to ensure that courts refused on grounds of public policy to enforce contracts, or contractual terms, that were unfair or unconscionable."* Carstens and Kok (2003) 18 *SAPR/PL* at 430 are very critical of the judgement in that the court ignored normative medical ethics and values namely, `to do the patient no harm' and `to act in the best interest of the patient'. Hawthorne 2004 67 (2) *THRHR* 294 at 301-302 is equally critical of the dictum in that instead of going with the mainstream of foreign jurisdictions *inter alia* the United Kingdom, United States of America and the Federal Republic of Germany, in which disclaimers in medical contracts are viewed as an infringement of the *boni mores* or against public policy Brandt JA chose business considerations to uphold these type of clauses.

74 Since the advent of our constitutional democracy, the South African Constitution itself is a powerful indicator of public policy. See Carstens and Pearmain 2007 (5) SA 323 (CC). In the majority judgement of the Constitutional Court case of *Barkhuizen v Napier*, Ngcobo J emphasized "ordinarily, constitutional challenges to contractual terms

African law of contract, as with many of the ideologies of western societies, still adopts an individualistic free market view as its point of departure. Great emphasis is placed on the principle that contracts are concluded on the basis of consensus which points to the recognition of private autonomy as the basis for contractual liability. Private autonomy means *inter alia*, that everyone who makes a decision must assume responsibility for his/her decisions. The underlying reasoning is that contractants, as independent free participants in legal intercourse contract with one another of their own free will and on an equal footing.

The consequence is that as long as the contractants, judged externally, have reached consensus, the courts as a rule are not interested in the fairness of the transaction that has been concluded. The basic rule is *pacta sunt servanda* must be honoured. [75] But in certain

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will give rise to the question of whether the disputed provision is contrary to public policy.*"Public policy represents the legal convictions of the community; it represents those values that are held most dear by society. Determining the contents of public policy was once fraught with difficulties. That is no longer the case. Since the advent of our constitutional democracy, public policy is now deeply rooted in our Constitution and the values which underlie it."* (Para 28) He goes on to state *"What public policy is and whether a term in a contract is contrary to public policy must now be determined by reference to the values that underlie our constitutional democracy as given expression by the provisions of the Bill of Rights. Thus a term in a contract that is inimical to the values enshrined in our constitution is contrary to public policy and is, therefore, unenforceable."* Para 29. The court then goes and lays down the following approach to constitutional challenges to contractual terms, namely, *"..... determine whether the term challenged is contrary to public policy as evidenced by the constitutional values, in particular, those found in the Bill of Rights. This approach leaves space for the doctrine of pacta sunt servanda to operate, but at the same time allows courts to decline to enforce contractual terms that are in conflict with the constitutional values even though the parties may have consented to them."* Consequently, the court held that section 34 not only reflects the foundational values that underlie our constitutional order, it also constitutes public policy. (Para 33). The court found that an unreasonable or unfair time limitation clause in general will be contrary to public policy as public policy takes into account the necessity to do simple justice between individuals and public policy is informed by the concept of ubuntu. When a time limitation clause does not afford the person bound by it an adequate and fair opportunity to seek judicial duress, it would be contrary to public policy as it is inconsistent with the notions of fairness and justice. But, the court held that there was no reason in logic or in principle why public policy would not tolerate a time limitation clause in contracts subject to the considerations of reasonableness and fairness. (Para 48).

In a minority judgement Sachs J however highlights the following objective factors that might provide pointers to what public policy requires with regard to standard form contracts in general and to the terms limiting access to court in particular. Sachs J consequently considered international practice in open and democratic societies such as the United Kingdom and other European countries which strive for the curtailment of unreasonableness, unconscionable ness or oppressiveness which these types of contracts often bring with them. Sachs J also considered the legal convictions of the community which demand consumer protection against one-sided terms. He concludes: *Public policy, now animated by section 34 of the Constitution, gives someone a right to access to the courts.* See further the comprehensive discussion of the case of *Ryland v Edros* 1997 (2) SA 690 (C) in Carstens and Pearmain (2007) 8-9. In the foretasted case the court based its decision on the *"change in the general sense of justice of the community ....."* and the *"fundamental alternation in regard to the basic values on which our civil policy is based ....."*

75 See *Brisley v Drotsky* 2002 (4) (A) (SCA) 15G-16F; *Afrox Healthcare Bpk v Strydom* 2002 (6) SA 21 (SCA) 38B-C and *Santos Professional Football Club v Ingesund* 2003 (5) 73 (C) where the Brisley decision was followed without considering the possible constitutional implications of enforcing the particular contract (86E/F-87D/E).

instances, in terms of the common law, in spite of the consensus that has been reached, a contracting party can avoid contractual liability *inter alia* where the contract would be illegal or against public interest; [76] or that he/she was persuaded by misrepresentation, duress or undue influence to enter into the contract. With the advent of the Constitution and its predecessor, the Interim Constitution, the Constitution has had significant influence on the development of private law, and specifically the law of contract, [77] based on human dignity, equality and freedom (Section 39(1)(a)); and when developing the common law, to promote the spirit, purport and objects of the Bill (Section 39(2)). [78]

Given the reasons for the constitutional revolution in South Africa and the aims and objectives to create social justice in this land of ours, I venture to suggest that the Bill of Rights radiates a spirit of collectivism and humanitarianism. Social or communal values are emphasized in contrast to private autonomy and individualism, which traditionally formed the basis of the law of contract. According to the principles of collectivism legal subjects are regarded as social beings will have the advantage and disadvantages that are inextricably attached to life in a collecting society. Great emphasis is placed on solidarity and commitment to the ethic and altruism. [79] In terms of this approach individuals or groups

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76 *Magna Alloys and Research v Ellis* 1984 (4) SA 874 (A).

77 In this regard it needs to be emphasized that the Bill of Rights contained in chapter 2 of the Constitution not only has a "vertical" effect (in other words only in respect of the relations between organs of the State and its subjects) but also enjoys "horizontal effect (in other words also in respect of the relations between legal subjects *inter se*). Section 8(2) of the Constitution expressly provides:
"A provision of the Bill of Rights binds a natural or a juristic person if, and to the extent that, it is applicable, taking into account the nature of the right and the nature of any duty imposed by the right."
For confirmation of this position see *Holomisa v Khumalo* 2002 (3) SA 38 (T); *Brisley v Drotsky* 2002 (4) SA 1 (SCA) 59 D/E-G and 20E-H. The Bill of Rights also binds the judiciary. In this regard section 8(1). The Bill of Rights also binds every court, tribunal or forum. The positive duty entails:
"To promote the values that underlies an open and democratic society."

78 The Chief Justice Langa CJ in the Constitutional Court case of *Barkhuizen v Napier* 2007 (5) SA 323 (CC) obiter makes an interesting remark, namely, section 39(2) is not the only acceptable approach to challenging the constitutionality of contractual terms and suggests without deciding the matter, that section 8 of the Bill of Rights may directly apply to contractual terms challenged, as well. With regard to a claim for damages in delict the Constitutional Court decided in *Carmichele v Minister of Safety and Security* 2001 (4) SA 938 (CC) that the constitutional duty of the courts to develop the common law in accordance with the Bill and the values underlying it, means that the principles and concepts of the common law must be tested against these values (955F/G-956C). There is a striking difference between the basis of the Bill and that of the law of contract, namely, the equality or purported equality of the contracting parties. Under the common law the law of contract provides that contractants are economically equal and negotiate as equals. In practice however that is often a mere fiction. The Bill on the other hand is specifically aimed at creating equality between the subjects. (Section 9(1)). Equality includes the full and equal enjoyment of all rights and freedom (Section 9(2)). To promote the achievement of equality measures may be taken which are designed to protect or advance persons, or categories of persons, who have been disadvantaged. (Section 9(2)).

79 See Grove "Die Kontraktereg, altruisme, keusevryheid en die Grondwet" 136 2003 *De Jure* 134; Pieterse "Beyond

may lawfully claim that all other members of society should support and foster their interests. A consequence of this approach is to achieve fairness in the relations between participants in modern commerce. [80]

The validity of exclusionary clauses or waivers in medical contracts is, as seen hereinbefore, influenced by the Constitution. Besides the influence of the Constitution, their validity is also influenced by other factors as more fully set out hereinafter.

It is trite to say that for a right to exist there must be some legal basis for it. The content of a right is shaped by that branch of law where it arises. Because, rights tend to be flavoured by the jurisprudence that gives birth to them, when a particular right is reflected as the subject matter of more than one area of law and is developed separately on different legal fronts, there is the potential for dissonance. [81]

When an answer is sought to a legal problem affecting or impacting on such a right, it follows therefore that proponents of the principles and theories of the subject matter involved, will attempt to conceptualise the right as a single legal construct. To this end, when one is confronted with the question of the right to enforce the validity of exclusionary clauses in hospital contracts, the question needs to be begged which branch of law needs to be followed should such a right claimed, be denounced. In South Africa, exclusionary clauses traditionally, have been assessed within the framework of the law of contract.

This includes both exclusionary clauses in general commercial contracts as well as the practice of disclaimers in hospital contracts. Although the use of disclaimers in hospital contracts is traditionally assessed within the framework of the law of contract, with the adoption of the new value-driven Constitution, any assessment post-constitutionally as was discussed before, must be done in accordance with the values that underlie the Bill of Rights and which affect the spheres of law in general, including the law of contract. [82]

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the Welfare State: Globalisation of neo-liberal culture and the constitutional protection of social and economic rights in South Africa" *Stell.*LR 2003 1, 3.

80 The express object of the Bill of Rights generally is to protect legal subjects, so that they can function effectively in a democratic society that is based on the principles of human dignity, equality and freedom. Compare for example the provisions of sections 7(1), 36(1) and 39(1) and (2). Legal subjects are not only protected as individuals, but also where they act in the context of a group. See in this regard sections 15, 17, 18, 23(2), 29(3), 30 and 31.

81 Pearmain (2004) Introduction Page X.

82 See Cockrell "Rainbow Jurisprudence" (1996) *SAJHR*; Botha The values and principles underlying the 1993 Constitution (1994) *SAPL* 233; Van der Walt "Tradition on trial: A critical analysis of civil-law tradition in South

In so far as the effect of the constitutional values on the Law of Contract is concerned, it has been stated over and over before that all law in South Africa, including the common law, which regulates the enforcement of contracts, must promote the values underlying the Bill of Rights. [83]

Besides the recognition of values such as openness, dignity, equality and freedom, what is mooted is, that other values underlying the Constitution including fairness and good faith also be recognised. [84] Strong arguments have also been put forward to promote the adoption of normative values and ethics in especially, medical contracts. [85]

The use of disclaimers in hospital contracts should therefore also be assessed by referring to medico-legal considerations. In this regard the influence of normative ethics and medical law on the practice of disclaimers or exclusionary clauses/exculpatory clauses in hospital

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African Property Law" (1995) 11 *SAJHR* 169 at 191-192.

83 See Hopkins "Standard-form Contracts and the Evolving Idea of Private Law Justice: A Case of Democratic Capitalist Justice versus Natural Justice" *TSAR* (2003) 1 150 at 157. The writer holds the view that the values include openness, dignity, equality and freedom. The writer however, suggests that besides the aforementioned values, the courts must also broaden the values to include fairness and reasonableness. See also Cockerell: "Private Law and the Bill of Rights: A threshold issue of Horizontality" *Bill of Rights Compendium* (1997). See also Christie *Bill of Rights Compendium* (1997) 3H quoting Devenish *A Commentary on the South African Constitution* (1998) 101-102, Davis *Democracy and Deliberation: Transformation and the South African Legal Order* (1999) 162 holds the view that the Constitution *"seeks to infuse all South African Law with the spirit of its fundamental values so that the legal system can promote a society based on human dignity, freedom and equality"*. The writers Bhana and Pieterse (2005) 123 *SALJ* 865 states that whilst acceptance must be given to the values of freedom and equality nonetheless caution the writers at (879), liberty and contractual freedom is not immune from limitation.

84 See Tladi (2002) 17 *SAPR/PL* 473 at 477. Besides recognizing freedom as a Constitutional value, the writer suggests that other values underlying the Constitution *inter alia* fairness, dignity and equality, especially the drive towards substantive equality should also be recognized.
For the influence of the value of equality see also Hawthorne "The Principle of Equality in the Law of Contract" 1999 (58) *THRHR* 157 at 166-167; Hawthorne "Public Policy and Micro-Lending - Has the Unruly horse died?" (2003) 66 *THRHR* 116. The legal writers also plead for the reintroduction of the value of good faith in contract. According to Bhana and Pieterse (2005) 123 *SALJ* 890 this will ensure a just and equitable law of contract.

85 Bhana and Pieterse (2005) 123 *SALJ* 865 at 879. They persuasively argue that: *"The law of contract, as a branch of the common law, is equally meant to embrace normative and constitutional values so as to adapt to the changing needs of the community. It is therefore difficult to discern a cogent explanation for contract law's apparent need for more certainty and its attendant `elevated' status."* See also Carstens and Kok (2003) 18 *SAPR/PL* 430 at 449 also convincingly argue that the practice of especially disclaimers in hospital contracts under the influence of a value-driven Constitution now dictates that normative medical ethics and broader medico-legal considerations ought to be considered when the purposive approach is adopted.

contracts should be considered. [86]

The question therefore, whether exclusionary or exculpatory clauses ought to be declared void and unenforceable in South Africa, should not be restricted to the common law of contract. The question of varying degrees needs to be addressed in a number of different legal areas, notably, the common law of contract, constitutional law, medical law, medical ethics, the common law of delict and statutory law, international law and foreign law. The extent to which these areas of law can be utilized is one of the issues explored in this thesis. An extensive comparative study is made in this thesis of the common law approach in the United States of America, as well as, the legislative approach in England to the issue surrounding the validity of exclusionary clauses in hospital contracts. The validity of exclusionary clauses or waivers will be examined by way of a series of situational questions and must be answered in the light of the Constitutional Bill of Rights and the legal theory behind its construction which serves as a grundnorm.

1.4.1 SYNTHESIS: SOME LEGAL QUESTIONS

It was previously stated hereinbefore that this thesis is pursued by having regard to six broad areas of law including, the law of contract, the law of delict, constitutional law, medical law and medical ethics, statutory law as well as foreign and International. To illustrate the importance of the possibility of synthesis of various branches of the law, the question may be posed whether one single branch of the law may provide the answer to the question whether exclusionary clauses in medical contracts ought to be declared invalid and unenforceable? Conversely, whether the synthesis of the various branches of the law will not yield the answer to the question whether exclusionary clauses in medical contracts ought to be declared invalid and unenforceable? To display the importance of the possibility of synthesis of the various branches of the law, the question may be posed whether the Constitution standing on its own will provide the answers to the questions posed hereinbefore or whether the common law of contract and delict should be used to underscore and remedy violations of constitutional rights that satisfy the recognized common law requirements for contract and delict. In other words, does the Constitution create another, new category of invalidating a contract or a delict outside the common law,

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86 Carstens and Kok (2003) 18 *SAPR/PL* 430 at 449 espouse that: *"The notion that any assessment of law within a medico-legal contract (such as disclaimers against medical negligence in hospital contracts) should be interpreted on a holistic inter-and-multidisciplinary approach has, by analogy, persuasively been argued by Steyn The Law of Malpractice Liability in Clinical Psychiatry Unpublished LLM Dissertation UNISA (2003) 3-27. See also Carstens and Pearmain Foundational (2007) 468.*

which may be developed in accordance with Constitutional law principles or is it more logical to develop the common law of contract law or of delict so as to accommodate certain violations of the constitutional law therein?

A further question could be posed in relation to the law of contract, namely, would the invalidation of a contract arising from a common law defence and which in itself also involves a violation of a constitutional right, render the contract unconstitutional? Must one consider two separate actions for the same wrong, one in terms of constitutional law and one in terms of the law of contract? The same questions may be asked about the effect of a delict. Would a delict, which in itself involves a constitutional right, render the delict unconstitutional? Must one consider two separate actions for the same wrong, one in terms of constitutional law and one in terms of delict?

Judging by the authorities with regard to delict, there is a clear distinction between a constitutional wrong and a delict even though these two fields may overlap. [87] In so far as the relationship between the Constitution and the law of contract is concerned, it has been stated over and over before that all law in South Africa, including the common law that regulates the enforcement of contracts, must promote the values that underlie the Bill of Rights. [88] But, from the legal opinion expressed by the legal writers, courts do not

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87 Neethling, Potgieter, Visser *Law of Delict* (1999) 22-23 quoted by Pearmain (2004) page x of the Introduction paragraph who draws this distinction on the basis that "requirements for a delict and those for a constitutional wrong differ materially." They also point to the fact that "….. Unlike a delictual remedy which is aimed at compensation, a constitutional remedy (even in the form of damages) is directed at affirming, enforcing, protecting and vindicating fundamental rights and at preventing or deterring future violations of chapter 2". According to the authors a constitutional wrong and a delict should not be treated alike and for conceptual clarity the term constitutional `delict' or `tort' should rather be avoided. They do state, however, that where a delictual remedy will also effectively vindicate the fundamental right concerned and deter future violations of it, the delictual remedy may e considered to be appropriate constitutional relief and in this way may serve a dual function. The view of the authors that a constitutional wring must be viewed as distinct from a delict is apparently at odds with the provisions of section 8(3)(a) and (b) of the Constitution which states that in order to give effect to a right in the Bill, a court must apply, or if necessary, develop, the common law to the extent that legislation does not give effect to that right and may develop rules of the common law to limit the right, provided that the limitation is in accordance with section 36(1). This section promotes the understanding that the vehicle for giving effect to rights in the Bill is the common law in the absence of relevant legislation. The concept of constitutional `wrongs' as a discrete category of wrongs apart from common or statutory law does not seem to be in keeping with what is intended by the Constitution itself. Rather the Constitution is to be regarded as the base reference for the edification of the legal system generally.

88 See Hopkins *TSAR* (2003) 1 150 at 157. The writer holds the view that the values include openness, dignity, equality and freedom. The writer however, suggests that besides the aforementioned values, the courts must also broaden the values to include fairness and reasonableness. See also Cockerel: *Bill of Rights Compendium* (1997). See also Christie *Bill of Rights Compendium* (1997) 3H quoting Devenish *Commentary on the South African Constitution* (1998) 101-102, Davis *Democracy and Deliberation: Transformation and the South African Legal Order* (1999) 162 holds the view that the Constitution *"seeks to infuse all South African Law with the spirit of its*

necessarily decide matters on pure constitutional lines but rather, courts do have a duty to develop the common law so as to promote the spirit, purport and objects of the Bill of Rights. Apart from constitutional values some academic writers have advocated that normative medical ethics and broader medico-legal considerations ought to be considered as well. [89] Others have favoured public policy as a means of developing the common law of contract in conformity with the Bill of Rights, [90] whereas, some academic writers suggest that the unequal bargaining position of the contracting parties, unjust and unreasonable clauses, as well as, contracts contrary to good faith ought to be considered when

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fundamental values so that the legal system can promote a society based on human dignity, freedom and equality". The writers Bhana and Pieterse (2005) 123 *SALJ* 865 states that whilst acceptance must be given to the values of freedom and equality nonetheless caution the writers at (879), liberty and contractual freedom is not immune from limitation. Consequently the writers' state: *"It is accordingly clear that the value of freedom does not equate with complete individual liberty and does not found an independent right to unlimited contractual liberty. What is also clear is that the meaning of the value of freedom in the 1996 Constitution is substantially less than its meaning in classical liberal theory. In particular, the value of freedom is reined in significantly by its interactions with the constitutional values of equality and dignity, as will now be contemplated."*
The writers emphasize in particular the value of equality when they state (at 880): *"To this end, the value of equality (and the right in which it finds concrete expression) aids the transformation of South African society into an ultimately more egalitarian one through measures which may, to varying extents, limit a variety of individual liberty interests. In the contractual realm, for instance, such liberty-limiting measures include provisions of the Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000. This Act declares both the imposition of contractual terms, conditions or practices that have the effect of perpetuating the consequences of past unfair discrimination and the unfair limiting or denial of contractual opportunities to be practices which may amount to (prohibited) unfair discrimination."*

89 Pearmain (2004) Introduction Page X

90 It is Christie *Bill of Rights Compendium* (1997) 3H-21 who convincingly argue that the Constitution itself provides an exceptionably reliable statement of seriously considered opinion, by reason of the widespread consultation and negotiation that preceded the drafting of the Constitution. Christie with reference to the case of *Ryland v Edros* 1997 (2) SA 690 (C) in which Farlam J was able to depart from *Ismail v Ismail* 1983 (1) SA 1006 (A) in which potentially polygamous Muslim marriages had been held contrary to public policy by radiating the effect of many provisions of the interim Constitution from which it was clear that such marriages could no longer be regarded as contrary to public policy. De Voss "Pious wishes or directly enforceable human rights? Social justice and economic rights in South Africa's 1996 Constitution" 1997 *SAJHR* 67 101 advocates similarly that this can be reached by treating as *contra bonos mores* any provision which is clearly at odds with the basic principles enshrined in the Bill of Rights. Van Aswegen "The Future of South African Contract Law" 1994 (57) *THRHR* 448 at 451 on the other hand suggests that the values underlying fundamental rights protected in the Bill of Rights, should be considered as important policy factors determining public policy in the circumstances. The author goes on to state all principles of contract law will have to be interpreted as far as possible in accordance with the values underlying fundamental rights. An example suggested by the author is that the present principle of *pacta sunt servanda* should be interpreted to conflict as little as possible with fundamental rights such as equality etc. It is especially Hawthorne 1995 (58) *THRHR* 157 who opines that the principle of equality is one of the cornerstones of South Africa's Constitution. The author suggests that other policy considerations than the principle of *pacta sunt servanda* (which was once one of the foundations of the classical theory of contract) ought to be considered for example public interest. See also the writings of Christie *Bill of Rights Compendium* 3H-21 who, like Hawthorne, suggests that public policy is the most satisfactory instrument for dealing with cases of inequality of bargaining power.

developing common law. [91]

The South African courts have emphasized some of the common law contractual factors which, in the new constitutional order, influence the courts in deciding on the validity of contractual provisions or contracts in their entirety. They include public policy, [92] fairness, justice, reasonableness and good faith. [93]

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91 Support for the development of the open norms of the South African common law to include *bona fides*, public policy and *boni mores* in accordance with the constitutional mandate, is also promoted by Hawthorne "The End of *Bona fides*" (2003) 15 *SA Merc. LJ* 271 at 277. Hopkins *TSAR* 243-1150 at 157 states that the Bill of Rights, is a guarantee to all South Africans that their fundamental rights will be protected against infringement. An area of concern, raised by the writer, is that contracts are often entered into between contracting parties where there is a huge disparity in their bargaining power, for example, in standard-form contracts. Such contracts ought to receive different treatment from the courts, especially, in those where there is no radical difference in bargaining power. A solution suggested by Hopkins is that as public policy is already entrenched in our common law and in particularly the law of contract wherein contracts contrary to public policy are declared unenforceable, the Bill of Rights should itself provide for an exceptionally reliable statement of seriously considered public opinion. This solution according to Hopkins is compatible with the rationale behind Section 39(2) of the Bill of Rights - that the common law be developed so as to be made compliant with the values that underlie the Constitution. To this end, it is argued that any standard-form contract that contains a clause that conflicts with the provisions of the Bill of Rights, is *prima facie* unenforceable, unless, good cause is shown by the contracting parties relying on the clause. Hopkins also persuasively argues that the enquiry by the judges in adjudicating these matters ought no longer to be restricted to judicial precedent, contractual capacity and the legality of the transaction. Instead, they will have to grapple with issues such as fairness and reasonableness as well. See also Christie *Bill of Rights Compendium* (1997) 3H-7.

92 The Constitutional Court per Ngcobo J in a majority judgement in *Barkhuizen v Napier* 2007 (5) SA 323 (CC) lay down the proper approach to the constitutional challenges to contractual terms when he stated: *"Ordinarily, constitutional challenges to contractual terms will give rise to the question of whether the disputed provision is contrary to public policy. Public policy represents the legal convictions of the community; it represents those values that are held most dear by the society. Determining the content of public policy was once fraught with difficulties. That is no longer the case. Since the advent of our constitutional democracy, public policy is now deeply rooted in our Constitution and the values which underlie it. Indeed, the founding provisions of our Constitution make it plain: our constitutional democracy is founded on, among other values, the values of human dignity, the achievement of equality and the advancement of human rights and freedoms, and the rule of law."* The courts go on to state: *"What public policy is and whether a term in a contract is contrary to public policy must now be determined by reference to the values that underlie our constitutional democracy as given expression by the provisions of the Bill of Rights. Thus a term in a contract that is inimical to the values enshrined in our Constitution is contrary to public policy and is, therefore, unenforceable."* And adds: *"In my view, the proper approach to the constitutional challenges to contractual terms is to determine whether the term challenged is contrary to public policy as evidenced by the constitutional values, in particular, those found in the Bill of Rights."*

93 In the case of *Barkhuizen v Napier* Ngcobo J also commented as follows to the role the Constitution plays in respect of contracts, namely: *"All law, including the common law of contract, is now subject to constitutional control. The validity of all law depends on their consistency with the provisions of the Constitution and the values that underlie our Constitution."* The court goes on to say: *"The application of the principle pacta sunt servanda is, therefore, subject to constitutional control."*
The courts do recognize the role fairness, justice and reasonableness plays in contract law, but, consequently holds that public policy ensures their existence. As to the recognition of good faith, the court rejects the idea that good faith ought to serve as one of the constitutional values governing the law of contract. In this regard the court states: *"As the law currently stands good faith is not a self-standing role, but an underlying value that is given expression through existing rules of law."*

It is especially, when one investigates the important question, namely, to what extent can the rights enshrined in the Bill of Rights be waived or limited, that one finds how dependent one area of law is on another. Take for example the guaranteed right to access to the courts in terms of section 34 of the Constitution. Section 34 of the Constitution gives expression to a foundational value, namely, guaranteeing to everyone the right to seek the assistance of a court and further, guaranteeing orderly and fair resolutions of disputes by courts or independent and impartial tribunals. In a recent judgement in the case of *Barkhuizen v Napier* [94] the Constitutional Court did not decide the issue regarding the influence of section 34 on pure constitutional lines but again emphasized the role that the common law concept of public policy plays even when deciding Constitutional issues. In so far as the common law position is concerned, our courts have over the last century held that any term in a contract which deprives a party of the right to seek judicial redress is contrary to public policy and in conflict with the common law. [95] As the common law position has not been changed since the adoption of section 34 of the Constitution, [96] it is likely that when the Constitutional Court is to pronounce on the validity of an exclusionary clause in which a contractual party undertakes to exonerate the other contractual party

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Quoting the authority Hutchinson "Non-variation clauses in contract: Any escape from the Shifren straitjacket?" (2001) 118 *SALJ* 720 at 743-4 and quoted with approval in Brisley above at Para 22, the court suggests *"Good faith has a creative, a controlling and a legitimating or explanatory function. It is not, however, the only value or principle that underlies the law of contracts."*

94 2007 (5) SA 323 (CC) at Para (31) the court put the position as follows:
"Our democratic order requires an orderly and fair resolution of disputes by courts or other independent and impartial tribunals. This is fundamental to the stability of an orderly society. It is indeed vital to a society that, like ours, is founded on the rule of law. Section 34 gives expression to this foundational value by guaranteeing to everyone the right to seek the assistance of a court."
The court at Para (33) relying on public policy concluded:
"Section 34 therefore not only reflects the foundational values that underlie our constitutional order, it also constitutes public policy."

95 See *Nino Bonino v De Lange* TS 120; *Share-out v Minister of Justice* 1925 (AD) 417; See also *Administrator, Transvaal and Others v Tab and Others* 1989 (4) SA 729 (A) at 764E; *Apex Air (Pty) Ltd v Borough of Vryheid* 1973 (1) SA 617 AD at 621F-G.

96 See Christie *Bill of Rights Compendium* (2002) 3H-50 who summarizes the position as follows:
"Section 34 cannot have been intended to change this common law position, as it expressly provides for a fair public hearing before another independent and impartial tribunal or forum where appropriate."
With regard to self-help agreements in the form of *parate executie* the author suggests that any such agreement must be carefully examined so that it can be determined whether its effect is to contravene the common law and Section 34 by ousting the jurisdiction of the courts. This position was confirmed by the South African courts in *Bock v Duburora Investments (Pty) Ltd* 2004 (2) SA 242 (SCA) 247-248 and the two Constitutional Court judgements of *Chief Lesapo v North West Agricultural Bank* 2000 (1) SA 409 (CC) and *First National Bank of South Africa Ltd v Rosenberg* 2000 (3) SA 626 (CC).

from liability arising from the other party's negligence, for example medical or hospital contracts, that the court will use the common law in conjunction with constitutional law in providing the answer. [97]

Besides using the common law aspect of public policy in conjunction with section 34 of the Constitution to establish whether a right to access to the courts can be waived, similarly, whether the right to healthcare services can be waived, is measured by weighing up s27(1) of the Constitution with the common law [98] and statutory law. [99] In the new Constitutional order where no law exists or law reform is necessary, for example, where competing rights conflict with the values in the Constitution, the Constitution has provided several aides to interpreting the Bill of Rights. These aides include the use of both international and foreign law. [100]

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97 The legal writer Hopkins in a most recent publication "Exemption clauses in contracts" *De Rebus* (June 2007) 22 at 24 suggests that if one were to take the proposition seriously that the Bill of Rights is an accurate statement of public policy *" ..... then it follows that contracts which violates provisions of the Bill of Rights (if enforced) without good reason should be deemed unconstitutional and therefore in violation of public policy with the result that they should be unenforceable."* In *Barkhuizen v Napier* Ngcobo J delivering the majority judgement emphasized the value of Section 34 of the Constitution which *"not only reflects the foundational values that underlie our constitutional order, it also constitute public policy".* The court consequently considered the common law position of an aggrieved person's right to seek the assistance of a court of law and whether the time-bar clause 5.2.5 was contrary to public policy and unenforceable? As to the nature of the clause, the court stated: *"What is also apparent from the clause is that it does not deny the applicant the right to seek judicial redress; it simply requires him to seek judicial redress within the period it prescribes failing which the respondent is released from liability. It is in this sense that the clause limits the right to seek judicial redress."*

98 Hospitals and other healthcare providers are ethically obliged by their professional rules to take due and proper care and exercise their mandate and professions with diligence. The promotion and maintenance of medical standards are embodied in the Hippocratic Oath, the Declaration of Geneva, and other codes of medical ethics. The underlying rationale for the promotion and maintenance of the standards stems from the philosophy that respect for human life needs to be maintained. See Smit "Die Geneeskunde en die Reg" *De Jure* 117-118; Mason and McCall Smith (1991) 3-6. It is especially the writers Carstens and Kok (2003) *SAPR/PL* 449-451 who persuasively argue that in the Constitutional state wherein we find ourselves, the role of normative medical ethics is *"a protective measure of human rights"* namely *"to do no harm"* and *"to act in the best interest of the patient"*. To this end, the writers argue that disclaimers against medical negligence in hospital contracts would amount to an unreasonable/unfair/unethical acceptance on the part of the patient to contract to his/her potential harm. After all, the medical practitioner (and hospital) is ethically bound not to harm. The right to have access to healthcare services, it is submitted, notionally brings about such a right, but it also brings about an obligation on the part of the medical practitioner and/or hospital not to harm the patient. Constitutionally therefore, this obligation to maintain a standard of due and skill cannot be compromised.

99 In so far as statutory controls are concerned, the regulations published in the Government Gazette on the 1st *February 1980 No 2948 No 6832* control the reasonable degree of care and skill which has to be maintained by private hospitals in securing a license granted to them. Regulation 25(23) of the regulations so published requires that *"all services which are reasonably, generally and necessary for adequate care and safety of patients, are maintained and observed."*

100 For the use of international law the position has been stated as follows: When interpreting the Bill of Rights, a

1.4.2 SYNTHESIS: SOME PRACTICAL QUESTIONS

The questions posed above and the manner in which they are answered have a direct impact on practical questions asked regarding the validity of exclusionary clauses in medical contracts in South Africa. Some of these questions go to the heart of exclusionary clauses in medical contracts. They confront issues such as, should these types of contracts still be tolerated, alternatively, has the time not come that these types of clauses should be outlawed in South African jurisprudence? Some practical questions in this context are:

- Given the new South African constitutional order, has the time not come for our legal jurisprudence to depart from the antiquated views so frequently expressed in respect of the law of contract, namely, that the principles of freedom of contract and the sanctity of contract are supreme? Instead, should we not follow the new Constitution with all its values and embrace a new ethos in the contractual sphere based on fairness, reasonableness and justice?

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court, tribunal or forum must therefore consider international law. See Blake "The World's law in one country: the South African Constitutional Court's use of public international law" 1998 *SALJ* 668; Botha "International law in the Constitutional Court" 1995 *SAYIL* 668 as quoted in Christie *Bill of Rights Compendium* (2002) 1A-21. According to the learned author the rule is peremptory, but, except where international agreements and international law are law in South Africa, a court is not obliged to apply international law, it must merely consider it. The learned author relies on ss231, 232 and 233 of the Constitution which indicate that the Constitution *"..... is the primary source of the protection of human rights in South Africa, in principle, international agreements become part of South African law only after they have been enacted as Acts of parliament and customary international law is law in the Republic unless it is inconsistent with the Constitution or an Act of parliament. See LS v AT 2001 2 BCLR 152 (CC); 2001 1 SA 1171 (CC) Para (27). "* For the use of foreign law it is especially in the case of *Carmichele v Minister of Safety and Security* 2001 (4) SA 938 at 954ff the Constitutional Court relied heavily on foreign law to develop the common law in particular in the field of delictual liability by extending the general duty of care in accordance with spirit, purport and objects of the Bill of Rights as intended in Section 39(2) of the Constitution. In this case the court found the prosecution and the police had a duty imposed on them not to perform any act infringing on the dignity, equality and freedom of citizens but rather to provide appropriate protection to everyone through and structures designed to afford such protection. Where such rights are infringed, the court held there is no ground for immunity of public officials from delictual causes by the public. This case is filled with foreign law cases ranging from Canadian Law, English Law and American Law and the European Court of Human Rights. The said cases pioneered the Constitutional Court in developing the common law. In the first instance the court supported the dictum of Tacobucli J in the Canadian decision of *R v Solitude* (1992) 8 CRR (2d) 173 (1991) 2 GCR 654 quoted with approval in *Du Plessis v De Klerk* 1996 (3) SA 850 (CC) 1996 (5) BCLR 658 at pares [15] - [24] wherein the index discussed the role judges should play in adopting the common law. In this regard the iudex held: *"Judges can and should adapt the common law to reflect the changing social, moral and economic fabric of the country. Judges should not be quick to perpetuate rules whose social foundation has long since disappeared. Nonetheless there are significant constraints on the power of the Judiciary to change the law. In a constitutional democracy such as ours it is the Legislature and not the courts which have the major responsibility for law reform. The Judiciary should confine itself to those incremental changers which are necessary to keep the common law in step with the dynamic and evolving fabric of our society."*

- As the core feature of the doctor/hospital-patient relationship is built on the promotion and maintenance of medical standards advancing the interests of the patient, should the courts, when assessing the validity of exclusionary clauses in medical/hospital contracts, not consider the values built into the doctor/hospital-patient relationship, given the fact that exclusionary clauses in medical/hospital contracts have the potential to compromise the relationship?

- Given the fact that normative ethics have played such a fundamental role in the practice of medicine *inter alia* setting standards of conduct and serving as a protective measure in maintaining these standards, does it not follow that exclusionary clauses with their apposite aim are in direct conflict with normative ethics?

- Does it not follow that given the nature, aims and objectives of exclusionary clauses in medical/hospital contracts that they do not serve the best interests of the patient and runs counter to the fiduciary nature of the doctor/hospital-patient relationship?

- As the obligation to act in the utmost good faith and not to allow a doctor/hospital's personal interests to conflict with their professional duty is fundamental to the doctor/hospital-patient relationship, does it not follow that exclusionary clauses in medical/hospital contracts are in conflict with such an obligation?

- Is it in public interest that, despite a patient consenting thereto, through the use of exclusionary clauses in medical/hospital contracts, the doctor/hospital are allowed to compromise the long standing standards of conduct expected of the medical profession?

- Should a doctor/hospital that stands in a position of trust in relation to his/her/its patient, exploit the relationship by using exclusionary clauses to relax the degree of care and skill expected of him/her/it?

- Should a patient rightfully be allowed to abandon a potential claim for damages flowing from the negligent conduct of a doctor or hospital by signing an agreement which includes a waiver of rights or exclusionary clause, built into the agreement?

- Why seek professional help if it means that despite professional standards being set for them and ethical rules being in place for centuries, that doctors/hospitals can, by way of agreement, be allowed to compromise professional standards resulting in patients suffering loss?

- Should the classical law principles of freedom of contract and the sanctity of contract reign supreme, despite, the inequality the weaker party to the contract, for example, a patient in the doctor/hospital-patient relationship, may face in the contractual relationship?

- Should there be fair dealings in contract, especially, where a degree of bargaining unfairness is present in concluding agreements?

- Should good faith be developed as a safety valve to ensure a minimum lack of fairness in contracting?

- Should the courts protect the weaker party to a contract where the parties stand in an unequal bargaining position and declare such contracts or contractual provisions to be invalid and unconscionable?

- Should exclusionary clauses or other contractual provisions which would result in extreme unfairness, or as a result of other policy convictions and contrary to the interests of the community, be declared invalid and unenforceable?

- Should exclusionary clauses or disclaimers excluding gross negligence or negligence or both be denounced as against public policy and unenforceable?

- Should the doctor/hospital's duty of care be regarded as inalienable even in the face of the doctor/hospital's contractual freedom? Put differently, can the obligation of the doctor/hospital to maintain and exercise reasonable care in treating a patient imposed by law, be avoided by contract?

- Should the prevailing standards of care bestowed on healthcare providers be declared a non-negotiable duty of public service?

- What effect should the regulation which governs the licensing of private hospitals and which aims to maintain standards of care and skill in treating a patient, have in the face of exclusionary clauses or waivers?

- Should the objective criteria such as fairness, reasonableness and conscionability in contracts not be given greater weight when assessing standard form contracts, more especially, exemption clauses or waivers in medical or hospital contracts?

- Should the fact that a patient stands in an unequal bargaining position to that of a medical practitioner/hospital not cause the contractual liberty of a contracting party to be scrutinized against the values that animate the Constitution?

- Does freedom of contract, when abused by the stronger contracting party resulting in unreasonable and unjust contracts, undermine the values enshrined in the Constitution and the Bill of Rights?

- Should the right to healthcare services be placed on the same footing as suppliers of other services? Put differently, should the courts put a greater premium on the constitutional right to healthcare services as that of a supplier of other services?

- Should a contracting party, relying on the principles of contractual freedom and the sanctity of contract validly be able to get the other contracting party to agree to waive his/her right to healthcare services as guaranteed by the constitutional values which include the doctor's/hospital's ethical duty of proper care and diligence?

- Can a right to access to healthcare services be waived or limited in any way or should such a right be declared as inalienable?

- When considering the validity of exclusionary clauses or waivers in contract should greater weight not be given to the right of access to the courts as provided for in terms of section 34 of the Constitution as opposed to the principles of freedom of contract and sanctity of contract?

- To what extent can international law and foreign law authorities assist in developing the common law, especially, the law of contract, more especially, when the Constitutional Court is confronted with pronouncing on the validity of

exclusionary clauses or waivers in hospital contracts?

- Should private agreements in the form of exemption clauses or waivers, which aim to reduce or diminish a hospital or other healthcare provider's statutory or ethical duties, be tolerated or should they be struck down as contrary to public policy?

It should be clear at this juncture, in view of the questions posed hereinbefore, that the Constitution, as a foundational source would now have a profound influence should the validity of exclusionary clauses in hospital contracts be reviewed and ultimately impact greatly on the decision-making of the Constitutional Court when called upon.

1.5 APPROACH AND METHODOLOGY

The thesis explores the questions raised above, and others, in the context of six broad areas of law, namely, the law of contract, constitutional law, medical law and medical ethics, the law of delict, statutory law as well as foreign and international law. The fore stated areas of law have in some instances been covered separately. Besides investigating the nature, scope and application of exclusionary clauses and how some of the six broad areas of law impact on them, a comparative legal study is made of the legal position with regard to exclusionary clauses, especially those clauses in medical contracts, in three jurisdictions separately. The jurisdictions are South Africa, England and the United States of America. The analysis of this thesis is cast in considering the views expressed by legal writers in the different jurisdictions, the findings of the courts on various aspects of law in the aforementioned jurisdictions and, formulating legal opinion on various aspects of law. The purpose is to find common ground in an attempt to answer the question which forms the subject of this thesis, namely, should exclusionary clauses in hospital contracts be declared invalid in South Africa? More particularly the research material is divided into twelve chapters in the following way:

1.5.1 DIVISION OF RESEARCH MATERIAL

- Chapter two explores the concept doctor-patient relationship from its infancy and its development through centuries of medical practice, until the present. The key components of the doctor-patient relationship include the internationally recognized principle that the doctor/hospital owes the patient the duty to take care and to act reasonably, as well as, normative medical ethics in which values such as conscience and intuitive sense of goodness, good faith and loyalty, fiduciary trust and responsibility play fundamental roles. This chapter also includes a discourse on

the issue of licensing which is aimed at regulating the health, welfare and safety of the public, especially, patients who receive medical treatment.

- Chapter three considers the nature of the doctor-patient relationship with specific reference to the contractual relationship between the doctor and patient. This chapter considers the nature of the contractual relationship as it appears in the jurisdictions of England, the United States of America and South Africa. This chapter also considers, in particular, the consensual nature of the relationship.

  What appears from this chapter, as well, is that a trust position is created between the doctor and patient wherein the doctor undertakes, arising from the nature of his or her position or profession, that reasonable care and skill will be exercised towards the patient once the relationship commences.

- Chapter four covers the general principles of the law of contract in a South African medical context. What is considered in this chapter is the formation of the contract including the capacity to contract as well as the intention of the parties to create such a relationship. The chapter goes further in exploring the formalities which need to be complied with and what terms could be included in the contract. Finally this chapter also covers the necessity of obtaining the patient's consent including the different forms of consent.

- Chapter five covers the mutual duties and obligations between the doctor and patient arising from the law of contract in a South African medical context. This duty includes the doctor's general duty to treat the patient and to exercise due care and skill. It also covers, separately, the hospital's duty towards the patient.

- Chapter six, deals with the doctor/hospital/other healthcare provider's general duty of care in delict. This arises independently of any contract. This general duty of care may even exist side by side with the contractual obligation. This chapter also considers the standard of care that needs to be exercised against the backdrop of medical ethics.

- Chapter seven considers when, and under what circumstances, may a doctor/hospital/other healthcare provider limit or exclude his/her/its duty of care with specific reference to the doctrine of *volenti non fit iniuria* in a general context

as well as the medical context. The same consideration is given to the concept "assumption of risk". The considerations in this chapter include a comparative study in the jurisdictions of South Africa, England and the United States of America.

- Chapter eight covers the foundational concept in the law of contract, namely, freedom of contract and how it influences the commercial sphere in general.

- Chapter nine deals with the *caveat subscriptor* rule in the law of contract and pursues a discussion on the general defences available to the *caveat subscriptor* rule.

- Chapter ten explores three selective concepts which impact on contractual freedom. They include the principle of fairness, the doctrine of unconscionability and the doctrine of public policy. This chapter examines the impact that they have on the law of contract in the jurisdictions of South Africa, England and the United States of America.

- Chapter eleven examines the recognition of exclusionary clauses in general as they appear in the jurisdictions of South Africa, England and the United States of America.

- Chapter twelve analyses various factors impacting on the validity of exclusionary clauses in general. These factors include fraud or dolus, public policy, the status and bargaining power of the contracting parties, public interests and statutory duty. An analysis of their impact includes the jurisdictions of South Africa, England and the United States of America.

- Chapter thirteen examines constitutional issues surrounding the law of contract and how the South African Constitution and the Bill of Rights impact on exclusionary clauses, especially those in medical/hospital contracts.

- Chapter fourteen explores the focal point of the research undertaken in this thesis. The legitimacy of exclusionary clauses in medical contracts is examined as they appear in South Africa, England and the United States of America. This chapter offers some concluding thoughts on the subject matter of this thesis.

The method employed to deal with the investigation into the validity of exclusionary or exculpatory clauses, otherwise known as waivers in medical/hospital contracts, is firstly to get a greater understanding of the doctor/hospital-patient relationship by expounding and discussing the foundations and principles of the relationship. The method applied in researching the history and development of the doctor/hospital-patient relationship reveals that the term owes its birth to the promotion and maintenance of medical standards and that the doctor/hospital has to exercise a duty of care towards the patients to attain that standard. What the research also reveals is that the relationship arises both contractually and from the doctor's general duty of care founded in tort or delict. The present exposition reveals that in the modern era the principles upon which the relationship between doctor/hospital and patient are founded remains universally very much intact. The relationship continues to be shaped and influenced by a strong commitment to long-standing principles of medical ethics which play a major role.

The traditional sociological nature of the doctor/hospital-patient relationship was founded on the paternalistic model in which the authority was invested in doctors by society because of their knowledge of bodily functions and disease. The paternalistic model was influenced to change due to the evolution in political philosophies *inter alia* nationalism and liberalism. Moreover, the paternalistic model in the modern day transformed into the autonomy or contract model which reflects the basic human right to self-determination. A high premium was placed on the protection of the individual under consumer sovereignty. Besides, the patient was seen to play a more active role in the relationship, the fiduciary nature of the relationship between the doctor/hospital and patient also emerged in which doctors/hospitals were expected to act with utmost good faith and loyalty and not to allow their personal interests to conflict with their professional duty. It is especially, the latter phenomenon, which is of tremendous importance in offering some concluding thoughts on the subject matter of this thesis.

What is also undertaken, in this context, is an investigation into the modern nature of the doctor/hospital-patient relationship as it appears in contemporary medical practice. To this extent and purpose, the nature of the relationship, including, the contractual relationship in a medical context as well as the general duty of care which naturally flows from the relationship is investigated as it appears within the framework of the South African, English and United States of American legal systems. What is also investigated is to what extent and under what circumstances may a doctor/hospital/other healthcare provider limit or exclude his/her/its duty of care, by using the doctrine of *volenti non fit iniuria* and the

assumption of risk, as a ground of justification in both the general, as well as the medical context?

Although the validity of exclusionary clauses or waivers could have been investigated within the framework of other legal systems as well, it was, for the following reasons decided to do a comparative law investigation within the aforementioned legal systems. There can be no question about it; all three legal systems are representative of the most important legal families, universally. Whereas England and the United States of America typify what is known as common law systems, South Africa especially, with the adoption of its new Constitution, is known as a hybrid system. [101] All three countries have had a tremendous development in the medical law sphere. Although English law has not had the challenges that South African law and that of the United States of America had to endure in pronouncing on the validity of exclusionary clauses, nonetheless, English law has been specifically chosen because of its close historical bond with South African law, as it appears from the Positive law. With regard to medical and contract law, the English and South African courts have often referred with approval, to each other's dicta. [102] More recently the South African courts, on occasions, have referred especially to the English legislation which was instituted to curb unfair and unreasonable exclusionary clauses in contract. [103]

The United States of America has been specifically chosen as the courts in America have had similar challenges in pronouncing on the validity of exclusionary clauses in medical contracts. [104]

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101 David and Brierly *Major Legal Systems in the World Today* (1978) 21-73; Van Zyl *Beginsels van Regsvergelyking* (1981) 131 at 170-196 284.

102 See in this regard the English case of *Chatterton v Gerson* (1981) 1 QB 432 which refers with approval to the South African case of *Stoffberg v Elliott* 1923 CPD 148; See further the case of *Castell v De Greef* 1994 (4) SA 408 in which the South African court relies heavily on English law in concluding in the end that the development of other common law countries like Canada, the United States of America and Australia should rather be following the English law; See also *Burger v Central South African Railways* 1903 TS 571; *Mathole v Mothle* 1951 (1) SA 456 (T) in which English rules and principles regarding exclusionary clauses were entrenched.

103 See in this regard the South African cases which referred to the English Unfair Contract Terms Act 1977. See the Supreme Court of Appeal judgement of *Johannesburg Country Club v Stott and May NO* 2004 (5) SA 511 (SCA); See also the Constitutional court judgement of *Barkhuizen v Napier* 2007 (5) SA 323 (CC).

104 See the leading case of *Tunkl v Regents of the University of California* 50 Cal 2d 92, 32 Cal RPTR 37 383 P.2d 441.

The question surrounding the validity of exclusionary clauses in medical contracts is settled in the United States of America and much can be learnt from them.

Relying upon the three forestated jurisdictions, a comprehensive investigation is also made into the role of the law of contract generally in the commercial sphere. What is also considered is the influence of freedom of contract and how the promotion of consumerism and other philosophies have impacted in curbing unlimited freedom of contract. Consideration is also given to the *caveat subscriptor* rule and the general defences to the rule. Three factors influencing the law of contract and which impacts on the unlimited use of exclusionary or exculpatory clauses are also signalled out for investigation. These factors include the principle of fairness, the doctrines of unconscionability and public policy. The investigation into the role of the said three factors together with a full consideration of the recognition of exclusionary clauses in the three jurisdictions in general, paves the way for a comprehensive investigation into the validity of exclusionary clauses in medical contracts, which forms the purpose of the present thesis. Moreover, the basis, principles and problems surrounding exclusionary clauses in medical contracts are researched. Furthermore, the aim and object of the thesis is to provide a proper theoretical and practical legal framework within which to adjudge the validity or put differently, the invalidity, of exclusionary clauses or waivers in medical contracts, within which the hitherto wrongly developed South African law of exclusionary clauses in medical contracts, may be corrected and further developed in future.

The method employed further, is to attempt to find answers in the Constitution of the Republic of South Africa, the Constitution being the supreme law of the Republic and in respect of which, all law, be that the common law, or the statutory law, is subordinate. Another reason for turning to the Constitution to find answers to the question which forms the subject of this thesis, is because the Constitution affects not only the relationship between the State and other government structures and its citizens, but also, private relations between business enterprises and their clients, including, the relationship between hospitals and patients. The values included in the Constitution, and emphasized by the Constitution, hold the key to the question under consideration.

Although there are here and there some differences between the legal systems themselves, the overall integrated survey reveals much common ground to draw from in order to find solutions to the question posed. The emphasis in presenting this thesis is on providing an overall picture and on synthesis rather than on a fragmented picture and on antithesis.

1.5.2 EXPLANATORY NOTE ON SOURCE REFERENCING AND BIBLIOGRAPHY

An extensive bibliography to this thesis is provided. The bibliography comprises of a listing of books, journal articles, academic theses and dissertations, and reports; a table of cases divided into South African Law and foreign Law; a table of statutes; and a list of abbreviations. It was decided, unlike other theses of this nature, where only the principal sources and cases and statutes are listed, to list the bibliography, with reference to every source cited in full, to avoid the possibility that important sources became obscured in some footnote.

One of the main objectives was to incorporate most, if not all, of the principal books and texts, academic theses and dissertations and journal articles on the subject matter ever written in South Africa. This was also the aim with reference to the discussion of related case law and legislation.

In addition the same approach was followed in including as many foreign law sources in certain chapters as possible. These included books, journal articles, academic theses and dissertations, and reports; a table of cases, a table of statutes, and a list of abbreviations.

At this point it needs to be emphasized that the theses and principles covered under the different landscapes of South African law as well as foreign law, was daunting in selection, but, it is submitted, reflect the foundational principle of South African medical law and ethics, the law of contract generally and how it interfaces with the doctor-patient relationship; the doctor-patient relationship relating to the law of delict, specifically in the context of the doctor/hospital's duty of care and the possible exclusions of the duty of care by utilizing the doctrines of *volenti non fit iniuria* and voluntary assumption of risk; the influence of exclusionary clauses in the law of contract and what factors impact on the use of exclusionary clauses in hospital contracts; the Constitution and its interface with, and broad impact on, medical law and ethics, the law of contract, the law of delict and statutory regulations as well as foreign/international law.

Although some comparative research was done in this thesis to seek out and include foreign law from the jurisdictions chosen for the research, especially, where they have dealt with issues similar to those under discussion, it is not claimed that all sources have been exhausted.

Although some criticism may legitimately be lodged at the voluminous work produced with this thesis, the size is attributable to the following:

- The thesis covers wide multitude of various legal landscapes. Some of these landscapes may be uncharted territories to some of the readers who may not have intimate knowledge of every area of law;

- The answer sought to the key question which forms the core subject matter of this thesis cannot be found without pursuing the different legal landscapes;

- The Constitution in the new constitutional order shapes the ordinary law and must inform the way legislation is drafted by the legislatures and interpreted by the courts and the way the courts develop the common law.

The Constitution permeates all laws in South Africa. The Constitution also requires consistency of all other law not only with itself but also between various fields of law. [105] As exclusionary clauses in medical contracts touches various fields of law *inter alia* medical law and ethics, the law of contract, the law of delict, statutory law and constitutional law, one cannot analytically assess the validity of exclusionary clauses in medical contracts without examining these major fields of law. In that way one may detect inconsistencies which the Constitution does not tolerate. As the Constitution unites all major fields of law, the structure of this thesis reflects the ideal approach to law - that there is a single legal system with many facets rather than a number of different systems that operates independently of each other.

The Constitution directs South African courts to consider international law and allows them to consider foreign law. This is the approach followed in this thesis. In many of the chapters a comparative study of various concepts and principles in the different fields of law is made.

1.5.3 ACKNOWLEDGEMENT OF THE CONTRIBUTION OF PAST AND PRESENT SOUTH AFRICAN WRITERS ON THE TITLE EXCLUSIONARY CLAUSES IN MEDICAL CONTRACTS

Researching and writing a thesis of this nature is comparable to ascending a steep and precipitous mountain. As is the case with the climbing of any mountain, the mountain

105 Carstens and Pearmain (2007) 17.

fortress is often obscure and precarious, unless that fortress has been explored and one can literally walk the same path as that undertaken before. In this regard, writer was fortunate that in many respects writer was able to pursue the charted footsteps of eminent South African writers, past and present, who have written, and still write prolifically, on the different legal landscapes revealed during this research. It was only during this academic ascendancy, researching this thesis, that one realises the vast and profound influence their writings have had over a period of time, and the significant contributions they have made, and continue to make, to South African legal jurisprudence.

When writer first started out ascending the academic mountain in assessing the law pertaining to the validity of exclusionary clauses in medical contracts, it became evident that it was a path less followed. Very little was written at the time on the subject matter in the South African jurisdiction. In time however, especially, after the controversial judgement of Brandt JA in the case of *Afrox Healthcare Bpk v Strydom*, [106] the path was followed more frequently in search of an answer to the question whether a hospital or other professional person *inter alia* nursing staff and/or doctor may validly exclude or restrict their liability to patient, for breach of their duty owed to the patient? In the end, as so eloquently stated before, it "turned out to be more of a pilgrimage where one could walk `in the steps' of previous writers and write the chapters while standing on their shoulders". [107] All that was required in the end was to contextualise the underlying themes and principles and align them with the constitutional demands in the post-constitutional era.

In thanking those who have assisted in the preparation of this thesis it is necessary to recall those who have contributed to the researching and writing of this thesis. I have particular debts of gratitude to repay a number of people. When first embarking on researching this subject matter in preparation of the medical negligence trial referred to earlier, I was privileged to share ideas with Professor Strauss, of the University of South Africa, with whom I spent a considerable time at the school of law of the University of South Africa. During our discussions Professor Strauss, brought to bear his great knowledge of medical law in South Africa as well as other foreign jurisdictions. His knowledge, wisdom and inspirational passion for law, influenced me immensely. So much so that, after finalising the case, I enrolled for the LLD Degree at my academic home for the last ten years, again I was

106 2002 (6) SA 21 (SCA).

107 The eloquence in which the academic path of research is described is quoted from Carstens and Pearmain (2007) 18.

very fortunate to have met up there with another academic giant, Professor FFW van Oosten, whom has sadly passed away since. Professor van Oosten, not only discussed innumerable points in this thesis with me while it was in gestation and while it was being written, he also introduced me to the complexities of academic legal writing.

Intellectually, my greatest debt is owed to Professor Pieter Carstens, whom I salute for his patience, valuable suggestions and detailed comments and without which; I would not have been saved academic embarrassment. Thank you, Professor Carstens, for providing me with a stimulating intellectual environment through which you guided me with dedication, unwavering support and warm academic friendship. I have also derived enormous benefit from reading your outstanding contribution to contemporary legal-medical literature. I owe you more than I can say.

It remains to acknowledge the debt that I owe to all those colleagues with whom I have profitably discussed some of the themes in this thesis and whom remained loyal in their belief that post the *Afrox Healthcare Bpk v Strydom* case more than ever before, judicial rethink, alternatively, legislative intervention is necessary to ensure that standards of fairness and reasonableness compliant with the legal convictions of the community in the contemporary society, is maintained.

1.6 CONCLUDING REMARKS

It will be demonstrated and witnessed in this thesis, that the quest for finding answers to the central theme of this thesis cannot be concentrated on in one area of law, be that the law of contract, be that medical law and ethics, be that the law of delict. What will also be borne out in this thesis is that the different areas of law or legal landscapes, as described, interface. The Constitution, being the Supreme Law, also underpins the other fields of law. The core issue under investigation in this thesis, namely, a critical analysis of exclusionary clauses in medical contracts, therefore, has to be considered not only in terms of its contractual content, but also in terms of the interaction between the law of contract, medical law and ethics, statutory law and constitutional law. What is also considered is the effect of international law and foreign law principles on the South African legal landscape dealing with the different fields of law. Although one can study the content of individual traditional branches of law to a certain extent, the study only becomes meaningful when one studies the interaction between the different fields of law given the fact that the Constitution unifies them all into a single, all encompassing, legal system. The values and principles expressed in the Constitution cement all the fields of law into the greater whole

of a legal system. For that reason, there is no better way of analysing the central theme of this thesis than to examine the different fields of law applicable as they interface.

In this regard, the validity or enforceability of exemption clauses in medical contracts can no longer be measured by way of traditional means and by dealing with the question under the sanctity of contract rule. Instead, the question will always be dealt with by having regard to the principles and values of the Constitution. To this end, it is particularly, rights to freedom of contract, access to healthcare with accompanying ethical standards of care, equality and access to court, which will play a role.

Furthermore, in weighing up these constitutional rights and their accompanying values and principles, the courts should consider which of the rights have been infringed when they question the enforceability of a contractual provision. Where a contractual provision tends to bring about a limitation of a constitutional right then it will be in violation of public policy, unless, it is reasonable and justifiable, as provided for in S30 of the Constitution.

No matter how high a premium we place on the sanctity of contract rule, the freedom to contract can never serve as a justification for enforcing a private agreement that has the aim and effect of unreasonably limiting the other party's constitutional rights.

Chapter 2

HISTORICAL OVERVIEW AND DEVELOPMENT OF THE DOCTOR-PATIENT RELATIONSHIP

2.1 Introduction

This chapter includes an investigation into the nature of the doctor-patient relationship and how it originated during the ancient period and developed throughout many centuries in the practice of medicine. A truly analytical and balanced assessment of the validity of exclusionary clauses or waivers in medical contracts involving doctors/hospitals/other healthcare providers and patients, which form the core theme of this thesis, cannot be made without an evaluation of the legal aspects of the doctor-patient relationship. The term doctor-patient relationship has been deliberately chosen for this chapter as the relationship between the patient and the doctor goes back much further than, as will be seen in this chapter, the hospital and patient relationship. It should however be borne in mind that there is much concurrency in the legal aspects between the doctor-patient as is the position in the hospital-patient relationship.

The doctor-patient relationship is of import to the central theme of this thesis. As an expansive discussion of the various features will be superfluous for the nature of the research undertaken with this thesis, a brief discourse follows. Central to the relationship between doctor/hospital and patient is the fact that the nature of the relationship is essentially a private law matter and is governed by the law of obligations: that is to say by the law of contract and the law of delict. [1] In the absence of a contract between the parties, the relationship is therefore governed by the law of delict. The establishment of the legal relationship between the doctor/hospital and the patient depending upon whether it is founded in contract or in delict, will thus reveal many legal aspects. When a contractual relationship is established, the salient features of the relationship will be revealed which will include *inter alia* the existence of the agreement, the terms of the agreement, whether there has been a breach of any of the terms agreed to, whether the agreement had been terminated etc. [2] Like the law of contract, the law of delict imposes a duty of reasonable care on the doctor/hospital in respect of the patients. In consequence thereof, the doctor/hospital is obliged to take reasonable care to prevent harm from occurring to the patient. This can obviously, when not adhered to, lead to liability for negligence. Equally, it is therefore important to establish such a relationship between the doctor/hospital and the patient outside a contractual relationship. [3] The doctor/hospital and patient relationship also indicates, when assessing the nature of the relationship, what sociological model is applicable to the relationship. Whereas traditionally, the paternalistic model was prevalent in which the doctors would take action or make decisions on behalf

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1 See Van Oosten "Medical Law - South Africa" in *International Encyclopaedia of Law* (Ed Blanpain R) (1996) 53. The writer expresses the view that in the ordinary course of events, the relationship between the parties is a contractual one. But since the breach of a duty of care and negligence may underlie both breach of contract and a delict; the same act or omission by a doctor/hospital may result in liability for both. Similar views are expressed by Strauss and Strydom (1967) 104ff; Strauss (1991) 3; For South African case law see *Van Wyk v Lewis* 1924 AD 438, 450-451; *Correira v Berwind* 1986 (4) SA 60 (Z) 63; *Edouard v Administrator Natal* 1989 (2) SA 368 (D) 385ff; *Magware v Minister of Health* 1981 (4) SA 472 (2) 476.

2 For a comprehensive discussion on the salient features and legal aspects of the contractual relationship between the doctor/hospital and patient see Van Oosten (1996) 54ff. Strauss and Strydom (1967) 104ff; Strauss (1991) 3ff. One of the essentialia of the conclusion of an agreement between the contracting parties is the principle of an offer and acceptance. For parties to reach true consensus there must be a clear understanding of the terms agreed to. See *Serf Commercial and Industrial Properties (Pty) Ltd v Silberman* 2001 (3) SA 952 (SCA) 958. This is particularly relevant in cases where informed consent is required for example the patient is fully informed of the nature of the proposed treatment, its consequences and the consequences of not having it, the risks associated with it and the alternative to it. See *Castell v De Greef* 1994 (4) SA 408 (C); *Broude v McIntosh* 1998 (3) SA 60 (SCA); *Minister of Health v Treatment Action Campaign (No 2)* 2002 (5) SA 721 (CC). See also the comprehensive discussion on the legal aspects of the contractual relationship between the hospital/doctor and patient in Carstens and Pearmain (2007) 404ff.

3 See Van Oosten (1996) 57-58; Strauss and Strydom (1967) 104ff; Carstens and Pearmain (2007) 406-407.

of their patients, [4] this has changed over the last four decades. Influenced by the ethos and philosophy of consumerism, the sociological model changed to the patient `autonomy' or `contract' model [5] wherein the patient is seen as an autonomous purchaser of services. It assumes that persons are free to choose between different courses of action. Their consent is required. This, it is submitted, will be a factor to be considered when assessing the validity of medical contracts exonerating the doctor/hospital from professional liability arising from their negligence. The doctor-patient relationship is not a new concept nor is the term a modern invention. The term, albeit in unwritten form, first emerged during the ancient period. Although priestly, medicine was practiced at the time. The concept doctor-patient relationships was not known in its present form, nonetheless, a relationship between healer and patient was in fact recognised at the time.

The term owes its birth to the promotion and maintenance of medical standards. Where harm was caused to a patient, this led to sanction.

In terms of the historical tract of the recognition of the relationship between doctor-patient, the relationship received more prominence during the rule of King Hammurabi (1792 BC) in which the exercise of a duty of care towards the patient became formalistic. It was during this period that traces of medical ethics and the standard of conduct are founded. [6]

The Babylonians in 2500 BC broadened the relationship with the introduction of greater obligations on the healers, including, penal and civil sanctions for the deviations from the standard of conduct. The term doctor-patient relationship continued to be refined. It was especially during the Greek period that Greek writings emerged which focused on the virtues and high moral standards and strong ethical values required from doctors. The writings of Hippocrates (460-360BC), who is generally acknowledged as the father of medical science, through his influential philosophy of the time, impacted very much on medical science in ancient Greece. His Hippocratic Oath is undoubtedly one of the greatest

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4 The doctor was seen as benevolent and will only undertake actions not harmful to the patient and therefore the patient's explicit permission was not necessary. See Benatar "The Changing Doctor-patient relationship and the New Medical Ethics" *SA Journal of Continuing Medical Education* Vol. 5 (April 1987) 27; See also Strauss "Geneesheer, Pasient en Die Reg: 'n Delikate Driehoek1987" TSAR 1ff.

5 See Benatar (1987) 29; See also Strauss *TSAR* 1987-1 1ff.

6 It was Hammurabi's belief at the time that *"the strong may not oppress the weak"*. See Chapman Physicians, *Law and Ethics* (1984) 5.

contributions to the practice of medicine. [7] The Hippocratic Oath then became the touchstone of modern medical ethics which have bound physicians in their conduct for many centuries. The Hippocratic Oath at the same time influenced the doctor-patient relationship and continues to do so today. [8] One of the objectives of the Oath was to prohibit the doctor taking advantage of the patient because of the nature of their relationship which was built on a position of trust.

The Roman Era was characterized by a lack of advancement of scientific development in medicine, [9] but, in a legal sense, the nature of the doctor-patient relationship was regulated by the *Lex Aquilia* which defined negligent medical conduct. [10] At the same time, remedies inter alia the *Lex Cornelia* and the *Lex Pompeia* were founded to deal with civil and criminal transgressions against patients. [11] A further significant feature of this era is the emergence of a clear identification of the nature of the doctor-patient relationship which was founded on the one hand, on contract based on Ulpianus' writings and on the other hand on the doctor's duty to take care under the *Lex Aquilia*. Consequently, legal remedies were founded during the Roman Era in both contract and delict. [12] A clearly identifiable standard of conduct for medical practitioners were founded and measured against the yard stone *imperitia culpae adnumeratur* which included ignorant conduct. [13]

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7 Jones *Hippocrates* (1923) 291. See also Strauss and Strydom (1967) 175; for a discussion of the influence of Hippocrates at the time see Carstens and Pearmain (2007) 610.

8 Edelstein *Legacies in Ethics and Medicine* (1977) 75 believes that the Hippocratic Oath embodies the truth between the doctor and the patient.

9 Carstens and Pearmain (2007) 611.

10 Frier *A Casebook on the Roman law of Delict* (1967) 39.

11 Amundsen "The Liability of the Physician in Roman Law" *International Symposium on Society, Medicine and Law (ed Karplus J)* (1973) 21.

12 Amundsen (1973) 20; Frier (1967) 39.

13 Amundsen (1973) 22 discusses the nature and effect of the standard of care citing the *Digesta* 50 17 32: "(Gaius 7 *ad edictuum provinciale): Imperitia culpae adnumeratur"; Inst Just* 4 3 7 *"Imperitia culpae adnumeratur, veluti si medicus ideo servum tuum occiderit, quod eum male secuerit aut perperam ei medicamentum dederit"*. Translated *"Imperitia is defined as lack of professional skill, lack of capacity, lack of knowledge, generally, incompetence relative to the standards that were expected of a person giving services, whether artisan or physician, craftsman or architect, whether acting under contract or mandate."* According to Carstens and Pearmain (2007) 613 this rule entailed that ignorance or incompetence was regarded as negligence, i.e. the absence of professional skill and experience which are required and set by the medical profession i.e., the physician performing an operation in an unskilful or incompetent manner.

The post Roman Era saw the development of medical ethics with the introduction of forensic medicine and medical jurisprudence. Further legal remedies inter alia the *Leges Barbarorum* and the *Lex Visigothorum* were founded which further regulated the conduct of doctors. The Renaissance period consolidated the doctor's duty of proper care and skill, the breach whereof, lays the medical practitioner open to an action of trespass in tort. A fundamental feature of this era was the introduction of medical practice in furtherance of public service. A service ideal was executed, devoted to the client's interests. [14]

The Roman Dutch Era was characterized by a strong commitment in documenting, by way of legal writings, the duties of medical practitioners and the requirements for legal liability. It was especially the writings of De Groot, Vinnings, Noodt, Vinnius and Huber who brought into discourse the role of the medical practitioner and his liability for medical negligence. It appears that in this regard the moral convictions of the community and public policy played a significant role in determining the delictual and criminal liability of medical practitioners. [15]

The nature of the relationship between the doctor/hospital/healthcare provider-patient during the Pre-Modern and Modern era very much remained the same and has been shaped by a strong commitment to long-standing principles of medical ethics in which conscience and the intuitive sense of goodness, public conscience, responsibility, the Hippocratic Oath, the sanctity of life and bodily integrity play a major role. [16] Trust and respect also continue to influence the relationship. Normative ethics including the responsibility of medical practitioners and hospitals to comply with standards of conduct, including moral principles, rules, rights and virtues continue to dominate the relationship. [17] Adequate care

14 Berkhouwer and Vorstman *Die Aansprakelijkheid van de Medicus voor Beroepsfouten door Hem en Zijn Helpers Gemaakt* (1950) 18-19; Porter *The Greatest Benefit of Mankind* (1999) 85ff; Rhodes *An Outline History of Medicine* (1985) 37-38; Cronje-Retief (2000) 23-24; See also the more recent publication of Carstens and Pearmain (2007) 615.

15 See De Groot in his *Inleidinge tot die Hollandsche Rechts-Geleerdheid* 3 33 5; See also Scott: "Die Reël Imperitia Culpae Adnumeratur as Grondslag vir die Nalatigheidstoets vir Deskundiges in die Deliktereg" - *Petere Fontes LC Steyn Gedenkbundel* (1981) 134; For a comprehensive discussion on the influence of Roman Dutch Law see Carstens and Pearmain (2007) 616-617.

16 See the writings of Jones (1996) 18ff; The writers Mason and McCall-Smith (1991) 14-17 in particular, emphasizes the role of medical ethics in the doctor-patient relationship; See also Ficarra (1995) 147ff; Skegg (1988) 8.

17 The writers Beauchamp and Childress (2001) 1-7 hold the view that normative ethics dictate to the medical practitioner the responsibility he/she has to show in maintaining standards of conduct, including moral principles and virtues; See also the very enlightened article by Carstens and Kok 2003 *SAPL* 430, 449-451.

and safety of patients confirming the `social contract' between the practitioner and patient in which the practitioners pledge to act to the benefit of their patients also remain a feature of the nature of the relationship in the modern constitutional state in which South Africa finds itself today. Normative medical ethics in the form of codes/regulations is viewed as a protective measure of human rights namely to do the patient no harm and to act always in the best interests of the patient. [18]

What has changed, however, in the nature of the doctor-patient relationship is the legal characterisation of the relationship and the sociological construction thereof. [19] In so far as the legal characterisation is concerned, a shift in the foundation of liability has taken place. Whereas the medical practitioner, prior to the modern era, incurred liability arising from his common calling and his deviation from his duty to use proper care and skill, [20] in the modern era the medical practitioner's liability arises *ex contractu* alternatively *ex delicto* or simultaneously. [21]

The relevance of establishing whether the doctor or hospital's staff's liability arises *ex contractu* alternatively *ex delicto* is to prevent a situation where patients could waive all or some of their delictual rights and negotiate the terms of liability through private contracts. [22]

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18 See Veatch (1997) 21; Carstens and Kok 2003 *SAPL* 430, 449-451.

19 See Benatar (April 1987) 27; See also Strauss (1987) *TSAR* 1ff.

20 Picard and Robertson *Legal Liability of Doctors and Hospitals in Canada* (1996) 1-2 state that in order to protect the public, certain legal constraints and expectations were placed on those who professed such a calling. These included, in particular, a legal duty to use proper care and skill. In turn, the seed of negligence action sprang to life; See also Teff Reasonable Care - *Legal perspectives on the doctor patient relationship* (1994) 159 states that originally the civil liability of doctors was derived from their status or calling and was rooted in the failure to exercise the skill and diligence expected in their calling. As, in some respects, medical transactions seem to fall more naturally within the realms of private law, the liability of doctors also came to be seen as contractual, especially, with the influence of the law of contract; See also Holdsworth *History of English Law* (1923) iii.

21 Van Oosten (1996) 57-58; See also the discussion of Carstens and Pearmain (2007) 407-409 with reference to the cases of *Van Wyk v Lewis* 1924 AD 438 and *Pinshaw v Nexus Securities (Pty) Ltd* 2002 (2) SA 510 (C) why it is so important to establish before a litigant engages in litigation, whether the claim is founded in contract or in delict. It is therefore important to decide upon which field either in contract or in delict the cause of action arises. The Pinshaw matter dealt with an indemnity clause exonerating the directors from liability arising from pure economic loss. The plaintiff proceeded against the first defendant on contract and against both the first and second defendants in delict. The court found that the same facts may give rise to a claim for damages *ex delicto* as well as one *ex contractu* and allows a plaintiff to choose which he wishes to pursue.

22 In this regard Teff (1994) 167 states that maintenance of high standards in health care is seen as an overriding need, not to be jeopardized by allowing providers to exercise their bargaining power to the detriment of relatively vulnerable and inferior patients. This, warns the writer, could lead to widespread diminution of standards,

The traditional sociological nature of the doctor-patient relationship was founded on the paternalistic model in which authority was invested in doctors, by society, because of their knowledge of bodily functions and disease. The doctor, akin to that of the role of the parent, is seen to give guidance and direction to the patient. [23]

The paternalistic model in which the doctor took actions or decisions on behalf of the patients, if necessary without their permission, sometimes even with coercion, has in the modern day been transformed into the autonomy or contract model which reflects the basic human right to self-determination in which the patient is seen as an autonomous purchaser of medical services and who is afforded protection under consumer sovereignty. The main features of the autonomy or contract model include the patients are seen to play a much more active roll in the relationship and the decision-making process. Consent by the patient is of utmost importance in promoting this model. The fiduciary nature of the relationship between the doctor and patient is another feature which emanates from the latter model in which the relationship is seen to have been built on trust and confidence, and in which doctors have an obligation to their patients to act with utmost good faith and loyalty and not to allow their personal interests to conflict with their professional duty. [24]

It will be argued when assessing the validity of exclusionary clauses in medical contracts that the doctors/hospitals modus in making use of these types of clauses to exonerate them from liability is very much based on the paternalistic position the doctor once occupied. It will be argued as well that to allow them to regulate their relationship in this regard, is an improper derogation from an area of public concern, namely, to maintain medical standards in public interest. Our common law, especially, Roman-Dutch law and foreign law *inter alia* English law; have had a tremendous influence on the development of the South African common law. Although Section 39 of Chapter 2 of the Bill of Rights contained in the Constitution 1996 Act 108 of 1996 makes provision for considering international law and foreign law, South African Courts have frequently stressed that

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contrary to the interests of patients and is difficult to reconcile with the ethical obligations of doctors.

23 Picard and Robertson (1996) 3; Benatar (April 1987) 27ff.

24 Picard and Robertson (1996) 3; Benatar (April 1987) 27ff; See also Grubb "A Survey of Medical Malpractice Law in England: Crises? What crises? (1985) 1 J *Contemp Health Law and Policy* quoted in Giesen "From Paternalism to Self-Determination to Shared Decision Making" *Law and Medicine Acta Juridica* (1988) 107 at 115 highlights the change towards the patient's self determination when he states:
"Paternalism was more appropriate to a by-gone age when the population were presumed to be uneducated and therefore incapable of playing an equal role in the doctor-patient relationship. Such a view has no foundations in our present society and consequently does not have any right to be reflected in our legal system."

foreign law and/or international law should not carte blanche be followed by our courts but rather with circumspection. [25]

Nevertheless, in a medical context, our courts have at times followed the trend of other countries such as England, the United States of America, Canada and Germany.

The Appellate Division (as it was known then) as long ago as 1924 in the case of *Van Wyk v Lewis*, [26] through a minority judgement of Kotze JA, relied on the English decision of *Hillyer v The Governors of St Bartholomew's Hospital* [27] to answer the question of *res ipsa loquitur* and finding that the placing of a foreign substance in the patient's body and leaving it there when sewing up the wound, unless satisfactorily explained, establishes a case of negligence.

In the case of *Castell v De Greeff* [28] both the court a quo and the Appeal Court relying upon English law as well as the United States of America, considered whether informed consent should form part of South African law? Scott J delivering the judgement in the court a quo noted that the House of Lords in *Sidaway v Governors of Bethlem Royal Hospital and Others* [29] declined to adopt the doctrine and instead reaffirmed the `Bolam'

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25 In the Constitutional Court case of *Bernstein v Bester* 1996 BCLR 449 (CC), 1996 2 SA (CC) par (133), Kriegler J (Didcott J concurring) stated: *"I however wish to discourage the frequent and, I suspect, often facile resort to foreign `authorities'. Far too often one sees citation by counsel of, for instance, an American judgement in support of a proposition. The prescripts of section 35(i) of the (Interim) Constitution are also clear: where applicable, public international law in the field of human rights must be considered, and regard may be had to comparable foreign case law. But that is a far cry from blithe adoption of alien concepts or inapposite precedents"*. See also *Ferreira v Levin; Vryenhoek v Powell* 1996 1 *BCLR* 1 (CC), 1966 1 SA 984 (CC) par (190). See however the strong view adopted by the Constitutional Court in *Carmichele v Minister of Safety and Security* 2001 (4) SA 938 (CC) 955-960 with regard to the provisions of s39(1) of the Constitution when developing the common law. Ackermann et Goldstone JJ had this to say: *"(39) It needs to be stressed that the obligation of Courts to develop the common law, in the context of the s39 (2) objectives, is not purely discretionary. On the contrary, it is implicit in s39(2) read with s173 that where the common law as it stands is deficient in promoting the s39(2) objectives, the Courts are under a general obligation to develop it appropriately. We say a `general obligation' because we do not mean to suggest that a court must, in each and every case where the common law is involved, embark on an independent exercise as to whether the common law is in need of development and, if so, how it is to be developed under s39(2). At the same time there might be circumstances where a court is obliged to raise the matter on its own and require full argument from the parties."* The court subsequently drew on international law i.e. European Convention on Human Rights as well as the European Court judgement of *Osman v United Kingdom 29 EHHR 245* to decide the issue.

26 1924 AD 438.

27 1909 2 KB 828.

28 1993 (3) SA 501 (C); 1994 (4) SA 408 (C).

29 (1985) 2 WLR 480 (HL); (1985) 1 ALL ER 643 at 488.

test and consequently said that in his view, there was no justification for adopting it in South African law.

Delivering the decision on appeal Ackerman J stated that there can be no justification for not introducing or adopting the doctrine of informed consent in South African law. He added that there was indeed a necessity for introducing a patient-orientated approach in this connection. Ackerman J held that it is clearly for the patient to decide whether he or she wishes to undergo the operation. This, he added, was in the exercise of the patient's fundamental right to self-determination. In this regard Ackerman J relied heavily on the writings of the international writer *Giesen* [30] as well as two leading decisions of the Australian courts [31] which dealt with the right to self-determination. He consequently held that the principles contained therein should be adopted in South African law as it accords with development in common law in countries like Canada, the United States of America and Australia, as well as judicial views on the continent of Europe. [32]

In a subsequent case of *Pops v Revelas,* [33] the court considering the aspect of consent in hospital consent forms, looked at the doctrine of informed consent. Consequently the court considered the principles laid down by Ackerman J in his decision in Castell but placed great emphasis on Canadian law, more particularly the 1980 Supreme Court decision of *Reibl v Hughes* [34] and *Haluska v University of Saskatchewan et al*. [35]

Professional negligence in which a specialist gynaecologist allegedly failed to advise the

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30 *International Medical Malpractice Law* (1988) 375 after drawing attention at page 289 to the fact that `an increasing number of both common and civil law jurisdictions' (as diverse as Canada, the United States, France, Germany and Switzerland) have moved away from `professional standards of disclosure' to more `patient-based' ones, Giesen points out (at 297) that there are two patient-based standards that could be applied:

"(i) the "objective" or "reasonable" patient standard, posited on the informational requirements of the hypothetical "reasonable" patient in what the physician knows or should know to be the patient's situation, or

(ii) the individual or "subjective" patient standard, whereby the physician must disclose information which he knows, or ought to know, that his particular patient in his particular situation requires."

31 *F v R* (1983) 33 SA SR 189 and *Rogers v Whitaker* (1993) 67 AL JR 47.

32 Per Ackerman J in *Castell v De Greef* 1994 (4) SA 408 (C).

33 Unreported case heard in the Witwatersrand Local Division and judgement delivered on the 5th August 1999.

34 (1980) 114 DLR (3d) 1 (Can SC).

35 (1965) 153 D.L.R. (2d) 436 (Sask. C.A.).

patient of the risk of the patient being pregnant with a potentially and/or disabled infant - the plaintiff wanting to terminate her pregnancy if there was such a risk was the subject for decision-making in the case of *Friedman v Glicksman*. [36] In this case the court also relied heavily on many reported judgements in foreign countries. `Wrongful pregnancy' or `wrongful birth' according to Goldblatt J is a common claim in the American courts. The court consequently agreed with the reasoning of the American court in *Berman v Allan* [37] stating that the reasoning of the American courts is sound and fit comfortably within the *Aquilian* action. Goldblatt J consequently remarked that a doctor acts wrongly if, he either fails to inform his patient, or incorrectly informs the patient, of such information she should reasonably have in order to make an informed choice of whether or not to proceed with her pregnancy or to legally terminate such pregnancy.

Similarly, the Supreme Court of Appeal, in the case of *Mukheiber v Raath* [38] Olivier JA, when referring to the so-called actions for `wrongful conception', `wrongful birth', `wrongful life' observed how troublesome these type of cases had been in the courts in England, the United States of America, Canada and Germany. Having relied previously on foreign law where the position seemed less clear in South Africa, it is surprising that Brandt JA in the Afrox case did not even consider the trend which countries such as the United Kingdom and the United States of America had taken to deal with exclusionary clauses in medical contracts. Had Brandt JA resorted to giving objective consideration to the legal position of exclusionary clauses in medical contracts, the result of the Afrox case may very well have been different.

It is especially in the shift in the doctor-patient paradigm from a paternalistic model to the patient autonomy model, which the court, in *Castell v De Greef* 1994 (4) SA 408 (6) relied heavily on the American doctrine of informed consent, in changing, the legal position in South Africa.

It must be emphasized that although, the nature of the relationship between the medical practitioner and the patient has been described differently over many centuries, what has emerged with certainty is that the relationship arises both contractually and from the doctor's duty to take care. The latter owes its existence to the creation of such rules

36 (1996) (1) SA 1134 (W).

37 404 A 2d 8 (1979).

38 1999 (3) SA 1065 (SCA).

assisting in the setting of outer limits of acceptable conduct -a minimum standard of professional behaviour which may, very well, arise independently of any contract but at the same time, creates a norm when the medical practitioner and the patient enter into a contractual relationship.

2.2 Historical Overview of the Doctor-Patient Relationship and its Development

2.2.1 General

As was pointed out earlier, the concept Doctor-Patient Relationship is not a modern invention. It has existed ever since medicine was practiced. Likewise, the doctor's duty to take care and to act reasonably towards his patient is equally as old. [39]

Although philosophy, religion, normative ethics, the Hippocratic Oath and other factors *inter alia* public policy and the moral convictions of society, have shaped the nature of the duty to take care and to act reasonably, nonetheless, this duty still remains the cornerstone of medical practice today. It has emerged as a fundamental principle inherent in the doctor-patient relationship. [40] Equally, the contractual relationship, in which the doctor's duty to take care play a major role between the doctor-patient, is not a modern invention as it was recognised as far back as the Roman Era. [41] Since medical practice first emerged, various ethical codes, regulations and the Hippocratic Oath itself were created wherein a standard of care was formulated, the purpose of which, was to protect the general public against conduct of doctors who breached their duty to take care and/or contractual relationship. At the same time, various remedies were founded and made available to patients and their dependants, who would sue those doctors who had deviated from the laid down standard of care. [42] Later, with the invention of hospitals and the

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39 Mason and McCall-Smith (1991) 3ff; Picard and Robertson (1996) 1ff; Teff (1994) 159ff; Holdsworth (1923) iii; Rhodes (1985) 7ff; Cronje-Retief (2000) 24-25; Carstens and Pearmain (2007) 607ff.

40 Van Oosten (1996) 53; Rhodes (1985) 11-12; Porter (1999) 54-61; Carstens and Pearmain (2007) 619ff.

41 Van Oosten (1996) 53 states that as a general rule the contract between the doctor/hospital and patient takes the form of letting and hiring of work (*locatio conductio operis*). This thinking is in line with the Roman law thinking. See Zimmerman *The Law of Obligations Roman Foundations of the Civil Tradition* (1990) 393 who states that the Medicus practice was that of a *locatio conductio operis*; Amundsen (1973) 17 equally recognize the contractual relationship in Roman Law.

42 Van Oosten (1996) 57; Amundsen (1973) 17; Picard and Robertson (1996) 2ff; Nathan Medical Negligence (1957) 7; Teff (1994) 160.

establishment of other health care providers, the remedies available for the breach of the duty to take care as well as the breach of the contractual obligations extended to those patients and their families who felt aggrieved. [43] The recognition given to the doctor/hospitals duty to take care and the contractual obligations he/she or it has towards the patient, will become important strands in the investigation into whether it is acceptable practice that a doctor, hospital or other health-care providers may protect himself, herself or itself, against liability for alleged negligence in treating the patient or for some other form of malpractice, in getting the patient to sign a waiver of claims, indemnity form or a so-called "disclaimer" prior to the intervention.

2.2.2 The Ancient Period

It was during this period that the first traces of the history of medicine are found. It was during this period that through the Science of Palaeopathology the history of medicine is introduced and made known to modern man. [44]

The most striking characteristics of the era of pre-historical medicine were the belief in the supernatural: Supernatural forces were thought to cause diseases, supernatural reason was accordingly used as diagnostic methods and treatment was supernatural in character. [45]

In time, especially in the period 5000 - 4000BC in the Eastern Mediterranean, medicine was predominantly of a magical or religious nature in which priests practiced medicine in which the religious beliefs of the day played a major role in diagnostic methods and treatment. [46]

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43 Mason and McCall Smith (1991) 6.

44 See the definition of Palaeo Pathology: *`Palaeo-' Oxford Advanced Learner's Dictionary 10th impression 1994. `Palaeo-pathology' as spelt by Castiglioni Medicine 13. Palaeo-, palae-, US paleo-, pale- comb form. Indicates ancient or prehistoric; [Greek palaio, from palaois, ancient, from palai, long ago.] Reader's Digest Universal Dictionary 1988 1113. Pathology n. 1. The scientific study of the nature of disease, its causes, processes, development, and consequences. 2. the anatomical or functional manifestations of disease, or of a particular disease, for example changes in organs and tissues. Reader's Digest Universal Dictionary 1988 1134.* See also Cronje-Retief (2000) 23-24. The author states that it was through the science of palaeo pathology that *"the first obscure evidence of primitive man's medicine is frowned which were instinctive medicine, empirical medicine, magic medicine and priestly medicine."* See also Castiglione *Medicine* (1975) 13 14 51.

45 See Cronje-Retief (2000) 24 - It is the supernatural element according to the author that distinguished primitive medicine from modern medicine. See also Peters et al *Medical Practice* (1981) 1.

46 See Cronje-Retief (2000) 24; See also Peters et al 33-44.

Even as far back as the ancient days despite the practice of magic medicine and priestly medicine, the promotion and maintenance of medical standards although primitive and unwritten, was recognised. During this period individuals emerged who felt a calling to treat the ill and to find ways to cure human ailments. The underlying rationale behind this movement of healing stems from the philosophy that the creation of man necessitates the preservation of life. [47] Although the healers during this period were very much influenced by supernatural powers, there was a strong belief that medicine consisted of care and compassion for the sick and injured. [48]

For that reason restrictions were placed on the conduct of the doctor, in that it was expected of the doctor to exercise a duty of care towards the patient.

Though the promotions and maintenance of medical standard was unwritten at first, the Babylonian and Egyptian societies who were more sophisticated in their approach. In this regard it was especially King Hammurabi of Mesopotamia 1792 BC who promulgated rules and sanctions to control the activities of physicians and surgeons. What followed was the adoption of the first case of medical ethics and a standard of conduct, for the physicians at the time. [49]

The case of Hammurabi was conceived by the Babylonians around 2500BC and detailed. The nature of the conduct required of physicians at the time as well as the doctor's penal and civil responsibility and medicine fees were specified. [50]

In particular the development of ancient Egyptian medicine took place parallel and

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47 See Smit "Die Geneeskunde en Die Reg" (1976) *De Jure* 107 - 119; Mason and McCall Smith (1991) 3 - 6 This continued to be the position during the later periods for the Declaration of Geneva, the Hippocratic Oath and other Codes of Medical Ethics endorse this principle. The Declaration of Geneva includes *inter alia* the following undertaking: *"I will maintain the utmost respect for human life from the time of conception; even under threat. I will not use my medical knowledge contrary to the laws of humanity."* See further The Appendices which include the Hippocratic Oath and other Codes of Medical Ethics.

48 Rhodes (1985) 7; Picard and Robertson (1996) 7.

49 The Code of Hammurabi contained medical ethical rules and legislation and provided professional fees for physicians. See the discussion of the influence of the Code Carstens and Pearmain (2007) 609.

50 Sanbar et al (1995) 6; See also Cronje-Retief (2000) 24-25; See further Chapman (1984) 5 who states that the essence of the code of ethics at the time centered around Hammurabi's belief *"that the strong may not oppress the weak."*

independently to that of Mesopotamia. Although during this period supernaturalism still had a strong influence to bear over the practice of medicine, what emerged as well, is priestly medicine during which period the rationalisation of patient's diagnosis and diseases steadily emerged. During this period the Egyptian papyri were promulgated, the first documented descriptions of the priest-physician, as well as methods of establishing diagnosis and appropriate treatment decisions. It also served as an ethical code, in which, the priest-physician's penal responsibility was documented in that, innovative or unconventional treatment on a patient that caused the death of the patient could result in the killing of the treating physician. [51]

Religious medicine continued to make inroads during this period. It was particularly during this period that Jewish medicine with strong religious overtones emerged. Prophets such as Amos, Jeremiah and Isaiah sounded strong ethical messages to leaders of Israel and Judah, which were redirected centuries later to include the medical profession which occupied the same status as priests and judges at the time. What lay at the foundation of Jewish medicine was social ethics and even social hygiene. [52] It was during this period that under the Talmudist Body of Laws the Nezikin (from the Hebrew root meaning "to damage or injure") provided for the first traces of the duty to take care. It was then that the duty arose. If one has in one's control, something, which, if misapplied may do damage. Negligence (peshiah), in Talmudic law, included every kind of breach of duty, whether recklessness, gross carelessness or ordinary negligence. [53] It was during this era that Isaac Israel produced a medical works entitled: *"The Book of Admonitions to the Physicians"* in which his precepts about thorough knowledge, attention to patients, and prompt response to their needs were emphasized. [54] The ideal doctor as depicted in ancient Hebrew writings had to possess strong virtues and high moral standards. What was also expected of the doctor was to take good care of the patient with the aid of such medicines and cures as are required. [55] Medicine practiced in other religions with strong ethical values also became known through writings. In this regard medicine of ancient Persia and India was perceived to be a magical experience, which later changed into a

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51 See Cronje-Retief (2000) 25; See also Sanbar et al (1995) 6.

52 See Cronje-Retief (2000) 26; See also Sanbar et al (1995) 6; See further Chapman (1984) 10 - 14. The author expresses the view that during this period the issue of *"righteousness"* was advocated which implied *"benevolence, kindness, generosity, the burning compassion for the oppressed."*

53 Chapman (1984) 13.

54 Burns *Legalities in Ethics and Medicine* (1997) 3.

55 Margalith "*The Ideal Doctor as Depicted in Ancient Hebrew Writings"* published in Burns (1977) 7 – 11.

religious ideation and Hindu medical mores, recorded as akin to those of Babylonians and the Greeks, whereas Persian medical ethics had an Arabian flavour. [56] Although ancient Greek medicine during this period was still characterised by Greek physicians maintaining that Gods punished people through illness, and, ritual sacrifices and purification ceremonies were used to cure their patients, it was the Hippocratic medicine (460 - 360BC) which rescued ancient Greek medicine, in that the supernatural stigma was exchanged for rational considerations of scientific value, such as clinical observations. [57]

It is the Hippocratic Oath which is the touchstone of modern medical ethics and which has bound physicians in their conduct for many centuries and has also served as a teaching environment in the teaching of Moslem, Jewish and Christian physicians thereby spreading throughout the Middle East and Europe. [58] The Hippocratic Oath very much influenced the doctor-patient relationship and continues to do so in modern times. [59] The object of the oath was clearly aimed at protecting the general public as the doctor was prohibited from doing that which would cause harm to his patient. An undertaking was also given by the doctor that he would not take advantage of the relationship between doctor and patient. For that reason, a relationship built on trust, became a focal point in medical practice. [60] The said Oath then remains the cornerstone of modern medical ethics and indicates the prevailing ethos of how doctors ought to behave towards their patients. During the period of Hippocratic medicine midwives appeared and a textbook for midwives was also compiled. [61] With the rise of intellectual levels during the Greek period, certain morals, ethics and rights actions were established and documented which had as their object, the enforcement of the doctor's duty of care. Ethics during this period were very much influenced by philosophy, in which, virtue and justice and other values played a

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56 See Cronje-Retief (2000) 26; See also Castiglioni (1975) 80 - 97; See further Chapman (1984) 7.

57 See Cronje-Retief (2000) 27; See also Peters et al 2 (1983).

58 See Cronje-Retief (2000) 27; see also Sanbar et al (1995) 6; See further Chapman (1984) who states: *"that the oath `... cannot be looked on as a great source of medical ethics, its chief purpose much more mundane and pragmatic."* **Contra** Edelstein (1977) 75 who states: *"That the Hippocratic Oath became the nucleus of all medical ethics. All men of all religions embraced the Oath and its ideals as being the embodiment of truth."*

59 Rhodes (1985) 11 - 12; Carstens and Pearmain (2007) 610.

60 Porter (1999) 54 - 61. The position of trust which the doctor occupies, has in modern times, been emphasized as the core of the fiduciary model. See also Picard and Robertson (1996) 4-5 who when promoting the fiduciary model, state that doctors have an obligation to their patients, to act with utmost good faith and loyalty.

61 See Cronje-Retief (2000) 29; See also Castiglioni (1975) 146.

predominant role. [62]

2.2.3 The Roman Era

The Romans did not speak highly of the ability of their own physicians, considering physicians of low status. Because of the development of Greek medicine and the empowerment of physicians who became endowed with high levels of skill, Greek physicians were encouraged to do work in the Roman Empire. This resulted in Greek physicians entering into contracts to provide medical services throughout the Roman Empire. [63]

Although Roman medicine did not nearly achieve or equal the scientific developments of the Greeks, what is significant of this era is the Romans introduced an outstanding system of law in which medical law or legal medicine featured. [64]

The *Lex Aquilia* included several references to physicians and medical care, for example, if a surgeon operated negligently on a slave or abandoned his patient, he would be guilty of negligence. [65]

With regard to medical ethics it is especially Cicero in Cicero's De Offieiis (written 46 - 43 B.C.) who concentrated, in his writings, on the justice-righteousness (law-ethics) concept. In this regard he condemns the practice of abstaining from *"doing for one's own profit only what the law expressly forbids."* [66]

He also speaks of practices that are not forbidden by statute or civil law, but that they are nevertheless forbidden by moral law. He also cites Plato's view that: *"..... The first ethical concern of the ruler is to place the good of the people above his own interests; the ruler is the servant of the people, not the other way round."* The doctor's duty is thus compared

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62 Rhodes (1985) 11-12.

63 See Cronje-Retief (2000) 29; See also Chapman (1984) 36-38; See further Peters et al 3 (1981) 3; Carstens and Pearmain (2007) 611ff.

64 See Cronje-Retief (2000) 29; Carstens and Pearmain (2007) 612.

65 Chapman (1984) 36-37; Amundsen (1973) 20; Buckland *Textbook of Roman Law from Augustus to Justinian* (1950) 556; Van Zyl *History and Principles of Roman Private Law* (1983) 264ff; See also Carstens and Pearmain (2007) 613ff.

66 Chapman (1984) 40.

with that of the ruler. [67]

What was installed during this period in the minds of the physicians is that it was the physicians' obligation to place his patient's interests above the loyalty to the medical guild. Medicine was recognised as a calling with an ethical commitment focusing on the patient. This belief was founded on the philosophy of the physician's compassion and love of mankind. Medical humanism was broadly advocated, in which it was generally believed *"where there is no love of people, and where good and bad are given the same value, medicine is degraded and, in a sense ceases to be a profession."* It was also not so much the desire for money and glory as the desire for knowledge of the science that was promoted by teachers of medicine. [68]

Galen, the Greek physician and teacher of ethics, in particular emphasizes virtue and duty and combined Hippocratic and Stoic Hellenic ethics. [69]

2.2.3.1 **The Roman System of Legal Medicine**

In this respect, although the procedure of licensing was not put in place during this period, the profession during this period, unlike the ancient period, also became controlled; a protective measure was put in place in that only those who acquired the skill to treat people had the authority to treat people. What also crystallized during this period is the fact that the duties of the doctor and the standard of care were defined and formally documented. During this period, regulations were also put into place, regulating the doctor-patient relationship. New laws were formulated imposing penalties for those practitioners who did not comply with the required standards of practice as well as their prescribed duties. [70]

2.2.3.2 **The Duties of the Doctor**

The doctor's duties during this period were defined by the distinguished legal writings of Ulpianus and Gaius. It is from the writings of Ulpianus that the contractual relationship (*ex contractu*) as well as the doctor's duty to take care, under the *Lex Aquilia,* first emerged.

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67 See Chapman (1984) 40.

68 See Cronje-Retief (2000) 29; Chapman (1984) 40-42 who quotes from the writings of Scribonius Larcus, a Roman physician, who wrote on the physician's obligations.

69 See Sanbar et al (1995) 7.

70 For a full discussion see Amundsen (1973) 17-25; Cronje-Retief (2000) 30.

[71]

2.2.3.2.1 **The Standard of Care**

Although the sources are silent on individual cases concerning negligent or ignorant malpractice in Roman law, the negligence of experts, as with medical practitioners was measured by the "*imperitia culpae adnumeratur*" rule. [72]

In Roman law, both forms of malpractice, whether negligent malpractice or ignorant, malpractice was measured against the failure to observe the standard of conduct that the law requires. What was expected was a reasonable degree of care measured against the conduct of the reasonable man. [73]

It can safely be assumed that the onus rested with him who alleged that the doctor was negligent. [74]

It was also generally accepted that medical negligence could also be proved by way of the principle *res ipsa locitur*. [75]

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71 See Amundsen (1973) 17-25; See Zimmerman (1990) 393-395 who states that as physicians were able to work for merces, they could render their services under a contract of *locatio conductio*. Both Ulpianus .D. 9, 2, 7 8; Gaius D.9, 2, 8 wrote that the doctor was said to be liable *ex locatio*: *"Proculus ait, si medicus servum imperite secuerit vel ex locato vel exlege Aquilia competere actionim."* See further Buckland (1963) 500 on the position of the liability of the *medici ex contractu*. But Zimmerman (1990) at 1028 highlights the rationale for broadening the liability outside the contractual field. It is said that the contractual relationship did not impose such a strict degree of diligence on the parties. See further the discussion by Carstens and Pearmain (2007) 613-614 of the examples found in the *Digest: Ad Legem Aquiliam* and where the physician was liable in terms of the *Lex Aquilia* to pay compensation. Inst 4 3 7; Van Zyl (1983) 264ff also deals with the aspect of Aquilian liability.

72 In this regard lack of skill is reckoned as a fault. A doctor will therefore be blamed for being negligent where he performs an operation or embarks on the treatment of a patient well knowing that he did not possess the necessary knowledge or experience, and the patient is injured as a result thereof. It is based on the fundamental principle that mere existence of the detrimental occurrence caused by an act performed by the Defendant constitutes a *prima facie* factual presumption that the Defendant had been negligent. See in this regard Carstens and Pearmain (2007) 613-514; See further Amundsen (1973) 22.

73 See Amundsen (1973) 22; Carstens and Pearmain (2007) 613.

74 See Amundsen (1973) 24 Digesta 50 17 32; Inst Just 4 37. See also Carstens and Pearmain (2007) 614; this appears very much to be the position today. *Mitchell v Dixon* 1914 (AD) 525; Dale v Hamilton 1924 (WLD) 200; *Coppen v Impey* 1916 (CPA) 320, 322, *Van Wyk v Lewis* (1924) 444 - 445, 462 - 464; *Afrox Healthcare Bpk v Strydom* 2002 (6) SA 18.

75 See Amendment (1973) 25; See further Van den Heever "The Application of the Doctrine of *Res ipsa Locitur to Medical Negligence Cases: A Comparative Survey" (Unpublished LLD Thesis, University of Pretoria, 2002) 13ff quoted in Carstens and Pearmain. This position has very much remained the position in South Africa today. In certain cases the maxim still applies as strict translation of the maxim entails that the facts of the case speak for*

2.2.3.2.2 **Legal Remedies**

Legal remedies during the Roman Era were founded both in contract as well as in malpractice or both. [76]

2.2.3.2.3 **Breach of Contract**

Ulpianus recognised an action based on contract of service (*ex locatio*) where, for example, the doctor unskilfully operates on a slave. [77]

2.2.3.2.4 **Malpractice**

Acts loosely defined as malpractice were subdivided into three areas namely:

(i) **Wilful Malpractice** - This involves treatment undertaken with the intention of causing an injury to, or death of, the patient;

(ii) **Negligent Malpractice** - This excludes criminal intent, but includes gross negligence, or failure to provide proper attention by an act or omission as a result of which a patient is injured or killed.

(iii) **Ignorant Malpractice** - Here the physician's lack of competence proves harmful or fatal to the patient, i.e. *imperitia culpae adnumeratur*. The legal advices available to the aggrieved party or his family depended very much upon the *animus* with which the act or omission was committed. [78] In this regard the following remedies were recognised.

2.2.3.2.5 **Remedy for Wilful Malpractice**

During this period physicians were at times employed to poison people of high standing

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itself. See in this regard Van Wyk v Lewis 1924 438; *Webb v Isaac*; 1915 (Ed L) 273; *Coppen v Impey* (1924) 509.

76 See Zimmerman (1990) 393ff in which the author discussed the position of physicians with regard to their liability in contract more specifically, ex locatio; See also Buckland (1950) 305. Zimmerman (1990) 1026ff discusses the content of the Aquilian claims in Roman law arising from the liability of the Medici arising from their actions or failure to act which included compensation for the infliction of bodily harm, medical expenses and loss of income. See further the discussion of Amundsen (1973) 20ff; Buckland (1950) 556ff.

77 For a very informative discussion of the work of Ulpianus and the liability of physicians for negligent malpractice see Carstens and Pearmain (2007) 613; See also Buckland (1990) 556; Van Zyl (1983) 264ff; Amundsen (1973) 20: Digesta 48, 8, 15.

78 See Amundsen (1973) 21; See the discussion on the imperitia rule and the influence of the Digesta 50, 17, 32; Inst Just 4 3 7 on the practice of medicine in Roman law by Carstens and Pearmain 613-614; Van Zyl (1983) 264ff; Buckland (1990) 556.

and benefited through their act by being paid by the beneficiaries. Similarly, physicians were also accused often being legacy hunters whereby they benefited directly through their wilful conduct. They could then be charged criminally. [79]

2.2.3.2.5.1 **Lex Cornelia de sicariis et veneficis**

This was criminal remedy available where as a result of the presence of *dolus* the doctor, through poisoning, caused the death of another. But it made no difference whether the physician himself poisoned another or was an accessory to the act, he would, either way, be guilty of homicide. [80]

2.2.3.2.5.2 **Lex Pompeia de parricidiis**

This was also a criminal remedy available where the death penalty was imposed upon a doctor who was found guilty of the poisoning of a relative. [81]

2.2.3.2.5.3 **Other Regulations**

Regulations were imposed during this era which were particularly aimed at preventing Doctors from exploiting their influence in the doctor - patient relationship, by getting the patients to act to their detriment. Ulpianus introduced the *adversa medicamenta* whereby regulations were put in place to punish the doctor who coerced his patient to act to his or her detriment. For example, a physician who compelled a sick man to sell his possessions would be punished and ordered to return that which he had received by coercion. [82]

2.2.3.2.6 **Lex Aquilian Action**

The *Lex Aquilian* action had as its aim an element of compensation, in that under the provisions of the *Lex Aquilia,* a person responsible for the death of a slave, or for his injury, was obliged to compensate the slave owner the highest value of the slave during his last year's working life prior to his death. Although it is not clear what compensation would be paid if the slave was merely injured, it is suggested the owner would be paid the loss of value of the slave, either temporary or permanent, as well as the expenses involved

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79 See Amundsen (1973) 21; Berkhouwer and Vorstman (1950) 16ff; Carstens and Pearmain (2007) 612.

80 See Amundsen (1973) 20-21; For a discussion of the role of the *Lex Cornelia* in Roman law see Carstens and Pearmain (2007) 612.

81 See Amundsen (1973) 21.

82 See Amundsen (1973) 21; Carstens and Pearmain (2007) 613 cites the writings of Ulpianus Digesta 50 13 3.

in the medical care. [83]

In order to succeed with a claim under this action, the aggrieved had to rely on *culpa* which freely translated, means "negligence". It was generally accepted during the Roman Law Era that negligence signified the failure to comply with a standard of conduct which the law required. The presence of *culpa* generally involved the failure to use a reasonable degree of care, *non intellegere quod omnes intellegunt*; put differently, not acting as a reasonable man would act or a failure to exercise the same *diligentia* as the reasonable man place in the same circumstances would have observed. [84]

The negligence of an expert, for example a physician, besides being measured against the presence of *culpa*, was also measured against the yardstick *imperitia culpae adnumeratur*. As previously stated *imperitia* is defined as lack of professional skill, lack of capability, lack of knowledge, incompetence relating to the standards that were expected of a person providing services. [85]

This rule was applied during this era where for example a physician conducted an operation in an incompetent manner [86] or giving a slave medicine without having acquired the knowledge becoming the suitability of the medication. [87]

2.2.3.2.7 **Institutiones of Justinianus**

This was a remedy aimed at punishing the physician for his negligence in not providing adequate post operative care, alternatively, not providing care at all. In this regard a physician would act negligently if after performing an operation on a slave he omitted to further treat the patient as a result of which the slave died. [88]

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83 See Zimmerman (1990) 1026 on the different heads of damages offered by the *Lex Aquilia* including compensation.

84 See Buckland (1950) 556; Van Zyl (1983) 264ff; Carstens and Pearmain (2007) 613-614 state that the concept *culpa* can be interpreted in both a narrow sense, meaning negligence, and in a broader context, namely, it is indicative of fault; See further the discussion of Amundsen (1973) 21-22.

85 The rule *imperitia culpae adnumeratur* rule is described in both the Digesta 50 17 32 and the Institutes of Justinian Inst Just 4 3 7: "I*mperitia culpae adnumeratur, veluti si medicus ideo servum tuum occiderit, quod eum male secuerit aut perperam ei medicamentum dederit"*. For a discussion of the rule and the effect of the imperitia rule see Carstens and Pearmain (2007) 613-614; Van Zyl (1983) 214; Amundsen (1973) 22.

86 Carstens and Pearmain (1973) 613 describes the rule as indicative of the absence of professional skill and experience which were required and set by the medical profession; See also the discussion of Amundsen (1973) 22 highlighting the provisions of the Digesta 9 2 7 8.

87 Carstens and Pearmain (1973) 613-614 highlighting the writings of Gaius D9 2 8; See also Amundsen (1973) 22.

88 Carstens and Pearmain (2007) 614 cites the Inst Just 4 3 6: *"Praetera si medicus qui servum tuum secuit*

2.2.4 The Post Roman Era

2.2.4.1 The Medieval Era and the middle Ages

It is noteworthy to record that the development of medical ethics, particularly during this Era began to make inroads. In this regard, it was the Judea-Christian influence which directed medical ethics. In this instance, the Christian belief was that disease stemmed from sin, the devil or witchcraft and could be countered only by prayer and recovery was perceived as a miracle. [89]

As medicine was governed by the law and the law was administered by the Priests, religion and medical practices were, therefore, inseparable. Religious doctrines it was felt widely benefited the community. [90] During this era the Jewish people were fighting for survival as a nation. The principle was accepted that the rights of the individual must be sacrificed for the good of the community. This resulted in people who were infected with, for example, venereal diseases to being isolated. [91]

The above philosophies were ultimately received into Christian cultures who adopted the concepts of equality, charity and devotion to the less fortunate. Medicine during this period was also kept alive in monasteries which became hospitals of the day and where medicine was practiced. [92]

This period was known as the learning period and `self-discovery of man'. It laid the foundation for major advances in the field of medicine *inter alia* the first authentic works on the medical-legal field were published in Italy which emphasized the interrelationship of the subject to both medicine and the law. In this period the first medical textbook was published. [93]

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dereliquerit curationem atque ob id mortuus fuerit servus culpae reus est". See also the discussion of the Institutes of Justinianus Inst Just 4 3 6 dealing with the physician failing to provide post-operative care.

89 Cronje-Retief (2000) 31; See also Peters et al 3 (1981) 3.

90 Mason and McCall Smith I (1991) 6.

91 Mason and McCall Smith (1991) 6.

92 Mason and McCall Smith (1991) 6; Peters et al (1981) 3; Cronje-Retief (2000) 31.

93 See Cronje-Retief (2000) 51 - 52; See also Curran *Health Law* (1998) 2. The author opines that the medico-legal field is today termed medical law.

This era also brought with it `forensic medicine', created in Germany, as well as legal medicine, created in Italy, in which the first autopsies were performed for legal purposes. In this way knowledge of anatomy was gained. [94]

During this period the subject of `medical jurisprudence' was also founded which included subjects such as forensic psychiatry, forensic pathology and public health regulations. [95]

2.2.4.1.1 **Legal Remedies**

During this period legislation in the form of the *Leges Barbarorum* and *Lex Visigothorum* were put in place to regulate the conduct of doctors. It was the second mentioned legislation which was particularly severe against a specific type of treatment excessively engaged in, predominantly by those who were of the medical profession whose level of competence was low.

2.2.4.1.1.1 **Leges Barbarorum**

The laws required that a near relative be present if a physician subjected a female patient to venesection. There was also a provision that where treatment was given under contract and if, under such circumstances the patient died, the physician received no fee. [96]

2.2.4.1.1.2 **Lex Visigothorum**

The penal sanctions introduced by this legislation were particularly severe against a specific type of treatment excessively engaged in, particularly by those members of the medical profession whose level of competence was low. [97]

2.2.5 **The Renaissance Period**

During this era fourteenth-century English judges began to require physicians to treat their patients with diligence. It was therefore required by law that when the doctor attended patients, he did so with proper care and skill. A failure by a physician to adhere to a duty imposed by law made the physician liable to an action of trespass on the case of

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94 Peters et al (1981) 4; See also Curran (1998) 2 who states that `forensic medicine' has come to mean that part of the medical field concerned with the presentation of medical data in courts of law; Cronje-Retief (2000) 53.

95 Curran (1998) 3.

96 See Chapman (1984) 45; Van Zyl (1983) 615ff; Carstens and Pearmain (2007) 615.

97 Carstens and Pearmain (2007) 615 states that it was especially in the West-Gothic Empire (about 500 AD) that the liability of physicians was explicitly regarded by legislation and uses the example of specific provisions pertaining to bloodletting. See also Berkhouwer and Vorstman (1990) 19; Amundsen (1973) 18.

negligence and the physician could be sued in tort. [98]

It was during the late middle ages (starting about 950AD) that universities were founded in which medicine was taught, which subject had as its foundation Greek philosophies. [99]

One of the greatest medical accomplishments during this period was also achieved with the establishment of hospitals. [100]

Medical ethics were inspirational in the founding of hospitals during this period in that Christians founded the first hospitals as a result of the duty they perceived they had to their fellow man. [101]

The finding of the College of Physicians of London (1518) which was preceded by the Royal Charter of Incorporation occurred during this period. The College's main endeavours were to safeguard the status of physicians and the standard of medical practice. The aim was to provide the best service to the public. Entry qualifications were introduced during this period in an attempt to regulate the profession i.e. the physicians conduct was guarded by the College's ethical statutes. [102] Several acts concerning the ethical conduct of physicians were also introduced in the period 1523-1523.

One of its main aims was to control ethical conduct in an endeavour to increase the value of the services rendered. [103]

2.2.6 **The Post Renaissance Period**

During the seventeenth century hospitals opened in the major cities of the United States and Canada. The number of hospitals also increased in France and England. [104]

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98 Holdsworth (1923) 385-386; See further Cronje-Retief (2000) 50; Giesen (1988) 4.

99 Giesen (1988) 4; Peters et al (1981) 3; See also Castiglioni (1975) 375.

100 Peters et al (1981) 3.

101 Carmi *Hospital Law* (1988) 7; Castiglioni (1975) 304 refers to hospitals in 1100 AD. In this regard an `Act concerning physicians and surgeons' was passed in 1512.

102 See Chapman (1984) 62-64; Giesen (1988) 4-5.

103 Giesen (1988) 5.

104 Castiglioni (1975) 659-660; See further Peters et al (1981) 126; Cronje-Retief (2000) 36.

Although this century did not bring about major development in medical practice, specialities developed and surgery was accorded the dignity of being comparable to medicine. [105]

During this century greater emphasis was also placed on the diagnosis of the patient. [106]

The eighteenth century saw a world-wide growth in hospitals and conditions at previously established hospitals faced major improvements, especially in Europe. Practice of medicine in England also became very well organised. [107]

During this era the London's Royal College of Physicians revived the social contract concept which, comprised of a set of moral norms applicable to the established profession. These norms dictated that, not only did the practitioner have to do technically competent and high-quality work, but that he adhered to a service ideal as well, which was devoted to the client's interests. The patient's interest's, more than primal or commercial profit, should guide decisions when the two are in conflict. The service ideal was the pivot around which the moral claim to professional status revolved. [108]
It was particularly Thomas Percival's writings which influenced general thinking in the profession. In this regard see a chapter in his book on the duties of physician - "An enquiry into the Duties of Men in the Higher and Middle Classes of Society in Great Britain, Resulting from Their Respective Stations, Professions, and Employments." The authors' main theme included:

"Diligent and early attention and an honest exertion of his best abilities are the primary duties which the physician owes to his patient. The performance of them is virtually promised, for he knows that it is universally expected when he undertakes the case of the sick man; and consequently, if he neglects to fulfil them, he is guilty of a direct breach of his engagement."

He continues to state that:

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105 Rhodes (1985) 52; Castiglioni (1975) 577; Cronje-Retief (2000) 36.

106 Rhodes (1985) 52.

107 The start of National Health Services although slow, commenced practice. See Castiglioni (1975) 659-660; Carmi (1988) 659.

108 Chapman (1984) 77.

"…. The physician's concern for the patient's recovery must be uninfluenced by private and personal considerations, and that he must show "all affectation of mystery." [109]

The Americans during this period also adopted Percival's Ethics. The Boston Physicians Association citing Percival's Ethics created the code of medical policy which provided *inter alia*: *"Every man who enters a fraternity, engages by a tacit contract not only to submit to the law, but to promote the honour and interest of the association so far as is consistent with morality and the general good of mankind."*

During the nineteenth century all American states finally required all medical practitioners to hold medical licenses reserving practice of medicine for those properly trained and credentialed. [110]

During the industrial revolution, with an increase in personal injury cases flowing from industrial accidents, negligent action in medical malpractice cases replaced the customary English Common Law concept of a duty in the doctor-patient relationship. [111]

The twentieth century, owing to politics, governmental powers, social and economic structures, advancing technologies and legal expansion, ushered in health-care services including National Health Policies in major countries such as England and America. [112]
This era also saw an increase in malpractice suits especially in the United States. [113]

2.2.7 The Roman Dutch Era

This period was characterized by a strong commitment in documenting by way of legal writings, the duties of medical practitioners and prescribing, the requirements for liability. [114]

It was particularly writers such as De Groot in his Inleiding tot die Hollandsche Rechts-

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109 Chapman (1984) 82 - 83; See also *Veatch Medical Ethics (1997) 9*.

110 Castiglioni (1975) 760; Chapman (1984) 103-104.

111 Fleming *The Law of Torts* (1992) 113 137 138; Picard et al (1996) 2; Giesen (1988) 4.

112 See Cronje-Retief (2000) 43.

113 Giesen (1988) 101.

114 See De Groot *Inleiding tot die Hollandsche Rechts-Geleerdheid 3 33 5*; See also Scott (1981) 134.

Geleerdheid wherein the writer illustrates by way of examples under which circumstances a physician incurs liability. In this regard the writer provides as follows:

"Dat de dood door iemands schuld is toegekomen, waer onder mede begrepen is verzuim ofte onwetenheid van een geneesmeester, vroedwijf, verzuim ofte onverstand van een waghanaer ofte schipper, of der zelver zwackheid in't bestieren van schip ofte paerden" [115]

From the foretasted quotation of De Groot the following appears to be the legal position namely, in Roman Dutch Law mere ignorance, lack of understanding and weakness are equal to guilt for which the physician incurs liability. [116]

In essence that appeared to have been the position in Roman law as well. The *imperitea* rule was thus received in Roman Dutch Law. [117]

Vinnings with reference to the *Digesta* [118] cautioned against this type of practice wherein a physician can without just cause incur liability for the death of a patient; Vinnings was
Of the view that the mere fact that a patient dies, is not *per se* indicative that the physician was negligent. [119] One thing is certain, with the introduction in 1532 of Section 134 of The Constitution Criminalis Carolina, physicians who caused the death of a patient through their lack of skill were severely punished, as severe forms of punishment were prescribed in this article. [120]

Noodt emphasized the need for the physician's liability which arose from his professional mistakes. According to Noodt, a duty of care arises as soon as the physician has

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115 Scott (1981) 136; See also the discussion of Carstens and Pearmain (2007) 616 on the role of the *imperitia* rule in the Roman-Dutch law.

116 Scott (1981) 135; Carstens and Pearmain (2007) 616.

117 See Scott (1981) 136.

118 D 1 18 6 7.

119 Scott (1981) 136; It is debatable whether this rule is still applicable in the South African Law particularly in view of the fact that it is not so much unskilfulness in itself which constitutes negligence, but rather an engagement in an undertaking which requires skill with the knowledge that skill is wanting - Boberg, *The Law of Delict* 1st ed (1984) 347, Neethling, Potgieter and Visser - *The Law of Delict* 2ed (1994) 134, Van Oosten - *Medicine and Law* (1986) 21; Contra the cases in which the rule was applied; *Coppin v Impey* 1916 (KPA) 309, *Dale v Hamilton* 1924 (WLD) 184, *R v Van der Merwe* 1953 2 PH (W) 124, *S v Mkwetshana* 1965 2 SA (493) (W) 496 – 497.

120 Scott (1981) 136; Berkhouwer and Vorstman (1950) 24; See also Carstens and Pearmain (2007) 616-617.

undertaken to treat the patient. There is a duty to continue treating the patient even after an operation. The untimely abandoning of a patient when further treatment is indicated "*Quia intempeseva desperavii*" would undoubtedly lead to the liability of the physician should the patient die in the process. [121]

Huber, the prominent writer, advocated during this period, that physicians ought to be held accountable for their actions where patients suffer damage arising from the physician's treatment. [122] During this period public policy and the moral convictions of society played a major role in determining what conduct of physicians constituted delictual and criminal liability. Voet when defending the application of the imperitea rule [123] stated:
"Sicur enim medico imputari eventus mortalitatis neo debet, ita quoque practestu humanae fraglitatis delictum decipientis in periculo homines vana medicinae faciendae pactantis epoxium esse fas non est." [124]

The crux of the matter locked up in the fore stated quotation is that it will be against public policy if physicians are excused for causing damages through their inexperience or clumsiness. [125]

2.2.8 The Pre-Modern and Modern Era

The relationship between the doctor and patient/healthcare provider and patient during this period has remained very much intact and has been shaped by a strong commitment to long-standing principles of medical ethics [126] in which, conscience and intuitive sense of

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121 Berkhouwer and Vorstman (1950) 24; See also Carstens and Pearmain (2007) 617.

122 See Berkhouwer and Vorstman (1950) 24; Carstens and Pearmain (2007) 617.

123 See Scott (1981) 138 - 140. The writer states the above is still very much part of our legal system today. Particularly with the introduction of the Bill of Rights in the Interim Constitution and the Final Constitution which followed, greater emphasis is placed on social responsibility. See also *Cape Town Municipality v Bakkerers* 2000 (3) SA 1049 (A) at 1056 F-G, Cape *Metropolitan Council v Graham ALL* South African Law Reports February (2001) 1 ALL SA 215 (A) at 218 h-i.

124 See Voet - *Commentarius ad Pandectas* 9 2 13.

125 See Scott (1981) 138.

126 See Jones (1998) 18. Mason and McCall Smith (1991) 14-17 who believes that in the doctor/patient relationship, medical ethics play an important role in that: *"trust and respect continue to influence the relationship."* See further Ficarra (1995) 147ff who states that as medicine operates in an ethical climate *"it is essential that ethical principles be applied to the physician-patient interaction."* See also Skegg (1988) 8.
Beauchamp and Childress (2001) 1-7, 27 hold the view that normative ethics have enjoyed a remarkable degree of continuity from the days of Hippocrates until the 20th century. According to the writers, normative ethics include the responsibility of medical practitioners to comply with *".... standards of conduct, including moral*

goodness, [127] public conscience, [128] responsibility, [129] the Hippocratic Oath, [130] the sanctity

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principles, rules, rights and virtues." A violation of these norms *"..... without having a morally good and sufficient reason"* constitutes immoral or improper conduct. The writers state that in addition thereto, health professionals and scientists are also given moral direction which comes through *"the public policy process, which includes regulations and guidelines promulgated by government agencies, the aim of which is to govern a particular area of conduct"* which includes *"abstaining from causing harm to others."* The latter thinking, it is submitted, corresponds with the position in South Africa today. The regulations published in the Government Gazette on the 1st February 1980 No 2948 No 6832 regulate the reasonable degree of care and skill which has to be maintained by private hospitals in maintaining a license held by the licensure. One of the relevant regulations 25(23) requires that: *"All services and measures generally necessary for adequate care and safety of patients are maintained and observed."*Veatch (1997) 21 views the codes regulating the conduct of medical practitioners as a "social contract" between the practitioners and the patients in which the practitioners pledge to *" ..... act to benefit their patients..... ."* For the nature and scope of ethics see Strauss "Ethics in the Treatment of Mental Patients: Some Aspects" in Van Wyk and Van Oosten (Eds) *Nihil Obstat: Feesbundel vir WJ Hosten/Essays in Honour of WJ Hosten* (1996) 181. Steyn The Law of Malpractice Liability in Clinical Psychiatry (unpublished LLM dissertation UNISA 2002) 67-68 defines ethics as *"the science of rules of moral conduct which should be followed because they are good in themselves." According to Strauss in Steyn (N152) 67 "Ethical considerations can never be excluded from the administration of Justice, which is the end and purpose of all civil law." With reference to the functions of the Health Professions Council of South Africa op cit 189 in Steyn (n157) 68 Strauss opines that "ethical rules certainly do have a significant degree of enforceability."* Steyn (2003) 68 correctly, it is submitted associates himself with Strauss when he declares that the set of standards of practice born from ethics and law are "reinforcing and enriching." See also Carstens and Kok (2003) 18 *SAPR/PL* 449-451 who, with South Africa's acquired status as a constitutional state, view the role of normative medical ethics in the form of codes/instruments as "a protective measure of human rights" in that "to do no harm" and "to act in the best interest of the patient". In this regard with reference to disclaimers against medical negligence in hospital contracts which forms the core of the research of this thesis. Carstens and Kok (2000) 450 persuasively argue: *"..... disclaimers against medical negligence in hospital contracts would amount to an unreasonable/unfair/unethical acceptance on the part of a patient to contract to the possibility of harm (in the form of personal injury/death resulting from medical malpractice) by an attending medical practitioner (albeit in the hospital setting) who is ethically bound not to harm."*

127 Mason and McCall Smith (1991) 7 state that *"Conscience, directed by an intuitive sense of goodness, lies in the heart of ethics."*

128 Skegg (188) 8 endorse the idea when he states: *"The conduct of doctors is circumscribed by public conscience."* Mason and McCall Smith (1991) 7 attach great value to public conscience and warn that *"the practice of medicine cannot be conducted solely on the basis of the individual conscience; the conduct of doctors is circumscribed by the public conscience ..... "It* is against this ethical background that the validity of exclusionary clauses in hospital contracts will be investigated as means to determine ultimately whether the exclusion of negligence in hospital contracts favours public attitudes. Put differently, whether regulating the relationship with the patient in this way, does not constitute an improper derogation from an area of legitimate public concern.

129 Hans *The Imperative of Responsibility* (1984*)* 6, 90-95 regards responsibility as the centre of the ethical stage which is borne out by the cliché "he is responsible, because he did it." The significance thereof according to Hans, is the doer must answer for his deed and is thus responsible for its consequences. So strong is his belief in the intrinsic value of responsibility that he argues: *".... responsibility is as unconditional and irrevocable as any posited by nature can be ..... "See* also Van Niekerk "Ethics for Medicine and Medicine for Ethics" *SAFR J. Philos (*2002) 21 (1) 35.

130 It is widely felt that the Hippocratic Oath remains a precursor of modern ethical codes. See Teff (1994) 72 who regards the Oath as *"a powerful symbol of the doctor's responsibility."* The author advocates that its future existence lies in the maintenance of high ethical standards and a sense of obligation to serve the best interests of

of life, [131] bodily integrity, [132] played a major role. What has changed during the Pre

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the patients. See also Giesen Acta Juridica (1988) 114. See further Sanbar et al (1999) 6 who view the Hippocratic Oath as the *"touchstone of modern medical ethics."* For a comprehensive discussion see also Mason and McCall-Smith (1991) 439-446; Carstens and Kok (2003) 450.

131 Brazier - Medicine, Patients and The Law (1992) 29-30 emphasizes the sanctity of life as a cornerstone of ethics in that religious followers and even non-believers share a deep seated instinct that taking human life is wrong as *"life is man's most precious possession."* Included in the Declaration of Geneva, the Hippocratic Oath and other codes of medical ethics is an undertaking which doctors take namely: *"I will maintain the utmost respect for human life, from the time of conception; even under threat, I will not use my medical knowledge contrary to the Laws of Humanity."* See also Mason and McCall Smith (1991) Appendices A - F, pp 251 - 261.

132 A high premium is placed in the modern era on the respect for bodily integrity as means to maintain a high level of ethical conduct. This principle has been included on a wide scale internationally in private Canons of Professional Conduct, Constitutional Legislation as well as the Common Law in both case law as well as academic writings. In *America* the *Canons of Professional conduct* have been promulgated by the American Medical Association which contains ethical standards. Section 1 of the preamble thereof reads: *"The principal objective of the medical profession is to render service to humanity with full respect for the dignity of man"*. See Waltz *Medical Jurisprudence* (1971) 29. See also Sanbar et al (1999) 7; In *South Africa* the conduct of doctors and practice of medicine are governed by ethics contained in the Health Professions Council of South Africa rules of conduct for medical practitioners and dentists, and the guidelines on ethics for medical research. In *England* the nature of service to patients and the accompanying ethical conduct are contained in the National Health Service (General Medical Services) regulations 1992. See also Scott *The General Practitioner and the Law of Negligence* (1995) 16 - 17. The rights of the individual to bodily integrity has found it's way into the constitutional regimes of both the *United States of America* as well as the *South African Constitution*. In America this right is based on the premise that every person has the right to determine what shall be done to his own body. See Prosser and Keeton on the *Law of Torts* 5th Ed (1971) 190; See also Teff (1994) 98. The *South African Constitution* acknowledges a patient's right to bodily integrity. Section 12(2) (C) of Act 108 of 1996 provides that *"everyone has the right to bodily and psychological integrity, which includes the right not to be subjected to medical or scientific experiments without their informed consent."* Internationally, although there is no single source of health rights in international law, many conventions recognizes the patient's right to bodily integrity. See McHale et al *Healthcare Law: Text cases and materials* (1997) 7. See also Art 25 of the *Universal Declaration of Human Rights* as well as Art 12 of the *International Covenant and Economic, Social and Cultural Rights*. The highest attainable standard of physical and mental health is guaranteed under Art 12. In *England*, despite the absence of a written constitution or bill of rights, the rights issue with regard to the bodily integrity is recognised by their common law. In *South Africa* the patient's right to bodily integrity at common law is regulated by the doctrine of informed consent. See Van Oosten - "The Law and Ethics of Information and Consent in Medical Research 2000 *THRHR* (63) 9; Van Oosten (1992) 13; See also Strauss (1991) 3, 91; Claassen and Verschoor (1992) 57-58; Strauss and Strydom (1967) 178. In *South Africa* the principle of the patient's protection to bodily integrity under the doctrine of informed consent was decided in a number of cases. See *Stoffberg v Elliott* 1923 148 at 149 - 150; *Lymbery v Jefferies* 1925 (AD) 236 at 240; *Ex Parte Dixie* 1950 (4) SA 748 (W) 751, *Rompel v Botha* 1953 (T) (Unreported) discussed in *Esterhuizen v Administrator Transvaal* 1957 (3) SA 710 T 719; *Lampert v Hefer*, 1955 (2) SA 507 (A) 508. The patient's protection of bodily integrity at *English Common Law* is recognised through the doctrine of informed consent. See Skegg (1984) 76; See also Kennedy (1988) 177 - 178; Kennedy and Grubb (1998) 110; Brazier (1992) 73 - 74, Teff (1994) 94; Scott (1995) 85 - 94. As far as case law is concerned refer to the matters of *Lindsey County Council v Marshall* (1936) 2 ALL ER 1076 (HL); *Bolam v Friern Hospital Management Committee* (1957) 2 ALL ER 118 (QB); *Chatterton v Gerson* (1981) 1 ALL ER 257 (QB); *Sidaway v Bethlem Royal Hospital Governors* (1985) 1 ALL ER 643 (HL). The *American Common Law* position regarding the preservation of the patient's bodily integrity is highlighted by the American Academic writers Waltz et al (1971) 153; Sanbar et al (1995) 120 -121; Holder *Medical Malpractice Law* (1975) 225. As far as case law is concerned the *locus classicus* is certainly the case of *Schloendorff v Society of New York Hospital* 105 NE 92, NY 1914 in which Justice Cardozo stated "*Every human being of adult years and sound mind has the right to determine what should be done with his own body and a surgeon who performs an operation without his patient's consent commits an*

Modern Era and the Modern Era is the legal characterisation of the doctor-patient relationship, [133] as well as the Sociological Construction [134] which comprises of the

assault for which he is liable in damages". In *Natanso v Kling* 350 P 2d 1093, 354 P 2d 670, KANS 1960 the court held "*A man is the master of his own body."*

133 It was particularly during the Ancient Period that the medical profession and particularly the doctor-patient relationship were characterized by the common calling of those who desired to treat people. Arising from the doctor's status as a member of that calling developed the doctor's duty to use proper care and skill. See Picard and Robertson (1996) 1; Cogg v Bernard (1703) 2ld RAYM.909, 92 E.R. 107 (K.B.); *Banbury v Bank of Montreal* (1918) A.C. 626 at 657 (H.L.) The concept of duty in the doctor-patient relationship as described by Fleming - *The Law of Torts* 1992 101-102 as "*Containing in it the seed of the negligence action which sprang to life in the fertile environment of the industrial revolution.*" What followed was for nearly a century most actions against doctors have been based on negligence. See Picard and Robertson (1996) 2 who state: *"With the development of the Law of Contract, the original basis for liability was suppressed by a contractual one in that, the patient's request for treatment and the doctor's response by commencing care were regarded as consonant with the principle of offer and acceptance."* See in this regard Holdsworth (1923) 385 -386; Picard and Robertson (1996) 2. One of the causes of action relied upon to prove the doctor's liability at contract, was that the physician when commencing treatment of the patient, possessed and would have due care and skill. See Giesen (1988) 6 - 7; See also *Slater v Baker* (1767) 2 WELS 395, 95 ER 860.

134 In this regard the doctor-patient relationship has undergone major changes. The traditional paternalistic model, in which authority was invested in doctors by society arising from their knowledge of bodily functions and disease, was called into question. The paternalistic model equally is based on the belief that doctors subscribe to the moral attributes embodied in the Hippocratic Oath. There are strong links in this model between medicine and religion. The doctor akin to a parent gives guidance and direction and the patient, as with the child, is expected to co-operate. See Picard and Robertson (1996) 3; Benatar (1987) 27; Strauss "Geneesheer, Pasiënt en Die Reg: 'n Delikate Driehoek" *TSAR* 1987 1; Giesen "From Paternalism to Self-determination to Shared Decision making" Acta Juridica (1988) 114; McHale et al (1997) 8-9. What has emerged is a more popular modern day model namely, the patient `autonomy' or `contract' model, which reflects the basic human right to self-determination in which the patient is seen as an `autonomous purchaser of services' who is afforded protection under consumer sovereignty. See Teff (1994) 94, 100-101; Benatar (1987) 29; Strauss (1983) 2-3; Giesen (1988) 116; Kennedy (1988) 178; McHale et al 76-77. Patients in this model are seen to play a much more active role in the relationship and the decision-making process. Consent by the patient is of paramount importance in the decision-making process which in turn, seeks to transfer some power to the patient in areas which affects the patient's self-determination i.e. in cases of chronic illness. See Picard and Robertson (1996)3; Strauss (1987) 4; Giesen (1988) 116; Kennedy (1988) 178. A direct result of the creation and recognition of this model is the doctrine of consent which has in modern history become a significant feature in the doctor patient relationship. See Benatar (1987) 29; Strauss (1983) 4. What has also emerged in more modern times is a reviewed interest in the fiduciary nature of the doctor-patient relationship in which the said relationship is one of trust and confidence and in which doctors have an obligation to their patients to act with utmost good faith and loyalty and not to allow their personal interests to conflict with their professional duty. See Picard and Robertson (1996) 4 who emphasize the fiduciary nature of the relationship. The Canadian Courts in particular have also emphasized the fiduciary nature of the relationship. In the case of *Norberg v Wynrib* 1992 72 D.L.R. (4th) 448 See McLachlin J deciding on a damages claim arising from sexual exploitation by the doctor and the patient expresses himself as follows: "*The relationship of physician and patient can be conceptualized in a variety of ways. It can be viewed as a creature of contract, with the physician's failure to fulfil his or her obligations giving rise to an action for breach of contract. It undoubtedly gives rise to a duty of care, the breach of which constitutes the tort of negligence. But perhaps the most fundamental characteristic of the doctor-patient relationship is its fiduciary nature. I think it is readily apparent that the doctor-patient relationship shares the peculiar hallmark of the fiduciary relationship - trust, the trust of a person with inferior power that another person who has assumed superior power and responsibility will exercise that power for his or her good and only for his or her good and in his or her best interests. Recognizing the fiduciary nature of the doctor-patient relationship provides the law with an analytic model by which physicians can be held to the high standards of dealing with their patients which the trust accorded them requires."*

traditional paternalistic model and the patient autonomy model. Both these models, notwithstanding the era in which they were used or continue to be used, have played a significant role in medical practice and medical law. In the traditional paternalistic model authority was vested in doctors by society arising from their knowledge of bodily functions and disease. The paternalistic model, equally, is based on the belief that doctors subscribe to the moral attributes embodied in the Hippocratic Oath. There are strong links in this model between medicine and religion. The doctor is akin to a person who gives guidance and direction and the patient, as with the child, is expected to co-operate.

In this model the patient is completely passive and the doctor active. The patient cannot contribute in any meaningful way to the interaction within the relationship, and all the decision-making power, lies with the doctor. [135]

In time, this model lost ground to the patient autonomy model within the sociological construction. Various factors influenced the change in the preference shown for this model. The factors include *inter alia* the shift towards consumerism and modern thinking and the recognition and promotion of the doctrine of informed consent. [136]

Academic writers have expressed strong views in favour of the fiduciary aspects of medical practice and in particular its usefulness in providing *"a dynamic tool for reshaping the doctor-patient relationship as means to finding a proper balance in the discourse between patient and doctor."* See Chapman (1984) 140 who describes the fiduciary relationship between the doctor and patient as *"..... One in which the patient's interests are placed first and foremost in the time-honoured traditions of service, duty and honour."* See also Picard and Robertson (1996) 4. What is of particular concern for the academic writers as well is the continued undue influence and imbalance in the power of decision-making which exist between doctor and patient arising from his status as doctor or of his being better informed than the patient. See Kennedy (1983) 181. In the past courts in countries like England (and I submit in South Africa as well) by reason of policy, maintained a desire not to expose the doctor to a burden of litigation which may harm the perceived good image of the profession and disturb the balance in the doctor-patient relationship. See Kennedy (1983) 181. By relying on the breach of the doctor's fiduciary duty Picard and Robertson (1996) 6 opine that reliance thereon may even enable the patient to avoid the Statute of Limitations defence that would otherwise apply. In South African Law the fiduciary relationship between the Director of a company and the company itself is recognised. See Cilliers and Benade (1982) 327.In the medical law sphere save for the comments of Strauss (1993) no authority, exist otherwise which indicate whether the South African Courts may follow the approach of the Canadian Courts or not. What is important however for purposes of this research is to investigate to what extent the fiduciary relationship which exists between the provider of medical services and the patient, flowing from the unique nature of the medical service provided, impact upon the validity of exclusionary clauses in hospital contracts? Put differently, does the entrenched fiduciary duty in the case of, for example, a hospital to act with the utmost good faith arising from the type of medical service it provides, vitiate a patient's consent usually given when completing a hospital admission form which admission form especially in private hospitals, contain an exclusionary clause exercising liability of a hospital for negligent acts or omissions?.

135 Picard and Robertson (1996) 3; Benatar (1987) 27; Strauss *TSAR* (1987) 1; Giesen (1988) 114; McHale et al (1997) 8-9; Teff (1994) 77ff.

136 Picard and Robertson (1996) 3; Teff (1994) 89, 94ff states that respect for personal dignity and by implication for minority views, justifies putting a high value on patients exercising decision-making powers; See further Benatar (1987) 29 who advocates that the rationale for the preference for the patient autonomy model is based more on

What has emerged is a more popular modern day model namely, the patient `autonomy' or `contract' model, which reflects the basic human rights to self-determination in which the patient is seen as an `autonomous purchaser of services' who is afforded protection under consumer sovereignty. [137] Patients in this model are seen to play a much more active role in the relationship and the decision-making process. Consent by the patient is of paramount importance in the decision-making process which in turn, seeks to transfer some power to the patient in areas which affects the patient's self-determination i.e. in cases of chronic illness etc. [138] A direct result of the creation and recognition of this model is the doctrine of consent which has, in modern history, become a significant feature in the doctor-patient relationship. [139]

What has also emerged in more modern times is a renewed interest in the fiduciary nature of the doctor-patient relationship, in which the said relationship is one of trust and confidence and in which doctors have an obligation to their patients to act with utmost good faith and loyalty and not to allow their personal interests to conflict with their professional duty. [140] Academic writers [141] have especially expressed strong views in

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social justice based on rights issues; Strauss *TSAR* (1987) opines that the human rights culture has very much influenced such change in the preferred model; Support for this thinking can be found in Giesen (1988) 116ff as well. For the most recent comments by Carstens and Pearmain (2007) 877 see the authors' opinion, namely, the shift from medical paternalism to patient autonomy accords with the provisions in the Bill of Rights, more particularly section 12(2) (b) and (c) which promote the doctrine of informed consent.

137 Teff (1994) 94, 100-101; Benatar (1987) 29; Strauss (1983) 2-3; Giesen (1988) 116; Kennedy (1988) 178; McHale et al 76-77.

138 Picard and Robertson (1996) 3; Strauss (1987) 4; Giesen (1988) 116; Kennedy (1988) 178.

139 Benatar (1987) 29; Strauss (1987) 4; See also the discussion of the foundations of the doctrine of informed consent by Carstens and Pearmain (2007) 877 in which the writers state: Informed consent is undoubtedly the foundation or core of the patient/doctor relationship, emanating from the law of obligations and underscored by ethical considerations. It represents, as it were, the beginning of either an amicable and harmonious encounter between patient and doctor (if informed consent is adequately explained and obtained), or an acrimonious relationship with the potential for litigation (if the informed consent-procedure is neglected or compromised and which has been borne out by the decisions in *Stoffberg v Elliott* CPD 148; *Esterhuizen v Administrator, Transvaal* 1957 (3) SA 710 (T); *Castell v De Greef* 1994 (4) SA 408 (C); *Broude v McIntosh* 1998 (3) SA 60 (SCA); *Jacobson v Carpenter-Kling* 1998 (T) unreported; *Oldwage v Louwrens* (2004) 1 ALL SA 532 (C); *McDonald v Wroe* unreported case no 7975/03 (CPD); *Louwrens v Oldwage* 2006 (2) SA 161 (SCA).

140 Picard and Robertson (1996) 4 emphasize the fiduciary nature of the relationship. The Canadian Courts in particular have also emphasized the fiduciary nature of the relationship. In the case of *Norberg v Wynrib* 1992 72 D.L.R. (4th) 448 see McLachlin J deciding on a damages claim arising from sexual exploitation by the doctor and the patient expresses himself as follows: *"The relationship of physician and patient can be conceptualized in a variety of ways. It can be viewed as a creature of contract, with the physician's failure to fulfil his or her obligations giving rise to an action for breach of contract. It undoubtedly gives rise to a duty of care; the breach of*

favour of the fiduciary aspects of medical practice and in particular its usefulness in providing *"a dynamic tool for reshaping the doctor-patient relationship as means to finding a proper balance in the discourse between patient and doctor."*

What is important however, for purposes of this research, is to investigate to what extent the fiduciary relationship which exists between the provider of medical services and the patient, flowing from the unique nature of the medical service provided, impact upon the validity of exclusionary clauses in hospital contracts? Put differently, does the entrenched fiduciary duty in the case of, for example, a hospital to act with utmost good faith arising from the type of medical service it provides, vitiate a patient's consent usually given when completing a hospital admission form, which admission form, especially in private hospitals, contain an exclusionary clause exorcising liability of a hospital for negligent acts or omissions?

2.2.8.1 **The Doctor-Patient Relationship in the Sociological Construction in a Contemporary South Africa**

The changes in the doctor-patient relationship paradigm in South Africa has, it is submitted, very much followed the trend of other countries such as England, United States of America, Canada, Germany to mention just a few. In this regard there can be no doubt about it; there has been a noticeable shift from paternalism to patient autonomy.

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this constitutes the tort of negligence. But perhaps the most fundamental characteristic of the doctor-patient relationship is its fiduciary nature. I think it is readily apparent that the doctor-patient relationship shares the peculiar hallmark of the fiduciary relationship - trust, the trust of a person with inferior power that another person who has assumed superior power and responsibility will exercise that power for his or her good and only for his or her good and in his or her best interests. Recognizing the fiduciary nature of the doctor-patient relationship provides the law with an analytic model by which physicians can be held to the high standards of dealing with their patients which the trust accorded them requires."

141 See Chapman (1984) 140 who describes the fiduciary relationship between the doctor and patient as *"..... one in which the patient's interests are placed first and foremost in the time-honoured traditions of service, duty and honour."* See also Picard and Robertson (1996) 4. What is of particular concern for the academic writers as well is the continued undue influence and imbalance in the power of decision-making which exist between doctor and patient arising from his status as doctor or of his being better informed than the patient. See Kennedy (1983) 181. In the past courts in countries like England and, I submit, in South Africa as well by reason of policy, maintained a desire not to expose the doctor to a burden of litigation which may harm the perceived good image of the profession and disturb the balance in the doctor-patient relationship. See Kennedy (1983) 181. By relying on the breach of the doctor's fiduciary duty Picard and Robertson (1996) 6 opine that reliance thereon may even enable the patient to avoid the Statute of Limitations defence that would otherwise apply. In South African law the fiduciary relationship between the Director of a company and the company itself is recognised. See Cilliers and Benade (1982) 327. In the medical law sphere, save for the comments of Strauss, (1993) no authority exist otherwise which indicate whether the South African Courts may follow the approach of the Canadian Courts or not.

The first traces of a change in judicial attitude toward the concept of patient autonomy in South African medical law occurred as far back as 1923 when Watermeyer J in the case of *Stoffberg v Elliot* [142] instructed the jury in the following terms:

"In the eyes of the law every person has certain absolute rights which the law protects. They are not dependent on statute or contract, but they are rights to be respected, and one of the rights is absolute security to the person. Any bodily interference or restraint of man's person which is not justified in law, or excused in law or consented to is a wrong, and for that wrong the person whose body has been interfered with has a right to claim such damages as he can prove he has suffered owing to that interference."

The court continued:

"A man, by entering a hospital, does not submit himself to such surgical treatment as the doctors in attendance upon him may think necessary; he may submit himself for medical treatment, but I am not going into that; I am not going to attempt to define the exact limits of the medical treatment, because they do not seem to me to be material in this case, but he does not consent to such surgical treatment as a doctor may consider necessary. By going into hospital, he does not waive or give up his right of absolute security of the person, he cannot be treated in hospital as a mere specimen, or as an inanimate object which can be used for the purposes of vivisection; he remains a human being, and he retains his rights of control and disposal of his own body; he still has the right to say what operation he will submit to, and, unless his consent to an operation is expressly obtained any operation performed upon him without his consent is an unlawful interference with his right of security and control over his own body, and is a wrong entitling him to damages if he suffers any." [143]

But more recently it is especially the South African academic writers [144] who have come

142 1923 CPD 148. The facts briefly stated amounted to this: The plaintiff claimed $10 000 in damages for assault. The plaintiff was admitted to hospital for surgery and medical treatment for cancer of the penis. Dr Elliott, who treated the plaintiff, was an honorary visiting surgeon who assumed that the administrative procedures, including the obtaining of the patient's consent, had been followed. He was doing charitable work at the hospital. The patient's penis was surgically removed. The patient maintained that he had not given consent to the operation. The jury found for the defendant.

143 *Stoffberg v Elliott* 1923 CPD 149-150. The approach was followed much later in the *Castell v De Greef* case 1994 (4) SA 408 (C) when Ackerman J endorsed the shift in the paradigm by remarking at 420: *"I am of the opinion that there is not only a justification, but indeed a necessity, for introducing a patient orientated approach ....."*

144 The eminent writer Van Oosten The Doctrine of Informed Consent in Medical Law (Unpublished doctoral thesis, University of South Africa, 1989) at 414 endorses the shift in the paradigm when he states:
"When it comes to a straight choice between patient autonomy and medical paternalism, there can be little doubt that the former is decidedly more in conformity with contemporary notions of and emphasis on human rights and individual freedoms and a modern professionalized and consumer-orientated society than the latter, which stems largely from a bygone era predominantly marked by presently outmoded patriarchal attitudes. The fundamental principle of self-determination puts the decision to undergo or refuse a medical intervention squarely where it belongs namely with the patient. It is, after all, the patient's life or health that is at stake and important though his life and health as such may be only the patient is in a position to determine where they rank in his order of priorities, in which the medical factor is but one of a number of considerations that influence his decision whether or not to submit to the proposed intervention. But even where medical considerations are the only ones that come into play, the cardinal principle of self-determination still demands that the ultimate and informed decision to undergo or refuse the proposed intervention should be that of the patient and not that of the doctor."
See also the role of patient autonomy in the light of the new Constitution discussed by Carstens and Pearmain

out strongly in favour of the paradigm shift from medical paternalism to patient autonomy.

In conclusion it needs to be emphasized it is especially the influence of normative medical ethics and its *sub strata* such as conscience, responsibility and the Hippocratic Oath, as well as the change in the legal characterisation of the doctor-patient relationship and the attendant sociological construction thereof, which it is submitted, will possibly pave the way in finding a solution to the core of our investigation, namely, whether a practitioner may validly exclude his/her liability from a negligent act by getting the patient to sign a disclaimer in a hospital contract.

Ever since medicine was first practised a certain standard of care was formulated as means to protect the general public against the conduct of practitioners who breached their duty to take care. Although at first unwritten, nevertheless, everyone was made aware of the standard of conduct [145] from which medical ethics developed.

2.2.10 **Legal Opinion**

Since the first traces of the practice of medicine there has always been a desire to regulate and structure the practice of medicine. Ever since the earliest of times when certain individuals felt that spiritually they had been called upon to heal disease and ailments affecting human beings, there has been a concern for those they treated. The limitations placed on healers during the primitive period were not quite the same as during the era of modern medicine. The degree of limitation was very much influenced during the primitive period by the belief that disease and affliction were caused by supernatural powers, whereas, during the modern era, less emphasis was placed on the cause of disease by the supernatural power and the medical man was judged more on his conduct. [146] But, notwithstanding the era in which medicine was practiced what was common cause was the strong philosophical feeling that existed, namely, that the creation of man brought with it, the sanctity of life. It is for that reason that protective measures, it was so felt from early times, had to be put in place to preserve life. [147] During the ancient period in which

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(2007) 879ff

145 Smit "Die Suid-Afrikaanse Geneeskunde en Die Reg" (1976) *De Jure* 107-119; Mason and McCall-Smith (1991) 3-6, Rhodes (1985) 7; Picard and Robertson (1996) 7.

146 Smith *Taylor's Principles and Practice of Medical Jurisprudence* (1905) 1ff; Schwär, Olivier and Loubser *Die ABC van Geregtelike Geneeskunde* (1984) 1ff; Smit (1976) *De Jure* 107; Strauss (1987) *TSAR* 1; Carstens LLD Thesis (1996) 106ff; Carstens and Pearmain (2007) 608.

147 Smith *Taylor's Principles and Practice of Medical Jurisprudence* (1905) 1ff; Schwär, Olivier and Loubser *Die ABC*

the priests practiced medicine and assumed the roles of physicians, [148] the limitations placed upon the physicians were not as sophisticated as formal regulations that followed, there was nonetheless, certain control over the conduct of physicians. [149]

What followed during the rule of Hammurabi of Mesopotamia, some 5000 years ago, was the first tract of formalism when the rules pertaining to the conduct of physicians and accompanying penalties for breach of their expected conduct was documented. [150] The Code of Hammurabi, it is submitted, forms the hallmark of the origin of the doctor-patient relationship. Not only did the code contain medical ethical rules and legislation regulating the conduct of the physicians, it also provided for professional fees and penalty provisions where physicians transgressed. [151] It was the Greeks who continued the momentum of formalising the regulating of medicine and expanding medical ethical rules. It was especially, the work of Hippocrates (460-360BC), who wrote the Hippocratic Oath, that contained the first basic ethical rules for accepted medical practice. [152]

The Romans, in contrast to the Greeks, did not make significant contributions towards the advancement of medical science. [153] What they did achieve, however, was to create in

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van Geregtelike Geneeskunde (1984) 1ff; Smit (1976) *De Jure* 107; Strauss (1987) *TSAR* 1; Carstens LLD Thesis (1996) 106ff; Carstens and Pearmain (2007) 608.

148 Berkhouwer and Vorstman (1950) 14; Massengill *A Sketch of Medicine and Pharmacy* (1943) 18; See also Carstens and Pearmain (2007) 608.

149 See the discussion of Carstens and Pearmain (2007) 608 who opine that although the historical incidences recorded in the ancient period are not necessarily indicative of medical negligence as it is understood today, nonetheless, limitations were placed on professional acts committed by physicians. Physicians were also held accountable where they deviated from expected `medical practice'.

150 The Code of Hammurabi contained the first signs of ethical rules and legislations as means to prevent physicians from doing harm to the patients. See Carstens and Pearmain (2007) 609; Massengill (1943) 19; Ackernecht *A Short History of Medicine* (1968) 17.

151 Massengill (1943) 19; Ackernecht (1968) 17 give examples of the penalties for medical negligence *inter alia*, the amputation of a physician's hands where he causes the death of the patient or a patient loses sight as a result of an operation to his eyes. See also Carstens and Pearmain (2007) 609.

152 Jones *Hippocrates* (1923); Strauss and Strydom (1967) 175; Massengill (1943) 22; Carstens and Pearmain (2007) 610 all share the view that this ethical medical code for physicians is undoubtedly one of the greatest contributions to the practice of medicine and continues to play a significant role in contemporary medicine today. See Edelstein L "The Hippocratic Oath: Text, Translation and Interpretation" in *Cross Cultural Perspectives in Medical Ethics* Readings (ed Veatch RM) (1989) 6 on the effect of the Hippocratic Oath in a Historical sense; For the comments on the role of the Hippocratic Oath in modern medicine see Teff (1994) 72; Giesen *Acta Juridica* (1988) 114; Sanbar et al (1999) 6. The writers place a great premium on the value of the Oath on the doctor/hospital-patient relationship in modern day medical practice.

153 Carstens and Pearmain (2007) 64.

their legal system, legal rules pertaining to identification and proof of the different forms of medical malpractices. In this regard, Roman law clearly distinguished between intentional malpractice, negligent malpractice and ignorant malpractice. [154] The *Lex Cornelia de Sicariis et veneficis* was put in place by the Romans to punish these physicians, who were convicted of homicide where the physician administered poison to a patient or was an accomplice thereto. [155] Negligent malpractice and ignorant malpractice were classified under the concept of *culpa*. [156] The presence of *culpa* is indicative of failure to act with the necessary skill and care: non intellegere quod omnes intellegunt (italics) - in other words, by not acting like the reasonable person in the same circumstances, or failure to act with the same degree of *diligentia* expected from a reasonable person in the same circumstances. [157]

The negligence of experts, such as physicians, is also assessed in context of the rule *imperitia culpae adnumeratur*. According to this rule, ignorance or incompetence was regarded as negligence. [158] The *Imperitia* rule, in principle, is indicative of the absence of professional skill and experience which are required and set by the medical profession. [159]

Roman law also recognized compensation to be paid to a patient who felt aggrieved through the conduct of the physician. Depending on whether the wrong was committed ***ex*** *contractu* or *ex delicto* the patient could claim by relying on the contractual relationship and, specifically, the breach thereof, alternatively, delict and show that there was a breach of the doctor's duty to take care under the *Lex Aquilia*. [160] In the post Roman era and more

154 Berkhouwer and Vorstman (1950) 16ff; Amundsen (1973) 20; Carstens and Pearmain (2007) 612.

155 Amundsen (1973) 20; See also Carstens and Pearmain (2007) 612-613 who hold the view that the *Lex Cornelia* forced physicians to be very cautious in the choice of administering medication.

156 For a discussion of the concept *culpa* see Carstens and Pearmain (2007) 613; See also Van Zyl (1983) 264. *Culpa* is also known as `negligence' which in turn can be defined as the failure to comply with standards of conduct required by law.

157 Van Zyl (1983) 264; See also Carstens and Pearmain (2007) 613.

158 For a discussion of the rule see Carstens and Pearmain (2007) who quote the Digesta 50 17 32: "Gaius 7 ad edictuum provinciale): Imperitia culpae adnumeratur" Inst Just 4 3 7: *"Imperitia culpae adnumeratur, veluti si medicus ideo servum tuum occiderit, quod eum male secuerit aut perperam ei medicamentum dederit."*

159 Examples can be found in the physician performing an operation in an unskilful or incompetent manner or wrong medication was prescribed. See Carstens and Pearmain (2007) 613-614.

160 For legal writings on the physician's liability *ex contractu* see Zimmerman (1990) 393-395; Buckland (1963) 500; Carstens and Pearmain (2007) 613-614. For discussions on the claims *ex delicto* under the *Lex Aquilia* see Van Zyl (1983) 264ff.

specifically, the medieval era and the middle ages, under the Judea-Christian influence the philosophy of humanism was greatly advocated. Community interest is weighed more heavily than individual interest. Medical ethics were further promoted. [161] During this period legislation in the form of the *Leges Barbarorum* and *Lex Visig*othorum were put in place to regulate the conduct of doctors. [162] During the Renaissance period, the courts began to place great emphasis on the doctor-patient relationship. More over, courts placed a premium on the doctor's obligation to treat their patients with diligence and to exercise proper care and skill. Any deviation from the standards set by the profession was met with successful tortuous claims against the doctors. [163] The late middle ages saw the founding and establishment of hospitals. Medical ethics played a significant role in establishing hospitals. It was the Christians who founded the first hospitals as a result of their perceived duty they had to their fellow man. [164]

During the eighteenth century the Royal College of Physicians in London promoted, as part of the training of physicians, moral norms which included service ideals devoted to client's interests. [165] The patient's interest was regarded as primary. Where there was a conflict between client's interests and the commercial interest of doctors, the former was pivotal. [166] The Roman Dutch era also did not make any major contributions to medical science. But writers in the like of De Groot, Noodt, Huber and Voet, all made their own contributions in formulating the duties of medical practitioners and the requirements for liability. [167] The *imperitia* rule was received in Roman Dutch law from Roman law. The rule was applied to assess the negligent or ignorant conduct of the physician. [168] What also emerged during this era are the public policy considerations and the moral convictions of society influenced the criminal and delictual liability of physicians. [169]

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161 Peters et al (1981) 3; Cronje-Retief (2000) 31; Mason and McCall Smith (1991) 6.

162 Chapman (1984) 45; Van Zyl (1983) 615ff; Carstens and Pearmain (2007) 615.

163 Holdsworth (1923) 385-386; Giesen (1988) 4; Cronje-Retief (2000) 50.

164 Castiglioni (1975) 304.

165 Chapman (1984) 77; It was Thomas Percival's writings at the time which influenced the thinking of the day. He wrote that the patient's interest should not be influenced by private and personal considerations.

166 Scott (1981) 136ff; Carstens and Pearmain (2007) 616-617.

167 Scott (1981) 134; Carstens and Pearmain (2007) 616ff.

168 Scott (1981) 138ff; See also Massengill (1943) 79ff; Carstens and Pearmain (2007) 73ff.

169 Scott (1981) 138ff; See also Massengill (1943) 79ff.

Voet in particular wrote about excluding physicians from liability when he stated that it will be against public policy if physicians are excused for causing damages through their inexperience or clumsiness. [170]

The need for maintaining a strong bond between the doctor and patient, based on a strong medical ethical foundation, continued during the pre-modern and modern era. [171] The medical ethical foundation on the other hand has as its crust conscience and intuitive sense of goodness; [172] public conscience; [173] responsibility; [174] the Hippocratic Oath; [175] the sanctity of life. [176] What did change, especially going from the pre-modern era to the modern era, is the legal characterisation of the doctor-patient relationship. In the beginning, especially during the ancient period, the doctor-patient relationship was characterized by the common calling of those who desired to treat people. [177] The common calling, influenced by the sociological constructions, was then replaced by the paternalistic model. This model was characterized by the authority which society vested in the doctor, arising from the doctor's knowledge of bodily functions and diseases, [178] in the

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170 Scott (1981) 138-140 cites Voet Commentarius ad Pandectas 9 2 13 who wrote *"Secut enim medico imputari eventus mortalitatis non debet , ita quoque praetextu humanae fragilitatis delictum decipientis in periculo homines vana medicinae faciendae jactantia innoxium esse fas non est".*

171 Jones (1998) 18; Mason and McCall Smith (1991) 14-17; Ficarra in Sanbar et al (1995) 147ff; Skegg (1988) 8. The writers share a common view that the relationship between doctor and patient is very much influenced by trust and respect. Beauchamp and Childress (2001) 1-7, 27 put the relationship down to moral principles, rights and virtues. Veatch (1997) 21 on the other hand describe the relationship as a "social contract" between the practitioners and the patients in which the practitioners pledge to *"..... act to benefit their patients ....."* For a similar view see Carstens and Kok (2003) 18 SAPR.PL 449-451

172 Mason and McCall Smith (1991) 7.

173 Skegg (1988) 8; Mason and McCall Smith (1991) 7.

174 Hans (1984) 90-95 argues that so strong is the belief in the intrinsic value of responsibility that *".... responsibility is an unconditional and irrevocable as any posited by any nature can be ....."* See also Van Niekerk (2002) 35.

175 Teff (1954) 72; Giesen (1988) 114; Sanbar et al (1991) 6; Mason and McCall Smith (1991) 439-466; Carstens and Kok (2003) 456.

176 Brazier (1992) 29-30; Mason and McCall Smith (1991) 251-261.

177 Picard and Robertson (1996) 1-2; Holdsworth (1923) 385-386.

178 Picard and Robertson (1996) 3; Benatar (1987) 27; Strauss TSAR (1987) 1; Giesen (1988) 114; Teff (1994) 72ff.

doctor-patient relationship. [179] In this relationship the patient plays a very passive role, whilst the doctor even with decision making plays an active role. A shift in consumerism brought about new thinking in which the patient's right to share the decision making process with the doctor was promoted. The patient autonomy model became the preferred model in the modern world. [180] The thrust of the argument supporting the change in the sociological construction is founded on the thinking that the patient autonomy or contract model reflects the basic human right to protection under consumer sovereignty. [181]

With the patient autonomy model, patients are seen to play a more active role in the relationship and the decision making process. [182] A direct result of the creation and recognition of this model is the doctrine of informed consent which, in the modern era, has become a significant feature of the doctor-patient relationship. South Africa has very much followed the trend of the foreign jurisdictions *inter alia* England, United States of America, Canada and Germany etc in accepting the patient autonomy model. [183]

2.3 Summary and Conclusions

An assessment of the origin and development of the doctor patient relationship reveals that the law, since time immemorial, has been desirous of regulating and structuring the medical profession. Such regulation is mainly aimed at the protection of the patients and the general public who seek the services of doctors and/or hospitals.

To this end, an assessment of the origin and development of the doctor-patient relationship reveals that the law, since time immemorial, has been desirous of regulating and structuring the medical profession. Such regulation is mainly aimed at the protection of the patients and the general public who seek the services of doctors and/or hospitals.

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179 Picard and Robertson (1996) 3; Teff (1994) 89; Benatar (1987) 29; Strauss TSAR (1987) 1; Giesen (1988) 116ff; See also the more recent writings of Carstens and Pearmain (2007) 877 who believe that the change in the sociological constriction accords with the new constitutional thinking which promotes the doctrine of informed consent.

180 Teff (1934) 94; Benatar (1987) 29; Strauss (1983) 2-3; Giesen (1988) 116.

181 Picard and Robertson (1996) 22; Strauss (1987) 4; Giesen (1988) 116; Kennedy (1988) 178.

182 Benatar (1987) 29; Strauss (1987) 4; Carstens and Pearmain (2007) 877.

183 For the first traces of its acceptance see *Stoffberg v Elliott* 1923 CPD 149-150; What followed were the strong comments by Ackermann J in *Castell v De Greef* 1994 (4) SA 408 (C). The South African writers Van Oosten (1989) 414, Carstens and Pearmain (2007) have very much endorsed the shift in the paradigm from paternalism to patient autonomy.

The doctor-patient relationship has for centuries been the cornerstone of setting standards of conduct, serving as a yardstick to measure whether the standard of conduct had been deviated from, which ultimately results in civil or criminal sanction. From the time that the relationship between the doctor (healer during the ancient period) and patient was first recognized, it had as it foundation, the duty to take care and to act reasonably towards the patient. The establishment and development of the doctor-patient relationship and its accompanying duty to take care, has very much been influenced by the forces of philosophy, religion, normative ethics, and the Hippocratic Oath. Other factors which influenced the relationship and shaped the duty of care and to act reasonably, include public policy and the moral convictions of society. The purpose of embodying the doctor-patient relationship with a standard of care to be observed is said to be to protect the general public against conduct of doctors who breached their duty to take care. With the founding of hospitals and the establishment of other healthcare providers, the same principles apply to the hospital-patient relationship as that of the doctor-patient relationship.

It was during the Roman period that the distinguished legal writers Ulpianus and Gaius first recognized that the doctor's duty of care is recognized in contract and in delict. For that reason, where a doctor deviates from the standard of conduct founded upon the doctor-patient relationship, the doctor's liability arose *ex contractu* or under the *Lex Aquilia*. Various legal remedies were found throughout centuries and made available to the aggrieved parties to seek relief against the conduct of the doctors and/or hospitals.

In the modern era, the principles upon which the relationship between doctor/hospital and patient are founded remains universally very much intact. It is believed that as in the past, the relationship will continue to be shaped and influenced by a strong commitment to long-standing principles of medical ethics in which conscience and intuitive sense of goodness, public conscience, and responsibility play a major role. What has changed however, during the modern era is the legal characterisation of the doctor-patient relationship, as well as the sociological construction. To this end, the doctor-patient relationship is no longer characterized by the common calling of those who desired to treat people. This was replaced by the recognition of the doctor in his professional capacity, whose duty of care is founded either in their contractual relationship or the general relationship. Insofar as the sociological construction is concerned, the doctor-patient relationship has also undergone major changes in that there has been a tremendous shift from the traditional paternalistic model to the more modern patient autonomy or contract model. In the first model, greater

authority vested in doctors, who, because of their knowledge, were bestowed with greater authority by the general society. Their decisions were hardly called into question. With the second model patients are seen to play a much more active role in the relationship and the decision-making process, greater power has been transferred to the patient. What has also emerged is the recognition of the fiduciary nature of the doctor-patient relationship in which the said relationship is one of trust and confidence and in which doctors have an obligation to their patients to act with the utmost good faith and loyalty and not to allow their personal intentions to conflict with their professional duty. What has also emerged is the recognition of a greater consumer-orientated society in which the rights of patients are protected and advanced. Patients, who sign indemnity forms exonerating the doctor/hospital from liability for their negligence, resulting in the patient suffering damages, may very well be challenged on consumer protection lines. Having now established that the doctor/hospital-patient relationship arises in the modern day context, from a relationship founded on contract or a general relationship, in the following Chapter the nature of the doctor-patient relationship will be considered. It will be seen in the two subsequent chapters that the doctor-patient relationship arising *ex contractu* plays a significant role in the practice of medicine.

What will be looked at will be the nature of the contractual relationship, when the relationship commences and, where a contractual relationship is entered into, what formalities need to be complied with.

Chapter 3

The Contractual Relationship between the Doctor/Hospital-Patient

3. THE NATURE OF THE DOCTOR/HOSPITAL-PATIENT RELATIONSHIP

3.1 Introduction

This Chapter, together with Chapter Four, deals with the subject of the nature of the doctor-patient relationship with specific reference to the contractual relationship between the doctor/hospital and the patient. The nature of the doctor-patient relationship is considered in an introductory way dealing with both the general duty of care in a general relationship and the contractual relationship as they exist side by side between the doctor/hospital and patient. The nature of the contractual relationship between the doctor and patient and when it commences are dealt with in this Chapter Three. The commencement date may be of importance to show in civil litigation whether a relationship in contract has been established.

It is to be noted in this discussion that the commencement of a doctor/hospital-patient relationship in express contracts are more easily discernable than in implied contracts.

Likewise, it appears from written, as opposed to implied contract arising from either oral agreements or merely by conduct from either oral agreements or merely by conduct, these principles relating to the nature of the relationship, especially, the commencement thereof, and the nature of the contractual relationship dealt with in Chapter Three, as well as the rest of this thesis, will be done by doing a comparative study in countries including South Africa, England and the United States of America. These countries have been specifically chosen for the research undertaken in this thesis. The countries have, as appears more specifically from Chapter 1, [1] been chosen for the research undertaken in this thesis because firstly, of their standing as the most important legal families, universally and secondly, because of their commonality. [2] All these systems have also experienced tremendous development in the medical law sphere. English law has been specifically chosen because of the close historical bond with South African law, as it appears from the positive law. [3] More recently the South African courts have also on occasions referred, especially to English legislation which was instituted to curb unfair and unreasonable exclusionary clauses in contract. [4] The United States of America was chosen because of the similar challenges they had to endure in pronouncing on the validity of exclusionary clauses in medical contracts. [5] Chapter Four, deals with the more formalistic nature of the law of contract in the South African medical context. This includes the formation of the contract and the legal requirements for establishing the agreement. Chapter Five, deals with the duties and obligations that flow from such a contractual relationship between the doctor/hospital and patient. What also falls to be dealt with is the general relationship between the doctor/hospital and patient outside the contractual terrain. This is dealt with in

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1 See the discussion on page 36.

2 Whereas the United States of America and England typifies what is known as common law systems, South Africa since the adoption of the new constitutional order is known as a hybrid system. See David and Brierly (1978) 21-73; Van Zyl (1981) 170-196.

3 The courts in jurisdictions, South African as well as that of England, have throughout history often referred with approval to each others dicta. This includes medical law as well as contract law. See in this regard the English case of *Chatterton v Gerson* (1981) 1 QB 432 which refers with approval to the South African case of *Stoffberg v Elliott* 1923 CPD 148; See further the case of *Castell v De Greef* 1994 (4) SA 408 in which the South African court relies heavily on English law in concluding in the end that the development of other common law countries like Canada, the United States of America and Australia should rather be following the English law; See also *Burger v Central South African Railways* 1903 TS 571; *Manhole v Mothle* 1951 (1) SA 456 (T) in which English rules and principles regarding exclusionary clauses were entrenched.

4 See in this regard the South African cases which referred to the *English Unfair Contract Terms Act* 1977. See the Supreme Court of Appeal judgement of *Johannesburg Country Club v Potts* 2004 (5) SA 511 (SCA). See also the Constitutional court judgement of *Barkhuizen v Napier* 2007 5) SA 323 (CC).

5 See the leading case of *Tunkl v Regents of the University of California* 50 Cal 2d 92. 32 Cal RPTR 37 383 P.2d 441.

Chapter Six. In this chapter the general duty of the doctor/hospital is explored encompassing the nature of the duty of care, the standard of care and the influencing factors impacting on the standard of care to be exercised by the doctor. Chapter Seven, deals with the limiting or exclusion of the doctor/hospital's duty of care. In order to have a better understanding of the subject matter it calls for a discussion of the of legal concepts including, the doctrine of *volenti non fit iniuria* and assumption of risk when applied as a ground of justification in a general context. What falls to be dealt with, further, in this chapter is a discussion of whether these general grounds of justification can be applied by way of limitation or exclusion in a medical context.

The material was too voluminous to include in a single chapter. In any event, it was felt that it might be more useful to structure the material in this way so that the nature of the doctor/hospital and patient relationship as it arises generally or contractually be dealt with separately for ease of reference and comparison.

The nature of the relationship between, especially, the doctor-patient has over centuries been described in different ways. Originally the duty to use proper care and skill emanated from their status as medical practitioners. They were there to protect the general public from any mishaps. The nature of their relationship was built on the position of trust that the doctor occupied. The doctor was also generally viewed as a person endowed with specialist expert knowledge and the services provided were executed against the backdrop of highly confidential nature. Besides the recognition given to the general nature of the doctor-patient relationship in which the doctor was expected to exercise a duty of care towards the patient, the contractual relationship stemming from the relationship as such, was also traditionally recognised. From the aforementioned, traditionally, the nature of the relationship between the doctor/hospital and the patient took two distinct forms. It needs therefore to be emphasised that although the nature of the relationship between the doctor and patient has been described differently over the past six centuries, [6] what has emerged

[6] Originally the duty to use proper care and skill attached to the doctor's status. The purpose was to protect the public from the mishaps of doctors: See Strauss and Strydom (1967) 175. The writers describe the nature of the relationship between the doctor and patient as one emanating firstly, from the position of trust that the doctor occupies, stemming from his specialized expert knowledge and the highly confidential nature of his services and secondly, from the contractual relationship between the doctor and patient. Gordon, Turner and Price (1953) 75 support the view that when a patient consults a medical practitioner, the patient enters into a contractual relationship with the doctor; See further Schwär Olivier and Laubscher - *Die ABC van Geregtelike Geneeskunde* (1984); The authors share the view that although the traditional view is that the doctor-patient relationship is usually one in contract nevertheless, a contractual relationship is not the only that subsists between a doctor and patient, as the doctor's duty to exercise care and skill arises independently of any contract. Support for the view can also be found in the dictum of *Correira v Berwind* 1986 (4) 60 (ZHC). The finding of the court also underlines the legal principle of medical ethics namely the doctor-patient relationship is not necessarily dependant upon the agreement between the parties. Take, for example, an emergency situation where the patient is unconscious and unable to enter into an agreement. That notwithstanding, results in legal and ethical obligations arising, to which

with certainty, is that such a relationship arises both contractually and from the doctor's duty to take care. What has also emerged from the discussion in Chapter Two is the strong commitment to long-standing principles of medical ethics and values which dominate the doctor-patient relationship, in the practise of medicine. The long-standing principles of medical ethics and values, as was seen earlier, have also resulted in the creation of legal rules assisting in setting the outer limits of acceptable conduct - a minimum standard of professional behaviour. Besides the creation of rules governing the minimum standard of professional behaviour in general terms, [7] the Law of Contract also regulates the relationship between the doctor and patient. [8]

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the doctor is bound. The view expressed in *Correira v Berwind* I submit is the preferred view as the doctor-patient relationship may very well arise independently of any contract.

7 In modern times, internationally, the conduct of doctors and the practice of medicine are governed by the existing International and several National medico-ethical codes of conduct. See Van Olsten (1996) 33. South African doctors and other healthcare providers are also governed by medico-ethical codes. The most significant codes are the Health Professions Council of South Africa Rules of Conduct for Medical Practitioners and Dentists and the national code of conduct contained in the South African Medical Research Councils (MRC) Guidelines on Ethics for Medical Research. See the South African Medical Research Council, Guidelines on Ethics for Medical Research (1993). The National Code of Conduct is very much influenced by medical practice. See Van Olsten Encyclopaedia (1996) 37 Legal principles on the other hand are brought into line with medical practice and societal needs. See Van Olsten Encyclopaedia (1996) 38 who uses the example of the South African Law Commission's engagement in projects, i.e. projects on euthanasia and living wills. See Suid-Afrikaanse Regskommissie Eutanasie en die Kunsmatige Instandhouding van Lewe Projek 86 (1994).

8 Support for this view in South Africa can be found in both academic writings as well as case law. See Van Oosten Encyclopaedia (1996) 53; Strauss (1993) 20; Claassen and Verschoor (1992) 115; Strauss and Strydom (1967) 104; Joubert (1983) 144; Gordon et al (1953) 69; See also the *dicta*: *Van Wyk v Lewis* (1924) AD 438, 443, 450-451; 455 -456; *Correira v Berwind* 1986(4) SA 60 (Z) 63 ff 66; *Edouard v Administrator Natal* (1989) (2) 389 ff; *Administrator Natal v Edouard* 1990 (3) 385 ff; *Castell v De Greef* (1994) 420, 425; *Hewat v Rendel* 1925 (TPD) 679, 691; *Allott v Paterson and Jackson* (1936) SR 221, 224; *Nock v Minister of Internal Affairs* (1939) SR 286, 290 ff.; *Dube v Administrator Transvaal* 1963 (4) SA 260 (T) 266; *Magware v Minister of Health* (1981) (4) SA 472(Z), 476, 477; *Lillicrap, Wassenaar and Partners v Health* (1989) (3) SA 600(D), 604; *Ramsamop v Moodley* 1991 (N) (unreported), discussed by Strauss SA 1991(4) SAPM 16); *Jansen van Vuuren v Kruger* 1993 (4) SA 842 (A) 848-849; *Friedman v Glicksman* (1996) (1) SA 434; *Clinton Parker v Administrator Transvaal* (1995) (W) (Unreported) pp.1 ff. 58. 68.
In England support can be found in academic writings. See Kennedy and Grubb Principles of Medical Law (1998) 286 - 288 in which the writer argues that it is only when treatment or other health care is private; a contractual relationship will arise between the doctor and the patient and usually the clinic or institution and patient. But under the National Health System, it is today generally accepted that there is no contractual relationship between a doctor, general practitioner or hospital doctor and the patient. See also Kennedy and Grubb *Medical Law, Text and Materials* (2000) 52 - 3; See also Teff *Reasonable Care* (1995) 61 - 2; Jones *Medical Negligence* (1994) 19 - 20; 69 -70; Nathan *Medical Negligence* (1957) 8 - 10; Powell *Professional Negligence* (1992) Par. 1 - 16; Jones and Burton *Medical Negligence Case Law* (1995) 26. Martin *Law relating to Medical Practise* (1979) 138; Wright *Medical Malpractice* (1984) 10 -11. In so far as case authority is concerned see *Everard v Hopkins* (1615) 80 ER 1164; *Slater v Baker and Stapleton* (1767) 95 ER 860; *Coggs v Bernard* (1703) 92 ER 107; *Pfizer Corp v Minister of Health* (1965) AC 512 (HL); *Thake v Maurice* (1986) QB 644(A); *Eyre v Measday* (1986) 1 ALL ER 488 (CA); *Hotson v East Berkshire Health Authority* (1984) 389; *Myers v Brent Cross Service Co* (1934) 1 K.B. 46. American academic writers and case law also support the view that the Law of Contract regulates the relationship between the doctor and patient. See Waltz *Medical Jurisprudence* (1971) 40; Furrow et al *Health Law Cases, Materials and Problems* (2000) 234 - 237; Sanbar et al *Legal Medicine* (1995) 62 -63; Holder *Medical Malpractice Law* (1978) 1 - 7; Sidley *Law and Ethics* (1985) 183. The American Case Law supports the recognition of a contractual relationship between the doctor and patient. See *Cartwright v Barthlomew*, 64 S.E. 2d 323 (GA. App

The development of both the general relationship and contractual relationship in the doctor/hospital-patient relationship brings about civil liability for doctors and/or hospitals which are founded in delict [9] (otherwise known as tort) or contract. [10]

1951; *Childs v Weis*, 440 S.W. 2d 104 (TEX.CIV. App 1969); *Hiser v Randolph* 617 P.2d 774, 776 (Ariz.App. 1980); *Murray v University of Pa. Hosp*, 490 A.2d 839 (Pa Super 1985); *Sander v Geib, Elston, Frost Professional Association*, 506 N.W. 2d 107, 114 (S.D. 1993); *Weils v Billars* 391 N.W.2d 668 (S.D. 1986); *Jones v Malloy* 412 N.W.2d, 837, 841 (Neb. 1987); *Tisdale v Pruitt*, 394 S.E. 2d 857 (S.C.App.1990); *Weaver v University of Michigan Board of Regents* 506 N.W.2d 264 (Mishap. 1993); *Lopez v Aziz* 852 S.W.2d 303 (Tex.App. - San Antonio) 1993); *Powers v Peoples Community Hosp Auth* 455 N.W.2d 371 (Mich.App.1990); *Cartwright v Bartholomew*, 64 SE 2d 323, GA 1951; *Suburban Hospital Association v Mewhinney*, 187 A 2d 671, Md. 1963; *Zipkin v Freeman*, 436 SW 2d 753, Mo 1968; *Barnes v Gardner*, 9 NYS 2d 785, NY 1939; *Rule v Cheeseman*, 317 P 2d 472, Kans 1957; *Hawkins v McCain*; 79 SE 2d 493, NC 1954; *Marvin v Talbott*, 30 Cal Rapt. 893, Cal 1963; *Robins v Finestone*, 127 NE 2d 330, NY 1955; *Caldwell v Missourie State Life Insurance Co.*, 230 SW 566, Ark 1921; *Cameron v Eynon*, 3 A 2d 423, Pa 1939; *Stohlman v Davis*, 220 NW 247, Neb. 1928; *Gross v Partlow*, 68 P 2d 1034, Wash 1937.

9 The Law of Delict as it is known in *South Africa* (as opposed to its counterpart known as the Law of Torts in England and the United States of America) places a duty of reasonable care on doctors and/or hospitals in their conduct towards their patients. The said duty is preventative in nature, in that the doctor and/or hospital guard against harm being done to the patient. See Van Oosten (1996) 57; Gordon et al (1953) 106; Strauss and Strydom (1967) 159; Claassen and Verschoor (1992) 178. For the general discussion of the role of delict in the South African jurisdictions see Neethling, Potgieter and Visser *The Law of Delict* (2005) 2ff. See also the discussion by Carstens and Pearmain (2007 489ff on the influence of the law of delict in a medical context. See also *Correira v Berwind* 1986 (4)66; *Van Wyk v Lewis* 1924 (AD) 443-444; *Collins v Administrator Cape* 1995 (4) 73. Where, as a result of a doctor's/hospital's action or conduct, the duty of reasonable care is transgressed causing the patient to die or physical or mental harm, the doctor may very well be civilly and/or criminally liable. See also *Kovalsky v Krige* (1910) 20; *Mitchell v Dixon* (1914) 519; *Webb v Isaac* (1915) 273; *Allott v Paterson and Jackson* (1936) 321; *Ex parte Rautenbach* (1938 150; *Nock v Minister of Internal Affairs* (1939) 286; *Dube v Administrator Transvaal* 1963 (4) 260; *S v Mkwetshana* 1965 (2) 493; *St Augustine Hospital (Pty) Ltd v Le Breton* 1975 (2) 530; *Richter v Estate Hammann* 1976 (3) 226; *Blyth v Van den Heever* 1980 (1) 191; *S v Bezuidenhout* 1985 Unreported; *Pearce v Fine*; *Pringle v Administrator Transvaal* 1990 (2) 379; *Castell v De Greef* (1994) 408; *Friedman v Glickman* 1996 (1) SA 1134 (W); *Clinton-Parker v Administrator Transvaal* (1990) (2) SA 37 (W); *Edouard v Administrator Natal* 1989 (2) 368 372; *Administrator Natal v Edouard* 1990 (3) 581, 585. The Law of Tort is a well known remedy in medical negligence cases in England. According to Kennedy *Principles of Medical Law* (1998) 292 - 3 civil negligent claims against doctors is by far founded in the tort of negligence as opposed to the breach of contract in England. The latter in the medical context, is an exception rather than the rule. See also Nathan (1957) 8; Jones (1994) 18; in tort, as with delict in South Africa, a duty of care is owed by the doctor and/or hospital in their conduct towards their patients. A breach of that duty, by not exercising reasonable care and skill and resulting in harm to the patient, will result in civil liability in tort. Kennedy (1998) 292 -3; Jones (1994) 18; Taylor *Medical Malpractice* (1980) 28 - 31; Lewis *Medical Negligence - A Plaintiff's Guide* (1984) 123 - 126; Kennedy and Grubb *Medical Law* (1994) 70 - 71; Wright (1982) 2 - 3, 8 - 17; Jackson and Powell *Professional Negligence* (1987) 291; Scott *The General Practitioner and the Law of Negligence* (1995) 6, 8; *Sideway v Bethel Royal Hospital Governors* (1985) AC 871 1 ALL 643; *Maynard v West Midlands RHA* (1984) 1 WLR 634 (HL); *Wisher v Essex AHA* (1987) QB 730 (CA); *Jones v Manchester Corp* (1952) QB 852; *Cassidy v Minister of Health* (1951) 2KB 343; *R v Bateman* (1925) (9) 4 LTKB 791; *White v Jones* (1995) 2 AC 207 (HL); *Henderson v Merritt Syndicates Ltd* (1999) 2 AC 145 (HL); *Capital and Counties Pty v Hampshire CC* (1997) 2 ALL ER 865 (CA); *F v West Berkshire Health Authority* (1989) 2 ALL ER 545; *Likely Iron Co v McMullan* (1934) AC 1; *Everett v Griffiths* (1920) 3 K.B. 163; *Lampher v Phipos* (1838) 8 CP 475; *Eyre v Measday* (1986) ALL ER 488; *Bolom v Friern Hospital Management Committee* (1957) 2 ALL ER 118; *Sidaway v Governers of Bethlem Royal Hospital* (1985) 2 WLR 480.

It is apparent that in *America*, as in *England*, a doctor and/or hospital incurs civil liability owing to an act or omission in that, the doctor and/or hospital owes his/her/it's patient a duty of care and, notwithstanding, has breached that duty, resulting in the patient suffering harm. See Waltz and Inbau (1971) 41; Furrow et al (2000) 234-237; Sanbar et al (1995) 119 - 120, 132 - 133; Holder *Medical Malpractice Law* (1975) 40; Sidley *Law and Ethics* (1985) 184; The principle is also supported by the following *dicta: Louden v Scott* 194 Pac. 488 (ST.CT.

What has also emerged during the discourse in Chapter Two is that although the relationship arising from contract or the general relationship is distinct, the interest protected in both instances remains the general wellbeing of the patient. The duty of care in both contract or in general, remains one, merely, the exercise of reasonable care towards the patient. In both instances the duty is preventative in nature, namely, to guard against harm being done to the patient.

What also emerges to be different is that the remedies in contract differ from those offered in delict. The reason lay in that the professional liability of medical practitioners is determined by the rules of delict (tort) or contract. Although there is a clear distinction in the rules governing delictual (or tortuous) or contractual liability, the contractual obligations

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Mont. 1920); *Pike v Honsinger* 49 N.E. 760 (CT APP. N.Y.1898); *Bardessono v Michels* 91 CAL. RPTR. 760, 764, 478 2d 480, 484 (CAL 1970); *Hall v Hildun* 466 SO. 2d 856, 872-73 (MES/1885); *Delaney v Rosenthal* 196 NE 2d 878; Mass 1964; *Schultz v Feigal* 142 NW 2d 84, Minn. 1966; *Orthopaedic Clinic v Hanson* 415 P 2d 991, Okla. 1966; *Bauer v Otis* 284 P 2d 133, Cal 1955.

10 For the *South African* Law position see Claassen and Verschoor (1992) 115; Strauss and Strydom (1967) 107 111; Joubert LAWSA (1983) 144; Gordon, Price and Turner (1957) 74; Van Oosten Encyclopaedia (1996) 56; See also the following case law: *Meyers v Abramson* (1952) 124; *Edouard v Administrator Natal* 1989 (2) 385 368 (D) 389; *Jansen van Vuuren v Kruger* 1993 (4) SA 842 (A) 848-849; *Sutherland v White* 1911 EDL 407; *Recsez's Estate v Meine* (1943) EDL 277; *Hewatt v Rendel* 1925 TPD 678.
With regard to English Law, support can be found in academic writings. See Kennedy (1998) 286 - 288 in which the writer argues that it is only when treatment or other health care is private; a contractual relationship will arise between the doctor and the patient and also the clinic or institution and the patient. Under the National Health System, it is generally agreed that there is no contractual relationship between a doctor (Contractual General Practitioner or Hospital Doctor) and the patient. See also Kennedy and Grubb (1994) 52 - 3; Teff (1995) 61 - 2; Jones (1994) 19 - 20; 69 - 70; Nathan (1957) 8 - 10; Powell (1992) Par. 1 - 16; Jones and Burton (1995) 26; See further Martin (1979) 138; Wright (1986) 10 – 11. *American* academic writers and Case Law also support the view that the Law of Contract recognizes the relationship between the doctor and patient. See Waltz (1971) 40; Furrow et al (2000) 234 - 237; Sanbar et al (1995) 62 -63; Holder (1975) 1 - 7; Sidley (1985) 183. For the American case law see *Cartwright v Barhlomew* 64 S.E. 2d 323 (GA. App) 1951; *Klein v Williams* 12 SO 2d 421 (S.CT MISS 1943); *Childs v Weis* 440 S.W. 2d 104 (TEX.CIV. App 1969); *Hiser v Randolph* 617 P.2d 774, 776 (Ariz.App, 1980); *Stewart v Rudner* 84 N.W. 2d 816, 822 - 23 (Mich. 1957); *Murray v University of Pa. Hosp* 490 A.2d 839 (Pa Super 1985); *Sander v Geib, Elston, Frost Professional Association* 506 N.W. 2d 107, 114 (S.D. 1993); *Pope v St John*, 862 S.W. 2d 657, 661 (Tex App - Austin 1993); *McKay v Cole* 625 So.2d 105 (Fla. App. Dist 1993); *Jewson v Mayo Clinic* 691 F.2d 405 (8th Cir 1982); *Weils v Billars* 391 N.W. 2d 668 (S.D. 1986); *Childs v Weis* 440 S.W.2d 104 (Tex. Civ.App. 1969); *Jones v Malloy* 412 N.W.2d. 837, 841 (Neb. 1987); *Tisdale v Pruitt* 394 S.E. 2d 857 (S.C.App. 1990); *Weaver v University of Michigan Board of Regents* 506 N.W. 2d 264 (Mich.App. 1993); *Lopez v Aziz* 825 S.W.2d 303 (Tex.App - San Antonio) 1993); *Stewart v Rudner*, 84 N.W.2d 816 (Mich. 1957); *Labarre v Duke Univ.*, 393 S.E.2d 321 (N.C. APP 1990); *Powers v Peoples Community Hosp Auth* 455 N.W.2d 371 (Mich.App.1990); *Scarzella v Saxon*, 436 A.2d 358 D.C.App. 1981); *Cartwright v Bartholomew*, 64 SE 2d 323, GA 1951; *Tveldt v Haugen*, 294 NW 183, ND 1940; *Harris v Fireman's Fund Indemnity Co*., 257 P 2d 221, Wash 1953; *Rule v Cheeseman*, 317 P 2d 472, Kans 1957; *Hawkins v McCain*; 79 SE 2d 493, NC 1954; *Marvin v Talbott*, 30 Cal Rptr. 893, Cal 1963; *Gluckstein v Lipsett*, 209 P 2d 98, Cal 1949; *Childers v Frye*, 158 SE 744. For other international law see Giesen (1988) 6 - 8, 9 - 10. The writer recognizes that the doctor and/or hospital liability is founded in contract or tort or both. The author argues that in the past century and a half most actions against physicians have been founded on negligence. For a similar view see Picard and Robertson (1996) 2, 173 - 175, 334, 339. The writers argue that the duty of care exists independently of any contract between the doctor and patient. Civil liability may therefore be found on negligence, in both tort and contract.

of a doctor are usually no greater than the duties owed in delict (tort). So is the duty to exercise reasonable care in delict (tort), effectively, the same as the implied term to exercise reasonable care in providing medical services in a contract. [11]

What also appeared from the discourse in Chapter Two is that although the functions of the law of contract and the law of delict may be different, particularly, with regard to their primary purposes and the interests they aim to protect, especially with regard to private treatment, a concurrent duty in both delict and contract arises. Consequently, as will be seen *infra*, the patient's claim may be pleaded both in contract or tort or both in the alternative. [12]

With the nature and scope of the doctor-patient relationship being comprehensively discussed in both Chapter Two and this Chapter Three, what will follow is an extensive discussion of the doctor's contractual relationship with his patient *inter alia* the nature of the relationship, how such a relationship commences, how the relationship is terminated and the consequences that flow from the breach of such relationship.

A contractual relationship will be found to exist in most cases between a doctor and patient albeit in the form of a tacit agreement. The nature of the agreement is that the doctor

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11 See in this regard the South African authorities. Van Oosten *Encyclopaedia* (1996) 53, 57; Claassen and Verschoor (1996) 118ff; Gordon et al (1953) 106 ff; Strauss 2ed (1984); See also *Van Wyk v Lewis* AD 438, 443, 450-451, 455-456; *Correira v Berwind* 1986 (4) SA 60; 63ff; *Edouard v Administrator Natal* 389 ff; *Administrator Natal v Edouard*; 585 ff; *Castell and De Greeff* (1994) 420, 425 cf; *Hewatt and Rendel* (1927) 679, 691; *Allott v Paterson and Jackson* 1936 SR 221., 224; *Nock v Minister of Internal Affairs* 1939 SR 286, 290 ff; *Dube v Administrator Transvaal* 266; *Magware v Minister of Health* 1981 (C) SA 472, 476, 477; *Lillicrap, Wassenaar and Partners v Pilkington Brothers (Pty) Ltd* 1987 (1) SA 475 (AD); *Ramsamop v Moodley* 1991 (N) (unreported) discussed by Strauss SA 1991(4) *SAPM* 162; *Jansen van Vuuren v Kruger* 1993 (4) SA 842 (A) 848-849; *Friedman v Glickman* 1996 (1) SA 1134; *Clinton-Parker v Administrator Transvaal* 1996 (2) SA 37 (W). For the English legal position see Kennedy (1998) 283, 294; Jones (1994) 20 states: *"The duty to exercise reasonable care in the tort of negligence is effectively the same as the implied term to exercise reasonable care in a contract to provide medical services. If anything, the stricter duties are to be found in the former."* See also Lewis (1988) 123 ff; Kennedy and Grubb (1994) 70; Wright (1984) 10 - 11. See also the *dicta Thake v Maurice* (1986) 1 ALL E.R. 497; *Eyre v Measday* (1986) 1 ALL E.R. 488; *Esso Petroleum v Mardon* (1976) 2 ALL ER 5 CA. For the American legal position see Waltz (1971) 45 ff; Furrow et al (1995) 237 - 238; Sanbar et al (1995) 62-63; Holder (1975) 42. For the American case law see *Leighton v Saredant*, 27 N.H. 460 (S.CT. N.H. 1853); *Adkins v Ropp* 14 NE 2d 727, Ind. 1938; In the case of *Kozan v Comstock* 270 F 2d 839, 844 (5 CIR 1959) the American position is stated as follows: *"It is true that usually a consensual relationship exists and the physician agrees impliedly to treat the patient in a proper manner. Thus, a malpractice suit is inextricably bound up with the idea of breach of implied contract. However, the patient-physician relationship, and the corresponding duty that is owed, is not one that is completely dependent upon contract theory. On principle then, we consider a malpractice action as tortuous in nature whether the duty grows out of a contractual relationship or has no origin in contract."* For other International views see Giesen (1988) 1 24-25; Picard and Robertson (1996) 175.

12 Claassen and Verschoor (1990) 118; Neethling Potgieter and Visser (2005) 4 - 5; Joubert LAWSA (1983) 144 - 145; Strauss and Strydom (1967); See also *Van Wyk v Lewis supra* 438; *Correira v Berwind supra* 63 - 66; For English law see also Jones (1994) 20; Jackson and Powell (1992) 118; Wright (1984) 11; Giesen (1988) 33.

undertakes to diagnose the patient's complaint and to treat the patient without the doctor guaranteeing that the patient will be cured of his or her ailment. The broad duty therefore, that flows from such a relationship, is that the doctor undertakes no more than to treat the patient with the amount of skill, competence and care which may reasonably be expected of the practitioner in his field of medicine.

Hospital authorities similarly, may also incur liability resulting from a breach of contract where they have failed to carry out an undertaking.

The existence of a contractual relationship between the medical practitioner and the patient provides evidentiary materials to establish contractual liability where the exercise of reasonable care and skill has been breached. For that reason, as has been stated before, it is vitally important to establish when the contractual relationship between the medical practitioner and the patient commences. This, in turn, is of paramount importance for determining whether such a relationship has been established. The success of civil litigation or a possible conviction in a criminal case depends largely on the establishment of such a contractual relationship.

The importance in determining the commencement of the contractual relationship between the doctor/hospital and patient has been stated in all three jurisdictions chosen for the research undertaken in this thesis.

The commencement of a contractual relationship between a medical practitioner and the patient is not dependant upon some legal formalities expected in, for example, a land transaction matter. [13] Writing is therefore no prerequisite for the commencement of a contractual relationship between the medical practitioner and the patient. That being the case, in the majority of instances, in practise, the contractual relationship between the medical practitioner and the patient arises from a tacit agreement, through mere conduct for example, the doctor consults the patient in the surgery and thereafter commences treatment or the doctor is summoned to attend to a patient elsewhere and commences treatment. [14]

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13 Van Oosten (1996) 54; Gordon et al (1953) 78; Claassen and Verschoor (1992) 59; See also what was stated by the court in *Myers v Abrahamson* 1951 (3) SA 438 (C).

14 Gordon et al (1953) 54; Van Oosten (1996) 59; Carstens and Pearmain (2007) 345; both the authors Christie *The Law of Contract* (2001) 93-95 and De Wet and Yates (1978) 307ff recognize the ordinary terms of agreement which are entered into tacitly. See further the case of *Bulls and Another v Tsatsarolakes* (1976) SA 851 (T). The English legal position is set out in the following sources and cases: Kennedy and Grubb (1994) 71ff; Wright (1984) 22; Kennedy (1988) paragraph 515ff; Jones (1994) 23ff; Jones (1991) 16; See the following cases: *Eyre v Measday* (1986) ALL E.R. 488 C.A. 493; *Thake v Maurice* (1986) 1 ALL E.R. 497; *Greaves and Co (Contractors)*

There are also instances in which express agreements between the medical practitioner and the patient are indicated, for example where more serious operations and/or more complicated treatment/surgery is undertaken and the informed consent of the patient is required. In those instances, it is strongly recommended that written agreements between medical practitioners and patients be pursued. The advantage of written contracts may be stated briefly, namely, they fall into the category of express contracts which are easily discernable, in that they are more formalistic in nature, resulting in a greater certainty for both the medical practitioner and the patient of the terms and conditions of what was agreed to, and can be established more easily. [15]

The nature of the contractual relationship between the medical practitioner and the patient has been described differently by the legal writers [16] over the years, often varying from a contract of mandate, to a contract of service, to a contract of leasing and hiring. What has emerged from their writings however, unanimity amongst them that the legal relationship between the medical practitioner and the patient is a consensual one, [17] founded upon the fact that in general terms, the medical practitioner is a free agent or independent contractor who, when committing himself in treating the patient, creates a position of trust with the patient, wherein the medical practitioner undertakes, arising from the nature of the profession, that he/she will exercise reasonable care and skill. A breach of such trust will result in civil or criminal liability. On the other hand, the patient does generally possess the necessary autonomy to enter into such relationship or not.

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v Boynham Mezule and Partners (1975) 3 ALL E.R. 99. For the American authorities see Waltz (1971) 46; Furrow et al (1995) 236ff; Sanbar et al (1995) 62-63; Holder (1975) 3-4; *Pike v Honsinger* 49 NE 780 New York (1898); *Ramberg v Morgan* 218 N.W. 492 (S.CT.IOWA 1928); *Williamson v Andrews* 27 N.W. 6 (S CT. MINN 1936); *McBride v Roy* 58 P 2d 886 (S CT. OKLA 1936); *Chilmet v Campbell* 188 N.W. 2d 601 (MICH 1971).

15 Strauss and Strydom (1967) 105 suggest that especially, with more complicated treatment or surgery doctors will be wise to reduce the agreement to writing in that it will spell out the nature of the treatment, the complications and risks accompanying the procedure and the nature and extent of the patient's informed consent. See also Strauss (1991) 8-9; Claassen and Verschoor (1992) 59; Joubert (1983) 144. For English law see Kennedy and Grubb (1998) Para 5.11-5.12; Jones (1996) 23; For American law see Furrow (1995) 234ff; Holder (1975) 1ff.

16 Some writers have described the contract between doctor/hospital and patient as that of letting and hiring of work (*locatio conductio operis*); See Van Oosten (1996) 54; Gordon et al (1953) 75; Strauss (1991) 69. The relationship was also described in the case of *Myers v Abrahamson* (1951) (3) SA 438 (C), 1952 (3) SA P121 (C) as letting and hiring of services (*locatio conductio operarum*); See De Wet and Yeats (1978) 307-308; Strauss and Strydom (1967) 104. The contract between the doctor and patient has also been described as a contract as mandate. The patient in the relationship is regarded as a mandator and the doctor the agent. See Strauss and Strydom (1967) 104; Claassen and Verschoor (1992) 115.

17 Van Oosten (1996) 63; Strauss and Strydom (1967) 105; Strauss (1991) 3; Claassen and Verschoor (1992) 116; Gordon et al (1953) 69-70. Recognition in English law is expressed by Kennedy and Grubb (1998) Fn 21 Para 5.07. The American law also recognizes that a relationship cannot commence between the doctor and patient unless consensus has been reached between the parties. See Furrow et al (1995) 235; Hill and McMenamin in American College of *Legal Medicine* (1995) (C) 49-50; Holder (1975) 1ff.

This position in England is discernable from the position in South Africa in that the majority view amongst the legal writers appears that the position articulated hereinabove, only applies to the relationship between private practitioners and their patients. The same cannot be said in instances where patients receive treatment under the National Health Service Scheme. The position in the United States of America however, appears to accord with the South African position.

The existence of a contractual relationship between the medical practitioner and the patient provides evidentiary materials to establish contractual liability where the exercise of reasonable care and skill has been breached. For that reason, it has been stated before, it is vitally important to establish when the contractual relationship between the medical practitioner and the patient commences. This, in turn, is of paramount importance for determining whether such a relationship has been established. The success of civil litigation or a possible conviction in a criminal case depends largely on the establishment of such a contractual relationship.

But, notwithstanding the fact that the agreement is not reduced to writing, it has been stated before that the principles of offer and acceptance and consensuality do nevertheless govern the commencement of the relationship. [18]

3.2 The Contractual Relationship between Doctor and Patient

The legal relationship between the doctor and patient as stated before is founded in contract and the doctor's duty to take care. [19]

The contractual relationship will be found to exist in most cases between a doctor and his patient. Ordinarily the contract entered into by the parties takes the form of a tacit agreement whereby the doctor undertakes to diagnose the patient's complaint and to treat him in the usual manner. By undertaking to treat the patient, a doctor does not however guarantee that the patient will be cured of his or her ailment or complaint. [20]

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18 Van Oosten (1996) 63; Strauss and Strydom (1967) 105; Strauss (1991) 3; Claassen and Verschoor (1992); Gordon et al (1953) 69-70. Recognition in English law is expressed by Kennedy and Grubb (1998) Fn 21 Para 5.07. The American law also recognizes that a relationship cannot commence between the doctor and patient unless consensus has been reached between the parties. See Furrow et al (1995) 235; Hill and McMenamin in American College of *Legal Medicine* (C) 49-50; Holder (1975) 1ff.

19 Van Oosten (1996) 53; Strauss and Strydom (1967) 104ff; Strauss (1991) 3ff; Carstens and Pearmain (2007) 404ff.

20 For South African Law see: Strauss and Strydom (1967) 105 ff; Strauss (1991) 5; Joubert LAWSA (1983) 144; Claassen and Verschoor (1992) 115 - 110; Van Oosten *Encyclopaedia* (1996) 54 ff; *Bulls and Another v Tsatsarolakes* (1976) SA 891 (T); Christie (2001) 93ff; De Wet and Yeates (1978) 307-308; Carstens and

Unless the doctor expressly guarantees a cure, the patient might be able to claim damages for breach of contract in the event of the doctor failing to fulfil his undertaking. But in the ordinary cause of events the doctor undertakes no more than to treat the patient with the amount of skill, competence and care which may reasonably be expected of a practitioner of his branch of medicine.

If a doctor departs from the patient's express instructions or fails to treat the patient in the manner tacitly agreed upon, the doctor may be liable for breach of contract and may be denied the right to claim remuneration. [21]

Hospital authorities may also be held liable for damages resulting from a breach of contract where the hospital doctors have failed to carry out an undertaking to provide adequate treatment. The liability arises from the hospital authority's liability for the acts of professional negligence on the part of the employees. [22]

Pearmain (2007) 345ff. The English legal position is set out in the following sources and cases: Kennedy and Grubb (1994) 71 ff; Wright (1984) 22; Kennedy (1988) Paragraph 515 ff; Jones (1994) 23 ff; Jones (1991) 16; See the following cases: Eyre v Measday (1986) ALL E.R. 488 C.A. 493; Thake v Maurice (1986) 1 ALL E.R. 497; Greaves and Co (Contractors) v Baynham Mezule and Partners (1975) 3 ALL ER 99.
For the American authorities see Waltz (1971) 46; Furrow et al (1995) 236 ff; Sanbar et al (1995) 62 - 63; Holder (1975) 3 - 4; Pike v Honsinger 49 NE 760 New York (1898); *Ramberg v Morgan* 218 N.W. 492 (S. CT. IOWA 1928); *Williamson v Andrews*; 27 N.W. 6 (S. CT. MINN 1936); *McBride v Roy* 58P 2d 886 (S. CT. OKLA 1936); *Ghilmet v Campbell* 188 N.W. 2d 601 (MICH 1971).

21 The South African position is set out in: Strauss and Strydom (1967) 107; Joubert LAWSA (1983) 144; Claassen and Verschoor (1992) 116; Gordon et al (1953) 74; Van Oosten *Encyclopaedia* (1996) 54 ff; *Sutherland v White* 1911 ED L 407. The English position is discussed in the following sources and case law: Kennedy (1998) Paragraph 5.13 ff; Jones (1991) 17 ff; Kennedy and Grubb (1994) 72 ff; Wright (1984) 22; *Eyre v Measday* (1986) 1 ALL E.R. 488; *Thake v Maurice* (1986) 1 ALL E.R. 479.
The American Law authorities also describe the instances when a doctor may be liable if he tacitly agreed to guarantee the outcome of his or her treatment and the result does not turn out to be that what he/she guaranteed. See Waltz (1991) 46; Furrow et al (1995) 236 ff; Sanbar et al (1995) 62 - 63; Holder (1978) 3 - 4; For case law see *Leighton v Sargeant* 27 N.H. 460 (S. CT. PA 1853); *Guelnet v Campbell* 188 N.W. 2d 601 MICH 1971; *McLandkas v McWhite PA* (10 Haris) 261 (S.CT. PA 1853).

22 The South African position with regard to hospital liability *ex contractu* is set out in: Van Oosten Encyclopaedia (1996) 86 ff; See also Strauss (1991) 299 ff; Claassen and Verchoor (1992) 98. As far as case law is concerned see *Lower Umfolozo District War Hospital v Lowe* 1937 NPD 1. In a later decision *Mtetwa v Minister of Health* 1989 (3) SA 600 (D) the court lay down the principle when the liability arises *ex contractu* when the court stated: *"The degree of supervising and control exercised by the person in authority over him is no longer regarded as the sole criterion to determine whether someone is a servant or something else. The deciding factor is the intention of the parties to the contract, which is to be gathered from a variety of facts and factors. Control is merely one of the indicia."* See also in this regard *Esterhuizen v Administrator Transvaal; Dube v Administrator Transvaal; Magware v Department of Health; Mtetwa v Minister of Health; Soumbabis v Administrator of the Orange Free State; Pringle v Administrator Transvaal; Collins v Administrator Cape; Clinton Parker v Administration Transvaal; cf. St Augustine Hospital (Pty) Ltd v Le Breton* pp 537 - 538; *Bulls v Tsatsarolakis; Edouard v Administrator Natal; Administrator Natal v Edouard; Burger v Administrateur Kaap* 1990 (1) SA 483 (C). In *England* the position regarding the liability of private hospitals has crystallized. Hospitals incur liability through the professional conduct of their staff in using the doctrine of vicarious liability. See Jackson and Powell (1997) 320; Nathan (1957) 129

3.2.1 COMMENCEMENT OF THE CONTRACTUAL RELATIONSHIP

The commencement of the contractual relationship between the doctor/hospital/other healthcare providers and patient is of paramount importance for determining whether a relationship has been established. This ultimately will be vital during civil litigation in that, in the absence of evidence proving the existence of such a relationship, the Plaintiff's chances of being successful with his/her civil suite may be diminished. Likewise, in a criminal case, the existence of a relationship between physician and patient may be vital in sustaining a conviction. [23]

The commencement of a physician-patient relationship in express contracts is more easily discernable than in implied contracts. An express contract is generally more formalistic in nature, albeit written or oral in that, the contract between doctor/hospital/other healthcare providers may begin with a specific agreement between the two for diagnosis and/or treatment. This may take the form of an oral agreement, usually preceded by the doctor disclosing to the patient sufficient information that will enable the patient to make an informed decision about a proposed treatment or procedure, and the patient's acceptance commonly known as informed consent. [24]

Similarly, written contracts will usually include the terms of the agreement ***inter alia*** the proposed treatment or procedure to be followed by the doctor/hospital/other healthcare provider, the provision of facilities to be utilized, the staff who will assist and the doctor

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ff; for case law see *Gold v Essex County Council* (1942) 2 KB 294; *Cassidy v Minister of Health* (1951) 2 KB 343; *Collins v Herts County Council* (1997) 1 KB 598; *Roe v Minister of Health* (1954) 2 QB 66. Uncertainty prevails whether hospitals operated under the National Health Service would incur liability for their conduct as employer, especially as it is believed that no contractual relationship comes into being between the doctor and the patient nor is there a contractual relationship between the patient and the hospital such as the NHS Trust. See Kennedy (1998) 286 ff; Jones (1994) 19 ff; Jones (1991) 15 ff; Kennedy and Grubb (1994) 68 ff; The position is set out in *Hotson v East Berkshire Area Health Authority* (1987) 1 ALL ER 210 in which the court stated: *"I am quite unable to detect any rational basis for a state of the law, if such it be, whereby in identical circumstances Dr A who treats a patient under the national health service, and whose liability thereby falls to be determined in accordance with the law of tort, should be in a different position from Dr B who treats a patient outside the service, and whose liability therefore falls to be determined in accordance with the law of contract, assuming, of course, that the contract is in terms which impose on him, neither more, nor less, than the tortuous duty."* The position in *America* as in South Africa is more certain in that hospital authority incur liability as a result of the conduct of its staff members, through the doctrine of vicarious liability. See Holder (1975) 211; See also Bertolet and Goldsmith *Hospital Liability Law and Practise* (1987) 326; See further Sanbar et al (1995) 156 ff; For case law see *Alden v Provincial Hospital* 383 F 2d 163 (DC 1963); *Daring v Charlestown Community Hospital* 33 ILL 2d NR 2d 253 (1965).

23 Gordon et al (1953) 78; Van Oosten (1996) 54; Strauss and Strydom (1967) 105; For English authority see Kennedy and Grubb (1998) Para 5 12ff; Jones (1996) 25. For American authority see Furrow et al (1997) 234ff; Holder (1978) 3ff.

24 See McQuoid-Mason and Strauss 17 LAWSA (1983) 144-145; Van Oosten Encyclopaedia (1996) 54-55; Strauss and Strydom (1967) 104-110; Strauss (1991) 8-10; Gordon Turner and Price (1953) 75-78.

who will be treating the patient and/or perform surgery, if necessary. [25]

More frequently, in cases involving cosmetic surgery and procedures, or instances where patients are to be admitted to hospitals, the usual procedure before cosmetic surgery and the procedures alike are performed, alternatively, when a patient is admitted to the hospital, he or she will be requested by the physician or hospital clerical staff, depending on the circumstances of the case, to sign a consent form which, in hospital matters, will be contained in a pre-printed admission form. Certain private hospitals make use of such admission forms containing an exemption clause which is signed by the patient as a condition of admission to the hospital. [26] The validity of the said exemption clause forms the subject of research in this matter.

More difficult, however, is to establish when an implied contract is created. The commencement thereof, it is submitted, may depend upon the circumstances inferred from the conduct of the physician and patient. The most obvious conduct from which an implied contract between doctor and patient may be inferred is where the patient submits himself or herself for examination and the doctor examines the patient. It has also been held before that where doctor talks with a patient by telephone, a contractual obligation may arise for the doctor especially, where medical advice is given. [27] But the identification of such an implied contract is not always that obvious.

3.2.1.1 **SOUTH AFRICA**

3.2.1.1.1 **Legal Writings**

As stated previously ordinarily the contract entered into between the doctor/hospital/other healthcare providers and patient takes the form of a tacit agreement, in terms of which, the doctor/hospital/other healthcare provider undertakes to diagnose the patient's complaint and to treat him or her in the usual manner. Generally, no legal formalities are required for tacit agreements, as writing is no prerequisite for the commencement of such relationship. The

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25 See McQuoid-Mason and Strauss 17 LAWSA (1983) 144-145; Van Oosten Encyclopaedia (1996) 54-55; Strauss and Strydom (1967) 104-110; Strauss (1991) 8-10; Gordon Turner and Price (1953) 75-78.

26 Van Oosten (1996) 88; Strauss (1991) 305; Claassen and Verschoor 102-103.

27 Van Oosten (1996) 54-51; Strauss and Strydom (1967) 105; Strauss (1991) 3ff; Carstens and Pearmain (2007) 405. The South African legal writers seem to apply the following test when determining whether a contract had arisen or not namely, the influence of a contract between the parties will depend upon the circumstances of each case and public policy considerations. See also the principles enunciated in *Edouard v Administrator, Natal* 1989 (2) SA 368 (D). English law adopts a very similar approach. See Kennedy and Grubb (1998) Para 3.37ff; See also Jackson and Powell (1997) 592. Similar views are expressed in America. See Waltz and Inbau (1971) 41; Furrow et al (2000) 235ff; Holder (1975) 1ff.

contract between the doctor/hospital/other healthcare provider and patient generally comes into being by way of mere conduct. South African writers have a difference of opinion as to exactly when the contract is concluded. [28]

3.2.1.1.2 **Case Law**

The commencement of the contractual relationship between the doctor/hospital and patient has received scant attention from the South African Courts. Although the courts, unlike the academic writers, have paid scant attention to the implied agreements between the doctor/hospital and the patient, nevertheless, in a number of decisions our courts recognise the commencement of the relationship by relying on the doctrine of consent as a manifestation of an express agreement between the doctor/hospital and patient.

In the case of *Correira v Berwind* [29] the Zimbabwean High Court endorsed the principle of an implied agreement between the doctor and patient, as stated by Lord Nathan in Medical Negligence (1957) 15 as follows: *"In the great majority of cases the duty owed by a medical man or a medical institution towards the patient is the same whether there exists a contract between them or not. Where there is no such contract, a duty arises by reason of the assumption of responsibility for the care of the patient; where there is such a contract this duty in tort exists side by side with a similar duty arising out of the contract. But the implied contractual duty is normally the same as that which exists from contract."* [30]

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28 See Gordon, Turner and Price (1953) 78 who share the view that: *"Notwithstanding the contract being express or implied, the contract to treat a patient begins from the moment the practitioner accepts the case." Contra* Van Oosten (1996) 54 who states that: *"Such a tacit agreement comes about by the patient consulting the doctor and the doctor attending to the patient." Contra* also Strauss and Strydom (1967) 105 who advocate that: *"Before an agreement can be said to have come into operation it must be clear from their conduct that consensus had been reached between the parties."* A classical example mentioned by the authors is where a doctor is summons to a person who is ill. *"The fact that he is summoned to attend to the sick is an implied indication that he or she instructs the doctor to treat him or her. When the doctor commences his examination and treatment of the patient he or she by his or her conduct consensually concludes the agreement."* See however McQuoid-Mason and Strauss LAWSA (1983) Volume 17 Par 144 who state that: *"An undertaking by a doctor to examine the patient and to diagnose his or her condition does not necessarily amount to an undertaking to treat the patient personally."* This is especially so if the patient has to be referred to a specialist or another professional when an agreement commences between that specialist or other professional and the patient. See also Dada and McQuoid-Mason - *Introduction to Medical-Legal Practices* (2001) 4.

29 1986 (4) SA 60 (ZHC).

30 *Correira v Berwind* 1986 (4) 60 (ZHC).

Express agreements between doctors/hospitals and patients in modern days have however; become the order of the day particularly when any unusual procedures are contemplated by practitioners. In these instances the procedure and the risks involved is first discussed with the patient hereafter the patient has an opportunity to consent. It is commonly known as informed consent. The patient's consent has often been held to be essential for medical intervention and the act of consent, it is submitted, indicates the commencement of the contractual relationship. This principle was clearly demonstrated in *Stoffberg v Elliott* [31] when the court remarked: *" ..... he still has the right to say what operation he will submit to, and, unless his consent to an operation is expressly obtained, any operation performed upon him without his consent is an unlawful interference with this right of security and control of his own body, and is a wrong, entitling him to damages if he suffers any."* [32]

As to the prerequisite in obtaining proper consent see *Ex Parte Dixie* [33] in which Millen J stated: *"With reference to a surgical operation, as a matter of law, that 1such an operation cannot lawfully be performed without the consent of the patient, or, if he is not competent to give it, that of some person in authority over his person. The fact that he is a patient in this hospital does not entitle those in charge of it to perform any surgical operation upon him which they may consider beneficial. They would only be justified in performing a major operation without proper consent where the operation is urgently necessary and cannot with due regard to the patient's interests be delayed."* [34]

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31 1923 (CPD) 148.

32 *Stoffberg v Elliot* 1923 (CPD) 148.

33 1950 (4) SA 748 (W).

34 *Ex Parte Dixie* 1950 (4) SA 748 (W) at 751.

In an unreported decision of *Rompel v Botha* [35] referred to in *Esterhuizen v Administrator, Transvaal* [36] the court with reference to the requirements for valid consent held: *"There is no doubt that a surgeon who intends operating on a patient must have the consent of the patient. In such cases where it is frequently a matter of life and death I do not intend to express any opinion as to whether it is a surgeon's duty to point out to the patient all the possible injuries which might result from the operation, but in a case of this nature, which may have serious results to which I have referred, in order to effect a possible cure for a serious condition, I have no doubt that a patient should be informed of the risks he does run. If such dangers are not pointed out to him then, in my opinion, the content of the treatment is not in reality consent - it is consent without knowledge of the possible injuries. On the evidence defendant did not inform him/her of the possible dangers, and even if plaintiff did consent to such treatment he consented without knowledge of injuries which might be caused to him. I find accordingly that plaintiff did not consent to the shock treatment."* [37]

In *Esterhuizen v Administrator, Transvaal* [38] the court dealing with the following facts concluded: *"A therapist, not called upon to act in an emergency involving a matter of life or death, who decides to administer a dosage of such an order and to employ a particular technique for that purpose, which he knows beforehand will cause disfigurement, cosmetic changes and result in severe irritation of the tissues to the extent that the possibility of necrosis (death of tissues) and a risk of amputation cannot be excluded, must explain the situation and resultant dangers to the patient no matter how laudable his motives might be and should he act without having done so and without having secured the patient's*

35 Unreported judgement TPD 1953.

36 1957 (3) TPD 712.

37 *Rompel v Botha* Unreported judgement 1957 (3) TPD 712.

38 1957 (3) TPD 712.

consent, he does so at his own peril." [39]

In *Richter and Another v Estate Hamman* [40] Watermeyer J makes the following remarks regarding prior consent: *"A doctor whose advice is sought about an operation to which certain dangers are attached, and there are dangers attached to most operations, is in a dilemma. If he fails to disclose the risks he may render himself liable to an action for assault, whereas if he discloses them he might well frighten the patient into not having the operation when the doctor knows full well that it would be in the patient's interests to have it. It may well be that in certain circumstances a doctor is negligent if he fails to warn a patient, and, if that is so, it seems to me in principle that his conduct should be tested by the standard of the reasonable doctor faced with the particular problem. In reaching a conclusion a court should be guided by medical opinion as to what a reasonable doctor, having regard to all the circumstances of the particular case, should or should not do. The court must, of course, make up its own mind, but it will be assisted in doing so by medical evidence."* [41]

In a more recent judgement of *Castell v De Greef* [42] the court when assessing the right of existence of consent in a medical law context in South Africa, concluded: *"In the South African context the doctor's duty to disclose a material risk must be seen in the contractual setting of an unimpeachable consent to the operation and its sequelae. (See Van Wyk v Lewis 1924 AD 438 at 451; Correira v Berwind 1986 (4) SA 60 CH at 63 and Verhoef v Meyer supra at 32 et seq. of the unreported Transvaal Provincial Division judgement and 26-9 of the unreported Appellate Division Judgement)."* [43]

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39 *Esterhuizen v Administrator, Transvaal* 1957 (3) TPD 712.

40 1976 (3) SA 226 (C).

41 *Richter and another v Estate Hamman* 1976 (3) SA 226 (C).

42 1994 (4) SA 408.

43 *Castell v De Greef* 1994 (4) SA 408 at 425 F-G.

In the latest case involving informed consent in *McDonald v Wroe* [44] the court in relying on the case of *Castell v De Greef* [45] concluded *inter alia* that had the defendant warned the plaintiff of the risk of permanent nerve damage, she would probably have undergone the procedure at a later stage.

Though writing is no prerequisite for the commencement of a contractual relationship between the doctor and patient the prudent doctor in certain instances prefer to have the agreement reduced to writing.

It is submitted that a written contract in certain instances will also result in greater certainty for both the practitioner and patient. [46]

3.2.1.1.3 **Legal Opinion**

(1) The commencement of the contractual relationship between the doctor/hospital/other healthcare providers and the patient has a twofold significance, firstly, to establish whether the relationship has been established and secondly, when it was established. The importance thereof lies in civil or criminal litigation, as proof of the existence of the relationship, may result in success in a civil suite and likewise, a possible conviction in a criminal case.

(2) The commencement of express contracts are made easily discernable than that of implied contracts. In the former event, the contract is generally more formalistic in nature. When in writing, it does result in greater certainly for both practitioner/hospital/other healthcare provider and the patient. [47] Even when not in

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44 Unreported case No 7975/03 (CPD) delivered on 6 March 2006.

45 1994(4) SA 408 (C).

46 See Strauss and Strydom (1967) 105 who advise that especially with more serious operations, written agreements, serve an important purpose in that, it highlights the nature of the operation and the functions of the practitioner. It also serves to provide proof of the exact terms of agreement between the practitioner and the patient in a civil action. See also McQuoid-Mason and Strauss LAWSA (1983) Vol. 17 Par 144 who emphasize the importance of reducing unusual procedures to paper particularly where informed consent of the patient is required. *"The doctor in that way will apprise the patient of the risks involved so that the patient may make an informed decision whether he consents to the practitioner proceeding with the treatment or procedure or not."*

47 Strauss and Strydom *Die Suid-Afrikaanse Geneeskundige Reg* (1967) 105ff. The writers advise that when in writing, especially with more serious operations, it serves an important purpose namely it highlights the nature of

writing, the agreement is usually preceded by the practitioner disclosing certain information to the patient after the practitioner was called out to see the patient or the patient calls on the practitioner and discusses ills. In the latter event, it is more difficult to establish when the implied contract is created.

(3) A major reason therefore is that with tacit agreements, generally, no legal formalities are required, as writing is no prerequisite for the commencement of such relationship.

(4) In South Africa, the tacit agreement between the doctor/hospital/other healthcare provider and patient generally comes into being by mere conduct for example where the patient submits himself or herself for examination and the doctor examines the patient. Uncertainty however prevails in South African Law as to exactly when the tacit agreement is concluded. [48] It is submitted that the preferred view is consensual conduct from which it is clearly inferred that the patient desires the treatment and the practitioner agrees to treat the patient. It is therefore recommended that through their conduct it must be made clear of their common understanding and intention.

(5) Written agreements are however indicated as far as possible as they create greater certainty. [49]

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the operation, the functions of the general practitioner and specialist as well as the exact terms of the agreement between practitioner/hospital/other healthcare provider and patient; McQuoid-Mason and Strauss *LAWSA* (1983) Vol. 17 Par 144 also highlight the importance of written agreements in that it will apprise the patient of the risks involved. The patient will therefore be in a better position to make an informed decision. See the *dicta Stoffberg v Elliot* 1923 (CPD) 148 149-150. *Ex Parte Dixie* 1950 (4); *Rompel v Botha* TPD 1953 (Unreported) referred to in *Esterhuizen v Administrator, Transvaal* 1957 (3) TPA 712.

48 It has been stated before that the commencement of a tacit agreement takes place from the moment the practitioner accepts the case, Gordon, Turner and Price *Medical Jurisprudence* (1957) 78. It has also been stated that the onset of such an agreement is the patient consulting the doctor and the doctor attending the patient. See Van Oosten *Encyclopaedia* (1996) 54. The preferred view it is submitted, is advocated by Strauss and Strydom *Geneeskundige Reg* (1967) 105 namely consensus between the practitioner and patient is vital for the commencement of the agreement. The fact that the practitioner is summoned to attend to the sick is an implied indication that the patient wants to enter into an agreement. The commencement of the examination and treatment of the patient, manifest consensual conduct in reaching a tacit agreement. *Contra* however the situation where the practitioner examines a patient and diagnose the illness but refers the patient for specialist treatment and/or surgery. McQuoid-Mason and Strauss *LAWSA* (1983) Volume 17 Par 144; Dada and McQuoid-Mason *Introduction to Medico-legal Practises* (2001) 4. For the South African *dicta* indicating the commencement of tacit agreements see *Correira v Berwind* 1986 (4) 60 (ZHC). The court places the commencement of the tacit agreement the moment the practitioner assumes the responsibility for the care of the patient.

49 Strauss and Strydom *Die Suid-Afrikaanse Geneeskundige Reg* (1967) 105 recommends that especially more serious operations and/or more complicated treatment/surgery should be reduced to writing where possible. Where informed consent is required, it is also desirable. McQuoid-Mason and Strauss *LAWSA* (1983) Vol. 17 Par 144;

3.2.1.2 **ENGLAND**

3.2.1.2.1 **Legal Writings**

In English Law from what was stated previously, contractual relationships between the general practitioner and patient flows generally from private contractual agreements only, which means a General Practitioner who treats a patient under the National Health Service Regulations and likewise, a hospital doctor who treats a patient in a National Health Service Hospital, does not enter into a contractual relationship *per se*. [50]

For the purposes of the research undertaken in this thesis, it is therefore of import, to establish exactly when the contractual relationship between the doctor/hospital and patient in private practise commences. After all, it is only once it can be established that a relationship between a doctor and patient had come into being, that thereafter, the law imposes a duty thereon. English legal writers, as that of its South African counterparts have paid scant attention to exactly when such contractual relationship commences. [51]

3.2.1.2.2 **Case Law**

In England, very few cases deal with the commencement of the contractual relationship between the doctor and patient. In *Coggs v Bernard* [52] and *Banbury v Bank of Montreal* [53] the courts by implication found that the patient's submission to treatment is an offer for

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50 See Kennedy *Principles of Medical Law* (1998) 286; Kennedy and Grubb *Medical Law, Test and Materials* (2000) 64; Teff *Reasonable Care* (1995) 161-162; Jones *Medical Negligence* (1994) 18 – 20.

51 See Kennedy and Grubb *Principles of Medical Law* (1994) 69 who state that: *"Although the coming into existence of a contract between a doctor and patient is critical there is little guidance to be found in the law as to when the contract is formed."* The authors are however of the view that the answer lies *`in the principle of offer and acceptance (together with consideration)'*. Relying on the writings of Picard and Robertson (1984) 1-2 the authors endorse the principle namely: *"The contractual relationship between the doctor and patient is founded on the patient requesting treatment (the offer) and the doctor's commencement of care (the acceptance)."* Difficulty in identifying the offer phase in the relationship is encountered where a child for example is too immature to enter into the relationship himself/herself or an adult who is unconscious or mentally incompetent is unable to request medical treatment. It also occurs in emergency situations in which a person is unable to request treatment. In those instances Kennedy and Grubb (1994) 76 - 80 suggest the `offer' for medical services will be part of "parental responsibility' in terms of *The Children's Act* 1989 alternatively if the circumstances so dictate, the request must be made by someone who has `the legal authority to act on the other's behalf to bring the relationship of doctor and patient into existence.' Examples given by the authors relate to `a local authority under *The Children's Act* 1989' or the `Supreme Court in terms of the Supreme Court Act 1981'. Where the patient is an adult who is unconscious or is otherwise mentally incompetent the `offer' for medical services may be executed in terms of the Medical Regulations and the Mental Health Act 1983. In instances involving emergencies in which a person is unable to make a request *"the mere undertaking by the doctor to provide medical services and taking care of the patient' will result in `a duty in law."*

52 (1703) 2 LD RAYM 909.

53 (1918) AC 626.

medical treatment whereas the doctor's willingness to treat the patient can be regarded as an acceptance to enter into a contractual relationship.

English Case Law has also recognised instances where a patient due to mental incompetence or unconsciousness is incapacitated or incapable of consenting to medical treatment. [54]

What is significant is that in English Law the above is distinguishable from the so-called `emergency' cases. In the so-called `emergency' cases the patient although capable in normal life of consenting is unable to do so due to circumstances beyond the patient's control. The patient can therefore not request medical treatment. The relationship is concluded by the doctor undertaking the care of the individual. Once the doctor undertakes to treat the patient in an emergency situation a duty in law will arise. [55]

3.2.1.2.3 **Legal Opinion**

(1) Very little has also been written in English Law as to exactly when the contractual relationship between the doctor/healthcare provider/hospital and the patient commences.

(2) It appears that the only authority *in casu*, apart from the English *dicta* is to be found in

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54 See *Ref (A Mental Patient: Sterilization)* 1990 2 AC1, 1989 2 ALL ER 545 (HC) in which the court recognized the principle of necessity as providing justification for seeking medical treatment on behalf of a patient who is unable or incapable from doing so. The court motivated the position as follows: *"When a person is rendered incapable of communication either permanently or over a considerable period of time (through illness or accident or mental disorder), it would be an unusual use of language to describe the case as one of `permanent emergency' - if indeed such a state of affairs can properly be said to exist. In truth, the relevance of an emergency is that it may give rise to a necessity to act in the interests of the assisted person, without first obtaining his consent. Emergency is however not the criterion or even a prerequisite, it is simply a frequent origin of the necessity which impels intervention. The principle is one of necessity, not of emergency."*

55 The above principle is best illustrated by the facts in *Barnett v Chelsea and Kensington HMC* (1968) ALL ER 1068: At about 5am on Jan 1, three night watchmen drank some tea. Soon afterwards all three men started vomiting. At about 8am the men walked to the casualty department of the defendant's hospital, which was open. One of them, the deceased, when he was in the room in the hospital, lay on some armless chairs. He appeared ill. Another of the men told the nurse that they had been vomiting after drinking tea. The nurse telephoned the casualty officer, a doctor, to tell him of the men's complaint. The casualty officer, who was himself unwell, did not see them, but said that they should go home and call in their own doctors. The men went away, and the deceased died some hours later from what was found to be arsenical poisoning. Cases of arsenical poisoning were rare, and, even if the deceased had been examined and admitted to the hospital and treated, there was little or no chance that the only effective antidote would have been administered to him before the time at which he died.
Nield J hearing the matter then asked himself the following question: `Is there, on these facts, known to be created a relationship between the three watchmen and the hospital staff such as gives rise to a duty of care in the defendants which they owe to the three men?' The answer he gave was: *"I have no doubt that [the nurse] and [the doctor] were under a duty to the deceased."*

Kennedy and Grubb [56] who advocates that as the relationship between the doctor/hospital/healthcare provider and patient is built upon the principle of offer and acceptance, in respect of which, the request by the patient for treatment is seen as an offer and the doctor's commencement of care as an acceptance.

(3) English Law does recognise instances where, due to age or incapacity or mental incompetency, other people or agencies may assume "parental responsibility" in making the offer to treat, on behalf of the patient. [57]

(4) In the so-called emergency cases, where although a patient in normal life, is capable of consenting, but because of the de facto position he or she finds himself or herself then the principle of offer and acceptance is not applicable as the mere undertaking of the care of the patient will trigger of the duty of care. [58]

3.2.1.3 **UNITED STATES OF AMERICA**

3.2.1.3.1 **Legal Writings**

The contractual relationship between the doctor and patient in America as was stated earlier described by legal writers as a consensual one [59] regardless whether the contract is express or implied.

The legal writers recognize that the contractual relationship between doctor and patient is founded on the principle of offer and acceptance. [60]

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56 *Medical Law: Text with Materials* (1994) 52-3; See the *dicta Coggs v Bernard* (1703) 2 LD RAYM 909; *Banbury v Bank of Montreal* (1918) AC 626.

57 Kennedy and Grubb *Medical Law, Text and Materials* (1994) 52-3 state that, where due to age, in the case of a minor, or due to incapacity or mental incompetency, the patient is not capable of consenting. i.e. making the offer for treatment, the `offer' for medical services may come from those who, in terms of the *Children's Act* 1989, have the necessary "parental responsibility". The Supreme Court in terms of the *Supreme Court Act* 1981 may exercise such responsibility. In terms of the *Mental Health Act* 1983 those in a position to do so may make the offer for medical services. In emergency situations, where the patient is unable to make a request the undertaking by the doctor to provide medical services and the taking care of the patient results in a duty to take care. See also the dictum of *Ref (A Mental Patient: Sterilization)* 1990 2 AC 1, 1989 2 ALL ER 545 (HL).

58 *Barnett v Chelsea and Kensington HMC* 1968 ALL ER 1068.

59 See Williston *A Treatise on the Law of Contracts* (1957) Vol. 10, Chapter 39, Paginated 1286 - 1286A. In this regard the author states: *"The relationship of physician and patient being a consensual one resembles that of attorney and client."*See also Waltz and Inbau (1971) 40-41; Furrow et al (2000) 235ff; Voight in Sanbar et al (1995) 209; Holder 1ff.

60 See Furrow et al (1995) 235: *"When a patient goes to a doctor's office with a particular problem, she is offering to enter into a contract with the physician. When the physician examines the patient, she accepts the offer and an implied contract are created. The physician is free to reject the offer and send the patient away, relieving herself of any duty to that patient."* See also Morris and Moritz *Doctor, Patient and the Law* 5ed (1971) 135 who describes the commencement of the relationship as: *"The physician-patient relationship begins when the physician, in*

For that reason the contractual relationship commences when the criteria for the commencement of the relationship is met.

3.2.1.3.2 **Case Law**

The American Courts have also held that the relationship between a physician and patient is consensual arising out of an express or implied contract. [61]

3.2.1.3.3 **Legal Opinion**

(1)The American authorities also recognise that the contractual relationship between the doctor/hospital/healthcare provider and the patient is a consensual one based upon the principle of offer and acceptance. [62]

(2) There are instances when due to age or incapacity, the minor or unconscious patient

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response to the express or implied request that he treat the patient, undertakes to render services. The mere rendering of such services alone, even as may be necessary in an emergency, does not give rise to the relationship. The physician is, nevertheless, required to use due skill and care in administering treatment." It is a well established rule in America that generally a physician must have the patient's consent to the proposed treatment before that treatment can be initiated. See in this regard Sanbar et al (1995) 274. In instances involving minors the general rule is that a minor must obtain the consent of a parent or guardian who will have to enter into the relationship with the physician on behalf of the minor. See Sanbar (1995) 274. The authors Sanbar (1995) 274 with regard to minor consent exceptions, list a number of instances when the minor himself or herself may consent to `selected or limited medical care' without the advice or consent of parents *inter alia* `contraception, physical examination for rape, abortion etc. In the above situation it is submitted the commencement of the contractual relationship is dependant on the parent or guardian alternatively the minor himself or herself. In the so-called `emergency cases' Sanbar et al (1995) 276 state that: *"Most physicians understand that where there is imminent danger of death without emergency treatment, consent will be implied."* The express contract according to Holder (1975) 1 commences `with a specific agreement between the physician and patient for treatment.' An example thereof is the patient asks the physician to treat him and the physician agrees to do so. See Holder (1975) 1. In more sophisticated procedures the physician is obliged to explain the full procedure and all its facts to the patient so much so that, the patient has an understanding of the treatment involved, so that the patient has the right to accept or reject the proposed contract for the physician's services on the basis of informed consent. See Holder (1975) 1.

61 See *Hankerson v Thomas* (Mun. Ct App DC) 148 A 2d 583; In *Spencer v West* (CA App) 126 S2d 423 the court described the relationship as follows: *"The relation between a doctor and patient is a consensual one wherein the patient knowingly seeks the assistance of a physician and the physician accepts him as a patient."* See also *Ivedt v Haugen* 70 ND 338, 294 NW 183, 132 ALR 379. *Contra Kennedy v Parrott* 243 NC 355, 90 SF2d 754, 56 ALR 2d 696, where the court held that *"when [a] person consults a physician or surgeon [who] agrees to accept him as a patient, it does not create a contract in the sense that term is ordinarily used. It is more apt to say that it creates a status or relation rather than a contract."* But the court held the physician to the same standard of care he would have been held to had he expressly contracted to enter the relationship.

62 Williston *A Treatise on the Law of Contracts* (1957) Vol. 10, Chapter 39, Paginated 1286-1286A; Furrow et al *Health Law* (1995) 235; Morris and Moritz *Doctor and Patient and The Law* (1971) 135. The writers are *ad idem* that in order to comply with the doctrine of informed consent the patient is expected to make an express or implied request that he or she be treated (the offer) and the doctor responds by undertaking to treat (the acceptance). See also the *American dicta* endorsing the consensual relationship between doctor and patient *Hankerson v Thomas* (MAN CT.APP DC) 148 A 2d 583; *Spencer v West* (CA APP) 1265 2d 423; *Zveat v Haugen* 70 ND 338, 29 4 NW 183, 132 ALR 379.

cannot consent to treatment himself or herself. In those instances, a guardian or parent asks the doctor to treat the patient. [63]

(3) In the so-called `emergency cases' where due to the condition of the patient he or she cannot personally consent to treatment, in those instances consent is implied. [64]

3.2.2 NATURE OF THE CONTRACT BETWEEN THE DOCTOR/HOSPITAL AND OTHER HEALTH CARE PROVIDERS AND THE PATIENT

3.2.2.1 SOUTH AFRICA

3.2.2.1.1 Legal Writings

As was stated earlier the question is often begged what type of contract comes into being when the doctor/hospital and/or other healthcare provider enters into a relationship? The answer is not that certain as the nature of the contract between the doctor/hospital and/or healthcare providers and patient has often been described in many ways in South Africa by our legal writers. [65]

Whatever the preference exercised by the legal writers as to what species the contract belongs, what has emerged is that the legal relationship between the doctor/hospital and other healthcare providers and patient is a consensual one [66] entered into on an ***ad hoc*** basis. It is submitted that the foretasted opinion aligns with two fundamental principles

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63 Sanbar et al *Legal Medicine* (1995) 274ff. The writers also point out instances where the minor himself or herself can consent for example contraception, physical examination in rape cases, abortions.

64 Sanbar et al *Legal Medicine* (1995) 274ff.

65 See Strauss and Strydom (1967) 104 describes the agreement as *"one falling under the Species Contract of Mandate, in terms of which, the doctor/hospital and/or other healthcare providers, acting as agent, undertakes to examine the patient as mandator and make a diagnosis and, if so requested by the patient, to administer the necessary treatment or perform a required operation."* A similar view is adopted by Claassen and Verschoor (1992) 115; See also Strauss and Strydom (1967) 104 who argue on the other hand that *"the possibility of a Contract of Service arising between the doctor and patient cannot be excluded."* Van Oosten Int. Encyclopaedia (1996) 88-89 who holds the view that as a general rule, *"the contract between doctor/hospital and patient takes the form of letting and hiring of work (locatio conductio operis)."* He states that as an exception to the rule *"the agreement may take the form of letting and hiring of services (locatio conductio operarum)."* The author argues it may on occasions even take the form of a contract of sale, for example a dentist supplying and fitting a patient with a denture or a hospital supplying and fitting a patient with an artificial leg.

66 See Strauss and Strydom (1967) 105; See further Claassen and Verschoor (1992) 115; See also Strauss (1991) 3 who prefers to describe the relationship as a consensual legal relationship rather than that of the professional right of the doctor, advocated by De Wet and Van Wyk (1978) 4-5. It is submitted that the concept consensual legal relationship is preferred in that, it is founded on the cornerstone of the law of contract namely no agreement comes into being without agreement being reached between the contracting parties. This is often referred to *consensus ad litem*. Therefore before any legal rights and obligations are vested in any of the contracting parties, a contractual relationship between the parties first has to come into being. See Christie - The Law of Contract in South Africa (1996) 21 - 26; Kerr (1967) 1 -3; Van der Merwe et al (1993) 13 - 14; De Wet and Yates, (1978) 7.

namely: The doctor as a free agent or independent `contractor' in general terms, may accept or refuse patients, as he chooses. [67] The consensual legal relationship between the doctor/hospital and/or other healthcare providers and patient is also recognised by the patient's autonomy [68] model to which has been much referred earlier.

Generally a person has control over his or her own body, even where medical treatment is involved. Apart from the doctor-patient relationship being described by many theorists as a consensual one, broad consensus has been reached amongst legal writers that the relationship between the doctor and patient is based on trust. In this way the doctor undertakes, arising from the nature of his or her position or profession, that reasonable care

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67 Although the legal position at one stage in our law was, as a general rule, the independent practicing doctor was under no obligation to treat any person requesting his services and was at liberty to select or refuse such patients at will. See Strauss and Strydom (1967) 175 et seq.; McQuoid Mason and Strauss (1991) 3; LAWSA (1983) Volume 17 Par 189. Nonetheless, the traditional rule needs to be qualified in two respects namely: Where a doctor, arbitrarily and unreasonably refuses to attend to a seriously ill or injured person, the doctor may be held liable if the patient cannot manage to get another doctor and suffers harm. This accords with the departure from the traditional belief in our Law of Delict namely; there is no positive duty on a person to ward off danger facing another person. See in this regard the Appellate Division judgements of *Silva's Fishing Corporation (Pty) Ltd v Mameza* 1957 (2) SA 256(A) 260 H and *Peri-Urban Areas Health Board v Munarin* 1965(3) SA 367 (A) 323E. This aligns with the opinion of Johannes Voet in the Commentarious ad Pandectas 9.2.3 quoted by Gane *The Selective Voet being the Commentary on the Pandectas* (1955 - 1958) wherein it is stated that: *"A doctor who refuses to attend a patient cannot be held liable under the Aquilian Law, `although' adds Voet, "It would suit the duty of the good man to come to help the imperilled fortunes of his neighbour, if he can do it without hurt to himself."* The position since the decision of *Minister van Polisie v Ewels* 1975 (3) SA 590 (A) has changed in that the court held that delictual liability may be founded on `pure' omission in those instances where the circumstances so warrant and in which a legal duty to act positively arise. Commenting on the judgement Strauss (1991) 25 states that "*a court may now well hold a doctor liable for harm suffered by an injured or ailing person, where the doctor was aware of his condition and unreasonably refused or failed to attend."* The comments made by Strauss it is submitted accords with the rules of the South African Medical and Dental Council (now the Health Provisions Council) (1978) in that: *"A medical practitioner is free to decide whomever he will serve. A practitioner may, however, be required to justify his actions should unnecessary suffering or death result from his refusal to attend to a patient in case of an emergency, a practitioner is obliged to render assistance under all circumstances."* See also McQuoid-Mason and Strauss LAWSA Volume 17 (1983) 145-146. A further deviation from the general rule arises once a doctor has accepted a patient and has embarked upon a specific course of treatment, he may then not unilaterally abandon the patient where such abandonment might be harmful to the patient (unless the patient makes it impossible for the doctor to continue treating him or her). See Strauss (1991) 3; See also Claassen and Verschoor (1992) 117. It is submitted that a patient's failure to co-operate makes it impossible for the doctor to treat him or her; the doctor may resile from the contract. See Claassen and Verschoor (1992) 117; See also Strauss and Strydom (1967) 113; LAWSA Volume 17 (1983) Par 145.

68 The Patient Autonomy model (also known as the Contract Model) discussed earlier in this Chapter, regulates the relationship between the doctor and patient and has, in particular, for the last century, made inroads in medical law jurisprudence. Many social scientists, medical writers, as well as legal writers, have distinguished and encouraged the importance of patient autonomy. Through the model mutual participation between the doctor and patient (often referred to as shared decision making or informed consent) is encouraged. Paternalism as a model in which the doctor takes action or makes decisions on behalf of patients where necessary often without the patient's permission and sometimes even with coercion has to a large extent been pushed into the background. See Benatar (1987) 27 et seq.; See also Strauss (1987) *TSAR* 1 et seq.; See also Carstens and Pearmain (2007) 404ff.

and skill will be exercised during the treatment of the patient. [69] Once a position of trust is created, the doctor may not conduct himself in a careless or negligent way. If he does, resulting in any harm to the patient, the patient may sue the doctor for breach of contract formed on the breach of trust alternatively in delict. [70]

3.2.2.1.2 **Case Law**

The contractual relationship between the doctor/hospital and other healthcare providers and patient has, since the case of *Argus Printing and Publishing Co v Van Niekerk* [71] been recognised by the South African Courts and that of Zimbabwe. What has often also been of a contentious nature is whether the relationship between the doctor/hospital and patient stems from the Law of Obligations or from the Law of Contract *per se?* The South African Courts, over a number of decades, have also had to contend with the question, under what species of contract certain agreements entered into between the doctor/hospital and patient, resorted. [72]

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69 See Strauss and Strydom (1967) 111; See also De Wet and Yeats (1978) 348; Christie (2001) 348, The latter authors base their reasoning on the fact that, as the relationship between the doctor and patient is based on a contract of mandate (also known as a mandatory), a position of trust is created. The doctor in this regard undertakes to execute his or her duties with the necessary good faith and with the utmost care and skill; see also the discussion on the contractual relationship between healthcare provider and patient *Carstens and Pearmain* (2007) 404-406.

70 See Strauss and Strydom (1967) 111 who argue that the nature of the relationship between doctor and patient is established on trust. That together with the unique nature of services rendered is factors which may very well be relied upon in a legal suit against the doctor. Carstens and Pearmain (2007) 321 in this regard discusses the fiduciary relationship between the doctor and the patient which is built on trust. Black in *Black's Law Dictionary* defines the fiduciary duty as *"a duty to act for someone else's benefit while subordinating one's personal interests to that of the other person. It is the highest standard of duty implied by law."*

71 (1895) 2 P40; Other cases in which the courts have given recognition to the contractual relationship between the doctor and patient include *Kovalsky v Krige* (1910) 20 OTR 822; *Tulloch v Marsh* 1910 TPA 453; *Oates v Niland* 1914 KPA 976; *Sutherland v White* 1911 ODPA 407; *Webb v Isaac* 1915 ODPA 273; *Hewat v Rendel* 1925 TPA 679; *Recsei's Estate v Meiring* 1943 ODPA 277; *Bulls v Tsatsarolakis* 1976 (2) SA 891 (T); *Correira v Berwind* 1986 (4) ZHC 60; *Friedman v Glicksman* 1996 (1) SA 1134 WLD at 1138; *Castel v De Greef* 1994 (4) SA 408 CPD at 425; *Silver v Premier, Gauteng Provincial Government* 1998 (4) SA 569 WLD at 574-575.

72 In *Administrator, Natal v Edouard* 1990 (3) SA 581 (AD) the court was asked to adjudicate *inter alia* on whether the Appellant was in law obliged to compensate the Respondent arising from a faulty sterilization operation? The court recognised the contractual relationship between the hospital and patient and dismissed the appeal. A similar question had to be decided in the case of *Correira v Berwind* (1986 (4) 60 at 63. Mfalila J looking at the relationship between the doctor and patient found "*it is usually one of contract"* but cautions the court "*this is not the same thing as saying that a contractual relationship is the only one that can subsist between a doctor and patient."* The court endorsed the comment of Lord Nathan, *Medical Negligence* (1957) "*In the great majority of cases the duty owed by a medical man or a medical institution towards the patient is the same whether there exist a contract between them or not. Where there is no such contract, a duty arises by reason of the assumption of responsibility for the care of the patient. Where there is such a contract, this duty in tort exists side by side with a similar duty arising out of the contract. But the implied contractual duty is normally the same as that which exists apart from contract concludes that the Law of Contract and the Law of Obligations can exist side by side in the legal relationship of doctor and patient."* The court continues: *"As between a doctor and patient there can exists both contractual and delictual liabilities."* This is often referred to as concurrent liability and very much

3.2.2.1.3 **Legal Opinion**

(1) The nature of the contract between the doctor/hospital/healthcare provider and patient has pre-eminently been described by our legal writers and courts alike, as a consensual one, entered into on an *ad hoc* basis. [73]

(2) The fore stated opinion, it is submitted, is founded upon two fundamental principles namely: Firstly, a doctor in private practise is generally regarded as a free agent or independent `contractor' who may accept or refuse patients, as he chooses, [74] the

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recognised in South African Law. See *Van Wyk v Lewis* 1924 AD 438; *Lillicrap, Wassenaar and Partners v Pilkington Brothers SA (Pty) Ltd* 1985 1 SA 475 (A); *Otto v Santam Versekeringsmaatskappy Bpk* 1992 (3) SA 615 (O); *Tsimatalupoulus v Hemingway, Isaacs and Coetzee CC* 1993 (4) SA 428 (C). Our courts have also in a number of cases found that the contract between doctor/hospital and patient takes the form of letting and hiring of work. (l*ocatio conductio operis*). In *Kovalsky v Krige* 1910 P824 the court regarded the responsibility of a doctor in this type of agreement *"to bring a fair, reasonable and competent degree of skill and ability."* See also *Coppen v Impey* 1916 309. Our courts have also in a number of cases stated the contract between doctor/hospital and patient takes the form of letting and hiring of services. (l*ocatio conduction o perarum*) See *Myers v Abrahamson* (1951) (3) SA P438. In this case, the court held, that the agreement between the doctor, the patient and his spouse, for the doctor to accompany them to the USA and to continue treating the patient and to pursue his post graduate studies, should be regarded as a contract of service. On a number of occasions our courts have also distinguished between a contract of letting and hiring of services and a contract of sale. See *Tulloch v Marsh* 1910 TPD P453; *Sutherland v White* 1911 EDL P407; *Oates v Miland* 1914 CPD P976; *Kruger v Boltman* 1933 (1) PH ANO 3. In the latter case the supplying and fitting of dentures were regarded as a contract of sale. Likewise in *Shield v Minister of Health* 1974 (3) SA P276 (RAD) it was held that the supplying and fitting of an artificial leg to a patient by the hospital constituted a contract of sale.

73 Strauss and Strydom *Die Suid-Afrikaanse Geneeskundige Reg* (1967) 105; Claassen and Verschoor *Medical Negligence in South Africa* (1992) 115; Strauss *Doctor Patient and the Law* (1991) 3. This view, it is submitted, is founded on the cornerstone of the Law of Contract in that no contract comes into being without agreement first being reached, also known as *consensus ad litem*. It follows therefore, before any legal rights and obligations vest in any of the contracting parties, *consensus ad litem* first has to take place. Christie *The Law of Contract in South Africa* 1996 21-26; Kerr *Principles of the Law of Contract* (1967) 1-3; Van der Merwe et al *Contract - General Principles* (1993) 13-14. For the recognition of the contractual relationship between doctor and patient see *Kovalsky v Krige* (1910) 20 OTR 822; *Tulloch v Marsh* 1910 TPA 453; *Oates v Niland* 1914 KPA 976; *Sutherland v White* 1911 ODPA 407; *Webb v Isaac* 1915 ODPA 273; *Hewat v Rendel* 1925 TPA 679; *Recsei's Estate v Meiring* 1943 ODPA 277; *Bulls v Tsatsarolakis* 1976 (2) SA 891 (T); *Correira v Berwind* 1990 (4) ZHC 60; *Friedman v Glickson* 1996 (1) SA 1134 WLD at 1138; *Castell v De Greef* 1994 (4) SA 408 CPD at 425; *Silver v Premier, Gauteng Provincial Government* 1998 (4) SA 569 (WLD) at 574-575.

74 Strauss and Strydom *Die Suid-Afrikaanse Geneeskundige Reg* (1967) 175ff; Strauss *Doctor Patient and the Law* (1991) 3 McQuoid-Mason and Strauss *LAWSA* Volume 17 Par 189. This accords with the traditional belief found in the South African Law of Delict namely there is no positive duty upon a person to act. *Silva's Fishing Corporation (Pty) Ltd v Maweza* 1957 (2) SA 256 (A) at 260H; *Peri-Urban Areas Health Board v Munarin* 1965 (3) SA 367 (A) 323E. The aforementioned *dicta* align with the common law writer, Johannes Voet in the *Commentarius ad Pandectas* 9.2.3. The situation, it is submitted, has changed ever since the judgement of *Minister van Polisie v Ewels* 1975 (3) SA 590 (A). In this case the court found that delictual liability may be founded on `pure' omission in those instances where the circumstances so warrants and in which a legal duty to act positively arises. Strauss *Doctor Patient and The Law* (1991) 24 opine in this regard that a court may well find against a doctor, where in the case of an injured or ailing person, and the doctor is aware of the patient's condition, but nevertheless, unreasonably refuses or fails to attend to the patient. Strauss's opinion accords with the Health Professional Council of South Africa's Regulation (2001) regarding emergency cases. See also McQuoid-Mason and Strauss *LAWSA* Volume 17 (1983) 145-146. The patient autonomy model as discussed *supra* emphasizes the control which the individual has over his/her own body where medical treatment is involved.

consensual relationship between the doctor and patient is also recognised by the patient autonomy model in its quest for shared decision-making by the doctor and patient. Secondly, the relationship between doctor and patient is based on trust. In this way, the doctor, arising from his/her position, undertakes to exercise reasonable care and skill during the treatment of the patient. [75] Once a position of trust is created between the doctor and patient, the doctor may not breach that position of trust by conducting himself/herself in a negligent manner without incurring liability. This, I submit, will be one of the factors that will be advanced against the recognition of exclusionary clauses in hospital contracts in which the hospital/doctor/other healthcare provider exonerates itself/himself/herself against liability.

3.2.2.2 **ENGLAND**

3.3.2.2.1 **Legal Writings**

Historically the legal obligations of a doctor in England were derived from his status and "common calling", that is, to exercise the skill and diligence expected of his calling. [76] Because of the nature of the doctor's obligations, most legal actions against doctors were edictal in nature.

In time the action was founded on the principle of assumpsit. That is the duty arises by reason of the assumption of responsibility for the care of the patient. But with the development of the law of contract, this basis for liability was supervised by claims in contract. It was acknowledged that where a doctor treated a patient for payment, the action is founded in contract. [77]

In more recent times in Britain, when considering actions founded in contract, a clear distinction is made between patients who receive treatment under the National Health Service Scheme and those who enter into a private relationship with a doctor and hospital.

Shared decision-making or informed consent is encouraged in terms of this model. See Benatar "The Changing Doctor-patient relationship and the New Medical Ethics" *SA Journal of Continuing Medical Education* (1987) Vol. 5 April 27ff; Strauss "Geneesheer, Patient en Die Rag - 'n Delikate Driehoek" (1987) *TSAR* 1ff.

75 It is especially those writers who argue that the type of contract which exists between doctor and patient is one of a contract of mandate who advance the argument that from such agreement a position of trust is created. Strauss and Strydom *Die Suid-Afrikaanse Geneeskundige Reg* (1967) 111; De Wet and Yeats *Die Suid-Afrikaanse Kontraktereg* (1978) 348. The writers opine that in creating the trust position the doctor undertakes to execute his or her duties with the necessary good faith and with the utmost care and skill.

76 See Kennedy and Grubb (1998) 285 – 285.

77 See Kennedy and Grubb (1998) 286; See also Jones (1996) 18; See further Wright (1993) 15.

Despite the difference of opinion amongst the legal writers in England, namely, whether a contractual relationship arises between a patient and the hospital in circumstances where the hospital provides treatment under the National Health Service Scheme, the majority view amongst English writers, appears to be that patients, who are treated under the National Health Service Scheme, do not enter into a contractual relationship with the general practitioner or hospital doctor. Equally, there is no contractual relationship between the patient and the hospital, where the patient is cared for. The agreement is twofold, namely, medical services within the National Health Service Scheme are provided to the patient pursuant to a statutory obligation and secondly, no consideration is given by the patient to the doctor for his services. [78] A contrary argument is advanced however by other critics, in that, the statutory obligation in the NHS System is not necessarily inconsistent with a contractual arrangement.

It is further argued that consideration may indirectly be provided by the patient since his inclusion upon the doctor's medical list will result in remuneration being paid by the health authority to the doctor. [79]

The type of contract that arises between the doctor/hospital and patient has widely been recognised in England as a contract of service. [80]

There are circumstances, however, in which the contract between doctor and, particularly, the hospital and patient is regarded as a contract of sale. [81]

English writers when analysing the nature of the contractual relationship between the

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78 See Kennedy and Grubb (1998) 285 - 286; See further Jones (1996) 18 - 19; See also Jones and Burton (1995) 26.

79 Kennedy and Grubb (1998) 286 – 288.

80 This stems from the fact that professional medical practice in England during the nineteenth century in particular, was explicitly commercial in nature in that the relationship between the doctor and patient was characterized by a fee-for-service structure. See Teff (1996) 159 - 160, 173 who describes the role of the ordinary physician *as "maybe more readily perceived as `selling' services than they are actually supplying work and materials as when giving patients drugs, medical devices, injections, or blood transfusions."*

81 The following transaction has been held to constitute a contract of sale namely the supply and fitting of dentures; the supply of vaccine, drugs, prosthetics, heart pace makers or artificial heart valves. See Jones (1996) 27 - 28; See also Kennedy and Grubb (1998) 292 who express the view that: *"The law implies terms in respect of services or goods provided to patients."* In England such protection is afforded by *inter alia* the *Supply of Goods and Services Act 1982* in respect of which `fitness for purpose' and `satisfactory quality' has to be present when medical services and products are supplied.

doctor/hospital and patient are less clinical in their approach. [82]

3.2.2.2.2 **Case Law**

The implied duty to exercise care and skill in carrying out an operation received the attention of the English Court of Appeal in two leading cases. What also comes strongly to the fore in both cases is the principle that generally the doctor does not warrant that he will cure the patient unless the doctor expressly guarantees the result.

In *Eyre v Measday* [83] the Plaintiff sought to recover damages from the Defendant, a

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82 Although the existence of a contractual relationship between the doctor/private hospital and the patient is *per se* recognised, little (if any) emphasis is placed on the consensual nature of the contractual relationship. See Kennedy and Grubb (1998) 283-292; Jones (1996) 18-28; Jones (1991) 14-20; Kennedy and Grubb (1994) 64-73; Martin (1979) 138-139; Wright (1994) 6-11; Jackson and Powell (1986) 590-593. What emerged however is the great emphasis placed by the writers upon the terms implied in the contract between doctor (and hospital) and patient. See Kennedy and Grubb (1998) 283- 292; Jones (1996) 23-28; Jones (1991) 16-20; Nelson-Jones and Burton (1995) 26-31. Wright (1986) 10-11, 16-17; Jackson and Powell (1997) 591-593. The terms implied in the contractual relationship between the doctor (or hospital) and patient briefly amounts to this namely when the doctor (or hospital) assumes to diagnose, advise, treat and/or provide a service to the patient and/or provides goods to the patients, he/she or it undertakes to exercise reasonable care and skill. See Kennedy and Grubb (1998) 292; See also Jones (1996) 20; Jones (1981) 16 - 17; See further Kennedy and Grubb (1994) 70 -71; Wright (1984) 16 - 19; Jackson and Powell (1997) 591 - 592: The terms also imply that where goods alone are supplied or where goods are supplied together with services, such services are fit for the purpose they are provided and the goods so provided are of satisfactory quality. These obligations are implied by *The Supply of Goods and Services Act 1982* and cannot be excluded. See in this regard Kennedy and Grubb (1998) 292; Jones (1996) 27; Jones (1991) 19; Kennedy and Grubb (1999) 71; Nelson and Burton (1995) 28. Although the doctor (or hospital) when undertaking to provide medical services inherits therewith an obligation by law to exercise reasonable care and skill he nevertheless is not expected to perform miracles. See Jones (1996) 23 who holds the view that unless the doctor gives a contractual warranty that he will achieve a particular result the courts are reluctant to infer such a warranty in the absence of an express term. See also Jones (1991) 16 - 17; Kennedy and Grubb (1994) 71 - 72; Jackson and Powell (1992) Para. 1.10. summarize the relationship between the professional person and his/her client as: *"In every contract between a professional man, and his client there will be express or implied terms defining the nature of the engagement. Thus if a surveyor is instructed to produce a report on certain property, there is an express or implied obligation to inspect it. If a surgeon agrees with his patient to perform a particular operation, there may be an implied term that he will give the necessary supervision thereafter until the discharge of the patient. If a solicitor is instructed to affect the grant of an option, there are implied terms that he will draw up the option agreement and effect registration. The importance of specific terms such as these is that a professional man will be liable if he breaks them, quite irrespective of skill and care which he has exercised."* From the sources consulted, very few writers have entered the debate whether patient autonomy is to be preferred to that of paternalism as the ideal doctor-patient relationship model. See however Kennedy (1998) 178 who relies on `consent as an ethical doctrine which guarantees respect for persons'. The authors prefer shared decision-making as an ideal model in which, neither medical paternalism nor patient sovereignty dominates. See also McHale et al (1997) 76 - 87 who opine that `*although the vestiges of the old medical paternalism linger on, particularly in the area of consent and capacity and provision of reproductive advice and treatment, nevertheless self-determination has become recognised as perhaps, the dormant principle of medical ethics.*'

83 1986 1 ALL E.R. 488; See also *Dendoas v Yackel* (1980) 109 D.L.R. (3d) 45 (B.C.S.C.) where there was a similar confusion between doctor and patient, the patient believing that the doctor's emphasis on the `irreversible' and permanent nature of the sterilization procedure meant that there was no chance of a future pregnancy. Bouck J. held that since there was no clear meeting of minds on this essential term the claim in contract must fail.

surgeon, based on breach of contract arising from a botched sterilisation operation. The facts relied upon appear to be the following:

The Plaintiff underwent a sterilisation operation performed by the Defendant. The Defendant had explained the nature of the operation (a laparoscopic sterilisation), emphasising that it was irreversible, but he did not inform the Plaintiff that there was a less than one percent risk of pregnancy occurring following such a procedure. Both the Plaintiff and her husband believed that the operation would render the Plaintiff completely sterile. The Plaintiff subsequently became pregnant. She issued proceedings claiming that the Defendant was in breach of a contractual term that she would be rendered irreversibly sterile and/or a contractual warranty to that effect, which induced her to enter the contract. It was common cause that the contract was embodied partly in oral conversations and partly in the written consent form signed by the Plaintiff. Slade LJ in analysing the legal obligations of the doctor to his patient with whom he has contracted to carry out the operation concluded: *"Applying the Moorcock principle, I think there is no doubt that the Plaintiff would have been entitled reasonably to assume that the Defendant was warranting that the operation would be performed with reasonable care and skill. That, I think, would have been the inevitable inference to be drawn, from an objective standpoint. The contract did, in my opinion, include an implied warranty of that nature."* [84]

The Court of Appeal ultimately concluded that it was a contract to perform a particular operation, not a contract to render the Plaintiff sterile. Additionally, there was neither an express nor an implied warranty that the procedure would be an unqualified success. Although the Plaintiff could reasonably have concluded from the Defendant's emphasis on the irreversible nature of the operation that she would be sterilised, it was not reasonable for her to have concluded that he had given her a guarantee that she would be absolutely sterile.

A similar case involving a sterilisation procedure namely: In *Thake v Maurice* [85] the Plaintiff sought to recover damages from the Defendant, a surgeon, based on breach of contract.

The facts relied upon appear to be the following:

The Plaintiffs, a married couple consulted the defendant, a surgeon, privately, in order for

84 *Eyre v Measday* (1986) 1 ALL E.R. 488.

85 1986 1 ALL ER 497.

the husband to undergo a vasectomy as they did not wish to have any more children. The defendant explained the procedure to the plaintiffs and he pointed out that although it was possible to restore the husband's fertility he could not guarantee it, and that the plaintiff's should regard the operation as permanent. The plaintiff's signed a consent form which stated, *inter alia*: *"I have been told that the object of the operation is to render me sterile and incapable of parenthood. I understand that the effect of the operation is irreversible."* The operation was carried out and appeared successful. However, almost three years later, the wife discovered that she was pregnant. The operation had naturally reversed itself by a process known as late re-canalization and the husband's fertility had been restored. Subsequently, a child was born and the plaintiff's sued the defendant in negligence and for breach of contract. The plaintiff's claimed that they had not been warned of the risk of reversal and that this was negligent. Further they claimed a breach of contract in that the defendant was negligent. Further they claimed a breach of contract in that the defendant had guaranteed the success of the operation namely the husband's infertility.

In the course of his judgement Nourse LJ remarked:

"The particular concern of this court in Eyre v Measday was to decide whether there had been an implied guarantee that the operation would succeed. But the approach of Slade LJ in testing that question objectively is of equal value in a case where it is said that there has been an express guarantee. Valuable too are the observation of Lord Denning MR in Greaves and Co (Contractors) Ltd v Boynham, Meikle and Partners (1975) 3 ALL ER 99 at 103-104, (1975) 1 WLR 1095 at 1100 which I now quote in full:

"Apply this to the employment of a professional man. The law does not usually imply a warranty that he will achieve the desired result, but only a term that he will use reasonable care and skill. The surgeon does not warrant that he will cure the patient. Nor does the solicitor warrant that he will win the case."

Emphasising the inexact nature of medical science and unpredictability of medical treatment, Nourse LJ and Neill LJJ held that a doctor would only be held to have guaranteed the success of an operation if he expressly said so in clear and unequivocal terms."

Nourse LJ in this regard remarked:

" ..... A professional man is not usually regarded as warranting that he will achieve the desired result. Indeed, it seems that that would not fit well with the universal warranty of reasonable care and skill, which tends to affirm the inexactness of the science which is professed. I do not intend to go beyond the case of the doctor. Of all sciences medicine is one of the least exact. In my view a doctor cannot be objectively regarded as guaranteeing the success of any operation or treatment unless he says so much in clear and unequivocal terms."

Neill LJ concurred adding that *"while both the plaintiffs and the defendant expected that sterility would result, that does not mean, however, that a reasonable person would have understood the defendant to be giving a binding promise that the operation would achieve*

its purpose or that the defendant was going further than to give an assurance that he expected and believed that it would have the desired result." [86]

3.2.2.2.3 **Legal opinion**

(1) English Law, when analysing the nature of the contractual relationship between the doctor and patient, is less clinical in its approach. Besides recognising the existence of the contractual relation between the doctor and the patient *per se*, little (if any) emphasis is placed on the consensual nature of the contractual relationship. [87]

(2) What English writers and the courts do emphasize are the terms implied in the contractual relationship between the doctor (or hospital) and the patient, which includes, the obligation by law to exercise reasonable care and skill, although, the doctor/hospital is not expected to perform miracles. [88]

3.2.2.3 **UNITED STATES OF AMERICA**

3.2.2.2.1 **Legal Writings**

In the United States of America the physician-patient relationship besides ordinarily considered to be based on contract, the type of contract more frequently recognised is one of contract of service. [89]

The contract between physician and patient has also been described by distinguished writer Furrow [90] as `one belonging to the Law of Obligations'.

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86 *Thake v Maurice* (1986) 1 ALL ER 497.

87 Kennedy and Grubb *Medical Law: Text with Materials* (1998) 283-292; Jones *Medical Negligence* (1996) 18-28; Martin *Law Relating to Medical Practise* (1979) 138-139; Wright *Medical Malpractice* (1986) 6-11; Jackson and Powell *Professional Negligence* (1997) 590-593. The closest the consensual nature of the agreement came to be recognised in English Law is the case of *Mendoas v Yackel* (1980) 109 D.L.R. (3d) 45 (B.C.S.C.) which concerned the meeting of the minds.

88 Kennedy and Grubb *Medical Law: Text with Materials* (1998) 283-292; Jones *Medical Negligence* (1996) 23-28; Nelson-Jones and Burton *Medical Negligence Case Law* (1995) 26-31; Wright *Medical Malpractice* (1986) 10-11, 16-17; Jackson and Powell *Professional Negligence* (1997) 591-593. What do emerge from the writings are obligations once imposed and which becomes an implied term in the agreement cannot be excluded in any way. The implied duty to exercise care and skill received the courts attention on the well-known cases of *Eyre v Measday* 1986 1 ALL E.R. 488 and *Thake v Maurice* 1986 1 ALL E.R. 497. It was emphasized in both *dicta* that although the courts recognize the implied duty to take care it does not mean that it excludes a warranty that the patient will be cured.

89 See Waltz (1971) 40 who describes the nature of the contract of service as *"... the physician promising to perform professional services in exchange for the patient's promise to pay a reasonable fee for them."* See also Furrow et al (1995) 235.

90 Furrow et al (1995) 235 describes the contractual nature of the physician-patient relationship as `one founded on an obligation'. Once the physician has accepted to treat the patient he/she is bestowed with an obligation of

The nature of the contractual relationship between physician and patient has also in certain cases been described as a consensual relationship. [91]

The physician-patient relationship is generally accepted by most American writers to have been founded on contract, express or implied. [92] Although the physician, unless he agrees otherwise, is generally expected to act with reasonable skill and care, he or she is not considered a guarantor of good results. [93]

3.2.2.3.2 **Case Law**

`continuing attention'. Treatment obligations cease if the physician can do nothing more for the patient or where surgery is involved to provide follow-up care *"until the threat of post-operative complications is past."* See also Morris and Moritz (1971) 135 who recognizes the obligations which flow from the physician-patient relationship in that *"in the absence of a specific agreement he/she shall attend to the care of the patient as long as it requires attention unless he/she gives notice of his/her intention to withdraw or he/she is dismissed by the patient."*

91 The consensual nature of the relationship according to Morris and Moritz (1971) 135 *"flows from the principle of offer and acceptance." Contra* Sanbar et al (1995) 62 who describe the physician and the patient relationship as *"…. one based on a fiduciary relationship between the physician and the patient in which the physician impliedly promises the patient that he or she will exercise that degree of skill ordinarily possessed by his or her colleagues and practise according to accepted standards."* See also Sidley (1985) 183 who describes the fiduciary relationship as *"…. the utmost good faith with respect to all aspects of the diagnosis and treatment process."* Holder (1975) 1 advocates the consensual relationship between the physician and patient when he states: *"For a valid contract to exist, however, there must be mutuality of understanding between the parties as to the terms of the agreement."* See in this regard also Kramer and Kramer *Medical Malpractice* (1983) 6 who describe the consensual relationship between the physician and patient as that of *"a voluntary agreement."*

92 See Waltz (1971) 40-41 in which the writer states: *Although occasionally a formal, written contract is drawn up between the doctor and the patient, the agreement more likely, simply arises by implication from the behaviour of the parties."* In the latter instances although there are no express terms to the agreement, the physician according to Waltz nevertheless when embarking upon treatment, *"represent to the patient that he has the necessary training, knowledge, and skill and that he will employ those assets in the way any reputable physician ordinarily would."* See also Furrow et al (1995) 234-236 who extend the realm of the implied contract to include *"… to properly perform his or her medical function."* See also Sanbar et al (1995) who recognizes the implied contract between physician and patient as one in which *"…. the physician warrants that he or she will treat the patient with the degree of skill ordinary possessed by members of the medical profession."* See further Holder (1975) 3; Sidley (1985) 183 who defines the implied contract as *"to act with reasonable skill and care and to comply with other reasonable obligations of the profession."*

93 See Waltz (1971) 46 who describes the physician's standard of care as *"unvarying perfection"* of which the *"…. workings of miracles are no more expected of the medical profession than any other calling."* In other words, despite man's knowledge in the field of medicine the stage has not yet been reached whereby a *"flat guarantee of total success is expected whenever treatment is undertaken."* The effect thereof according to Waltz is *"when a qualified practitioner competently performs the work for which he has been trained the result may be good or bad; the fact that it sometimes is bad in no way brings about tort or contract liability."* In that regard erroneous diagnosis according to Waltz *"…. is not always indicative of lack of proper skill."* See also Furrow et al (1995) 237; See Sanbar et al (1995) 67ff who opine that although physicians are free to guarantee or ensure a result or guarantee improvement or a cure they would be *"foolish to be more than optimistic or encouraging."* See also the caution rendered to the American physicians by the author Alton (1977) 24. The author states that physicians are there *"….. to treat not to cure."* According to Holder (1975) 3 the American courts are very reluctant to *"assume a guarantee or warranty from a physician that he will cure the patient."*

An implied contract has in principle been accepted in general terms in a number of cases. Its existence has been justified in that it has been defined in a number of American decisions as: *"One not created by the explicit agreement of the parties but inferred by the law as a matter of reason and justice from their acts or conduct, the circumstances surrounding their translation making it a reasonable or even necessary assumption that a contract existed between them by tacit understanding.* [94]

As early as 1898 the highest court in New York established the existence of an implied contract between the physician and patient. The facts relied upon in *Pike v Honsinger* [95] are: The patient had been kicked in the knee by a horse and treated by the physician, the defendant. It was claimed that he had treated the patient in a negligent manner, resulting in a failure of the bones to unite. The court found: *"The law relating to malpractice is simply and well settled, although not always easy of application. A physician and surgeon, by taking charge of a case, impliedly represents that he possesses, and the law places upon him the duty of possessing, that reasonable degree of learning and skill that is ordinarily possessed by physicians and surgeons in the locality in which he practices, and which is ordinarily regarded by those conversant with the employment as is necessary to qualify him to engage in the business of practising medicine and surgery. Upon consenting to treat a patient, it becomes his duty to use reasonable care and diligence in the exercise of his skill and the application of his learning to accomplish the purpose for which he was employed. He is under the further obligation to use his best judgement in exercising his skill and applying his knowledge."*

But, warns the court, the physician is not expected to use anything more than his best judgement nor is he or she a guarantor of good results: "The rule requiring him to use his best judgement does not hold him liable for a mere error of judgement, provided he does what he thinks is best after careful examination.

His implied engagement with his patient does not guarantee a good result, but he promises, by implication, to use the skill and learning of the average physician, to exercise reasonable care and to exert his best judgement in the effort to bring about a good result." [96]

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94 *Pike v Honsinger* 49 NE 760, NY 1898; See also *Landon v Kanses City Gas CC* 10 F 2d 263, DC KANS 1926; *Calamelo v Missouki State Life Insurance Co* 230 SW 566 ARK, 1921.

95 49 NE 760, NY 1898.

96 *Pike v Honsinger* 49 NE 760, NY 1898.

In a later judgement in the case of *Adkins v Ropp* [97] the Supreme Court of Indiana expanded on this definition in 1938. The case involved a patient who had lost the sight of one eye. He claimed that the defendant had been negligent in removing a foreign body from it and the eye had then become infected as the result of the negligence. The defendant argued that the infection was an unavoidable result of the original injury. The court held:

"When a physician and surgeon assumes to treat and care for a patient, in the absence of a special agreement, he is held in law to have impliedly contracted that he possesses the reasonable and ordinary qualifications of his profession and that he will exercise at least reasonable skill, care and diligence in his treatment of him. This implied contract on the part of the physician does not include a promise to effect a cure and negligence cannot be imputed because a cure is not effected, but he does impliedly promise that he will use due diligence and ordinary skill in his treatment of the patient so that a cure may follow such care and skill, and this degree of care and skill is required by him, not only in performing an operation or administering first treatments, but he is held to the like degree of care and skill in the necessary subsequent treatments unless he is excused from further service by the patient himself, or the physician or surgeon upon due notice refuses to further treat the case." [98]

But there are cases in which the courts have been prepared to find that a doctor has guaranteed a particular result, and when he has failed to achieve it, they have allowed the patient to succeed in an action for breach of contract. An American case involving cosmetic surgery illustrates this. In *Sullivan v O'Connor* [99] a professional entertainer, sued the defendant because of the condition of her nose after he had operated. Justice Kaplan described the plaintiff's condition as follows:

" .... judging from exhibits, the plaintiff's nose had been straight, but long and prominent; the defendant undertook by two operations to reduce its prominence and somewhat to shorten it, thus making it more pleasing in relation to the plaintiff's other features. Actually the plaintiff was obliged to undergo three operations, and her appearance was worsened. Her nose now had a concave line to about the midpoint, at which it became bulbous; viewed frontally, the nose from bridge to midpoint was flattened and broadened, and the two sides of the tip had lost symmetry. This configuration evidently could not be improved by further surgery."

The ultimately succeeded in her claim for breach of contract. The court went on, however, to warn of the difficulties facing plaintiffs who allege that a doctor guaranteed success:

"It is not hard to see why the courts should be unenthusiastic or sceptical about the contract theory. Considering the uncertainties of medical science and the variations in the physical and psychological conditions of individual patients, doctors can seldom in good faith promise specific results. Therefore it is unlikely that physicians of even average integrity will in fact make such promises. Statements of opinion by the physician with some optimistic colouring are a different thing, and may indeed have therapeutic value. But patients may transform such statements into firm promises in their own minds, especially when they have been disappointed in the event, and testify in that sense to sympathetic juries. If actions for breach of promise can be readily maintained, doctors, so it

97 14 NE 2d 727, IND 1938.

98 *Adkins v Ropp* 14 NE 2d 727 IND 1938.

99 (1973) 296 NE 2d 183 (CAL.SUP Ct).

is said, will be frightened into practising `defensive medicine'. On the other hand, of these actions were outlawed, leaving only the possibility of suits for malpractice, there is fear that the public might be exposed to the enticements of charlatans, and confidence in the profession might ultimately be shaken. The law has taken the middle of the road position of allowing actions based on alleged contract, but insisting on clear proof. Instructions to the jury may well stress this requirement and point to tests of truth, such as the complexity or difficulty of an operation as bearing on the probability that a given result was promised." [100]

3.2.2.3.3 **Legal Opinion**

(1) Legal writers and the courts in the United States of America recognise the consensuality of an agreement in the physician-patient relationship. [101]

(2) In the absence of an express agreement, an implied term is present in all other agreements between the doctor and patient. The nature of the implied term is that the doctor will exercise reasonable skill and care when treating the patient. [102]

(3) The implied term to exercise reasonable care and skill does not include a warranty of cure. In this regard no doctor is seen as a guarantor of good results. [103]

3.3 **Summary and Conclusions**

The nature of the doctor/hospital-patient relationship has for many centuries and continues today, to play a significant role in the practise of medicine. The relationship between the doctor/hospital and patient has been founded on normative ethics and values and the long-

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100 *Sullivan v O'Connor* (1973) 296 NE 2d 183 (CAL.SUP. Ct).

101 Morris and Moritz *Doctor Patient and the Law* (1971) 135 acknowledges that the consensual nature of the relationship is founded on the contractual principle of offer and acceptance. Holder *Medical Malpractice Law* (1975) 1 refers to the consensual element of the agreement as the "mutuality of understanding between the Parties ....." It has also been referred to as a voluntary agreement. See Kramer and Kramer *Medical Malpractice* (1983) 6. *Contra* Sanbar et al *Legal Medicine* (1995) 62 who describes the nature of the doctor-patient relationship as a fiduciary one in which the doctor impliedly undertakes to exercise that degree of skill "ordinarily possessed by his or her colleagues in accordance with acceptable standards." See also Sidley *Law and Ethics* (1985) 183 who advocates good faith in all the practitioner's endeavours.

102 Waltz *Medical Jurisprudence* (1971) 40-41 state that when a doctor accepts the patient and undertakes to treat him or her he/she gives out to the patient that he/she possesses the necessary training, knowledge, and skill and that he/she will employ those assets. Furrow et al *Health Law* (1995) 234-236; Sanbar et al *Legal Medicine* (1995) 62ff; Holder *Medical Malpractice Law* (1975) 3; Sidley *Law and Ethics* (1985) 183. For the recognition of implied terms in the contractual relationship between doctor-patient see *Pike v Honsinger* 49 N.E 760 NY (1898); *Landon v Kanses City Gas CC* 10f 2d 263, DC KANS (1926).

103 Waltz *Medical Jurisprudence* (1971) 46 states that the implied agreement to exercise reasonable care and skill does not include the working of miracles; Furrow et al *Health Law* (1995) 237; Sanbar et al *Legal Medicine* (1995) 62ff expresses the view that although practitioners are free to guarantee results they would be "foolish to be more than optimistic or encouraging." See also Alton *Malpractice* (1977) 24; Holder *Medical Malpractice* (1975) 3ff for case law in which it was held that the implied term of the agreement does not include a warranty to success or a cure. See *Adkins v Ropp* 14 NE 2d 727, Ind. 1938. For a case involving cosmetic treatment and surgery in which the court held there was a guarantee to produce a certain result see *Sullivan v O'Connor* (1973) 296 NE 2D 183 (CAL SUP.CT).

standing principles of medical ethics and values dominate the relationship.

The long-standing principles involving ethics and values, resulting in the creation of legal rules set the outer limits as to how the doctor/hospital should conduct himself/herself/itself towards the patient. What has also crystallized from the relationship is the minimum standard of professional behaviour expected of the doctor or hospital.

Foundational to the doctor/hospital-patient relationship is that the behaviour of the practitioner or hospital arises in the general sphere from their relationship, alternatively, from a contractual relationship created by them. But, notwithstanding the distinct creation of the relationship, what has emerged is that the interest protected remains the same, namely the well being of the patient. The duty of care in both contract or in general, remains one, namely, the exercise of reasonable care towards the patient and to guard against the harm being done to the patient.

Furthermore, although the professional liability of medical practitioners/hospitals is founded upon different rules some in delict (also known in other jurisdictions as tort) or in contract, the contractual obligations are usually no greater than the duties owed in delict (tort). The duty to exercise reasonable care in delict is effectively the same as the implied term to exercise reasonable care in contract.

Because of the distinction between the rules of contract and those of delict, the establishment of the existence of a contractual relationship between the doctor/hospital and the patient will provide evidentiary materials to establish contractual liability where the exercise of reasonable care and skill is breached. It is for that reason that it is, at times, necessary to establish precisely when the relationship commenced. The success of civil litigation or a possible conviction in a criminal case is dependant largely on whether such a relationship has come into being and if so, when.

The commencement of the relationship is not always easy to establish. Unlike, for example, a land transaction matter where the terms are reduced to writing, writing is no prerequisite for establishing a contractual relationship. In most instances a tacit agreement arises through mere conduct. There are however, instances where express agreements are entered into with the patient. This occurs especially, in the hospital-patient relationship where more serious operations and/or complicated treatment/surgery are undertaken and the informed consent of the patient is required.

There is unanimity that when regard is had to the nature of the legal relationship between

the doctor/hospital and the patient, that it is a consensual one. It needs to be indicated that whatever the terms concluded, the central term remains that the doctor/hospital will exercise reasonable care and skill. From the nature of the relationship, a position of trust is created between the doctor/hospital and the patient. The effect thereof is that the practitioner/hospital may not conduct himself/herself/it in a careless or negligent way. Should this occur the patient may sue the doctor for breach of contract formed on the breach of trust.

The next chapter will deal with the formation of the medical contracts. In this chapter aspects such as, what type of agreements may validly be entered into will be looked at, also, what will be looked at in more depth, are the different terms which may be included in medical contracts. Consent is a fundamental concept in the doctor/hospital and patient relationship. Consequently, in Chapter Four the different forms of consent will be looked at as well as the effect of consent.

Chapter 4

Contractual Formalities in the Doctor/Hospital- Patient Relationship

4.1 Introduction

From what was stated in Chapters two and three the relationship between the doctor/hospital and patient, besides its general nature, is also contractual in nature. For that reason it is necessary to establish therefore, the manner and grounds upon which such contract is formed. It was stated in Chapter Three that although the nature of the contractual relationship between the medical practitioner/hospital and the patient has been described differently, varying from a contract of mandate, to a contract of service etc, unanimity exists amongst the legal writers universally, that the contractual relationship is a consensual one, the medical practitioner/hospital being a free agent or independent contractor who, when committing himself/herself/itself in treating the patient, creates a position of trust with the patient, wherein the practitioner/hospital undertakes to exercise reasonable care and skill.

In South African law, consideration is not an essential requirement for the existence of a contract, as it is in English law. The intention of the parties is therefore of paramount importance. [1] Both parties must have the requisite intention to create a legal relationship and obligation between the two of them. This is commonly known in legal parlance as *consensus ad idem*. [2] The fore stated is however, also subject to a further requirement, namely, the parties must have the necessary contractual capacity at the time, when the intention to conclude the agreement is formed. [3] Save for the so-called `emergency' situations, a clear distinction is drawn between the capability, alternatively incapability and the exceptions between adult patients, juvenile patients and mentally ill patients. [4] There are clearly recognised occasions when especially juvenile patients and mentally ill patients may validly represent themselves, alternatively, be represented by someone else who may validly enter into agreements on their behalf. [5] A further requirement in the formation of the contractual relationship between the doctor/hospital and the patient is that the parties agree that one or both of the parties to the contract must perform something. The agreement for

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1 In *Conradie v Roussouw* 1919 AD 279 the Appellant Division unanimously rejected the idea that the English doctrine of consideration forms part of South African law. De Villiers, AJA, concluded at p320 that *"According to our law, if two or more persons, of sound mind and capable of contracting enter into a lawful agreement, a valid contract arises between them enforceable by action. The agreement may be for the benefit of one of them or both (Grotius 3.6.2). The promise must have been made with the intention that it should be accepted (Grotius 3.1.48); according to Voet the agreement must have been entered into serio ac deliberato animo. And this is what is meant by saying that the only element that our law requires for a valid contract is consensus, naturally within proper limits - it should be in or de re lucia ac honesta."* See Christie (2001) 213; De Wet and Van Wyk (1992) 73 for a discussion of the element `intention' as a requirement for the formation of a contract in general. Similarly, when a doctor/hospital enters into an agreement whereby the patient is to be treated and/or operated on there must be an intention to contract. See in this regard the writings of Van Oosten (1996) 54; Strauss and Strydom (1967) 105; Strauss (1991) 3; Claassen and Verschoor (1992) 115; Carstens and Pearmain (2007) 313-314.

2 Christie (2006) 22; De Wet and Van Wyk (1992) 23-24; Lubbe and Murray (1988) 28; Van Oosten (1996) 54; Strauss and Strydom (1967) 105; Strauss (1991) 3; Claassen and Verschoor (1992) 115; Carstens and Pearmain (2007) 313-314.

3 For the law regarding the contractual capacity in general see Christie (2006) 227ff; Lubbe and Murray (1988) 20; for the requirement of capacity in a medical sense in which the patient is required to have the necessary legal capacity to consent. In this regard he/she must be legally capable of consenting. See Van Oosten (1996) 65ff; Strauss and Strydom (1967) 119ff; Strauss (1991) 4ff; See also Carstens and Pearmain (2007) 248, 899-902 regarding the legal capacity of mentally ill patients; 898ff the legal capacity of adults.

4 For a very comprehensive discussion on the legal capacity of various categories of patients see Carstens and Pearmain 898ff. See also Van Oosten (1996) 68ff; Strauss (1991) 4ff.

5 In so far as youths are concerned they are usually represented by their parents, guardians or wards. Gordon et al (1953) 79; Strauss and Strydom (1967) 188; Strauss (1991) 6-7; Van Oosten *Encyclopaedia* (1996) 66. The *Children's Act* 38 of 2005 especially Section 39(4) does *inter alia* provide assistance to youths when they may enter into agreements themselves. The *Mental Health Care Act* 17 of 2002 also provides assistance for mentally ill patients who are institutionalized. For a full discussion on the writings of the *Children's Act* and the *Mental Health Care Act* see Carstens and Pearmain (2007) 899ff.

performance is one of the obligations which flow from the agreement. [6] For that reason the agreement concluded between the medical practitioner and the patient, or where there is a hospital involved, between the representative of the hospital and the patient, must be one for performance from which, a legal obligation arises for the medical practitioner or hospital. Once again a legal obligation cannot arise unless there is a valid agreement contemplated between the parties concerned. It has been stated by our legal writers, and held by our courts before, that duress or undue influence to bring about an agreement, negatively impacts on the validity of such agreement. [7] The agreement for performance between the doctor/hospital and the patient is said to entail that the doctor/hospital is expected to perform only that which he/she/it has undertaken to do unless, of course, the doctor/hospital expressly guaranteed some results. [8] The formation of a contract in South Africa, as previously indicated, is dependent on a number of factors which have been considered hereinbefore. A further requirement for a valid agreement between the doctor/hospital and the patient is that the agreement between them must not be against public policy or against good morals. Contracts that are contrary to public policy are generally unenforceable. [9] Any agreement entered into between the medical

6 Joubert et al *LAWSA* Volume 4 Part 1 (1994) par 125 with reference to the agreement for performance suggest that *"conscious accord can never manifest itself unless the parties intend to create between them an obligation (or obligations) with a specific content which include inter alia `the consent of the obligations, that is to the performances to be rendered' must be clear."* See also Christie (2006) 403; Lubbe and Murray (1988) 1ff. For the agreement for performance in the medical setting see Van Oosten *Encyclopaedia* (1996) 55; McQuiod-Mason and Strauss (1983) 144; Strauss and Strydom (1967) 106; Claassen and Verschoor (1992) 115-116; Dada and McQuiod-Mason (2001) 5. There is great unanimity amongst the legal writers that the agreement for performance which creates an obligation entails nothing more than to treat the patient with professional care and skill.

7 For a general discussion on the effect of duress and undue influence on an agreement entered into see Christie (2006) 301ff; Lubbe and Murray (1988) 356ff, 374ff. For the *locus classicus* on the effect of duress on a contract entered into see *Broodryk v Smuts* No 1942 TPD 47 53; *Arends v Astra Furnishers (Pty) Ltd* 1974 (1) SA 298 (C) 306(A). For the leading authority involving an agreement entered into between a medical practitioner and patient, an elderly farmer upon whom the doctor exercised an undue influence see *Preller v Jordaan* (1956) 1 (SA) 483(A).

8 See in this regard Van Oosten *Encyclopaedia* (1996) 55 *"The doctor undertakes no more than to treat or operate upon the patient with the amount of competence, care and skill which may be expected from a medical practitioner in the particular branch of the profession."* See also McQuiod-Mason and Strauss *LAWSA* Volume 17 (1983) 144; Strauss and Strydom (1967) 106; Claassen and Verschoor (1992) 115-116; Dada and McQuiod-Mason (2001) 5. It does not however, in the absence of an express or implied warranty to that effect, include a guarantee that the patient will be cured or that the intervention will be a success. Van Oosten *Encyclopaedia* (1996) 55; Strauss and Strydom (1991) 329. In a number of cases our courts have held that by undertaking a case, a doctor does not guarantee that the patient will be cured of his disease (cf. the judge's remarks in *Buls and Another v Tsatsarolakis* 1976 (2) SA 891 (T) at 893; *Behrmann and Another v Klugman* 1988 (4) SA 6 (W); *Chalk v Fraser* (1995) WLD, unreported, discussed by Strauss 1995 (4) SAPM 1 the Judge remarked that *"no comparison can be drawn between an agreement to repair a car and an agreement to treat a patient medically. In the light of modern technology motor cars are generally repairable if reasonable care and skill are used, surgery, however, holds the risk of failure."*

9 See Christie (2006) 343ff; Lubbe and Murray (1988) 236ff. For case law see *Adminisitrator Natal v Edouard* 1990

practitioner/hospital and the patient which is against public policy or against good morals, negatively impacts on the validity of such agreements. [10] Although many cases involving contracts of general application have been decided by the South African courts over decades, the courts have not been invited to pronounce on the validity of medical contracts based on public policy in many cases. In the case of *Friedman v Glicksman,* [11] the court held that an agreement between a pregnant woman and a doctor, that he would advise her whether there was a greater risk than normal that she might have a potentially abnormal or disabled child, so that she might make an informed decision on whether or not to terminate the pregnancy is not *contra bonos mores* but sensible, moral and in accordance with modern medical practice. A case in point is that of *Afrox Healthcare Limited v Strydom*. [12] The facts and a full discussion of the case will be dealt with in a later chapter dealing with the validity of exclusionary clauses in hospital contracts, which forms the focal point of the investigative study conducted within this thesis. What is determined in the chapter is whether disclaimers (or exculpatory clauses) in hospital contracts have, contrary to the Supreme Court of Appeal's decision in the *Afrox case*, a right of existence in South Africa, suffice to say, in the Afrox case the court refused to allow a patient to escape the consequences of a disclaimer he had signed absolving the hospital from all liability and indemnifying it from any claim instituted by any person (including a dependant of the patient) for damages or loss of whatever nature (including consequential damages or special damages of any nature) flowing directly or indirectly from any injury (including fatal injury) suffered by, or damage caused to, the patient or any illness (including terminal illness) contracted by the patient, whatever the cause/causes, except only with the exclusion of intentional omission by the hospital, its employees or agents. The respondent contended *inter alia* that the relevant clause was contrary to the public interest. The Supreme Court of Appeal refused to accept the respondent's argument and ruled that such a clause is not against public policy. The judgement has and continues to receive much criticism and quite desirably so. It will be argued in the latter chapter that such disclaimers (or exclusionary clauses) in hospital contracts have no right of existence in South Africa, considering constitutional demands, foreign law and medico-legal considerations.

Generally, as was previously stated, the agreement between the doctor/hospital and patient

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(3) SA 581 (4); *Ryland v Edros* 1997 (2) SA 690 (C); *Sasfin (Pty) Ltd v Beukes* 1989 (1) SA 1 (AD).

10 See the general comments by the Supreme Court of Appeal although not adopted in *Afrox Healthcare Bpk v Strydom* 2002 (6) SA 21 (SCA).

11 1996 (1) SA 1134 (W).

12 2002 (6) SA 21 (SCA).

requires no legal formalities to bring about a valid contract. Where the agreement has not been reduced to writing and uncertainty prevails as to whether the parties have entered into an agreement *Christie* [13] suggests that the most common and normally helpful technique for ascertaining whether there has been agreement is to look for an offer and acceptance of that offer. This can be done by ascertaining whether some act manifesting assent and willingness to be bound by the terms of the contract is present.

From previous discourse it was ascertained that a contractual relationship between the doctor/hospital and patient can never come into being without consensual agreement being reached between the parties concerned. [14] Where there are terms created in the agreement, they must be understood when agreed to.

This is especially relevant and applicable in instances where more serious operations are undertaken or the medical practitioner engages in unusual treatment. In that event, it has become customary that the agreement is reduced to writing where a patient is admitted to a hospital. The patient then is required to sign an admission form which serves as an agreement between the medical practitioner/hospital/ healthcare provider and the patient. The admission form should, therefore, contain as comprehensive detail regarding the nature of the operation and/or treatment as possible. The admission form, in turn, serves as an offer to the patient setting out the terms of the agreement.

The following circumstances, in general terms, make it impossible for a contracting party to accept an offer, namely, he or she is unable to accept, for example, a patient in an emergency situation or where the validity of a contract may be affected by mistake (error), misrepresentation, duress, the contract as a whole being against public policy.

As a general rule, the contract entered into between the doctor and patient takes the form of a tacit agreement which includes implied terms. This will be covered more fully in Chapter Five. Suffice to say that one of the implied terms is that the doctor, when concluding the agreement, undertakes execute his duties with the utmost care in treating

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13 *The Law of Contract* 4th Ed (2006) at 28.

14 Christie (2006) at 28 refers to *Reid Bros (SA) Ltd v Fischer Bearings Co Ltd* 1943 AD 232 where the court stated at p241 that "a binding contract is as a rule constituted by the acceptance of an offer" and *Estate Breat v Peri Urban Areas Health Board* 1955 3 SA 523 (A) at 532 E where it was stated that: *"Consensus is normally evidenced by offer and acceptance. But a contract may be concluded without offer and acceptance other than pure fictions imported into the transaction for doctrinal reasons. Nor does every accepted offer constitute a contract."*

and/or operating on the patient. The implied term to exercise due care and skill has its roots in the fiduciary relationship between the doctor/hospital and the patient in which the doctor/hospital is expected to exercise their professional skills with the utmost diligence with the patient's interests being placed first.

There are occasions however, when expressed terms are relied on when entering into a contractual relationship. This is particularly relevant in situations where the doctor has to adopt unusual procedures when treating the patient or the patient is hospitalised and he/she enters into an agreement with the hospital. In these instances the agreements will be reduced to writing with the expressed terms agreed to being included in the agreement. The terms will include *inter alia* the treatment to be given, the procedure to be followed etc.

Although the doctor/hospital and patient enjoy the utmost freedom to contract [15] and generally wide latitude is allowed in their selection of express terms, [16] which they purport to agree to, they are not without limits. They cannot, for example, agree to that which would be regarded as contrary to public policy. [17] Since constitutional values and principles now infuse public policy, the principle of freedom of contract, in the new constitutional

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15 Freedom to contract and the sanctity of contract have been identified as principles that are fundamental to the law of contract in South Africa. This freedom has also hitherto been based on public policy. See *Standard Bank of SA Ltd v Wilkinson* 1993 (3) SA 822 (C) in which the court stated: *"Which brings us to the third aspect that must be borne in mind, viz. 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 them in respect of all legitimate subject matters."*
One is further reminded of the much-quoted aphorism of Jessel MR in *Printing and Numerical Registering Co v Sampson* (1875) LR Esq. 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."* (See also *Wells v South African Alumenite Company* 1927 AD 69 at p73) In *SA Sentrale Ko-op Graanmaatskappy Bpk v Shifren en and ere* 1964 (4) SA 760 (A) at 767A Steyn CJ emphasized *"die elementêre en grondliggende algemene beginsel dat kontrakte wat vryelik en in alle erns deur bevoegde partye aangegaan is, in die openbare belang afgedwing word." 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."*

16 See van Oosten Encyclopaedia (1996) 57.

17 See Van Oosten *Encyclopaedia* (1996) 88; See also Strauss and Strydom (1967) 110, 324 "*argue that where such an agreement of waiver is entered into by a doctor with his patient it ought to be regarded as null and void as being contrary to public policy."* See also Strauss (1983) footnote 43 at 349. The author expresses the opinion *"that the same consideration ought to apply in the case of hospitals in respect of personal injury to the patient. After all, it is the interest in his bodily inviolability (the persoonlikheidsgoed) that is at stake here and not merely his patrimonial interest."* See further Claassen and Verschoor (1992) 102 ex seq.; See further Van Dokkum "Hospital Consent Forms" *Stell., LR* (1996) 255; See further Cronje-Retief (2000) 440 et seq.

order, must similarly be acknowledged and shaped in accordance with constitutional values and principles. [18] Even before the Constitution came into being, the limits of the freedom of contract were very much influenced by public policy. [19]

As was previously stated, in order for a contract to arise, there must be an intention to

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18 Pearmain (2004) 527.

19 In *Bank of Lisbon and South Africa Ltd v De Ornelas and Another* fn 45 supra Jansen JA stated: Apart from statutory innovations, there are in any event a number of well-recognised instances in our law contract where freedom of contract and the principle of *pacta servande sunt* and the ideal of certainty give way to other considerations. A few examples may be mentioned. A creditor has a right to specific performance but a Court may in the exercise of its discretion refuse to make such an order. The discretion is aimed at preventing an injustice - for cases do arise where justice demands that a plaintiff be denied his right to performance - and the basic principle thus is that the order which the Court makes should not produce an unjust result which will be the case, egg, if, in the particular circumstances, the order will operate unduly harshly on the defendant. Another principle is that the remedy of specific performance should always be granted or withheld in accordance with legal and public policy....' (Per Hefer JA in *Benson v SA Mutual Life Assurance Society* 1986 (1) SA 776 (A) at 783D-E). A restraint of trade is not per se invalid or unenforceable - but it is so if it offends against the public interest *Magna Alloys and Research (SA) (Pty) Ltd v Ellis* 1984 (4) SA 874 (A). In delivering the judgement of the Court, Rabie CJ points out: *"Omdat opvattings oor wat in die openbare belang is, of wat die openbare belang vereis, nie altyd dieselfde is nie en van tyd tot tyd kan verander, kan daar oor geen numerus clausus wees van soorte ooreenkomste wat as strydig met die openbare belang beskou kan word nie. Dit sou dus volgens die beginsels van ons reg moontlik wees om te sê dat 'n ooreenkoms wat iemand se handelsvryheid inkort teen die openbare belang is indien die omstandighede van die betrokke geval sodanig is dat die Hof daarvan oortuig is dat die afdwing van die betrokke ooreenkoms die openbare belang sou skaad"* and further *"Die opvatting dat 'n persoon van 'n beperking wil afdwing nie die las dra om te bewys dat dit redelik inter partes is nie, bring nie mee dat oorwegings van die redelikheid of onredelikheid van 'n beperking nie van belang is of kan wees nie. (At 803H). Die belangrike vraag is dus nie of 'n ooreenkoms van so 'n aard is dat dit ab initio ongeldig is nie, maar of dit 'n ooreenkoms is wat die Hof, gesien die vereistes van die openbare belang, nie behoort af te dwing nie."* (At 895 D-E). The Court may reduce a stipulated penalty to such an extent as it may consider equitable in the circumstances (Act 15 of 1962, S3 - reinstating the common law). Not only contracts against public interest or public policy are subject to control by the Court, but also justice (regsgevoel) of the community, as is the case in delict, where it is now recognised that there is no *numerus* those offending the boni mores. In this field reference must be made to the sense of *clausus* of actionable wrongs. But the influence of the doctrine of sanctity of contract and the maxim *pacta sunt servanda* have been so great that Sachs J in a recent Constitutional Court judgement of *Barkhuizen v Napier* 2007 (5) SA 323 (CC) Para 14 remarked that their usage *"through judicial and text-book repetition come to appear axiomatic, indeed mesmeric, to many in the legal world."* Ngcobo J at Para 15 delivering the majority judgement also remarked: *"I do not understand the Supreme Court of Appeal as suggesting that the principle of contract pacta sunt servanda is a sacred cow that should trump all other considerations."* The court goes on to state: *All law, including the common law of contract, is now subject to constitutional control. The validity of all law depends on their consistency with the provisions of the Constitution and the values that underlie our Constitution. The application of the principle pacta sunt servanda is, therefore, subject to constitutional control."* And further: *"Public policy represents the legal convictions of the community; it represents those values that are held most dear by the society. Determining the content of public policy was once fraught with difficulties. That is no longer the case. Since the advent of our constitutional democracy, public policy is now deeply rooted in our Constitution and the values which underlie it. Indeed, the founding provisions of our Constitution make it plain: our constitutional democracy is founded on, among other values, the values of human dignity, the achievement of equality and the advancement of human rights and freedoms, and the rule of law."* The court consequently lay down the following test: *"What public policy is and whether a term in a contract is contrary to public policy must now be determined by reference to the values that underlie our constitutional democracy as given expression by the provisions of the Bill of Rights. Thus a term in a contract that is inimical to the values enshrined in our Constitution is contrary to public policy and is, therefore, unenforceable."*

contract. The intention to contract, on the other hand, must be exercised freely and with knowledge of that which is agreed to. The patient, in particular, must be aware of what he/she agrees to. One of the material manifestations of the existence of consensus between the parties is that of consent. It has often been stated that the patient's effective consent is fundamental to medical treatment. In the new constitutional order every patient has a constitutional right to his/her bodily integrity and security. In the absence of consent, the doctor/hospital conduct, save in certain instances such as emergency, may well be viewed as a violation of a constitutional right. Consent takes various forms, including express or implied consent, and may be executed in oral or written form. Certain legislative provisions require that consent be reduced to writing. In practice it is especially in hospital admission forms that consent forms are incorporated. But, there is no legal requirement for consent to be in written form.

The role of informed consent in the formation and conclusion of a contract is of great importance in the practice of medicine. [20]

The rationale for the patient's informed decision-making opportunity is founded upon the principle that, in a medical context, the patient's consent is of paramount importance within the medical practitioner/hospital/healthcare provider and patient's contractual relationship. Besides creating and promoting a healthy relationship between the medical practitioner/hospital/other healthcare provider and the patient, at common law and in terms of the Constitution, the patient, as was stated earlier, has the right to integrity and security.

For consent, however, to be real, there has to be an exchange of information between the medical practitioner/hospital/healthcare provider and the patient. It is this imparting of appropriate information and the acquisition of knowledge of material risks of complications, as was previously stated which puts the patient in a position to make an informed decision. It is this exchange of information, in which the patient acquires knowledge and appreciation in order to put him in a position to make an informed decision, which is also known as informed consent.

A failure in making a decision based on the awareness of the circumstances may very well result in the patient raising a defence of misrepresentation, which is a fundamental and inherent conflict that arises within the law of contract in the context of health service

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20 This causes Carstens and Pearmain (2007) 322 to remark that *"informed consent from a contractual point of view is important to ensure consensus and that the parties are bound by the terms of their agreement."*

delivery. [21]

The South African writers and the courts have in more recent years of the history of medical jurisprudence; put a premium on the presence of informed consent. [22] The value in recognizing informed consent has a twofold purpose namely; it firstly enhances a proper and healthy relationship between the medical practitioner/hospital/other healthcare provider and the patient. [23] In this relationship, the medical practitioner/hospital/other healthcare provider no longer assumes a paternalistic role, in which, the patient has no say in the decision-making process regarding his/her own treatment. What has changed fundamentally as well is the shift in, especially, the doctor-patient paradigm, in which the patient now assumes an autonomous role in exercising his/her right to self-determination. In this regard,

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21 Pearmain (2004) 520; Christie (2006) 320 observes that silence may amount to misrepresentation in some cases. This may according to Pearmain (2004) 522 where a party, not necessarily with dishonest motive, has done something which has had the effect of concealing facts which would otherwise been apparent to the other party. *Dibley v Furter* 1951 (4) SA 73(C); *Knight v Hemming* 1959 (1) SA (EC); where a party presents for signature a standard form contract without drawing attention to an unusually onerous clause, in circumstances where he must have known that the signatory would not read the contract and discover the clause *Kempston Hire (Pty) Ltd v Snyman* 1988 (4) SA 371 (SE). For the more recent constitutional court dictum of *Barkhuizen v Napier* 2007 (5) SA 323 (CC) the comments of Sachs J on the ill effects of standard form contracts Para 182.

22 Christie (2006) 322 states that partners, and agents by the very nature of their relationship is put in a position of involuntary reliance on sharing of information. In this regard Christie hold the following view: *"..... we require disclosure of material facts in insurance and other contracts not because they are contracts uberrimae fidei but because they are contracts in which a situation of involuntary reliance necessarily exists, and we came to attach the uberrimae fides label to them as a reminder that, in them, this situation always exists."* Pearmain (2004) 423 hold the view that the patient is very much involuntarily reliant on the healthcare provider to disclose information. This fits the paradigm of duties of disclosure in the so-called fiduciary relationship.

23 The relationship advocated is the one built on the so-called fiduciary relationship. See Pearmain (2004) 523ff. Although it is a concept that has not really developed in South Africa as much as in Canadian law nonetheless it is not a foreign concept. Litman "Self-referral and kickbacks: Fiduciary law and the regulation of Trafficking in Patients" 2004 *CMAJ 17*0 (7) 1119 has the following comments to make: "Fiduciaries are `obligatory altruists'. They must selflessly, although not without remuneration, attend to their patients interests with single-minded attention. In law, physicians are fiduciaries because they undertake to dedicate themselves to their patients, who have a reasonable expectation of such dedication, and patients rely on it implicitly. Factors which give rise to the fiduciary duty of physicians include the power and influence of physicians, the vulnerability and dependence of patients and the solemn pledge of physicians to act only in their patients' interests. Fiduciary duty mandates exemplary relational behaviours and unlike malpractice law, is not concerned with standard of care issues. As fiduciaries, physicians must discharge their responsibilities to patients with loyalty, honesty, candour and good faith, all the while avoiding conflict of interest. Material interests that compete with the interests of patients, including benefits of self-referrals and kickbacks, must be avoided for they give rise to a `reasonable possibility of mischief' (footnotes omitted). Fiduciary law in South Africa with regard to health professionals in particular appears to be largely undeveloped compared to the Canadian situation. Given that, despite this, the Canadians still experience problems with flagrant disregard of these legally imposed duties, it is hardly surprising that there are problems of this nature in South Africa where the law on this subject is not developed. Given the approach of the South African courts to health care contracts, it is likely to remain so unless the Legislature steps in. It is Pearmain (2004) 525 who persuasively argues that it is unfortunate that the Supreme Court of Appeal in the *Afrox Healthcare v Strydom* case was unable to adopt these principles but continued to see the hospital as a supplier of goods and services.

the patient has a greater say in the decision-making process affecting his/her welfare. Secondly, the value in recognising informed consent has also proved to be essential for lawful medical interventions. For medical interventions, whether they take the form of treatment or experimental, to be lawful, informed consent is essential, in that, informed consent serves as a ground of justification to escape criminal and/or civil liability.

The doctrine of informed consent can only be effective provided certain requirements are met. The requirements include, consent must be recognised by law, that is, that which is consented to must not be *contra bonos mores* or against public interests; besides the consent being free and voluntary, consent must be given by someone capable of consenting; the consenting party must have had knowledge and been aware of the nature and extent of the harm or risk; the consenting party must have appreciated and understood the nature and extent of the harm or risk. The nature and scope of the information which must be discussed by the physician should now be assessed in context of legislative requirements. [24] For full appreciation and understanding to take place, the information given to the patient must be as comprehensive as possible, clear and unequivocal, before it can be said that the patient consented to the harm or assumed the risk. With regard to the patient consenting to the harm or assumed risk, although the South African legal writers recognise the doctrines of *volenti non fit iniuria* and informed consent they are not unlimited, in that individual autonomy is limited by considerations of individual and social responsibility. Public interests dictate that the prevailing legal convictions of the community aim to protect the individual against his/her folly. [25]

For that reason, individual rights in certain circumstances are curtailed and kept within reasonable bounds. Factors which influence the placement of this limitation are said to include the nature and extent of the interests involved, the motives of the parties and the

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24 Carstens and Pearmain (2007) 883. Section 6 of the *National Health Act* 61 of 2003 read with ss7, 8, 9 of the said Act provide as follows: *"S6(1) ..... every healthcare provider must inform a user of (a) the user's health status except in circumstances where there is substantial evidence that the disclosure of the user's health status would be contrary to the best interest of the user; (b) the range of diagnostic procedures and treatment options generally available to the user; (c) the benefits, risks, costs and consequences generally associated with each option; and (d) the user's right to refuse and explain the implications, risks, obligations of such refusal."* Section 7 of the Act deals with the situation where the user cannot consent and the consent has to be given by another person etc. Section 7(2) provides for definition of `informed consent' meaning *"consent for the provision of a specified health service given by a person with legal capacity to do so and who has been informed as contemplated in Section 6" Section* 8 of the Act deals with a user's right to self determination in the following terms: "(1) a user has a right to participate in any decision affecting his or her personal health and treatment .....". Section 9 of the Act provides for health service without consent.

25 Van der Walt (1979) 53-54; See also Strauss (1964) *SALJ* 139 182-184.

social purpose of the consent or assumption of risk.

4.2 FORMATION OF THE CONTRACT - SOUTH AFRICA

4.2.1 Intention to Create Legal Relations

One of the cornerstones of the doctor-patient relationship in forming a contract is the intention by the parties to create a legal relationship. [26]

It involves the purchase of professional services and/or sale of medical equipment [27] where the parties, both the doctor/hospital and the patient are known to each other. For the legal relationship between the doctor/hospital and patient to be valid the parties must be competent to conclude the contract. [28] In the Law of Contract it is commonly described as `the meeting of minds' between the contracting parties when the contract is formed. [29]
The validity thereof, as will be seen hereinafter, will depend on whether the patient is legally capable of consenting.

4.2.2 The Capacity to Contract

One of the *essentially* for a valid contract between the doctor/hospital and the patient is that the parties must have the necessary contractual capacity at the time when the

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26 The above principle is founded on the definition given to contract in general by the authors De Wet and Van Wyk (1978) 23ff namely: *"An agreement entered into with the intention of creating an obligation or obligations."* A similar definition is given to a contract by Gordon, Turner and Price Medical Jurisprudence (1953) 69 namely: *"An agreement between two or more persons which create or are intended to create a legal obligation."*

27 See Van Oosten *Encyclopaedia* (1996) 53 - 54 who uses the examples of a patient undergoing dental treatment and arising from such treatment the dentist supply and fits the patient with a denture. See also: *Tulbach v Marsh* 1910 (TPD) 453; *Sutherland v White* 1911 (EDL) 407; *Noakes v Niland* 1914 (CPD) 976; *Kruger v Baltman* 1933 (1) PH 306; *S v Progressive Dental Laboratory (Pty) Ltd* 1965(1) SA (T) 195; See also Strauss (1991) 69. A further example is where a patient undergoes treatment in a hospital and the hospital thereafter supplies and fits an artificial leg for the patient. See *Shields v Minister of Health* 1974 (3) SA 276 (RAD).

28 This is referred to by Strauss (1991) 3 as *"the capacity of the doctor and patient to contract."* See also Van Oosten *Encyclopaedia* (1996) 65 who refers to the competency to contract as *"the legal capacity to consent."* See also Gordon Turner and Price (1953) 71 who refers to the doctor's `contractual capacity'. See further Van der Merwe and Olivier *Die Onregmatige Daad in die Suid-Afrikaanse Reg* (1985) 91 who define that legal capability as *"a person is capable of forming an intention when he or she is intellectually of sufficient maturity to understand the implications of his or her acts and when he or she is not mentally ill or under the influence of drugs which have an impairing affect on his or her brain."* See also Claassen and Verschoor *Medical Negligence in South Africa* (1992) 60 in this regard.

29 See Christie (2006) 22 - 23 who refers to this act as *"A coincidence of the wills or consensus ad litem."* See also Joubert Volume 5 Part 1 (1994) par 126. See further Van Oosten Encyclopaedia (1996) 63 who states that the contractual relationship between the doctor/hospital and patient *"presupposes consensus ad idem between the parties."*

contract is entered into. A valid doctor/hospital-patient agreement will therefore depend, primarily, on whether the patient is legally capable of consenting to be diagnosed or treated. [30]

It is essential therefore, that, save for the exceptions enunciated in the footnote hereunder, as a general rule, the doctor/hospital first establishes whether the patient has the necessary capacity to enter into an agreement with the doctor/hospital.

The patient's capacity to contract is dependent on whether he/she is in a position to consent to the medical treatment or surgery etc. Currently South African legislation governs various aspects of consent. [31] The legislation includes the *National Health Act*, [32] the *Mental Health Care Act*, [33] the *Child Care Act*, [34] and the *Choice on Termination of Pregnancy Act*. [35]

The following broad categories of people are influenced by the fore stated legislation, namely, capacitated adult patients, minor patients, mentally ill patients, consent to termination of pregnancy.

4.2.2.1 **Adult Patients**

In the case of adults, normally the patient himself or herself will consent to be diagnosed or treated.

One of the pre-requisites is that the patient be of sound or sober senses or free of intoxication or drug impediments or unconscious or in a complete state of shock before it may be assumed that the patient has the necessary legal capacity to enter into such an

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30 For the general requirement of contractual capacity see Christie (2006) 227ff; Lubbe and Murray (1988) 20. For the requirement in the medical sense see Strauss (1991) 3 who state that: *"Legally the doctor's right to treat or to operate is based entirely on the patient's consent apart from those cases where the patient is under a statutory duty to submit to for example a vaccination or an examination for the purposes of public health and apart from emergency cases where a patient is brought to a doctor in an unconscious or semi-conscious state."*

31 Carstens and Pearmain (2007) 897ff.

32 61 of 2003.

33 17 of 2002.

34 38 of 2005.

35 92 of 1996.

agreement. [36]

Although the concept, adulthood, commonly referred to a person who has reached the age of majority (21 years of age), significantly, in terms of the *Child Care Act* [37] any person over the age of 18 years shall be competent to consent to the performance of any medical operation upon himself. [38] More recently, the age of majority which was previously in place, has now been repealed and a person who attains the age of 18 is now deemed to be a major. [39]

In instances concerning married couples, the general rule is that each individual spouse, either husband or wife, is fully entitled to consent independently to any medical treatment, notwithstanding the fact that they are married in community of property. [40] Where the procreative powers of a spouse may be terminated by an operation, as in a case of sterilization, the doctor should ascertain if the consent of the patient's spouse has been obtained. But if the other spouse does not consent, the doctor may still carry out the procedure. [41]

Where an emergency situation prevails and one cannot rely on the patient to exercise his or her individual capability, this pre-requisite is dispensed with and the operation may take place without the direct consent of the patient, provided, the requirements of the *National Health Act* [42] are complied with. In context of consent requirement relating to adults, reference should be made to section 7(1) of the *National Health Act*, [43] which provides for proxy or substituted consent to medical interventions by someone else on behalf of the patient who himself/herself cannot consent. The provision states the following:

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36 Dada and McQuiod-Mason *Introduction to Medico-legal practice* (2001) 8. See especially the case of *Recsei's Estate v Meine* 1943 EDL 277 wherein the court held *"" ..... Ordinarily the consent of an adult in full possession of his mental faculties ..... would be sufficient authority for the performance of a surgical operation upon him.*

37 38 of 2005.

38 S39 (4) (a) of the *Child Care Act* 74 of 1983; See the discussion of Carstens and Pearmain (2007) 898.

39 See the *Child Care Act* 38 of 2005.

40 Dada and McQuiod-Mason (2001) 9.

41 The reason therefore is that the consent of the spouse is not legally necessary. See Dada and McQuiod-Mason (2001) 9. The Constitution also provides that every person has the right to make decisions concerning his or her reproduction. See Section 12 (2) of Act 108 of 1996.

42 61 of 2003.

43 61 of 2003.

Subject to section 8, a health service [44] may not be provided to a user, [45] without the user's informed consent, unless:

(a) the user is unable to give informed consent and such consent is given by a person -

(i) mandated by the user in writing to grant consent on his or her behalf; or
(ii) authorized to give such consent in terms of any law or court order.

(b) the user is unable to give informed consent and no person is mandated or authorised to give such consent, and the consent is given by the spouse or partner of the user or, in the absence of such spouse or partner, a parent, grandparent, an adult child or a brother or a sister of the user, in the specific order as listed;

(c) the provision of a health service without informed consent is authorised in terms of any law or a court order;

(d) failure to treat the user, or group of people which includes the user, will result in a serious risk to public health; or

(e) any delay in the provision of the health service to the user might result in his or her death or irreversible damage to his or her health and the user has not expressly, impliedly or by conduct refused that service."

4.2.2.2 **Juvenile Patients**

Generally, in the case of minors because of their age, save for specific legislative provisions to the contrary, they cannot enter into any agreement with a doctor/hospital. It is the parents or guardian who enters into agreements on their behalf. [46]

The doctor will, as a general rule, be perfectly safe in relying upon the consent of either the mother or father. In the case of adopted children or orphans, the person who is the legal guardian of the child has the authority to enter into an agreement with the doctor/hospital on behalf of the child. [47]

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44 Defined in the Act as *"health care services, including reproductive health care and emergency medical treatment contemplated in section 27 of the Constitution, basic nutrition and basic health care services is contemplated in section 28(1)(c) of the Constitution, medical treatment contemplated in section 35(2) of the Constitution; municipal health services."*

45 "User" the term now employed by the Act to describe the patient, is now defined as *"the person receiving treatment in a health establishment, including receiving blood of blood products, or using a health service, and if the person receiving treatment or using a health service is (a) below the age contemplated in s39(4) of the Child Care Act, "user" includes the person's parents or guardian or another person authorized by law to act on the first mentioned person's behalf; of (b) incapable of taking decisions, "user" includes the person's spouse or partner or, in the absence of such spouse or partner, the person's parent, grandparent, adult child or brother or sister, or another person authorized by law to act on the first mentioned person's behalf".* See the discussion by Carstens and Pearmain (2007) 899.

46 Dada and McQuiod-Mason (2001) 10ff; Strauss (1991) 6-7, 211-212; See also *Esterhuizen v Administrator, Transvaal* 1957 (3) SA 714 (T); *G v Superintendant Groote Schuur Hospital* 1993 (2) SA 255 (C) 262.

47 See Strauss (1991) 4 - 5; See also Van Oosten Encyclopaedia (1996) 66; Dada and McQuoid-Mason (2001) 10 - 12; Claassen and Verschoor (1992) 60; McQuoid-Mason and Strauss (1983) Volume 17 Par 193; See also Gordon

In certain instances where the patient, in terms of the common law, delegates certain of his parental powers to another person who acts *in loco parentis* (on behalf of the parent) for example a teacher, a youth leader or a relative in whose care the child is temporarily. Where a parent has expressly or tacitly authorised such a person to enter into an agreement with a hospital/doctor for medical intervention for the minor child on his or her behalf, that person has the legal capacity to contract. [48]

Despite the common law position which, as was discussed herein before, limits the contractual capacity of minors in general, certain legislative provisions vitiate the general limitations. [49]

4.2.2.3 **Mentally ill Patients**

The consent requirements for mentally ill patients are to be found in the recently passed *Mental Health Care Act*. [50] In terms of the legislation mentally ill patients are regarded as "mental health care users" and include *inter alia* the following categories of persons:

"A person receiving care, treatment and rehabilitation services or using a health service at a health establishment aimed at enhancing the mental health status of a user, state patient and mentally ill prisoner." [51]

Turner and Price (1953) 79 who expresses the view that *"The contractual capacity of the minor is subject to the control of his parent or guardian. Generally speaking, he is not bound by any contract into which he may enter if he does not have the consent of his parent or guardian with the following exceptions namely:*

(a) The parent or guardian may ratify the contract after it has been signed;

(b) The minor may ratify the contract on attaining majority;

(c) The minor may be "tacitly emancipated". The practitioner will be well advised not to rely on it unless advised." See also Strauss and Strydom (1967) 188.

48 Strauss (1991) 6-7; Van Oosten (1996) 66; Dada and McQuoid-Mason (2001) 10ff. The court may also exercise the power of an upper guardian in instances where a parent or guardian declines to furnish consent. See *Seetal v Pravitha NO* 1983 (3) SA 827 (D) *S v L* 1992 (3) SA 713 (E) 723; *O v O* 1992 (4) SA 137 (C) 139.

49 The *Children's Act* 38 of 2005 and especially Section 39(4) thereof provides *"any person over the age of 18 may enter into an agreement with a doctor/hospital independently of his or her parents to the performance of any surgical procedure; and any person over the agree of 14 years is given the authority in terms of this act to enter into an agreement with a doctor/hospital without the assistance of his parents to medical treatment."* More recently in terms of The Choice on Termination of Pregnancy Act 92 of 1996 and especially Section 5 thereof which *"provides a minor of whatever age with the legal capacity to enter into an agreement with a doctor/hospital for the purpose of securing the termination of the pregnancy provided certain requirements are met. The requirements are: (1) The minor must be of sane and sober mind and conscious at the time the agreement is entered into and the minor is advised by a medical practitioner or a registered midwife to consult with her parents provided that the termination of the pregnancy shall not be denied because the minor does not choose to consult the parents."* See the general discussion on the legislative provisions by Carstens and Pearmain (2007) 902-905.

50 Act 17 of 2002.

51 Sec 1 of Act 17 of 2002.

Where the person concerned is below the age of 18 years or is incapable of taking decisions, the following persons may make decisions on their behalf:

(i) Prospective user;
(ii) The person's next of kin;
(iii) A person authorized by any other law or court order to act on that person's behalf;
(iv) An administrator, appointed in terms of this Act; and
(iv) An executor of that person's estate ……;

The Act also makes provision for voluntary and involuntary care and rehabilitation affecting mental care users. [52]

It is thus clear from the provisions of the Act that a mentally ill person may generally be able to consent to care, treatment and rehabilitation. [53] The law has thus changed from the common law position, in that, where a person is mentally ill does not *per se* imply that such a person is unable to consent.

But where the mentally ill person is unable to consent, a court may issue the necessary court order. [54]

4.3 Agreement for Performance

The foundation of the nature of the agreement for performance between the doctor/hospital and the patient is based on the general definition of a contract. [55] The agreement for performance, it is submitted, is one of the obligations which flow from the agreement entered into by the parties concerned.

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52 Section 9(1) of the Act provides for treatment or rehabilitation or admit a mental health care user only if:-
(a) the user has consented to the care, treatment and rehabilitation or to admission;
(b) authorized by a court order or a review norm; or
(c) due to mental illness, any delay in providing care, treatment and rehabilitation services or admission may result in the:-
(i) death or irreversible harm to the health of the user;
(ii) User inflicting serious harm to himself or herself or others; or
(iii) User causing serious damage to or loss of property belonging to him or her or others."

53 Carstens and Pearmain (2007) 900.

54 Carstens and Pearmain (2007) 900.

55 See Joubert, Harms and Rabie Volume 5 Part 1 (1994) Par 124 who, despite numerous varying definitions been given to a contract, prefers the definition given by the authors De Wet and Van Wyk (1992) 124 namely `*A contract is an agreement entered into with the intention of creating an obligation or obligations.* See also Gordon, Turner and Price (1953) 69.

For that reason it is suggested that the agreement for performance between the doctor/hospital and patient can be defined as: The contemplated agreement [56] between the doctor/hospital and the latter's representative, [57] who are both competent, [58] upon legal consideration, [59] to do or to abstain from doing some act. [60]

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56 See Van Oosten *Encyclopaedia* (1996) 63 who states that *"the contemplated agreement is concluded when consensus ad idem is reached between the parties of which the patient's effective consent is fundamental."* See also Strauss and Strydom (1967) 105; Strauss (1991) 3; Claassen and Verschoor (1992) 115; See further Gordon, Turner and Price (1953) 70. For that reason Joubert, Harms and Rabie Volume 5 Part 1 (1994) Par 126 suggest that there cannot be an agreement unless *`there has been a complete meeting of the minds that is unless the intention of the one corresponds exactly to that of the other."* The effect of a lack of consensus is to nullify the purported contract or to make the agreement void. See Joubert, Harms and Rabie *LAWSA* Volume 5 Part 1 (1994) see also Strauss and Strydom (1967) 106 who share the view that *"an agreement for performance will be voidable if the contents of the agreement is vague or an error in negotia has occurred."* Furthermore it will also be voidable if the doctor, despite it been indicated, fails to illicit the patient's informed consent. For that reason it has been suggested that any unusual proceedings contemplated by the doctor should first be discussed with the patient. See Strauss (1991) 91.

57 For a discussion as to whom usually enter into an agreement see Van Oosten Encyclopaedia (1996) 54; See also Strauss (1991) 3; Claassen and Verschoor (1992) 115; Strauss and Strydom (1967) 104; McQuiod-Mason and Strauss Volume 17 (1983) 147. See further Dada and McQuoid- Mason (2001) 5 who distinguishes between the doctor in private practice in which a direct agreement for performance between doctor and patient takes place and that of a patient who presents for medical treatment by the staff at a hospital in which event the patient enters into an agreement for performance with the relevant hospital authority regardless of it being a private or provincial authority. See in this regard also *Friedman v Glicksman* 1996 (1) SA 1134 (W); See further Strauss *Legal Handbook for Nurses and Health Personnel* 7ed (1992) 5.

58 Although there may in fact be consensus between two persons and the content of that consensus may be that they wish to create obligations, no valid, enforceable obligations will arise from such consensus if one or both of the parties did not have the necessary capacity to contract. In other words, they are not competent to perform judicial acts. See Joubert, Harms and Rabie Volume 5 Part 1 (1994) Par 158 for a discussion as to who is competent and who is not in a medical context.

59 Legal consideration entails that despite parties agreeing to bind themselves legally, enforceable obligations will arise only if the contract is legal or lawful. Where the making of the agreement is tainted in any way by duress and undue influence, i.e. if the Plaintiff in the contract suit took unfair advantage of a trusting relationship with the Defendant the defence may well be successfully invoked depending on the circumstances. See generally Christie - 2006 259; Christie *The Law of South Africa* First re-issue Volume 5 Part 1 (1994) Par 154. See also Van Oosten Encyclopaedia (1996) 55 for a medical context setting. See also Strauss and Strydom (1967) 110 who state that *`the agreement between the doctor and patient as with any other agreement must be valid. Where for example the parties agree to an unlawful abortion, such an agreement shall be invalid.'* Likewise with duress or undue influence Strauss and Strydom (1967) 110 relying on the Common Law position as advocated by Voet endorse the principle that *"it is reprehensible that a doctor exploits a patient's position owing to the patient's mental or physical position."* See the *Digesta* 2.14.19. See also Gordon, Turner and Price (1953) 71 who is also protective of a patient who fears death or even illness and who is at the mercy of an unscrupulous physician. The authors suggest that our courts should follow the strict rules laid down by the English Law in *"throwing the onus upon the physician to show if he can, that he had in fact brought no moral pressure to bear upon his patient, failing whom the gift or legacy may be declared void at the suit of an interested party."* The afore mentioned matter also received the attention of our courts. It has been decided before that: *"Undue influence on a doctor's part which resulted in his patient, an old sick, weak and weary farmer donating four farms to the doctor, was held to constitute a ground for restitutio in integrum.* See in this regard *Preller v Jordaan* 1956 (1) SA 487 (A). Also the claim of a doctor who had treated a patient free of charge over a number of years for fees from her estate after her death was refused on the basis that he had not proved the existence of an agreement which entitled him to such fees. See also *Faure v Britz* 1981(4) SA 346 (O). See also *Armstrong v Magid* 1937 A.D. 260,

Katzwellenbogen v Katzwellenbogen (WLD) 1947 (2) S.A.L.R. 528.

60 Generally, in the absence of an express agreement between the doctor/ hospital and patient or his or her representative, the agreement for performance entails that the doctor/hospital ordinarily undertakes to examine the patient and/or diagnose his or her ailment and/or treat his or her condition with professional care and skill. That the doctor has undertaken to do or not to do has been interpreted by our academic writers as follows: See Van Oosten *Encyclopaedia* (1996) 55 *"The doctor undertakes no more than to treat or operate upon the patient with the amount of competence, care and skill which may be expected, from a medical practitioner in the particular branch of the profession."* See also McQuiod-Mason and Strauss Volume 17 (1983) 144; Strauss and Strydom (1967) 106; Claassen and Verschoor (1992) 115 - 116; Dada and McQuiod-Mason (2001) 5. It does not however, in the absence of an express or implied warranty to that effect, include a guarantee that the patient will be cured or that the intervention will be a success. See Van Oosten *Encyclopaedia* (1996) 55; Strauss and Strydom (1967) 106; *Contra* Claassen and Verschoor (1992) 116 who express the view that *"a physician is free, however, to warrant explicitly that he will cure a patient, in which instance he will expose himself to a claim for damages based on breach of contract should he be unable to fulfil his undertaking."* See also McQuiod-Mason and Strauss *LAWSA* Volume 17 (1983) 144. See further Strauss (1991) 329 who states that *`should the doctor be so bold as to guarantee a cure, he assumes a special risk of liability in the event of him being unable to fulfil his guarantee.'* In a number of cases our courts have held that by undertaking a case, a doctor does not guarantee that the patient will be cured of his disease (cf. the judge's remarks in *Buls and Another v Tsatsarolakis* 1976 (2) SA 891 (T) at 893; *Behrmann and Another v Klugman* 1988 (4) SA 6 (W). In *Chalk v Fassler* (1995, WLD, unreported, discussed by Strauss 1995 (4) *SAPM* 12 the judge remarked that *"no comparison can be drawn between an agreement to repair a car and an agreement to treat a patient medically. In the light of modern technology motor cars are generally repairable if reasonable care and skill are used; surgery, however, holds the risk of failure."* The court remarked further: *"Should a doctor be so unwise as to expressly guarantee a cure, the patient might be able to claim damages for breach of contract in the event of the doctor's failing to fulfil his undertaking. Ordinarily, however, the doctor undertakes no more than to treat the patient with the amount of skill, competence and care which may reasonably be expected of a practitioner of his branch of medicine."* The effects of the doctor's failing to fulfil his undertaking have received the attention of our courts in a number of cases. If a doctor departs from the patient's express instructions or fails to treat the patient in the manner tacitly agreed upon, the doctor will be guilty of breach of contract and may be denied the right to claim remuneration for his services, for example a dentist furnishing a patient with ill-fitting dentures. See *Sutherland v White* 1911 EDL 407. A doctor who has undertaken to perform an operation upon a patient, handing the patient over to another doctor (because of a golf appointment which the first-mentioned doctor has made in the meantime) See *Recsei's Estate v Meine* 1943 EDL 277. A doctor who has undertaken to forward for analysis a biopsy taken of a tumour in a patient's nose, but through negligence causes the biopsy to be lost (*Hewat v Rendel* 1925 TPD 679). In *Administrator of Natal v Edouard* 1990 (3) SA 581 (A) a hospital authority was held liable for damages resulting from a breach of contract in that the hospital doctors had failed to carry out an undertaking to perform a tubular ligation (sterilization) on a woman, who subsequently fell pregnant and gave birth to a child. The above statement needs to be qualified in that an undertaking by a doctor to examine the patient and to diagnose his or her condition does not amount to an undertaking to treat the patient personally. See Dada and McQuoid-Mason (2001) 5 who expresses the view that *`in some instances it may be necessary for the doctor to refer the patient to a specialist or other professional'. A failure to do so `when the physician lacks the necessary skill may constitute negligence'.* See also Van Oosten *Encyclopaedia* (1996) 55 who opines: *"If the diagnosis and/or treatment falls outside the doctor's sphere of training or specialization, he or she is under a duty to refer the patient to or to call in a specialist."* In that event Van Oosten *Encyclopaedia* (1996) 55 states that: *"If the doctor is in private practice, the patient and the specialist have to enter into a separate and independent agreement for purposes of a specialized diagnosis and/or treatment."* See further Dada and McQuoid-Mason (2001) 5; Strauss and Strydom (1967) 106; See also further *Kovalsky v Krige* p. 823; *Coppen v Impey* p. 314; *Van Wyk v Lewis* AD p. 456; *Verhoef v Meyer* 1975 (1); 1976) (unreported, discussed on Strauss (1991) pp. 35, 36); *Behrmann v Klugman* 1988 (W) (unreported, discussed on Strauss (1991) pp. 41 176-177; *Chalk v Fassler* 1995 (W) (unreported, discussed by Strauss SA 1995 (4) SAPM p. 12) *Buls v Tsatsarolakus* P. 393 (in which the question was raised but not decided. In more serious matters Strauss and Strydom (1967) 224 hold the view that *"the operation agreed to or the treatment undertaken may not materially be deviated from save for emergency situations."*

The agreement for performance between the doctor and patient is said to also entail that the doctor is expected to perform only that which he has undertaken to do. [61] Unless the doctor expressly guarantees a cure, the patient might not be able to claim damages for breach of contract in the event of the doctor failing to fulfil his undertaking. But in the general course of events the doctor undertakes no more than to treat the patient with the amount of skill, competence and care which may reasonably be expected of practitioners of his branch of medicine.

Likewise, when a patient enters a hospital for treatment and/or confinement and signs an admission form, a contractual relationship between the hospital and patient comes into being. One of the terms of which is the implied term that the hospital and its staff owe the patient a duty to take care. [62]

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61 Generally a doctor/hospital may not abstain from that what he/she or it has undertaken to do, nor, may the doctor/hospital depart or deviate from the express or implied terms of the agreement. If the doctor/hospital does it will constitute a breach of contract and may result in the doctor/hospital being held liable for patrimonial loss but not for non-pecuniary damages. The doctor/hospital shall also be liable to recover a fee for services rendered. See Van Oosten *Encyclopaedia* (1996) 56; See also Strauss and Strydom (1967) 107; See further Claassen and Verschoor (1992) 116 who are of the view that: *"Where a practitioner digresses from the explicit instructions of a patient, or fails to treat the patient in the manner tacitly agreed upon or explicitly warranted, he will be committing breach of contract and he may be denied the right to recover any remuneration for the services he had rendered."* See also further McQuiod-Mason and Strauss *LAWSA* (1983) 145; *Contra* Gordon, Turner and Price (1953) who opine that besides claiming damages for breach of contract a patient may also repudiate the agreement or seek an interdict depending on the circumstances; See further Dada and McQuoid-Mason (2001) 5 - 6; Strauss and Strydom (1967) 107 also point out that a physician can be delictually responsible where he performs another operation than the one the patient has consented to. Our case law has also recognised the remedies available to a patient where a doctor departs from the patient's express instructions or fails to treat the patient in the manner tacitly agreed upon. In that event the doctor will be guilty of breach of contract and may be denied the right to claim remuneration for his services, for example a dentist furnishing a patient with ill-fitting dentures. See *Sutherland v White* 1911 EDL 407, a doctor who has undertaken to perform an operation upon a patient, handing the patient over to another doctor (because of a golf appointment which the first-mentioned doctor has made in the meantime). See *Recsei's Estate v Meine* 1943 EDL 277, or a doctor who has undertaken to forward for analysis a biopsy taken of a tumour in a patient's nose, through negligence causing the biopsy to be lost. See *Hewat v Rendel* 1925 TPD 679. See further in *Administrator of Natal v Edouard* 1990 (3) SA 581 (A) in which the hospital authority was held liable for damages resulting from a breach of contract in that the hospital doctors had failed to carry out an undertaking to perform a tubular ligation (sterilization) on a woman who subsequently fell pregnant and gave birth to a child.

62 In so far as the South African legal position is concerned see generally Strauss (1991) 9; See also Cronje-Retief - (2000) 89, 421 who advocates that the duty to take care *"is a strict duty", `a non-delegable duty' in which the hospital has a primary duty to the patient:*

(i) to ensure that the duty is performed; and

(ii) *To be responsible for the manner in which it is performed."*

See also Van Dokkum "Medical Malpractice in South African Law" *De Rebus* 1996 252 who describe the duty to take care to include:

- deciding whether to undertake the case;
- taking a proper case history;
- making careful diagnosis; and
- properly informing the patient about any proposed treatment or operation and the inherent (material) risks of treatment). A duty of care is similarly imposed when the patient's consent to such treatment is

obtained, and in the administration of that treatment or the performance of an operation or medical procedure.

In so far as case law is concerned see *Administrator Natal v Edouard* 1990 (3) SA 581 (A) in which the court found that the hospital liability was established on account of breach of contract in failing to perform the operation they had agreed upon. Van Heerden JA in considering the action state at 588 D-F that: *"It was common cause that the respondent suffered damages (i.e. child raising expenses) as a result of the breach, that such damages were a direct and natural consequence thereof, and that the loss was contemplated by the parties as a likely consequence of failure to perform the agreed sterilization operation, more particularly because, to the knowledge of the Administration, the respondent and Andrae could not afford to support any more children. The claim therefore satisfies all the requirements of our law for the recovery of damages flowing from breach of contract."* See also the case of *Silver v Premier, Gauteng Provincial Government*, 1998 (4) SA 569 (W); per Colette J at 574 J-575 B: The plaintiff's claim was '*founded in contract and, in the alternative, in delict. ... The loss sustained by the plaintiff is said to have been caused by the breach of an implied term of an agreement that the hospital through its staff and employees would exercise due care, skill and diligence in providing nursing care. Precisely the same facts are relied upon as constituting a breach of the implied term of the duty of care owed to the plaintiff.*' The latter 'duty of care' (formulation) referred to, could also have founded another alternative/sovereign legal ground for hospital liability, namely direct liability. *Mukheiber v Raath and another* 1999 (3) SA 1065 (SCA). This was a case with similar facts to the case of *Administrator, Natal v. Edouard* 1990 (3) SA 581 (A) but the former claim was founded in delict." The legal position in England with regard to a hospital's duty of care to its patients is recognized by both academic writers as well as the English courts. See Kennedy and Grubb *Medical Law: Text with Materials* (1995) describe the duty of care as *"a direct or personal or corporate duty of care."* See also Brazier *Medicine, Patients and the Law* (1992) 88 - 89 who state the hospital authorities is *"directly responsible for its own breach of contract"* which is preferred to the term *"direct liability."* One of the first English cases which dealt with hospital liability and which affected all modern developments of law in this field is the case of *Cassidy v Minister of Health* (1951) 2 KB 343. Denning LJ describes the hospital authorities' duty of care in the treatment of their patients as one purporting *"to involve the use of reasonable care and skill to cure patients of their ailments."* He described the duty to use care as follows:

"In my opinion authorities who run a hospital, be they local authorities, government boards, or any other corporation, are in law under the selfsame duty as the humblest doctor; whenever they accept a patient for treatment, they must use reasonable care and skill to cure him of his ailment. The hospital authorities cannot, of course, do it by themselves: they have no ears to listen through the stethoscope, and no hands to hold the surgeon's knife. They must do it by the staff which they employ, and if their staffs are negligent in giving the treatment, they are just as liable for that negligence as is anyone else who employs others to do his duties for him. Once they undertake the task, they come under a duty to use care in the doing of is, and that is so whether they do it for reward or not." In *Roe v Minister of Health* (1954) 2 QB 66 Denning LJ again had to decide on whether the hospital authority was negligent or not and gave a summary of crucial questions to be answered in every case:

(i) The first question in every case is whether there was a duty of care owed to the plaintiff; and the test of duty depends, without doubt on what you should foresee.

(ii) The second question is whether the neglect of duty was a `cause' of the injury in the proper sense of that term; and causation, as well as duty, often depends on what you should foresee.

(iii) The third question, remoteness of damage, comes into play only when the first two questions - duty and causation - are answered in favour of the plaintiff. The extent of the liability is found by asking: *"Is the consequence fairly to be regarded as within the risk created by the negligence?"*

The position in the United States of America is described by academic writers as *"corporate or direct liability arising from a breach of the hospital's independent direct duty of care which it owes the patients."* See Cronje-Retief (2000) 354; See also Werthmann *Medical Malpractice Law: How medicine is changing the Law* (1984) 19; See also Pozgar *Legal aspects of Health Care Administration* (1993) 207 - 208; See further Mason and McCall-Smith 1987 *Encyclopaedia* 482. According to Pozgar (1993) 207 - 208 *"The direct duties which a corporation owes the general public and its patients, usually arising from statutes, regulations and principles of law which the courts develop and internal operating rules of the institution."* In one of the first cases in the United States namely *Darling v Charleston Community Memorial Hospital* 50 III APP. 24 254, 20 NE 2d 149 (1964) AFF 1d 33 III 2d 326 211 NE 2d 253 (1969) which formally introduced corporate hospital liability as a legal ground. The court held in determining whether a hospital was negligent the court must start off by looking at *"the duty or standard of care the hospital owed its patients."* The court held that *"the duty or standard of care contained in the regulations and bylaws demonstrate that the medical profession and other responsible authorities regard it as both*

4.4 Absence of Illegality

A further requirement for a valid agreement between the doctor/hospital/other health care provider and the patient, it is submitted, is that the agreement between the doctor/hospital/other health care provider and patient must not be against public policy or against good morals. [63]

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desirable and feasible that a hospital assume certain responsibilities for the care of the patient." The court then highlighted the following duties owed by hospital authorities to their patients:

(i) the duty of nurses to adhere to proper procedures by supervising patients adequately and regularly,
(ii) the duty that nurses should inform medical staff, the attending physician or the hospital administration of (dangerous) conditions,
(iii) the duty to obtain the necessary consultation, especially where complications had developed,
(iv) The duty to review the (independent contractor) physician's work.

In a later judgement of *Gonzales v Work No 228566* (CAL SIP CT Sacramento County) (filed Nov 19, 1973) 1974 the court held that the hospital's corporate liability was founded on *"its duty to protect patients from malpractice by members of its medical staff."* The court held if the hospital knew, had reason to know or should have known that negligent acts were likely to occur, the hospital or the hospital governing basis was corporately responsible for the (negligent) conduct of its medical staff. The North Carolina Court of Appeals in *Boast v Riley* 44 No APP 638, 262 SE 2d SE 2d 391 (1980) recognised the direct hospital duties in the state of North Carolina when it stated: *"We acknowledge that a breach of any such duty may correctly be termed corporate negligence, and that our state recognised this as a basis for liability apart and distinct from respondent superior."*

In this case the court interpreted the hospital's duty to take care to include: *"To monitor and overall the physicians prescribing and rendering treatment and medical care at the facility."* In a succeeding case of *Johnson v Misericordia Community Hospital* 99 Wis. 2d 708, 301 NW 2d 158 1981 Coffey J recognised that hospitals owe a duty of ordinary care in selecting and maintaining only qualified members on their medical staff, to ensure quality care, diagnosis and treatment of their patients. It was confirmed and concluded that *"a hospital is under a duty to execute reasonable care to permit only competent medical doctors the privilege of using their facilities."* In the case of *Elam v College Park Hospitals* 4 CIV. No 24479 (CAL.CT APP filed May 27, 1982) t he court was also asked to assist the hospital's duty of care towards its patients in employing independent physicians who performed surgery on hospital patients. The court held that the hospital owed a duty of care towards the patients *"through careful selection and review, as well as a duty of continuing evaluation to monitor, review and trends in the quality of treatment given by a staff physician over time to ensure quality or adequacy of medical care at the hospitals."*

[63] See Gordon, Turner and Price (1953) 72. The authors discuss the general principles of the illegality of contracts without going into medical contracts. They conclude *"..... An illegal contract is void in law, and no court will enforce it."* The authors also identify two causes for illegality namely acts contrary to statutes or the common law. Support for this view is found in the general law of contract. See Van Ransburg, Lotz and Van Rhijn *LAWSA* Volume 5 Part 1 (1994) 214. The authors opine that a contract is illegal *"when its conclusion, its performance or its object is expressly or impliedly prohibited by legislative enactment or is contrary to good morals or public policy. The absence of illegality which renders agreements void in the common law rule ex turpi causa non obitur actio."* See I3 19 24 D2 14 27 4 which makes no distinction between immoral (turpis) and an illegal (iniustus) contract. For a discussion of contracts contrary to legislative enactment see Van Rensburg, Lotz and Van Rhijn *LAWSA* Volume 5 Part 1 (1994) 215; See also Christie (2006) 391. The writer states that *"contracts that are void as a result of statutory illegality cannot be subsequently ratified nor its voidness renounced or waived."* For a discussion of the common law illegality and unenforceability of contracts see Van Rensburg, Lotz and Van Rhijn *LAWSA* Volume 5 Part 1 (1994) 215. The authors take the view that *"public policy requires that a contract should not be clearly inimical to the interests of the community, nor contrary to law or morality, nor should it encounter to social or economic experience."* The authors continue to add: *"Freedom of contract, backed by the necessity to do simple justice between man and man, is a constituent of public policy."* But caution the authors: *"The power to declare a contract contrary to public policy should be exercised sparingly and only when the impropriety of the contract and the event of public harm are manifest."* See also Christie (2006) 398 400. The author when considering the effect of the judgement *Sasfin (Pty) Ltd v Beukes* 1989 (1) SA 1(A) in pronouncing on the illegality

It is against this background that an investigative study is conducted with this thesis, the focal point of which is to determine whether disclaimers (or exculpatory clauses) in hospital

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or unenforceability of contracts by common law, comments as follows on public policy which influences the illegality of contracts. The author in concluding that *"public policy is a question of fact not law"* which changes with *"the general sense of justice of the community, the boni mores, manifested in public opinion"* expresses the view that *"in pondering these words it is necessary to draw a distinction between superficial public opinion, which can swing like a weather cock, and seriously considered public opinion on the general sense of justice and good morals of the community. It is the latter, not the former, to which the courts must direct their attention."* See further 402 - 403. The author is particularly critical on the affects of the provisions of the Constitution of the Republic of South Africa Act 108 of 1996 and states: *"By accepting the constitution as a reliable statement of public policy, a court would have no difficulty in declaring a contract which infringed a provision of the Bill of Rights to be contrary to public policy and therefore unenforceable."* Other factors which may influence the public's indignation against the upholding of the legality of certain contracts include good faith. See in this regard Fletcher, "The Role of Good Faith in the South African Law." It is particularly against the background of linguistic diversity in South Africa that the writer argues: of Contract" *Responsa Meridiana* (1997) 1 - 14. The writer in relying on the spirit of the Bill of Right argues that: *"The spirit of the Bill of Rights certainly leans towards such notion as good faith in contravening." It is particularly against the background of linguistic diversity in South Africa that the writer argues: "Many people do not understand English or Afrikaans and are hence predisposed to being victims of unfair contractual terms, particularly via the widespread use of standard contracts. Legislation entrenching good faith will go some way towards ameliorating this problem as drafters of contracts will be wary of constructing agreement that could be struck down by the Courts. With or without specific preventative measures, the net effect of such legislation would be preventative in itself. Suffice it to say that contemporary South Africa is readier that ever for the legislative entrenchment of good faith in contracting."* See also Van der Walt: "Aangepaste Voorstelling vir 'n Stelsel van Voorkomende Beheer oor Kontrakteer Vryheid in die Suid-Afrikaanse Reg" *THRHR* 1993 65 - 82. The writer in advancing a strong argument for the introduction of legislation to control standard contract terms which often are immoral and have unjust results state: *"Several additional arguments in favour of a general criterion in terms of good faith rather than public policy, are offered. Amongst other reasons, good faith is locally and internationally acknowledged as the term in which the ethical requirement set by public policy is expressed when public policy is considered in the contractual field. Using public policy will lead to the question who the public in public policy is. Employing fairness to express the general criterion would not improve matters either, because it stresses generalism and stands in stark contrast to the individualistic bent of our law of contract. Good faith thus represents the collective experience of our legal culture and has been integrated into our approach to contractual relationships as well as that of comparable legal systems."* See also Zimmerman and Visser *Civil Law and Common Law in South Africa* (1996) 259 -260. The authors in making out a case for good faith influencing public interests state: *"Good faith, it could be argued, requires that parties to a contract show a minimum level of respect for each other's interest. 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. Public policy, under these circumstances, rather requires the courts to refuse to enforce the contract. From the point of view of the appropriate doctrinal pigeonholes, conduct contrary to good faith may thus be classified as illegal."* See also Van Oosten (1996) 64 who discusses the influence of legally recognised consent in the doctor/patient agreements. The author expresses the view that legally recognised consent will only be attained should it *"…. conform to the boni mores."* See also Dada and McQueen-Mason (2001) 8 who state that consent will only be deemed to be legally recognised consent *"if the act consented to is in accordance with public policy, not contra bonos mores."* See also Strauss and Strydom (1967) 82. The authors opine that "…. *consent to a reckless medical examination with no scientific foundation or to a statutory prohibition abortion would not render the doctor's conduct lawful."* See further Strauss (1991) 286 287. The author gives an example of situations in which agreements, despite consent being obtained, the act to which the patient consents, renders the agreement invalid for example a young man who gives consent to the amputation of his perfectly normal and healthy hand in order to evade military duty and fugitive criminal who gives consent to plastic surgery with the exclusive purpose of shielding him from justice. See also Claassen and Verschoor (1992) 60; McQuoid-Mason and Strauss *LAWSA* Vol. 17 (1983) 147.

contracts have a right of existence in South Africa, [64] taking into consideration

64 For introductory comments see Strauss and Strydom (1967) 324. The authors take the view that where an agreement is concluded between a physician and his patient in whom the physician in the form of an indemnity clause excludes his liability, the agreement will be null and void because it is considered *contra bonos mores* in that the patient is in an unfavourable position. See also Strauss (1991) 305; The authors states that the same consideration should be applicable in the instance of hospitals where patients have suffered personal injuries;
For support of this view see Cronje-Retief (2000) 440 - 441. The author takes the view those exemption clauses in which *"big institutions, corporations or other groups with unrestricted financial resources and adequate insurance exempt themselves from liability, are effectively contra bonos mores, against public policy and/or public interest and should be declared invalid by our courts."* See further Claassen and Verschoor (1992) 103; See also Gordon, Turner and Price (1953) 188-189. Although the writers recognize the maxim *"volenti non fit injuria*" certain requirements must be met namely: *"The allegedly consenting party expressly or impliedly consent to an act of which he or she know the risks involved and appreciated them and clear evidence in this regard is shown"* where however, a medical practitioner: *"include in such a contract a term releasing him from any legal obligation to show due skill and care, for such conduct which would be grossly unprofessional and deserving of disciplinary action by the Medical Council, contracting out of liability for malpractice in such circumstances would necessitate that the Courts would declare such a contract void as against public policy, leaving the patient's right to sue for damages unimpaired. In such a case it could be argued that society cannot allow a medical practitioner to take such an advantage of his patient, in regard to whom he stands in a position of such power." Contra* Burchell and Schaffer: "Liability of Hospitals for Negligence" *Businessman's Law* (1977). The authors state that *"If a patient signs a form containing such a clause (exculpatory clause) the maxim caveat subscriptor applies: Let the signatory beware."* The authors go on to state that: *"Despite an exemption or exculpatory agreement between hospitals and patients in America being regarded as invalid, our courts are not at liberty to declare these clauses invalid."* The authors suggest that: *"….. The most that our courts can do is to place as narrow an interpretation upon such an agreement. However, these exemption clauses which are signed by patients entering a private hospital are often warned in such explicit terms that there is little room for restricting interpretation."* See also Van Oosten (1996) 88. The writer expresses the view that: *"Provided they are stated in unambiguous terms, exemption clauses are enforceable unless they exclude liability for intentional medical malpractice, in which case they will be regarded by the courts as contra bonos mores and, hence, as null and void."* The writer continuous: *"Whether or not a clause excluding liability for gross medical negligence will be upheld, is at present open to doubt." Contra* the most recent South African case law. In the case of *Afrox Health Care Bpk v Strydom* 2002 (6) SA 21 SCA in which the Supreme Court of Appeal was asked to pronounce on whether a contractual clause in a hospital contract which indemnifies a hospital against liability for the negligent conduct of its nursing staff was legally enforceable, alternatively whether such exemption clause militated against public policy. The court held that such a clause was valid and enforceable. Much criticism had thus far been levied at the finding. See 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) 18 *SAPR/PL* 430. The writers question *inter alia*, although the Supreme Court of Appeal confirmed that contractual clause that offends public policy, is unenforceable, it nevertheless regarded the unequal bargaining position between the parties, i.e. on the one hand the hospital as provider of health care services and on the other hand, the patient who relies on the hospital's expertise to treat him and the fact that, he was at their mercy. In this regard Carstens and Kok convincingly argues that, when regard is had to medical law/health care law, as opposed to the fragmented traditional compartments which lawyers have become familiar with namely delict, contract, criminal law, family law and public law, it is clear that a patient is in a disadvantageous position resultant in exemption clauses from a public policy point of view, being an undesirable feature in that hospitals should take responsibility for sub-standard negligence provision of services. Furthermore an exemption clause constitutes a *pactum de non petendo* in that the parties envisage the commission of an unlawful act and that, in such an event, the agreeing party agrees not to institute action which he would otherwise have enjoyed. This position according to the writers is also indicative of the validity of exemption clauses being an undesirable feature. The writers furthermore call into question the court's finding that the meaning of a disclaimer clause, in the context of the facts, should rather be interpreted restrictively to exclude gross negligence. In this regard the writers argue that in principle, it makes no difference in establishing civil or criminal liability whether the conduct complained about, arises from negligence or gross negligence.

constitutional demands, [65] foreign law [66] and medico-legal considerations. [67]

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65 With regard to the constitutional demands, the writers Carstens and Kok (2003) 18 criticize the Supreme Court of Appeal for not upholding the argument that as providers of Health Care Services, private hospitals, should not be permitted to use disclaimers based on Section 27(1) (a) of the Constitution. The writers also criticize the court for its failure to appreciate the affect of Section 27(1) (a) on disclaimer clauses. Although the court held that a disclaimer clause in no way prevents the provision of Health Care Services, where a signed disclaimer is used as a pre-condition for admission, `access' to health care is very much in issue. The writers also correctly point out that the court failed to uphold the respondent's argument that the Constitution demanded professional care and that a disclaimer allows hospital personnel to act in an unprofessional and negligent fashion which is in breach of the values enshrined in Section 27(1)(a) of the Constitution. To say that the hospital staff is still bound by their professional code and their negligent conduct threaten the hospital's reputation and competiveness just does not make sense in that, although the patient may lodge a complaint with the overseeing body and the relevant staff may be disciplined, the patient is still without remedy which clearly is an undesirable consequence for professional negligence. Although the Supreme Court of Appeal points out that the contractual autonomy, as encapsulated in the common law maxim of *pacta sunt servanda* forms part of the nature of freedom and protected in terms of the Constitution, Carstens and Kok argue that the Supreme Court of Appeal over emphasizes contractual autonomy at the expense of access to health care, the latter explicitly recognised in the Bill of Rights with the former not explicitly recognized. In this regard the writers correctly opine in the context of Health Care Services, *"contractual autonomy must yield to enhancing access to professional health care services."* Carstens and Kok are also critical of the Supreme Court of Appeal in the court's interpretation of Section 39 of the Constitution in the developing of the common law to be in line with the Constitution. The writers are highly critical of the stance taken by the Supreme Court of Appeal namely: *"Courts are obliged to follow legal interpretations of the Supreme Court of Appeal whether they relate to constitutional issues or other issues, and remain so obliged unless and until the Supreme Court of Appeal itself decided otherwise or the Constitutional Court does so in respect of a constitutional issue."* Another section of the judgement dealing with pre-constitutional decisions which also did not escape the wrath of criticism which I submit rightly so, was the Supreme Court of Appeal's attitude in dealing with pre-constitutional decisions and the effect of Section 39(2) of the Constitution thereon. The court's attitude is: *" Where a common law rule was laid down in a pre-constitutional decision, and that rule is not directly in breach of any specific provision in the Constitution, and it is also not dependent on the boni mores or public policy, but the court is convinced that the rule must be developed to accord with the spirit, purport and purpose of the Constitution, section 39(2) yields to stare decisis and the court would be obliged to follow the pre-constitutional decision."* The above statement according to Carstens and Kok is a shocking view in that, the Supreme Court of Appeals therewith gives out that the common law is stronger than the Constitution, ignoring the Constitutional Court's dictates in the case of *Carmichele v Minister of Safety and Security (Centre for applied legal studies intervening)* 2001 (4) SA 938 CC Paras. 33, 34 and 39 in which the rule was laid down that where the common law deviates from the spirit, purport and objects of the Bill of Rights, the courts have an obligation to develop the common law in the context of the Section 39(2) objectives. Ignoring the fore stated rule according to Carstens and Kok, would be tantamount to being in breach of the Constitution. That I submit would not be in the interests of the sound administration of justice.

66 Besides criticizing the judgement of *Strydom v Afrox supra* on Constitutional lines, Carstens and Kok (2003) pages 440 - 449 also criticize the Supreme Court of Appeal in ignoring the judicial resistance given by a number of foreign jurisdictions to disclaimer clauses aimed at exonerating hospitals and other health care provides from liability for medical negligence. To this end the United Kingdom, the United States of America and Federal Republic of Germany have all by way of legislation or case law authority pronounced that the exclusion or limitation of professional medical liability by disclaimer affect the public interest put differently it amounts to an infringement of the boni mores and cannot be upheld. For an in-depth discussion on the foreign law position see Chapter 13.

67 See also Carstens and Kok (2003) 449 - 452 who argue that medico-legal considerations may also influence the decision making process in deciding on the validity of disclaimer in hospital contracts especially where the process takes place under the influence of a value-driven constitution. In this regard it is especially medical ethics which may bring to bear in pronouncing against the validity of exclusionary clauses. Medical practitioners (and hospitals) by accepting and treating a patient is required to do no harm and to act in the best interest of the patient. Disclaimers against medical negligence in hospital contracts, so it is persuasively argued by Carstens and Kok,

4.5 **Performing what was undertaken**

The agreement for performance between the doctor and patient is said to also entail that the doctor is expected to perform only that which he had undertaken to do. [68] Unless the doctor expressly guarantees a cure, the patient might be able to claim damages for breach of contract in the event of the doctor failing to fulfil his undertaking. But in the general cause of events the doctor undertakes no more than to treat the patient with the amount of skill, competence and care which may reasonably be expected of practitioners of his branch of medicine.

Likewise, when a patient enters a hospital for treatment and/or confinement and signs an admission form, a contractual relationship between the hospital and patient comes into being. One of the terms of which is the implied term that the hospital and its staff owe the patient a duty to take care. [69] This is where liability in contract, alternatively, in delict

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"would amount to an unreasonable/unfair/unethical acceptance on the part of the patient to contract to the possibility of harm (in the form of personal injury/death resulting from medical practice) by an attending medical practitioner who is ethically bound not to do harm." See also Van den Heever "Exclusion of Liability of Private Hospitals in South Africa" *De Rebus*, April 2003 47. The writer criticizes the judgement in that *"..... Not sufficient weight was given to public interests as well as the considerations of public policy."*

68 Generally a doctor/hospital may not abstain from that what he/she or it has undertaken to do, nor, may the doctor/hospital depart or deviate from the express or implied terms of the agreement. If the doctor/hospital does it will constitute a breach of contract and may result in the doctor/hospital being held liable for patrimonial loss but not for non-pecuniary damages. The doctor/hospital shall also be liable to recover a fee for services rendered. See Van Oosten *Encyclopaedia* (1996) 56; See also Strauss and Strydom (1967) 107; See further Claassen and Verschoor (1992) 116 who are of the view that: *"Where a practitioner digresses from the explicit instructions of a patient, or fails to treat the patient in the manner tacitly agreed upon or explicitly warranted, he will be committing breach of contract and he may be denied the right to recover any remuneration for the services he had rendered."* See also further McQuiod-Mason and Strauss *LAWSA* (1983) 145; *Contra* Gordon, Turner and Price (1953) who opine that besides claiming damages for breach of contract a patient may also repudiate the agreement or seek an interdict depending on the circumstances; See further Dada and McQuoid-Mason (2001) 5 - 6; Strauss and Strydom (1967) 107 also point out that a physician can be delictually responsible where he performs another operation than the one the patient has consented to. Our case law has also recognised the remedies available to a patient where a doctor departs from the patient's express instructions or fails to treat the patient in the manner tacitly agreed upon. In that event the doctor will be guilty of breach of contract and may be denied the right to claim remuneration for his services, for example a dentist furnishing a patient with ill-fitting dentures. See *Sutherland v White* 1911 EDL 407, a doctor who has undertaken to perform an operation upon a patient, handing the patient over to another doctor (because of a golf appointment which the first-mentioned doctor has made in the meantime). See *Recsei's Estate v Meine* 1943 EDL 277, or a doctor who has undertaken to forward for analysis a biopsy taken of a growth in a patient's nose, through negligence causing the biopsy to be lost. See *Hewat v Rendel* 1925 TPD 679. See further in *Administrator of Natal v Edouard* 1990 (3) SA 581 (A) in which the hospital authority was held liable for damages resulting from a breach of contract in that the hospital doctors had failed to carry out an undertaking to perform a tubular ligation (sterilization) on a woman who subsequently fell pregnant and gave birth to a child.

69 In so far as the South African legal position is concerned see generally Strauss (1991) 9; See also Cronje-Retief (2000) 89, 421 who advocates that the duty to take care *"is a strict duty", `a non-delegable duty' in which the hospital has a primary duty to the patient:*
(i) to ensure that the duty is performed; and

(ii) *to be responsible for the manner in which it is performed."*

See also Van Dokkum "Medical Malpractice in South African Law" *De Rebus* 1996 252 who describe the duty to take care to include:

- deciding whether to undertake the case;
- taking a proper case history;
- making careful diagnosis; and
- properly informing the patient about any proposed treatment or operation and the inherent (material) risks of treatment). A duty of care is similarly imposed when the patient's consent to such treatment is obtained, and in the administration of that treatment or the performance of an operation or medical procedure.

The legal position in England with regard to a hospital's duty of care to its patients is recognised by both academic writers as well as the English courts. See Kennedy and Grubb (1995) describe the duty of care as *"a direct or personal or corporate duty of care."* See also Brazier (1992) 88 - 89 who state the hospital authorities are *"directly responsible for its own breach of contract"* which is preferred to the term *"direct liability."* One of the first English cases which dealt with hospital liability and which affected all modern developments of law in this field is the case of *Cassidy v Minister of Health* (1951) 2 KB 343. Denning LJ describes the hospital authorities' duty of care in the treatment of their patients as one purporting *"to involve the use of reasonable care and skill to cure patients of their ailments. He described the duty to use care as follows:*

*"In my opinion authorities who run a hospital, be they local authorities, government boards, or any other corporation, are in law under the selfsame duty as the humblest doctor; whenever they accept a patient for treatment, they must use reasonable care and skill to cure him of his ailment. The hospital authorities cannot, of course, do it by themselves: they have no ears to listen through the stethoscope, and no hands to hold the surgeon's knife. They must do it by the staff which they employ, and if their staff is negligent in giving the treatment, they are just as liable for that negligence as is anyone else who employs others to do his duties for him. Once they undertake the task, they come under a duty to use care in the doing of is, and that is so whether they do it for reward or not."*In *Roe v Minister of Health* (1954) 2 QB 66 Denning LJ again had to decide on whether the hospital authority was negligent or not and gave a summary of crucial questions to be answered in every case:

(i) *The first question in every case is whether there was a duty of care owed to the plaintiff; and the test of duty depends, without doubt on what you should foresee.*

(ii) *The second question is whether the neglect of duty was a `cause' of the injury in the proper sense of that term; and causation, as well as duty, often depends on what you should foresee.*

(iii) *The third question, remoteness of damage, comes into play only when the first two questions - duty and causation - are answered in favour of the plaintiff. The extent of the liability is found by asking: "Is the consequence fairly to be regarded as within the risk created by the negligence?"*

The position in the United States of America is described by academic writers as *"corporate or direct liability arising from a breach of the hospital's independent direct duty of care which it owes the patients."*

See Cronje-Retief (2000) 354; See also Werthmann *Medical Malpractice Law: How medicine is changing the law* (1984) 19; See also Pozgar *Legal aspects of Health Care Administration* (1993) 207 - 208; See further Mason and McCall-Smith 1987 *Encyclopaedia* 482.According to Pozgar (1993) 207 - 208 *"The direct duties which a corporation owes the general public and its patients, usually arising from statutes, regulations, and principles of law which the courts develop and internal operating rules of the institution."* In one of the first cases in the United States namely *Darling v Charleston Community Memorial Hospital* 50 III APP. 24 254, 20 NE 2d 149 (1964) AFF 1d 33 III 2d 326 211 NE 2d 253 (1969) which formally introduced corporate hospital liability as a legal ground. The court held in determining whether a hospital was negligent the court must start off by looking at *"the duty or standard of care the hospital owed its patients."* The court held that *"the duty or standard of care contained in the regulations and bylaws demonstrate that the medical profession and other responsible authorities regard it as both desirable and feasible that a hospital assume certain responsibilities for the care of the patient."* The court then highlighted the following duties owed by hospital authorities to their patients:

(i) the duty of nurses to adhere to proper procedures by supervising patients adequately and regularly,

(ii) the duty that nurses should inform medical staff, the attending physician or the hospital administration of (dangerous) conditions,

(iii) the duty to obtain the necessary consultation, especially where complications had developed,

(iv) the duty to review the (independent contractor) physician's work.

In a later judgement of *Gonzales v Work No 228566* (CAL SIP CT Sacramento County) (filed Nov 19, 1973) 1974

sometimes overlaps. [70]

It is especially, from the judgement of the case of *Silver v Premier, Gauteng Provincial Government* [71] that the court refused to distinguish between the tests for causation in considering the contractual, as opposed to the delictual, claim of the patient. [72]

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the court held that the hospital's corporate liability was founded on *"its duty to protect patients from malpractice by members of its medical staff."* The court held if the hospital knew, had reason to know or should have known that negligent acts were likely to occur, the hospital or the hospital governing basis was corporately responsible for the (negligent) conduct of its medical staff. The North Carolina Court of Appeals in *Boast v Riley* 44 No APP 638, 262 SE 2d SE 2d 391 (1980) recognised the direct hospital duties in the state of North Carolina when it stated: *"We acknowledge that a breach of any such duty may correctly be termed corporate negligence, and that our state recognised this as a basis for liability apart and distinct from respondent superior."* In this case the court interpreted the hospital's duty to take care to include: *"To monitor and overall the physicians prescribing and rendering treatment and medical care at the facility."* In a succeeding case of *Johnson v Misericordia Community Hospital* 99 Wis. 2d 708, 301 NW 2d 158 1981 Coffey J recognised that hospitals owe a duty of ordinary care in selecting and maintaining only qualified members on their medical staff, to ensure quality care, diagnosis and treatment of their patients. It was confirmed and concluded that *"a hospital is under a duty to execute reasonable care to permit only competent medical doctors the privilege of using their facilities."* In the case of *Elam v College Park Hospitals* 4 CIV. No 24479 (CAL.CT APP filed May 27, 1982). The court was also asked to assist the hospital's duty of care towards its patients in employing independent physicians who performed surgery on hospital patients. The court held that the hospital owed a duty of care towards the patients *"through careful selection and review, as well as a duty of continuing evaluation to monitor, review and trends in the quality of treatment given by a staff physician over time to ensure quality or adequacy of medical care at the hospitals."*

70 In so far as case law is concerned see *Administrator Natal v Edouard* 1990 (3) SA 581 (A) in which the court found that the hospital liability was established on account of breach of contract in failing to perform the operation they had agreed upon. Van Heerden JA in considering the action state at 588 D-F that: *"It was common cause that the respondent suffered damages (i.e. child raising expenses) as a result of the breach, that such damages were a direct and natural consequence thereof, and that the loss was contemplated by the parties as a likely consequence of failure to perform the agreed sterilization operation, more particularly because, to the knowledge of the Administration, the respondent and others could not afford to support any more children. The claim therefore satisfies all the requirements of our law for the recovery of damages flowing from breach of contract."* See also the case of *Silver v Premier, Gauteng Provincial Government*, 1998 (4) SA 569 (W); per Cloete J at 574 J-575 B: The plaintiff's claim was '*founded in contract and, in the alternative, in delict. … The loss sustained by the plaintiff is said to have been caused by the breach of an implied term of an agreement that the hospital through its staff and employees would exercise due care, skill and diligence in providing nursing care. Precisely the same facts are relied upon as constituting a breach of the implied term of the duty of care owed to the plaintiff.*' The latter 'duty of care' (formulation) referred to, could also have founded another alternative/sovereign legal ground for hospital liability delictual liability. The court stated further that as the plaintiff's claim was founded in contract and, in the alternative in delict, there was no reason why the *sine qua non* test should not apply equally to the contractual claim *in casu*. It was also been emphasized that common sense must be employed in such cases (at p574-575) of the judgement. This approach has also been emphasized by Corbett JA in the case of *Siman and Co (Pty) Ltd v Barclays National Bank Ltd* 1984 (2) SA 888 (A) 914F-915A; *International Shipping Co (Pty) Ltd v Bentley* 1990 (1) SA 680 (A) 700E-701F.

71 1998 (4) SA 569 (W).

72 For a comprehensive discussion on the potential convergence of the principles of the law of contract and the delict see Carstens and Pearmain (2007) 511ff. The writers argue that this is particularly relevant in the context of claims involving healthcare services since the facts upon which the claim is based, whether in contract or delict, are much the same in many instances. See Page 511 of the Judgement.

4.6 FORMALITIES TO COMPLY WITH

4.6.1 Legal Writings

The agreement between doctor/hospital/other healthcare provider and patient require no legal formalities to bring about a valid contract. [73]

In practice the terms of the agreement between the doctor and patient are rarely written down or even expressly discussed. Consensus has been reached amongst our legal writers that where no legal forms are required the agreement generally comes into existence by mere consensus. [74]

Where a patient, however, is admitted to a hospital or clinic, the agreement between the hospital/clinic and patient, is usually reduced to writing, in that, the patient is required to sign an admission form, which also serves as a consent form and which sets out, *inter alia,* the type of treatment or operation which the hospital/doctor/clinic will undertake. [75]

What is required however, to bring about a valid contract, as will be seen hereinafter is the pre-consensus phase of offer and acceptance.

4.6.1.1 Case Law

The only case I came across during my research which dealt with the formalities which

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73 See Van Oosten (1996) 54 who acknowledges that due to the very nature of the doctor/hospital/patient relationship the contract may be express or tacit, written or oral hence no legal formalities are required for the conclusion of the contract between the doctor/hospital/patient. See also Strauss and Strydom (1967) 105; See further Claassen and Verschoor (1992) 115; See further Gordon Turner and Price (1953) 70.

74 See Strauss and Strydom (1967) 105 - The consensus between the parties are reached by way of an offer and acceptance which are either orally agreed to or may be inferred from their conduct. See also Gordon, Turner and Price (1953) 78; Van Oosten (1996) 54; Claassen and Verschoor 115; McQuoid-Mason and Strauss *LAWSA* (1983) Par 189. See also Strauss and Strydom (1967) 105 - They emphasize especially with more serious operations, written agreements serve an important purpose in that, it highlights the nature of the operation and the functions of the practitioner. They also serve to provide proof of the agreement between the practitioner/hospital/clinic and patient in a civil trial. See further McQuoid-Mason and Strauss *LAWSA* (1983) Vol. 17 144 who emphasize the importance of reducing unusual procedures to paper particularly where informed consent of the patient is required; Strauss (1991) 9-10 who cautions that the contents of the admission form should be explained to the patient in order to obtain real consent otherwise such consent *"would have been expressed in form only, not in reality."* The author sounds the following advice: *"The consent given by a patient on the admission form should be reasonable specific and comprehensive"* in order to escape such consent from being *"ruled invalid by our courts on account of vagueness"*. For what are usually included in typical admission forms the appendices may be consulted.

75 See Van Oosten *Encyclopaedia* (1996) 54. Hospitals, irrespective of whether they run privately or by the State, usually require from their patients the signing of an admission form.

ought to be complied with in a medical setting, is that of Myers v Abrahamson. [76]

4.6.1.2 **OFFER AND ACCEPTANCE**

The pre-consensus phase of offer and acceptance in the medical contract context is as essential as that which was described in the foundation of a contract in general. It is submitted, that the origin of a contractual commitment is the initial suggestion of willingness to enter into a contract.

Therefore an offer is a communication that creates the possibility of the foundation of a contract between the doctor/hospital and the patient. If the offer is accepted a contract between them comes into being. As disputes may arise over whether there was an offer or not, it is critical to establish whether an offer was made or not.

The criteria for one to establish whether an offer was made, has been said, in law, to be a very practical one. [77] The terms of the offer must be sufficiently firm to allow court enforcement.

Equally important is to establish that the offer was accepted before any court will enforce a contract. There must be some act manifesting assent and willingness to be bound by the terms of the contract.

It has also been suggested before that the acceptance must be made in response to, or at least with knowledge of, the offer. [78] In other words, the acceptance has to be unequivocal.

4.6.1.3 **Legal Writings**

Although, as was seen hereinbefore, the coming into existence of a contract between the doctor and patient is critical, there is little guidance to be found in South African legal writings as to when the contract is formed, our legal writers are however of the view that,

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76 1951 (3) SA 438 The court in this matter held: *"Unlike for example the Land Alienation Act or the Credit Agreement Act in terms of which, the parties are required to reduce their agreement to writing, and although as previously stated, the agreement between the doctor and patient being a consensual one, the law does not require the doctor and patient to go about it as though they are drawing up a deed of sale."*

77 See Hutchinson Van Heerden Visser and Van der Merwe *Wille's Principles of South African Law* 3ed (1991) 412. The authors' state that the determination can be made by establishing what was said if the offer was made orally or in writing alternatively by looking at the conduct of the parties alone, where no words are spoken or reduced to writing. See also Kerr 5ed (1988) 4; Christie 3ed (2006) 2.

78 See Hutchinson et al (1981) 412ff; See also Kerr (1998) 7; Christie (1996) 6.

akin to the formation of any contract outside the field of medicine, there must be an offer and acceptance together with consideration, before one can say that the doctor/hospital/other health-care provider and patient has reached agreement or otherwise known as *consensus*. [79]

4.6.1.4 **Case Law**

Equally the South African case law pertaining to the principle of offer and acceptance in medical context is very rare. The only case I came across during my research which deals with conditional acceptance is the case of *Sutherland v White* [80] in which a dentist supplied a set of dentures to a patient. After receiving the set of dentures the patient complained that the dentures did not fit properly. The patient refused to pay the dentist for services rendered and the dentist subsequently sued the patient for his fees.

4.6.2 **Terms of the Agreement**

It is of the utmost importance in the formation of a contract generally, that the parties to the agreement come into conscious accord, [81] before it can be said that, a valid agreement had come into being.

One of the means of coming into conscious accord, it is submitted, is to create clear and unequivocal terms especially where express terms are created. [82]

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79 See Strauss and Strydom 1967) 105 - The authors recognizes that although offer and acceptance may take place orally or by mere conduct between the parties it is sometimes however uncertain who n the doctor/hospital-patient relationship acts as the offeror and likewise, who acts as offeree. The authors suggest that where a patient summons a doctor or consults a doctor and consents to be examined and/or treated, such conduct amounts to an offer whereas the conduct of the doctor when accepting such an offer amounts to acceptance. See also Gordon Turner and Price (1953) 78 - The authors are of the view: *"The contract to treat a patient begins from the moment that the practitioner accepts the case, expressly or impliedly."* See also McQuoid-Mason and Strauss *LAWSA* (1983) Par 189 who suggest further that where a patient goes to hospital for medical treatment by hospital staff, a contract arises between him or her and the hospital authority.

80 1911 E.D.C. 407 it appears from the dictum that the dentist by undertaking to supply the patient with `proper and usable set of teeth' constituted an offer and `the patient's willingness to accept such dentures' an acceptance.

81 See Joubert Harms Rabie *LAWSA* Volume 5 Part 1 (1994) 188.

82 See Joubert Harms Rabie *LAWSA* (1994) 189; The authors endorse the principle laid down by Innes JA in *Pieters and Co v Solomon* 1911 AD 121 at 137 - 138: *"When a man makes an offer in plain and unambiguous language, which is understood in its ordinary sense by the person to whom it is addressed, and accepted by him bona fide in that sense, then there is a concluded contract. The promissor is bound to perform what his language justified the promissee in expecting. Cf also the well-known dictum of Blackburn J in Smith v Hughes (1871) 6 OB 597 607: "If, wherever a man's real intention may be, he so conducts himself that a reasonable man would believe that he was assenting to the terms proposed by the other party, and that other party upon that belief enters into the*

But even where the offered creates clear and unequivocal terms, the conscious accord may adversely be affected where the offeree is faced with a case of offers to the general public which are embodied in the self-evident proposition that is impossible for a person to accept an offer of which he or she is unable, [83] or where the validity of a contract may be affected by mistake, (error) [84] misrepresentation, [85] duress, [86] the contract as a whole being against

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contract with him, the man thus conducting himself would be equally bound as if he had intended to agree to the other party's terms", often cited with approval by SA courts: See *Van Rhyn Wine and Spirit Co v Chandes Bar* 1928 TPD 417 423; *Hodgson Bros v SA Railways* 1928 CPD 257 261; *Collen v Rietfontein Engineering Works* 1948 1 SA 413 (A0 429 - 430; *Ocean Cargo Line Ltd v FR Waring (Pty) Ltd* 1963 4 SA 641 (A) 653; *Spes Bona Bank Ltd v Portals Water Treatment SA (Pty) Ltd* 1983 1 SA 978 (A) 984E-F; See also *Sonop Petroleum (SA) (Pty) Ltd (formerly known as Sonarep (SA) (Pty) Ltd v Pappadogiamis* 1992 SA 234 (A). The above principle is advocated by the authors Joubert Harms Rabie *LAWSA* (1994) Vol. 5 Part 1 190 in that the authors suggest that unless the offer is not couched in definite and complete terms which embodies sufficient information in which a clear indication of the offeror's intention, acceptance thereof cannot give rise to a contract. See also the following South African case law: *Humphreys v Cassell* 1923 TPD 280; *Regenstein v Brabro Investments (Pty) Ltd* 1959 3 SA 176 (FC). In such cases it is usually said that the *"contract is void for vagueness."* See, further, on the subject of vagueness, *Williams and Taylor v Hitchcock* 1915 WLD 51; *Strand Meat Co (Pty) Ltd v Smith* 1930 CPD 24; *Mouton v Hanekom* 1959 3 SA 35 (A); *Kantor v Kantor* 1962 3 SA 207 (T). See also *Spes Bona Bank Ltd v Portals Water Treatment SA (Pty) Ltd* 1983 1 SA 978 (A) in which an invoice was held not to constitute an unequivocal offer to sell. Cf *Saambou Nasionale Bouvereniging v Friedman* 1979 3 SA 978 (A).

83 See Christie (2006) 32ff; Lubbe and Murray (1988); Joubert et al (1994) 194. See also the case law *Bloom v The American Swiss Watch Co* 1915 AD 100.

84 See Joubert Harms Rabie *LAWSA* (1994) Vol. 5 Part 1196. The authors advocate that the validity of a contract *"may be affected by mistake (error) in that the offence may either be under a wrong impression regarding some fact connected with the contract"* or *"each party is mistaken as to the other's intention and the parties are consequently at cross-purposes."* This is sometimes referred to as *"mutual mistake"* in which both parties are under the wrong impression. On the other hand, so it is advocated by Joubert Harms Rabie *LAWSA* (1994) 197 - 198 it may also happen that one of the parties is under a mistaken belief also termed *"unilateral mistake"* as a result of which he is allowed to claim nullity of a contract on the grounds of mistake, provided *"he shows that he was labouring under a mistake which was both operative and reasonable often referred to as a justus error."* See also the following South African cases: *Logan v Beit* (1890) 7 SC 197; *Maritz v Pratley* (1894) 11 SC 345; *George v Fairmead (Pty) Ltd* 1958 2 SA 465 (A); *National and Overseas Distributors Corporation (Pty) Ltd v Potato Board supra; Van Wyk v Otten* 1963 1 SA 415 (O); *Allen v Sixteen Stirling Investments (Pty) Ltd* 1974 4 SA 164 (D); *Gollach and Comperts (1967) (Pty) Ltd v Universal Mills and Produce Co (Pty) Ltd* 1978 1 SA 914 (A); *Papadopoulos v Trans-State Properties and Investments Ltd* 1979 1 SA 682 (W); *Glen Comeragh (Pty) Ltd v Colibri (Pty) Ltd v Interior Acoustics (Pty) Ltd* 1984 3 SA 537 (W); *Kempston Hire (Pty) Ltd v Snyman* 1988 4 SA 465 (T).

85 See Christie (2006) 871ff; Joubert et al (1994) 201. The authors state that in certain instances an agreement can be nullified because of one or another form of misrepresentation. *"A party who has been persuaded by a misrepresentation to enter into a contract or to agree to terms to which he would not otherwise have agreed, is entitled to relief whether the misrepresentation was fraudulent (intentional), negligent or innocent."* But argues the author: *"The nature of the relief differs, however, according to whether the misrepresentation was fraudulent or not."*

86 See Christie (2006) 301ff; Joubert et al (1994) 207ff who comments as follows on the effect of duress and undue influence: *"If a person consent to a contract is obtained by some form of pressure which the law regards as improper, the contract is voidable at the instance of the person thus imposed upon. There are two forms of pressure which the law regards as improper, duress and undue influence."* The authors emphasize that this occurs particularly in instances where a special relationship exists *inter alia, "a doctor and patient relationship."*

public policy. [87]

4.6.2.1 **Actual Terms of the Agreement**

4.6.2.1.1 **Legal Writings**

The terms of the agreement as between the doctor/hospital/clinic and patient, as stated hereunto fore, may either be implied or expressed or in certain circumstances expressed and implied. Generally, in the absence of an express agreement between doctor/hospital/clinic and patient and depending on the circumstances, implied terms emerge, [88] the nature whereof will be discussed hereinafter.

4.6.2.2 **Implied Terms**

One of the most fundamental terms of the agreement between the doctor/hospital/other healthcare provider and patient is that the doctor/hospital/other healthcare provider, when accepting and commencing treatment and/or executing surgery, he, she or it undertakes to exercise reasonable care and skill in treating and/or operating on the patient. [89] This undertaking to treat does not, however, entail that a doctor/hospital guarantee that the patient will be healed of his or her ailment or cured of his or her disease, unless the doctor expressly guarantees the result. [90]

See further the South African case of *Preller v Jordaan* 1956 (1) SA 483(A) in which the court found that undue influence prevented true consent and subsequently denied restitutio in integrum.

87 See Christie (2006) 337ff; Joubert et al (1996) 214-215. The authors state that notwithstanding agreement being reached between the parties to the contract, in instances *"when its conclusion, its performance or its object is expressly or impliedly prohibited by legislative enactment or is contrary to good morals or public policy,"* the contract is illegal and void. The authors identify *"freedom of contract on the one hand balanced by the necessity to do simple justice between man and man, as a constituent of public policy."* But cautions the authors *"the power to declare a contract contrary to public policy should be exercised sparingly and only when the impropriety of the contract and the element of public harm are manifest."* See also *Botha (now Griessel) v Finance Credit (Pty) Ltd* 1989 3 SA 773 (A) 782i - 783c.

88 See Van Oosten *Encyclopaedia* (1996) 54; See also Strauss and Strydom (1967) 105; See also Gordon Turner and Price (1953) 75ff; See further Claassen and Verschoor (1992) 115; McQuoid-Mason and Strauss *LAWSA* (1983) Par 144; Van Dokkum (1996) 256.

89 See Van Oosten (1996) 54. The author describes the nature of this implied term as an undertaking *"to examine the patient and/or diagnose his or her ailment and/or treat his or her condition with such professional care, skill and judgement as the average or ordinary medical practitioner in the particular branch of the profession possesses, and in accordance with the recognised, accepted, customary or usual practices of medicine."* See also Claassen and Verschoor (1992) 115 - 116; Strauss and Strydom (1967) 106; Strauss (1984) 37; McQuoid-Mason and Strauss *LAWSA* (1983) Par 144.

90 See Van Oosten *Encyclopaedia* (1996) 55; See also Strauss and Strydom (1967) 106 - 107; See further Claassen and Verschoor (1992) 116 - *"Although a physician is free, however to warrant explicitly that he will cure a patient, in which he will expose himself to a claim for damages based on breach of contract should he be unable*

The implied term to exercise due care and skill has its origin in the common law [91] and is also governed by legislation. [92] It has its roots, so it is submitted, in the fiduciary relationship between the doctor/hospital and patient, in which, the doctor/hospital is expected to exercise their professional skills with the utmost diligence, in which the patient's interests are placed first in accordance with the time-honoured traditions of service, duty, and honour. [93] It is against this background that the focal point of this research will be conducted, in establishing whether exemption clauses contained in hospital admission forms, in an attempt to exempt hospitals from liability where a patient is injured or suffered loss or damage arising from the negligent conduct of the hospital or its staff, are valid or not! In other words, can the patient, who is a party to a contractual agreement, exempt the hospital from liability where the hospital or their staff fails in their duty to exercise due care and skill? Alternatively, does an attempt by a hospital to exclude the exercise of due care and skill, by incorporating exemption clauses in hospital admission forms, constitute acceptable conduct?

4.6.2.3 **Expressed Terms**

4.6.2.3.1 **Legal Writings**

From what was discussed *supra* and as a general rule, the contract entered into between the doctor and patient, takes the form of a tacit agreement which includes implied terms of which the doctor's duty to take care is possibly the most important. On the other hand, particularly where the doctor adopts an unusual procedure or in the event of a patient being hospitalized, the agreement between the doctor/hospital and patient is usually reduced to writing, containing the express terms agreed upon amongst the parties themselves, *inter alia*, what treatment is to be given, the procedure to be followed where corrective surgery is indicated. [94]

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to fulfil his undertaking." See also McQuoid-Mason and Strauss *LAWSA* (1983) 144; See also Dada and McQuoid-Mason (2001) 5 *Contra* Strauss (1991) 37. The author cautions *"it would be unwise for a prudent doctor to guarantee such results."*

91 See Strauss and Strydom (1967) 111; The authors reason that such an implied term is founded in the nature of the profession of the doctor in which, the doctor is seen to stand in a position of trust with his or her patient in which, the doctor undertakes to execute his or her duties with the necessary good faith and with the utmost care and skill. See also De Wet and Yeats (1978) 308; See also Claassen and Verschoor (1992) 116; See also Van der Merwe and Olivier (1989) 84ff; See also McKerron *The Law of Delict* (1971) 38; See also Van der Walt and Midgely *Delict: Principles and Cases* (1997) 73.

92 See Strauss (1984) 437-441; See also *The Prisons Act* 8 of 1959.

93 See a detailed discussion in Chapter 5 infra.

94 See McQuoid-Mason and Strauss 17 *LAWSA* (1983) 144 - 145; Van Oosten *Encyclopaedia* (1996) 54 - 55; Strauss and Strydom (1967) 104 - 110; Strauss (1991) 8 - 10; Gordon Turner and Price (1953) 75 – 78.

Where the procedure has to be carried out by someone else, the name of the specialist concerned, the means of payment etc must be reduced to writing. [95] Typical agreements, containing express terms entered into between hospital/other healthcare providers and patient, are often found in hospital admission forms incorporating consent forms, as well as consent forms generally used by clinics.

Although the doctor and patient have the utmost freedom to contract and generally wide latitude is allowed in their selection of express terms, [96] it is submitted that there are limits to what the parties may purport to agree through express terms. They cannot, for example, agree to do that which would be regarded as contrary to public policy. [97]

It is for this purpose that the research undertaken attempts to establish whether an exculpatory clause contained in a hospital admission form, indemnifying a hospital against any negligence, form part of the limits referred to. In order, ultimately, to make such a finding, it is of the utmost importance to look briefly also at the patient's consent, the different forms of consent and the restrictions on consent, etc.

4.6.2.3.2 **Case Law**

Some courts have repeatedly confirmed that the terms of the agreement between the doctor/hospital and patient may either be implied or expressed or, in certain instances, expressed and implied.

One of the earliest cases dealing with the implied terms of the agreement between the doctor and patient is that of *Kovalsky v Krige,* [98] in which the Plaintiff, an infant, was duly assisted by his father and natural guardian. The Plaintiff's declaration also contained the following facts namely:

In accordance with the Jewish custom, plaintiff was submitted, in November, 1909, to the

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95 See Strauss (1991) 8 - 10 The author highlights the necessity and advantages of reducing express terms into writing in that medical treatment `*entails a certain amount of risk'* and notwithstanding the inherent risk attached to such treatment and with the patient `*adequately apprised of the risks involved'*, where the patient nonetheless, consents to such `*drastic or unusual treatment'*, written consent containing the expressed terms, will provide proof of such informed consent and is of the utmost importance in safeguarding the doctor against unwarranted legal proceedings.

96 See Van Oosten (1996) 57.

97 See Van Oosten (1996) 88; See also Strauss and Strydom (1967) 110, 324. See also Strauss (1991) footnote 43 at 349. See further Van Dokkum (1996) 255; See further Cronje-Retief (2000) 440 et seq.

98 1910 20 CTR 822.

operation of circumcision. This was performed by the Ref E Lyons. Afterwards the child suffered from haemorrhage, and defendant was called in. He prescribed certain treatment, which was carried out. Subsequently gangrene developed, and the child sustained certain permanent injuries. It was alleged that these were due to the unskilful, negligent, and improper treatment of the defendant. Plaintiff claimed 500 pounds damages.

Buchanan J referring to the English decision of *Lampher v Phipos* [99] agrees with the principle laid down therein namely:

"Every person who enters into a learned profession undertakes to bring to it the exercise of a reasonable care and skill. Speaking of a surgeon, he says he does not undertake that he will perform a cure, nor does he undertake to use the highest possible degree of skill. He undertakes to bring a fair, reasonable and competent degree of skill to his case."

In a later decision of *Coppen v Impey,* [100] the plaintiff sought to recover damages from the defendant, a medical practitioner, who treated her for rheumatism. Her case is that, while suffering from rheumatism in the back of the right hand, she went to the defendant for treatment with the X-rays. She complains that, while under the defendant's care, the condition of her hand became worse, causing her great pain and suffering, and she attributes this to the negligent, unskilful and improper treatment of her hand by the defendant, or his assistant, or both, in the application of the X-Rays.

Kotze J in assessing the implied duty of the medical practitioner made the following remarks: *"For holding himself out as a professional man, he undertakes to perform the service required of him with reasonable skill and ability."*

But, cautions the court, by undertaking to perform the services required of him: *"He does not undertake to perform a cure, or to treat his patient with the utmost skill and competency, he will, on the other hand be liable for negligence or unskilful ness in his treatment."* [101]

In another South African decision *Mitchell v Dixon,* [102] the Appellate Division, the Plaintiff

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99 (1835) 8 C and 475.

100 1916 CPA 309.

101 *Coppen v Impey* 1916 CPA 309 at 314.

102 1914 AD 519.

sought to have the court hold a doctor liable for injuries caused to the patient by the breaking of the needle of a syringe used during exploration of the chest cavity for suspected pneumo-thorax. The court in stressing that medicine is not an exact science and even a specialist is not infallible, formulates the implied duty of the medical practitioner as:

"A medical practitioner is not expected to bring to bear upon the case entrusted to him the highest possible degree of professional skill, but he is bound to employ reasonable skill and care; and he is liable for the consequences if he does not." [103]

In a later Appellate division case of *Van Wyk v Lewis,* [104] regarded by many as the *locus classicus,* the court was asked to adjudicate on the conduct of a medical practitioner, who, having performed an emergency abdominal operation upon the plaintiff left a swab in her body. Some twelve months later the plaintiff evacuated the swab through her bowel, into which it had evidently found its way. Alleging that the defendant had acted negligently and unskilfully in failing to remove the swab, the plaintiff sued him for 20000 Pounds damages.

Innes CJ recognises the implied contractual term between the medical practitioner and patient when commenting: *"No doubt the duty to take care arose from the contractual relationship between the parties, but it was a duty the breach of which was actionable under the Aquilian procedure. The Respondent's liability therefore depends on whether it was due to negligence or unskilful ness on his part that the swab was allowed to remain in the wound."* [105]

As to the nature of the duty to take care and endorsing the principle laid down in *Mitchell v Dixon* [106] namely the medical practitioner is expected to employ `reasonable skill and care'. Lewis CJ continues to state:

"And in deciding what is reasonable the court will have regard to the general level of skill and diligence possessed and exercised at the time by the members of the branch of the profession to which the practitioner belongs." [107]

Wessels JA delivering a concurring judgement gives a more informative account of the implied term of the contractual agreement between the medical practitioner and patient

103 *Mitchell v Dixon* 1914 AD 519 at 525.

104 1924 AD 438.

105 *Van Wyk v Lewis* 1924 AD 438 at 444.

106 1914 AD 519 at 525.

107 *Van Wyk v Lewis* 1924 AD 438 at 443.

when he states:

"The case is one of those where the relationship between the parties arises out of a contract but where the act complained of is an injury or delict done in consequence of carrying out the contract. The delict grows out of a breach of duty which the law implies from the contract between the parties, the duty of the surgeon, who contracts to operate, not to do so negligently. I think the law necessary for the decision of this case may well be stated in a series of propositions." [108]

Wessels JA continued to formulate a series of propositions *inter alia*:

"(1) The contract between a patient operated upon in a hospital and the operating surgeon is that the surgeon will perform the operation with such technical skill as the average medical practitioner in South Africa possesses and that he will apply that skill with reasonable care and judgement. [A] medical practitioner is not expected to bring to bear the highest possible professional skill but is bound to employ reasonable skill and care. It seems to me, however, that you cannot expect the same skill and care of a practitioner in a country town as you can of one in a large hospital. You can only expect of surgeons in South Africa that degree of skill and that degree of care which is generally to be found in surgeons practising in this country. It seems to me threfore that the locality where an operation is performed is an element in judging whether or not reasonable skill, care and judgement have been exercised." [109]

In a later case of *Buls v Tsatsarolakis* [110] the Plaintiff sued the doctor after the Plaintiff was treated at a Provincial Hospital for a painful wrist. The facts relied on can briefly be summarized as follows:

Although the wrist was X-rayed, Dr B could detect no fracture, nor did the radiologist who subsequently reported on the X-rays, find any. The Plaintiff's wrist was strapped with Elastoplasts, he was given tablets to reduce the swelling and relieve the pain, and he was told to return a week later. When the Plaintiff duly returned the pain had diminished and the swelling had almost disappeared. Dr B gave him further medication and told him to return again if the pain continued. The pain did continue, but the Plaintiff did not return. Three weeks after the accident he consulted a specialist orthopaedic surgeon, who, after further X-rays had been taken, diagnosed a fracture of the scaphoid bone of the Plaintiff's right wrist, and immobilized the wrist in plaster for a time. Alleging that, as a result of Dr B's negligence and lack of skill (of which he gave full particulars), the proper treatment of his wrist had been delayed for three weeks, the Plaintiff sued Dr B and the Administrator of the Transvaal as first and second defendants respectively. He claimed damages for pain and

108 *Van Wyk v Lewis* 1924 AD 438 at 455-456.

109 *Van Wyk v Lewis* 1924 AD 438 at 457.

110 1976 (2) SA 891 (T).

suffering and loss of earnings for three weeks, together with the specialist's fee and the cost of the X-rays ordered by him, a total of R779.30.

Recognising the medical practitioner's duty to act in terms of the implied term of the agreement the court of appeal held:

"Generally speaking every man has a right that others shall not injure him in his person and that involves a duty to exercise proper care. Every man has a legal right not to be harmed; but is there, apart from a contract, a legal right to be healed?

It is no doubt the professional duty of a medical practitioner to treat his patient with due care and skill, but does he, merely by undertaking a case, become subject to a legal duty, a breach of which founds an action for damages, to take due and proper steps to heal the patient? It is an interesting question but, because it was not argued and because it is not necessary for the purposes of the present decision to answer it, I shall not discuss it further." [111]

As to the standard of care required of a medical practitioner, the court contended:

"The standard of care required of a medical practitioner who undertakes the treatment of a patient is not the highest possible degree of professional skill, but reasonable skill and care. (See Mitchell v Dixon 1914 AD 519)." [112]

In a later decision of *Pringle v Administrator, Transvaal* [113] the court had to consider the following facts in deciding whether the defendant, the *Administrator, Transvaal* was negligent or not.

The plaintiff presented at a Transvaal Provincial Administration hospital with a past history of chest carcinoma and opacity (shadows) on the lung. A biopsy of a Para tracheal node was indicated. The procedure adopted (correctly) by the surgeon was a mediastinoscopy, a minor procedure but an invasive one. That is, incision into the mediastinum or area between the lungs and heart, which would facilitate the removal and biopsy of a lymph node on the trachea. In the course of removal of the Para tracheal node, the superior vena cava was perforated, by what the surgeon himself conceded was the use of `excessive force' in excising the node; the resultant haemorrhage from the superior vena cava was not diagnosed until, after leaving the theatre, the patient became hypertensive. The surgeon waited in the recovery room with her, monitoring her condition, whilst X-rays were taken to

111 *Buls v Tsatsarolakes* 1976 (2) 891 (T) at 893.

112 *Buls v Tsatsarolakes* 1976 (2) 891 (T) 894.

113 1990 (2) SA 379 (W).

establish whether or not bleeding from the superior vena cava was the cause of hypotension. Thereafter the patient was returned to theatre for emergency surgery. This latter surgery commenced some one hour fifteen minutes after the mediastinoscopy had been completed. A partial thoracotomy (opening of the chest) revealed that an estimated two litres of blood (approximately one-third of the total blood volume) had escaped through a tear in the superior vena cava and mediastinal pleura, and accumulated in the pleural cavity. The vessel was repaired, but as a result of the perforation and blood loss the plaintiff suffered an occipital lobe thrombosis, that is, a blood clot in the posterior area of the brain. The resultant damage to the brain led to substantially impaired eyesight and a permanent inability to continue in her employment.

The plaintiff subsequently sued the hospital for damages arising from the hospital's alleged negligence. The court consequently found for the plaintiff and recognised the hospital's duty of care towards the plaintiff which, by implication, the court found to be an implied term of the agreement between the hospital and patient. Consequently, the sole ground on which the court found for the plaintiff was that the surgeon had been negligent in perforating the superior vena cava. The principle on which the court based its finding was that negligence is the failure of a medical professional to achieve the general level of skill and diligence possessed and exercised at the time by the members of the branch of the profession to which he belongs (per Innes ACJ) in *Mitchell v Dixon* 1914 AD 519 at 525).

In a later judgment of *Friedman v Glicksman* [114] the court was also confronted with the question; whether a breach of the implied terms of the agreement between hospital and patient occurred. The facts relied upon by the plaintiff can briefly be stated as follows:

The plaintiff alleged that his disability had resulted from infection which had entered and spread from a sacral bedsore, which he had sustained in consequence of the negligent omission on the part of the nursing staff to apply proper care while he was in the general surgical ward of the hospital before being admitted to the intensive care unit (ICU).

Cloete J who delivered the judgement stated *inter alia*:

"I am aware that the plaintiff's claim is founded in contract and, in the alternative, in delict. But I see no reason why the sine qua non test should not apply equally to the contractual claim in casu. The loss sustained by the plaintiff is said to have been caused by the breach of an implied term of an agreement that the hospital through its staff and employees would exercise due care, skill and diligence in providing nursing care. Precisely the same facts are relied upon as constituting a breach of the implied term as are relied upon as constituting a breach of the duty of care owed to the plaintiff. It would be anomalous if the same result did not follow irrespective of the cause of

114 1998 (1) SA 569 (W).

action. Furthermore, although the question of remoteness of damage for breach of contract is approached (in the absence of a contractual stipulation as to the basis on which compensation is to be made) by determining whether the damage flowed naturally and directly from the defendant's breach or is such a loss as the parties contemplated might occur as a result of such breach." [115]

4.6.2.4 **Clear and Unequivocal Terms**

Equally important in the legal relationship between doctor and patient, especially where Consent, is required, it is important to ensure from a medical practitioner/hospital's point of view, that clear, unequivocal and comprehensive consent is obtained from the patient. This, it is submitted, is only attainable if the patient is given clear and unequivocal terms to consider before he or she finally concludes the agreement. Where the medical treatment involves a certain amount of risk not only is it essential to adequately apprise the patient of the risks in clear and unequivocal terms, it is also of the utmost importance to ensure that the patient clearly understands the risks involved and that he or she is prepared to undergo the suggested treatment notwithstanding the risks involved. [116]

4.6.3 **The Patient's Consent**

The patient's consent for a number of reasons is of paramount importance within the Doctor/hospital/other health-care provider and patient contractual relationship. [117]

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115 *Friedman v Glicksman* 1998 (4) SA 569 (W) at 573-574

116 See Strauss (1991) 8. The author suggests that to safeguard a doctor against unwarranted legal proceedings, *"it may be to the advantage of the doctor to take a written and signed consent in which the nature of the treatment is described in detail especially where the treatment is very drastic or unusual."* Of similar import for the medical practitioner to obtain unequivocal consent is in a situation where certain conditions are imposed by the patient especially where the patient is one of those difficult patients. It is of the utmost importance to agree on clear and unequivocal terms before the doctor commences treatment. See Strauss (1991) 9. See further Strauss (1991) 9-10 who suggests where the hospital makes use of admission forms which also serves as a consent form in which the type of treatment or operation which will be undertaken, the hospital authorities will be well advised to formulate the consent required from the patient *"as reasonably specific and comprehensive as possible setting out all the risks applicable where possible by competent staff who ensure that the patient clearly understands the contents and unequivocal consent thereto."*

117 Our legal writers on a number of occasions have expressed their opinion namely: *"Consent between the doctor/hospital/other health care provider and patient is one of the material manifestations of the existence of consensus ad idem, the latter being a prerequisite for a healthy contractual relationship."* See Van Olsten *Encyclopaedia* (1996) 63. See also Strauss (1991) 91; See further Strauss and Strydom (1967) 106. It is particularly in medical interventions or where the medical treatment is very drastic or unusual that Van Oosten *Encyclopaedia* (1996) 63 states: *"The patient's effective consent is fundamental."* See also Strauss (1991) 91; See further Strauss and Strydom (1967) 106. Another of the reasons advanced is that a patient has an absolute common law and constitutional right to his or her integrity and security. For the common law position see the legal writings of Van Oosten *Encyclopaedia* (1996) 64; Strauss (1991) 4; Gordon Turner and Price (1953) 153; Dada and McQuoid-Mason (2001) 7; For the South African case law see *Stoffberg v Elliot* (1923) 148; *Lambert v Hefer* 1955 (2) SA 507 (a) 508; *Esterhuizen v Administrator Transvaal* (1957) 718; *S v Sikunyana* 1961 (3) SA 549 at 551; *Richter and Another v Hamman* (1976) 232; *Burger v Administrateur Kaap* 1990 (1) SA 483 (C); *S v Kiti* 1994 (1) SACR 14 (E) at 18; *S v Binta* 1993 (2) SACR 553 (C) at 561 - 562. For the Constitutional Law position see S12(1)and(2) of the *Constitution of the Republic of South Africa Act* 108 of 1996 which reads as follows:

It is against this background that an investigative study will be made in regard to the validity of the so-called *"contracting out of liability"* clauses, alternatively indemnity clauses (also known as exculpatory clauses), in which the doctor or hospital purport to contract out of liability for malpractice.

4.6.3.1 **Forms of Consent**

Consent, regardless of whether entered into between a doctor and patient or hospital/other health care provider and patient, may be granted expressly, [118] either orally [119] or in writing,

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"*Freedom and security of the person" 12(1)Everyone has the right to freedom and security of the person, which includes the right-*

(a) not to be deprived of freedom arbitrarily or without just cause;
(b) not to be detained without trial;
(c) to be free from all forms of violence from either public or private sources;
(d) not to be tortured in any way; and
(e) not to be treated or punished in a cruel, inhuman or degrading way

(2) Everyone has the right to bodily and psychological integrity, which includes the right-

(a) to make decisions concerning reproduction;
(b) to security in and control over their body; and
(c) not to be subjected to medical or scientific experiments without their informed consent."

Consent it is submitted may also be an important element where a doctor or hospital attempts to successfully plead in an action for assault and false imprisonment the defence of `*volenti non fit injuria*'. For the defence of *volenti non fit injuria* to be successful however, the following requirements have to be met namely: Firstly, the patient must have knowledge of the procedure to be followed, as well as, the nature or extent of the harm or risk. Secondly, the patient must appreciate and understand the nature of the harm or risk and notwithstanding, consents to the harm or assumed the risk. Thirdly, the consent given must be comprehensive and extend to the entire transaction inclusive of its consequences. Further, the act consented to must be in accordance with public policy, and not *contra bonos mores*. For the comments of the legal authors see Van Oosten (1996) 63, 73, 76, 77 - 78; See also Gordon, Turner and Price (1957) 162; See further Strauss and Strydom (1967) 237; McQuoid-Mason and Strauss *LAWSA* (1983) P198; Schwär; Laubscher and Olivier (1984) 10 - 11; Strauss (1991) 3, 6, 31, 89; Claassen and Verschoor (1992) 69, 75. For South African case law authority see: *Stoffberg v Elliott* (1923) 150; *Esterhuizen v Administrator v Elliot* (1957) 716; *S v Mahaci* 1993 (2) SACR 36 at 47 - 48.

118 For the Common Law legal writings see Van Oosten *Encyclopaedia* (1996) 64; See also Claassen and Verschoor (1992) 59. The authors state that: *"A patient can expressly consent to a medical intervention by way of speech or writing."* See further Strauss and Strydom (1967) 187; McQuoid-Mason and Strauss *LAWSA* Volume 17 (1993) 147; See further Gordon, Turner and Price (1953) 156; Strauss and Strydom (1967) 187; See also Strauss (1991) 9; Dada McQuoid-Mason (2001) 5. For the position reflected in the South African Case Law see *Stoffberg v Elliott* 1923 (CPD) 148 in which Watermeyer J with reference to the requirement of consent stated: *"Unless his consent to an operation is expressly obtained, any operation performed upon him without his consent (sic) is an unlawful interference with his right of security and control of his own body, and is a wrong entitling him to damages if he suffers any."*
Watermeyer's statement in *Stoffberg v Elliott supra* has quite correctly come under criticism by our legal writers. See Gordon Turner and Price (1953) 155 - 156. The authors in their criticism stated: *"It must be confessed that this passage is not entirely convincing; it is obvious, for example, that the law was somewhat overstated when the learned Judge suggested that no valid consent could arise by implication. But there is a clear warning in it to the careful practitioner: If he is in the least doubt as to the validity of an implied consent, he should obtain an express consent, preferably written and witnessed, in accordance with the form suggested on page 162."*
Contra Van Oosten *Encyclopaedia* (1996) who states that *"Watermeyer statement in Stoffberg v Elliott that consent to an operation must be express overlooks the fact that implied consent to medical interventions suffices."* See also Strauss and Strydom (1967) 187.

[120] or may even be implied from the patient's conduct. [121]

As a general rule however saves where regulated by legislation, there is no legal requirement for consent to be in written form. For that reason oral and implied consent are equally valid.

4.6.3.1.1 **Expressed Consent**

Expressed consent, as was previously stated, may either be granted orally or in writing, there being no legal requirement, unless provided for by legislation.

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[119] See Strauss and Strydom (1967) 187 - 188. The authors recognize the validity of a patient's oral consent in that where the patient verbally consents to the medical intervention but has undisclosed mental reservations about it, but nevertheless submits himself, apparent consent must be taken as real consent. Also where the patient for fear of pain or injury verbally refuses a medical intervention but nevertheless subjects him or herself, tacit consent must be taken to have been granted. See also Van Oosten *Encyclopaedia* (1996) 64; See further Claassen and Verschoor (1992) 59. The authors are of the view that *"consent is usually given by way of requesting a practitioner to administer a particular treatment or to perform an operation."* See also Strauss (1991) 4; McQuoid-Mason and Strauss (1983) *LAWSA* Volume 17 Par 147; Dada and McQuoid-Mason (2001) 8. The writers take the view that *"there is no difference between a written and oral consent in law except that the latter is easier to prove if there is a subsequent dispute."* See also Van Oosten *The Doctrine of Informed Consent in Medical Law* (an unpublished thesis) (1989) 354 in which the writer opine that *"oral disclosure and consent will usually suffice, although written disclosure and consent will, of course, facilitate their proof."*

[120] See Van Oosten (unpublished thesis) 1989 354. The author states that *"it is generally acknowledged that a discussion and dialogue between doctor and patient are of paramount importance. Written disclosure and consent may, at best, form a basis for and supplement or support oral disclosure and consent."* See also Van Oosten *Encyclopaedia* (1996) 64; See further Strauss and Strydom (1967) 187 in which the authors take the view that the importance of written consent is to be found in the fact that it is to prove if there is a subsequent dispute as well as in instances where the medical practitioner engages in involved or complicated treatment or surgery. See further Dada and McQuoid-Mason (2001) 8; Strauss (1984) 9; McQuoid-Mason and Strauss *LAWSA* Volume 17 (1983) Par 147; Gordon Turner and Price (1953) 155-156, 161-162. Certain legislative provisions set it as a prerequisite that consent be reduced to writing. See Section 60 A (3) of the *Mental Health Act*, No 18 of 1973. It provides *inter alia* that: *If a patient is on account of his mental illness, not capable of consenting to medical treatment to, or an operation on, himself, then depending on which category of person is required to consent, such consent is required to be in writing."* See also Section 4(c) of the *Sterilization Act*, No 44 of 1998. It provides that: *"Consent given for sterilization to be performed on a patient, must be in writing, with the consent form duly signed."* See further Section 18 of the *Human Tissue Act*, No 56 of 1983. It also provides that: *"The removal of tissue, blood and gametes for transplantation purposes, may only be executed if consent has been obtained, from the donor or his or her parents in writing."*

[121] For the legal writer's opinion on implied consent see Claassen and Verschoor (1992) 59 - 60. The authors recognize this form of consent when they state: *"Consent may also be constituted by a tacit submission to treatment. Mere acquiescence is no consent, but where a person capable of forming an intention, submits himself to medical treatment the nature of which he is acquainted with, without any resistance or protest, the conclusion will normally be made that he impliedly consented thereto."* See also McQuoid-Mason and Strauss *LAWSA* Volume 17 (1983) Par 147; Gordon Turner Price (1953) 153; Van Oosten *Encyclopaedia* (1996) 64; See further Strauss and Strydom (1967) 187. The authors lay down the test for determining whether the patient consented or not namely it being a question of fact in looking at the conduct of the patient against all the surrounding circumstances. Dada and McQuoid-Mason (2001) 8.

In most instances in practice however, the expressed consent by a patient, is obtained orally. Though written consent, as was stated earlier, is not a requirement unless so regulated by statute, nonetheless, in practice as a general rule, when a patient enters a hospital or undergoes surgery, written consent is required.

It has therefore become a rule of practice in South African Hospitals, albeit provincial hospitals or privately owned hospitals that patients are required to sign pro formo admission forms which usually incorporate an express consent clause which the patient is required to sign.

One of the greatest advantages in getting a patient to sign such written consent, especially where the nature of the type of treatment and the nature of the surgery to be performed are included in the consent form, is founded in the fact that it is usually very precise and provides better evidence that the patient's permission had been obtained. [122]

Some private hospitals have even gone so far in exploiting expressed consent practices by including exemption clauses, alternatively known as exculpatory clauses, in the pro formo admission forms in an attempt to exempt themselves from liability, to the effect that the hospital will not be liable for any injury, loss or damage of whatever nature suffered by the patient arising out of any treatment or attention received or defects in the premises or instruments of the hospital, whether it is due to the negligence of the hospital or its staff or servants or not. [123]

The above will form the subject of the investigation into whether such waiver agreements between doctor/hospital and patients, excluding liability for medical malpractice, are valid and if not, whether they should not be regarded as invalid, such agreements being *contra bones mores*.

4.6.3.1.2 **Implied Consent**

Implied consent to medical treatment, as was seen earlier, may be inferred from the words

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122 See Strauss (1991) 9. The author states that written and signed consent is *"of the utmost importance in safeguarding the doctor against unwarranted legal proceedings."* See also Strauss and Strydom (1967) 187. The authors attach value to written consent in that it is easier to prove a fact if there is a subsequent dispute. See further Dada and McQuoid-Mason (2001) 8; Claassen and Strydom (1967) 59; Strauss (1991) 9; McQuoid-Mason and Strauss (1983) *LAWSA* Volume 17 147; Gordon Turner and Price (1953) 155 - 156; 161 – 162.

123 See Cronje-Retief *The Legal Liability of Hospitals* (2000) 440; See also Claassen and Verschoor (1992) 102 - 103; See further Burchell and Schaffer "Liability of Hospitals for Negligence" *Businessman's Law* (1977) 109 - 111; See further Claassen and Verschoor (1992) 102 - 103; Strauss (1991) 348; Strauss and Strydom (1967) 324.

or conduct of the patient. Although, generally, it is not hard to imply consent in obvious cases, for example, a patient goes and lies on a bed in the doctor's surgery or consulting rooms or a patient presents his or her arms for an injection or a patient finds himself or herself in the consulting rooms of a dentist or a doctor and opens his or her mouth for an examination, nevertheless, a mere submission by the patient, does not amount to consent. What is required is the submission to treatment by the patient, as well as a manifestation of the will to consent. [124]

4.6.3.1.3 **Informed Consent**

The doctor-patient contractual relationship as was previously stated is a consensual one in which *consensus ad idem* in relation to medical treatment and/or surgery is of paramount importance. Consent, as was also previously stated, is a manifestation of the parties reaching consensus. Consensus on the other hand, it is submitted, can never be achieved, unless there is a meeting of the minds between the doctor and his or her patient.

One way of achieving this, is the exchanging of information between the doctor and patient. It is this parting of appropriate information and the acquisition of knowledge and Appreciation, of material risks of complications, which will put the patient in a position to make an informed decision. The exchange of information in which the patient acquires knowledge and appreciation in order to put him in a position to make in informed decision is also known as informed consent.

4.6.3.1.3.1 **The Nature and Scope of Informed Consent**

The concept of "informed consent" has been defined as indicating that the person, who consents, knows and appreciates what it is that he consents to. [125] Most of our legal

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124 For the views expressed by the Common Law legal writers see Dada and McQuoid-Mason (2001) 9. The authors define the manifestation of the will as *"patients capable of submitting themselves to medical treatment in the full knowledge of the nature thereof, and offering no resistance or make no objection to such treatment."* From the definition it is clear that only those patients capable of consenting may provide valid consent. For that reason the authors Dada and McQuoid-Mason caution: *"Tacit or presumed consent will not be inferred in the case of young children or mentally ill or defective persons, as they do not have the legal capacity to give an informed consent."* See also McQuoid-Mason *LAWSA* Volume 17 147; See further Claassen and Verschoor (1992) 59 - 60; Gordon Turner and Price (1955) 153; Van Oosten *Encyclopaedia* (1996) 64. For the test in determining whether the patient consented or not, see Strauss and Strydom (1967) 187. The authors advocate that this can be determined by looking at the conduct of the patient against all the surrounding circumstances of a case.

125 See Strauss (1991) 6 14 - 15; See also Smit "Enkele opmerkings aangaande eksperimentering op menslike wesens deur medici" 1975 *THRHR* 254; See further Burchell "Informed Consent Variations on a Familiar Theme" 1986 *MED and LAW* 293; See further Van Oosten - The Doctrine of Informed Consent in Medical Law (unpublished thesis) (1989) 20 58.

writers, [126] as well as the South African case law, [127] put a premium on the presence

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126 For the recognition and requirements set for informed consent see Van Oosten *Encyclopaedia* (1996) 67 - 68 The author expresses the view that as with "*ordinary, lawful consent, in which the consenting party knows what he or she consents to, in medical matters, knowledge and appreciation are also prerequisites for obtaining lawful consent.*" See also Claassen and Verschoor (1992) 62. The authors similarly take the view that *"a person must have knowledge of all the true and essential facts relating to the treatment he is consenting to."* In a medical contract the authors opine: *"Consent will therefore only be valid where it is based on essential knowledge regarding the nature and effect of the proposed treatment, consent must accordingly be "informed"."*
See also Strauss and Strydom (1967) 209; McQuoid-Mason and Strauss *LAWSA* Volume 17 (1983) 149. *Contra* Gordon Turner and Price (1953) 157: *"In such a case it is clear that the patient should have been left in no doubt as to the exact nature of the operation proposed, but the question is not always so simple. The practitioner has to compromise between, on the one hand, failing to explain enough to the patient to get his clear and understanding consent, in which case he may lay himself open to a complaint of assault, and, on the other hand, explaining so much that the patient takes fright and refuses to undergo treatment which is really necessary and desirable, in which case the practitioner may lay himself open to a complaint of malpractice as well as the unsatisfactory realisation that he has morally and ethically, if not legally, failed his patient."* See also Strauss (1991) 6 - 7. The author supports the view that knowledge and appreciation *"are two of the basic elements of consent."* The author also expresses the view that *"as a general rule there is no question of legal consent unless the party concerned is fully au fait with what he is consenting to."* But cautions the author that in the medical field this requirement is not without problems in that: *"There may be some doubts in the doctor's mind on the correctness of the diagnosis; there may be alternative methods of treatment for a particular case; many medical procedures involve a certain amount of risk; the effects of the treatment undertaken may not be altogether predictable; a successful outcome cannot always be guaranteed; there is the possibility of an idiosyncratic reaction in the patient to e reckoned with. The question is, considering these difficulties, to what extent the patient should be apprised of the diagnosis, the nature of the treatment proposed, and the inherent risks of such treatment."* In so far as diagnosis is concerned Strauss expresses the view: *"There is no duty upon the doctor to inform the patient fully of the diagnosis. The diagnosis concerns the question why? It may be based on a complexity of symptoms and it involves scientific assessment of the case on the basis of the doctor's knowledge, skill and experience. It may be impractical to attempt giving the patient a general indication in layman's language of the diagnosis. The full diagnosis must be given only where the patient stipulates this as a condition to giving his consent to an operation or treatment."* As to the treatment which must be given and expected results of the treatment as well as the medical profiant proposed, see Strauss (1991) 7 who opines: *"The nature of the medical procedures proposed should be described in simple terms to the patient where a final diagnosis is impossible in the absence of an exploratory operation, or where there is the possibility of extension of the operation agreed upon the patient should be so informed in such detail that he may apply his mind intelligently."* But cautions the author: *The patient should, in unequivocal terms, be informed of those results that are inevitable, egg where a colostomy will be undertaken, the patient must be told that he will be fitted with an artificial opening of the colon on the surface of the body, where a hysterectomy is undertaken, the woman should be told in simple terms that she will be unable to bear children."* As to the danger of risks the author advises: *"Where there are `serious risks' involved in shock therapy for neurosis, the patient must be apprised of these."* *Contra* Van Oosten *Encyclopaedia* (1996) 69 who with regard to the nature and scope of the information the medical practitioner is obliged to disclose. The author opines that: *"..... the doctor is obliged to give the patient a general idea in broad terms and in a layperson's language of the nature, scope, consequences, risks, dangers, complications, benefits, disadvantages and prognosis of, as well as the alternative to, the proposed intervention. More particularly, all serious and typical risks and dangers should be disclosed, but not unusual or remote risks unless they are serious or typical, respectively, or the patient makes enquiries about them."* But the author recognizes that various factors may influence the medical practitioner's disclosure. The circumstances referred to are: *" ..... the matter to be disclosed, the nature of the medical intervention, the patient's desire to be informed, the patient's temperament and health and the patient's intelligence and understanding. However, the doctor should avoid causing the patient anxiety and distress by an unnecessary disclosure of an adverse diagnosis or the adverse consequences of the proposed intervention."*

127 In so far as the recognition of the patient's consent as an essential for lawful medical intervention is concluded, the South African courts in a number of cases have recognised this principle. See in this regard: *Zurnamer v Thielke* 1914 CPD 176 178; *McCallum v Hallen* 1916 EDL 74 82; *Stoffberg v Elliott* 1923 CPD 148 149 - 150;

Lymberry v Jefferies 1925 AD 236 240; *Prowse v Kaplan* 1933 EDL 257 260 - 261; *Allott v Paterson and Jackson* 1936 SR 221 224; *Recsei's Estate v Meine* 1943 EDL 277 283 - 290; *Layton and Layton v Wilcox and Higginson* 1944 SR 48 50 - 51; *Ex parte Dixie* 1950 (4) SA 748 (W) 751; *Rompel v Botha* 1953(T) (unreported), discussed in *Esterhuizen v Administrator Transvaal* 1957 (3) SA 710(T) 719; *Lampert v Hefer* 1955(2) SA 507(A) 508; *Richter v Estate Hammann* 1976 (3) SA 226(C) 232. The doctor's duty to inform the patient also has a very long history. The first case in which this duty was recognised was that of *Lymberry v Jefferies* 1925 AD 236. See also *Prowse v Kaplan* 1933 EDL 257; *Dube v Administrator Transvaal* 1963 (4) SA 260 (W); *Rompel v Botha* 1953 (T) (unreported, discussed) in *Esterhuizen v Administrator Transvaal* 1957 (3) SA 710 (T) 719; *Richter v Estate Hammann* 1976 (3) SA 226 (C); *Edouard v Administrator Natal* 1989 (2) SA 368 (D) 371, 385; *Mtetwa v Administrator Natal* 1989 (3) SA 600 (D) 604. As to what information the medical practitioner is to share with the patient see the remark made by Wessel J in *Lymberry v Jefferies* 1925 AD 236 at 240: *"All the surgeon is called upon to do is to give some general idea of the consequences. There is no necessity to point out meticulously all the complications that may arise."* In a later judgement of *Rompel v Botha* 1953 (T) (unreported), discussed in *Esterhuizen v Administrator Transvaal* 1957 (3) SA 710 (T) 719: *"I have no doubt that a patient should be informed of the serious risks he does run. If such dangers are not pointed out to him then, in my opinion the consent to the treatment is not in reality consent. It is consent without knowledge of the possible injuries. On the evidence defendant did not notify plaintiff of the possible dangers, and even if plaintiff did consent to shock treatment he consented without knowledge of injuries which might be caused to him."* The above principle was endorsed in *Esterhuizen v Administrator Transvaal* 1957 (3) SA 710 (T) 721: *"I do not pretend to lay down any such general rule; but it seems to me, and this is as far as I need go for purposes of a decision in the present case, that a therapist, not called upon to act in an emergency involving a matter of life or death, who decides to administer a dosage of such an order and to employ a particular technique for that purpose, which he knows beforehand will cause disfigurement, cosmetic changes and result in severe irradiation of the tissues to an extent that the possibility of necrosis and a risk of amputation of the limbs cannot be excluded, must explain the situation and resultant dangers to the patient no matter how laudable his motives might be and should he act without having done so and without having secured the patient's consent, he does so at his own peril."* Although the term "informed consent" was first used in *Verhoef v Meyer* 1975 (T); 1976 (A) (unreported), discussed in Strauss (1991) 32 - 33, it was only much later in the case of Castell v De Greeff 1994 (4) SA 408 CPD 408 when the doctrine was formally recognised and received into South African Law. Referring to Van Oosten *The doctrine of informed consent in medical law* (unpublished doctoral thesis, University of South Africa (1989) at 414 in which the learned author opines: *"When it comes to a straight choice between patient autonomy and medical paternalism, there can be little doubt that the former is decidedly more in conformity with contemporary notions of and emphasis on human rights and individual freedoms and a modern professionalised and consumer-orientated society than the latter, which stems largely from a bygone era predominantly marked by presently outmoded patriarchal attitudes. The fundamental principle of self-determination puts the decision to undergo or refuse a medical intervention squarely where it belongs, namely with the patient It is, after all, the patient's life or health that is at stake and important though his life and health as such may be, only the patient is in a position to determine where they rank in his order of priorities, in which the medical factor is but one of a number of considerations that influence his decision whether or not to submit to the proposed intervention. But even where medical considerations are the only ones that come into play, the cardinal principle of self-determination still demands that the ultimate and informed decision to undergo or refuse the proposed intervention should be that of the patient and not that of the doctor."* The court duly endorsed the principle. Referring further to two leading decisions of the Australian Courts on the standard of disclosure required of a doctor in treating a patient namely *F v R* (1983) 33 SASR 189 and *Rogers v Whitaker* (1993) 67 ALJR 47 Ackermann J in *Castell v De Greeff* op cit at 426 quotes with approval the conclusion come to in *Rogers v Whitaker* namely: *The law should recognize that a doctor has a duty to warn a patient of a material risk inherent in the proposed treatment; a risk is material if, in the circumstances of the particular case, a reasonable person in the patient's position, if warned of the risk, would be likely to attach significance to it or if the medical practitioner is or should reasonably be aware that the particular patient, if warned of the risk, would be likely to attach significance to it. This duty is subject to the therapeutic privilege."* And concludes at 427: "*In my view we ought, in South Africa, to adopt the above formulation laid down in Rogers v Whitaker, suitably adapted to the needs of South African jurisprudence. It is in accord with the fundamental right of individual autonomy and self-determination to which South African law is moving. This formulation also sets its face against paternalism, from many other species whereof South African is now turning away. It is in accord with developments in common law countries like Canada, the United States of America and Australia, as well as judicial views on the continent of Europe. The majority view in Sidaway must be regarded as*

of knowledge and appreciation with the patient before real consent can be achieved.

Informed consent, it is submitted, serves a twofold function. On the one hand, it is essential to establish a proper doctor-patient relationship which ultimately enhances a healthy doctor-patient relationship; [128] on the other hand, it is also essential for lawful medical interventions. [129]

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out of harmony with medical malpractice jurisprudence in other common law countries. I therefore conclude that, in our law, for a patient's consent to constitute a justification that excludes the wrongfulness of medical treatment and its consequences, the doctor is obliged to warn a patient so consenting of a material risk inherent in the proposed treatment; a risk being material if in the circumstances of the particular case:

(a) a reasonable person in the patient's position, if warned of the risk, would be likely to attach significance to it; or

(b) the medical practitioner is or should reasonably be aware that the particular patient, if warned of the risk, would be likely to attach significance to it.

This obligation is subject to the therapeutic privilege, whatever the ambit of the so-called `privilege' today still may be."

128 It is particularly Van Olsten who recognizes that the doctrine of informed consent has made a major contribution in the change in the doctor-patient paradigm in that *"patient autonomy as a fundamental right has been endorsed and medical paternalism rejected."* The effect thereof has been put that *"the ultimate decision to undergo (informed consent) or refuse (informed refusal) a medical intervention lies with the patient and not with the doctor."* See Van Oosten 1996 68; See also Van Oosten *The Doctrine of Informed Consent in Medical Law* (1989) 12 - 13 414. This shift in the doctor-patient paradigm in which the fundamental right of individual autonomy and self determination as opposed to paternalism is preferred by our courts and may be deduced from the judgement of Ackermann J in *Castell v De Greeff* 1994 (4) SA 408 at 426 in which the judge endorses the principle laid down in *Rogers v Whitaker*: *"It is in accord with the fundamental right of individual autonomy and self-determination to which South African law is moving. This formulation also sets its face against paternalism, from many other species whereof South Africa is now turning away. It is in accord with developments in common law countries like Canada, the United States of America and Australia, as well as judicial views on the continent of Europe. The majority view in Sidaway must be regarded as out of harmony with medical malpractice jurisprudence in other common law countries."*

129 See generally the legal writings of the common law writers who are *ad idem* that informed consent is in the absence of other grounds of justification a requisite. For lawful medical interventions regardless of whether they take the form of treatment or experimental in that consent serves as a defence to criminal and/or civil liability.
See Van Oosten *The Doctrine of Informed Consent in Medical Law* (1989) 11 13 20 31 - 33 54 56-57 445 - 446. See also Van Oosten *Encyclopaedia* (1996) 67 - 68; Claassen and Verschoor (1992) 62 - 63; Dada and McQuoid-Mason (2001) 13 - 14; Strauss (1991) 3 - 46 27 70 - 71; See further McQuoid-Mason and Strauss *LAWSA* Volume 17 (1983) 149. In regard to grounds of justification for example necessity, negotiorum gestio, statutory authority in the general context see Loubscher in *LAWSA* Volume 6 (1981) (ed Joubert) par 63; Burchell, Milton and Burchell *South African Criminal Law and Procedure* 1 (1983) 372; Boberg *The Law of Delict* 1 (1984) 751; Strauss (1991) 3 27 70 ff; De Wet *Strafreg* (1985) 102; Van der Merwe and Olivier *Die Onregmatige Daad in die Suid-Afrikaanse Reg* (1985) 107 - 108; Snyman *Strafreg* (1986) 133 - 134; Visser and Vorster *General Principles of Criminal Law through the Cases* (1987) 197. For grounds of justification in a medical context see Van Oosten Encyclopaedia (1996) 76 -78. The authors highlights that in the following situations informed consent does not have to be obtained prior to medical interventions namely:

(i) Deviations or extensions: - In this regard during for example surgery, the doctor discovers that an undiagnosed condition exists, which renders *"a deviation or extension of the agreed operation necessary or reasonable where otherwise, the patient's medical interests may be detrimentally affected." Contra* however Strauss and Strydom (1967) 223 - 224: The authors identify the following situations as justifiable deviating or extensions *inter alia*: *"Where the patient consents to the intervention in question, but not to it being negligently performed, and where the patient consents to the intervention in question,*

but is not fully informed of all the consequences thereof." See also the situations described in the following case law: *Esterhuizen v Administrator Transvaal* (1957) (T) 716 in which consent to the initial superficial radiotherapy was held not to cover the subsequent radical radiotherapy, the patient's allegation in *Verhoef v Meyer* (1976) AD 33 (unreported) that not only had the right eye been operated upon as agreed, but also her left eye for which no consent was given, the patient's allegation in *Fowlie v Wilson* 1993 (N) (Unreported) that consent had been given to a laparoscopy but not to subsequent cancer surgery.

(ii) Emergency interventions: - This may arise independent of emergency interventions, justified by statutory authority *inter alia* Rules 27, 28 and 29 of the *South African Health Services Council Rules of Conduct.* For South African case law see: Cf. *Stoffberg v Elliott* (1923) CPD 148 at 150; *Ex parte Dixie* 1950 (4) SA 748 (W) at 751; *Rompel v Botha* 1953 (T) (unreported); *Esterhuizen v Administrator Transvaal* 1957 (3) SA 710 T at 716 ff; *Burger v Administrator Kaap* 1990 (1) SA 483 (C) 489. It may arise in unauthorized administration situations better known as negotiorum gestio or necessity situations. In these situations the patient as a result of unconsciousness, delirium, shock or loss arising from indulgence or accident is unable to give consent to a medical intervention, which is urgently necessary to save his or her life or to preserve his or her health the action taken must be in the patient's best interests. In necessity situations, even if the patient is capable of consenting, in some instances action taken in these situations will connote lawful medical interventions. In this regard Van Oosten *Encyclopaedia* (1996) 74 states: *"Necessity as a defence will therefore be relevant where the patient was capable of consenting or where the intervention was against his or her will or where the intervention was performed in society's best interest. Thus the inoculation of conscious, sane, sober and healthy persons against their express wish in order to prevent a dangerous and infectious disease from spreading may be justified in necessity."* See also Strauss (1991) 31 91 - 92 who takes the view that: *"Medical treatment of a patient whose life or health is in serious danger against the patient's express wishes will be justifiable in necessity only if it is administered solely (a stringent qualification which may conceivably give rise to difficulties) for the protection of society's interest, cf. GN R2438 of 30 October 1987 Regulation 13 under Section 33(1) (j) of the Health Act."*

(iii) Statutory authority:- Some acts in the form of medical interventions may, even in the absence of informed consent, be justified by statute, for example: *" ..... the taking of a blood sample which may be relevant to criminal proceedings, a compulsory medical examination, hospitalization and treatment or immunization of persons suspected on reasonable grounds of being carriers of communicable diseases; or psychiatric treatment administered to a mental patient institutionalized in terms of a compulsory detention order."* For the relevant statutory provisions see: Section 37(2) of the *Criminal Procedure Act*; cf. also Section 225(2). In terms of GV R2438 of 30 October 1987 Regulations 14 and 17 under Section 33(1) (r) of the *Health Act*. In terms of GN R2438 of 30 October 1987 Regulation 13 under Section 33(1) (j) of the *Health Act*. Sections 1 and 9(3) of the *Mental Health Act*.

(iv) Court authorization: - Authorization by the court may justify a medical intervention. This may be justified regardless of the medical intervention be against the patient's will or not.

The ratio for informed consent being essential for lawful medical interventions has been discussed differently by our common law writers. See Gordon, Turner and Price (1953) 153. The authors emphasize their standpoint namely: *"Consent vitiates otherwise conduct which would otherwise have been regarded as civil and/or criminal assault."* See also Strauss (1991) 3; See also Van Oosten *The Doctrine of Informed Consent in Medical Law* (1989) 56; Millner "The Doctor's Dilemma" 1957 *SALJ* 389; Burchell "Informed Consent Variations on a Familiar Theme." 1986 *Med and Law* 298; Smit "Enkele Opmerkings aangaande eksperimentering op Menslike wesens deur Medici" 1979 *THRHR* 267 -258 259 262; See further McQuoid-Mason and Strauss *LAWSA* 1983 Volume 17 146. *Contra* Claassen and Verschoor (1992) 57 - The authors on the other hand places a great premium on the "personal integrity and right of self-determination of the patient". See also Van Oosten Encyclopaedia (1996) who equally places great emphasis on the patient's autonomy. In this regard the writer describes the purpose and function of informed consent as: *"(a) To ensure the patient's right to self-determination and freedom of choice; and (b) to encourage rational decision-making by enabling the patient to weigh and balance the benefits and disadvantages of the proposed intervention in order to come to an enlightened choice either to undergo or refuse it."* The writer cautions: *"In the absence of other grounds of justification, medical interventions without the patient's informed consent on the basis of the patient's-best-interest and the doctor-knows-best criteria constitute a violation of the patient's autonomy."* See in this regard the South African case law: *Stoffberg v Elliott* (1923) 146 at 149 - 150; *Ex parte Dixie* 1950(4) SA 748 (W) 51; *Esterhuizen v Administrator Transvaal* 1957 (3) SA

The relationship between health care providers and their personnel and the health care users imposes certain rights and duties on users as well as the health care providers and their personnel. The National Health Act[130], it is submitted, oversees that such a relationship is fostered and promoted.[131] Some of the primary duties and obligations of a health care provider and its staff involves the sharing of information with the user of health services regarding his/her health status, diagnostic procedures and treatment options and the risks involved.[132] The underlying reason for sharing the information with the user is for the user to make an informed decision. The user's informed consent is necessary before any treatment can commence or surgery is carried out, save for instances where, due to circumstances, consent is not necessary.[133] The participation of the health service user in

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710(T) 918, 720; *Castell v De Greef* (1994) (4) SA 408 (CPD) at 420 - 421. It is particularly since the *Castell v De Greef* (1994) (4) SA 408 CPD cases that patient autonomy as model governing the doctor-patient relationship has received recognition and acceptance, thus displacing medical paternalism as a preferred model. Since the said judgement the emphasis has shifted from the doctor taking action or making important decisions on behalf of patients to the doctor telling the whole truth to the patient and the doctor having greater accountability for medical decisions and with the patient having a greater right to self-determination. It is the scope of patient autonomy and his or her right to self-determination which will form the focal point of this thesis in determining whether an exemption clause excluding liability for intentional medical malpractice or for gross medical negligence alternatively negligence will be upheld by our courts or not.

130 Act 61 of 2003.

131 The National Health Act 61 of 2003 it is submitted imposes certain duties and obligations against the back drop of the Constitution. One just has to have regard to the preamble of the Act which provides for the aim and objectives of the provisions of the Act, namely; *"to provide a framework for a structured uniform health system within the Republic, taking into account the obligations imposed by the Constitution and other laws on the national, provincial and local governments with regard to health services; and to provide for matters connected therewith."* Pearmain (2004) 523 with reference to the work of Christie The Law of Contract 4th ed 322 advances the argument that the disclosure of information to the patient fits the paradigm proposed namely, the duties within the fiduciary relationship in which the interests of the patient is primal.

132 The duties of the healthcare provider and its personnel are contained in Chapter 2 of the National Health Act No 61 of 2003. Section 6 provides:
" User to have full knowledge (1) Every health care provider must inform a user of –
(a) the user's health status except in circumstances where there is substantial evidence that the disclosure of the user's health status would be contrary to the best interests of the user;
(b) the range of diagnostic procedures and treatment options generally available to the user;
(c) the benefits, risks, costs and consequences generally associated with each option; and
(d) the user's right to refuse health services and explain the implications, risks, obligations of such refusal.
(2) the health care provider concerned must where possible, inform the user as contemplated in subsection (1) in a language that the user understands and in a manner which takes into account the user's level of literacy.

133 *"'Consent of user (1) Subject to section 8 a health service may not be provided to a user without the user's informed consent, unless-*
(a) the user is unable to give informed consent and such consent is given by a person-
(i) mandated by the user in writing to grant consent on his or her behalf; or
(ii) authorized to give such consent in terms of any law or court order;
(b) the user is unable to give informed consent and no person is mandated or authorized to give such consent, and the consent is given by the spouse or partner, a parent, grandparent, an adult child or a brother or a sister of the user, in the specific order as listed;
(c) the provision of a health service without informed consent is authorized in terms of any law or a court order;
(d) failure to treat the user, or group of people which includes the user, will result in a serious risk to public health; or

the decision making process is encouraged by the Health Care Act.[134] The Act also lays down certain requirements where consent cannot be obtained.[135]

4.6.3.1.4 **Requirements for Valid Consent**

As was previously stated, consent will only be valid if it is based on the imparting of appropriate information by the doctor and the acquiring of substantial knowledge by the patient, of the nature and effect of the act consented to.

The question therefore needs to be begged, what information needs to be parted with and further, what is the extent of the information the patient ought to acquire before he validly consents? An assessment of the relevant literature [136] pertaining to real consent reveals that real consent can never be achieved unless the following requirements are first met. It is especially, the following writings which influenced modern thinking. The requirements include:

- Consent must be recognised by law, that is, it must not be *contra bonos mores*. In

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(e) any delay in the provision of the health service to the user might result in his or her death or irreversible damage to his or her health and the user has not expressly, impliedly or by conduct refused that service.
(2) A health care provider must take all reasonable steps to obtain the user's informed consent.
(3) For the purpose of this section 'informed consent" means consent for the provision of a specified health service given by a person with legal capacity to do so and who has been informed as contemplated in section 6."

134 Sec *"8. Participation in decisions*
(1) A user has the right to participate in any decision affecting his or her personal health and treatment.
(2) (a) If the informed consent required by section 7 is given by a person other than the user, such person must, if possible, consult the user before giving the required consent.
(b) A user who is capable of understanding must be informed as contemplated in section 6 even if he or she lacks the legal capacity to give the informed consent required by section 7.
(3) If a user is unable to participate in a decision affecting his or her personal health and treatment, he or she must be informed as contemplated in section 6 after the provision of the health service in question unless the disclosure of such information would be contrary to the user's best interest."

135 Sec *"9. Health service without consent*
(1) Subject to any applicable law, where a user is admitted to a health establishment without his or her consent, the health establishment must notify the head of the provincial department in the province / in which that health establishment is situated within 48 hours after the user was admitted of the user's admission and must submit such other information as may be prescribed.
(2) If the 48 hour period contemplated in subsection (1) expires on a Saturday, Sunday or public holiday, the health establishment must notify the head of the provincial department of the user's admission and must submit the other information contemplated in subsection (1) at any time before noon of the next day that is not a Saturday, Sunday or public holiday.
(3) Subsection (1) does not apply if the user consents to the provision of any health service in that health establishment with 24 hours of admission".

136 It is particularly the writings of Van Oosten "The Doctrine of Informed Consent in Medical Law" (Unpublished LLD Thesis, Unisa, 1989) 17-13 which set out the criteria in the light of other writings which ought to be complied with before real consent can be deemed to have been given. Each requirement enumerated by Van Oosten will be dealt with in the text.

this regard Claassen and Verschoor [137] state that consent will only be a valid defence where the treatment consented to be not in conflict with public interest. Consent, for example, reckless medical experiments, euthanasia or unlawful abortions, according to the writers, will not exempt a practitioner from liability because such acts are considered *contra bonos mores*. It is against this background that the central theme of this thesis is carried out in ascertaining whether consent forms included in hospital admission forms containing waivers of liability are recognised by law, alternatively, whether they should not be regarded as invalid as they are considered *contra bonos mores*.

- It must be given by a person capable in law of consenting, that is, by someone who is capable of forming an intention (wilsbevoeg) or of understanding what he consents to. The traits needed to comply with this requirement have been stated before, meaning, when he is intellectually of sufficient maturity to understand the implications of his acts and when he is not mentally ill or under the influence of drugs which have an impeding effect on his brain. [138]

- It is also a requirement that consent must be free and voluntary, that is not induced by fear, force or fraud. [139] The writers Claassen and Verschoor are particularly assertive in their views when they state that there can be no question of legally valid consent when it has been obtained by using physical force on a patient. Consent also is invalid when a patient has been persuaded by fraudulent misrepresentation to agree to some or other medical treatment.

- A further requirement is that the consenting party must have had knowledge and been aware of the nature and extent of the harm or risk. This is one of the *essentialia* of informed consent in that the doctor is obliged to give the patient sufficient information for the patient to acquire the knowledge regarding the intervention as well as the risks, dangers, complications of the proposed

137 (1992) 60; See also Van Oosten *Encyclopaedia* (1996) 64; McQuoid-Mason and Strauss *LAWSA* Volume 17 (1983) Par 147.

138 Claassen and Verschoor (1992) 60; Van Oosten *Encyclopaedia* (1996) 65-67. For a comprehensive discussion on who is capable of consenting and who is not and the influence of recent South African legislation governing consent see Carstens and Pearmain (2007) 897ff.

139 Claassen and Verschoor (1992) 99; see also Gordon, Turner and Price (1953) 156 who state: *"The practitioner must be reasonably sure that the patient is a genuinely and actively consenting party, and that he is not submitting through fear or ignorance of his rights."*

intervention. [140]

- The consenting party must also have appreciated and understood the nature and extent of the harm or risk. In this regard, it has been said before, that real consent cannot be attained unless the consenting party fully appreciates and understands the information communicated to her or him in this regard. The effect thereof is that this means that the doctor, as an expert, is saddled with a legal duty to provide the patient with the necessary information to ensure knowledge and appreciation, and hence, real consent on the patient's part. [141]

- But `necessary information' does not mean that a practitioner needs to point out meticulously all the conceivable consequences which may arise, but he should at least inform the patient about the more serious risks involved in the operation or treatment. [142]

- A further requirement is that the consenting party must have consented to the harm or assumed the risk. The rationale behind this thinking is that real consent can only exist if the person who consents has knowledge of the danger and further, he or she consenting must have full appreciation of its nature and extent, he voluntarily elects to encounter or he takes the risk upon himself. [143]
- The extent of the information to be given also include that it must be comprehensive, extend to the entire transaction, inclusive of its consequences. [144]

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140 See Van Oosten *Encyclopaedia* (1996) 69; See also Claassen and Verschoor (1992) 62-66 and the more recent writings of Carstens and Pearmain (2007) 883ff who deals comprehensively with the legislative requirements in terms of Section 6 of the *National Health Act* 61 of 2003 on how much detail to be given. For a discussion of the legislative requirements see supra.

141 Claassen and Verschoor (1992) 63.

142 McQuoid-Mason and Strauss *LAWSA* (1983) Volume 17 Par 149.

143 Van Oosten (1996) 69ff. See also Van der Merwe and Olivier 6ed (1989) 92 96-97; See also Neethling, Potgieter and Visser (1989) 88. *Contra* Van der Walt (1979) 53-54. Although the author recognizes the defence of *volenti non fit iniuria*, the defence is not unlimited in that *"the individual autonomy is limited by considerations of individual and social responsibility. Public interest requires that the capacity curtail one's rights and should be kept within reasonable bounds."* The author continues: *"Consent to or assumption of a risk is therefore only valid if it is not considered to be contra bonos mores"*. In determining whether consent is *contra bonos mores* the author suggests: *"The prevailing legal convictions of the community with regard to the lawfulness of the particular conduct in question must be applied. The factors which should be taken into consideration are the nature and extent of the interests involved the motives of the parties and the social purpose of the consent or assumption of risk. This one can accept that consent to be killed or to be seriously injured without the presence of a serious social purpose is contra bonos mores*". See further the discussion of Strauss (1964) *SALJ* 139, 182-184.

144 Strauss (1991) 8 states that in the doctor-patient relationship, it is crucial for a doctor to ensure *"that there should*

- The next requirement is that the consent must be clear and unequivocal. [145]

- The writers also point out that consent must precede the conduct in question. [146]

- The consent given must qualify as a legal act. (Regshandeling) For that reason there must be external conduct which reveals the intention of the parties, namely, that consent has been given. [147]

- A further requirement is that consent, as a rule, must be granted by the plaintiff or the complainant, himself/herself. [148]

- Finally, it is also a requirement that the conduct in question must fall within the limits of the consent given, that is, it must not exceed the bounds of the consent given. [149]

The South African courts have also on a number of occasions set certain requirements which must be met before it can be said that real consent has been obtained in a medical context. In this regard our courts have placed certain duties on medical practitioners to disclose sufficient information regarding the nature and extent of the harm or risk in order for the consenting party to appreciate and understand the harm or risk. In the case of *Lymbery v Jefferies* [150] Wessels JA held *inter alia*: *"It is the duty of a surgeon, before*

subsequently be no question about what exactly the patient has consented to." As medical treatment often entails a certain amount of risk the author cautions: *"Upon the assumption that the patient has been adequately apprised of the risks involved, the next step is to ensure that the patient has left no doubt that he is prepared to undergo the suggested treatment notwithstanding the risk involved."*

145 Strauss (1991) 8; See also Carstens and Pearmain (2007) for a discussion on the nature and scope of the information to be declared as prescribed by Section 6 of the *National Health Act* 61 of 2003.

146 Strauss *Toestemming tot Benadeling as Verweer in die Strafreg en die Deliktereg* (Unpublished ELD Thesis 1961 (Unisa) 108ff 110ff; See also McKerron (1971) 67-68; Van der Walt (1979) 51-52 53; Neethling, Potgieter and Visser (2000) 87-88.

147 In this regard it is Van der Walt (1979) 54 who holds the view that *"in order to constitute a legal act the will and intention of the consenting party must be manifested by external conduct. Consent or assumption of a risk as particular states of mind must therefore be disclosed by some form of conduct."* See also Van der Merwe and Olivier (1989) 90 99. See further Strauss *Toestemming* (1961) 22-23 33 34.

148 Van der Merwe and Olivier (1989) 91; Van Oosten (1984) 19; Neethling et al (1989) 86.

149 Van der Merwe and Olivier (1989) 91; Van Oosten (1984) 19; Neethling et al (1989) 86.

150 1925 AD 236.

operating, to inform the patient that the operation is dangerous and may end in death, or that it will be accompanied by great pain and to obtain the patient's consent to such operation." [151]

In *Prowse v Kaplan* [152] the court held a dentist liable for his failure to disclose to the patient that he had fractured the patient's jaw, in an attempt to remedy a dislocation, which he had caused the patient during a previous operation upon her.

In *Dube v Administrator Transvaal* [153] the court recognised the hospital's duty to warn the patient clearly and unambiguously to return immediately once any abnormal symptoms became manifest.

Support for the view that a medical practitioner is under an obligation to disclose to the patient the nature and consequences of the treatment to be given can be found in the cases of *Rompel v Botha*[154], discussed in *Esterhuizen v Administrator Transvaal*[155], in which the court held that there is at least a duty upon medical practitioners to inform their patients of the serious risks they run.

In *Esterhuizen v Administrator Transvaal*, Bekker J, while accepting a medical practitioner's duty to inform the patient of the dangers attendant upon an operation made the following remarks:

> *"Generally speaking to establish the defence of volenti non fit injuria the plaintiff must be shown not only to have perceived the danger, for this alone would not be sufficient, but also that he fully appreciated it and consented to incur it."*

and

> *"Indeed if it is to be said that a person consented to bodily harm or to run the risk of such harm, then it presupposes, so it seems to me, knowledge of that harm or risk; accordingly mere consent to undergo X-ray treatment, in the belief that it is harmless or being unaware of the risks it carries, cannot in my view amount to effective consent to undergo the risk or the consequent harm."* [156]

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151 *Lymbery v Jefferies* 1925 AD 236.

152 1933 (EDL) 257.

153 1963 (4) SA 260 (W).

154 Unreported case 1953 (T).

155 1957 (3) SA 710 (T) 719.

156 *Esterhuizen v Administrator Transvaal* 1957 (3) SA 710 (T) 719.

The doctor's obligation to disclose was also dealt with in *Richter v Estate Hammann*. [157] Watermeyer J made the following remarks:

"A doctor whose advice is sought about an operation to which certain dangers is attached, and there are dangers attached to most operations, is in a dilemma. If he fails to disclose the risks he may render himself liable to an action for assault, whereas if he discloses them he might well frighten the patient into not having the operation when the doctor knows full well that it would be in the patient's interests to have it, it may well be negligent if he fails to warn a patient, and, if that is so, it seems to me in principle that his conduct should be tested by the standard of the reasonable doctor faced with the particular problem. In reaching a conclusion a court should be guided by medical opinion as to what a reasonable doctor, having regard to all the circumstances of the particular case, should or should not do. The court must, of course, make up its own mind, but it will be assisted in doing so by medical evidence." [158]

In *Castell v De Greef* [159] Ackerman J endorsed the requirements needed for consent to operate as a defence, as formulated by Van Oosten (1989) at 13-25:

"(a) *the consenting party must have had knowledge and been aware of the nature and extent of the harm or risk;*

(b) *the consenting party must have appreciated and understood the nature and extent of the harm or risk;*

(c) *the consenting party must have consented to the harm or assumed risk;*

(d) *the consent must be comprehensive, that is extending to the entire transaction, inclusive of its consequences."* [160]

In *Friedman v Glicksman* [161] the court was tasked to consider whether an agreement between a pregnant woman and a doctor that he would advise her whether there was a greater risk than normal that she might have a potentially abnormal or disabled child so that she might make an informed decision on whether or not to terminate the pregnancy was *contra bonos* or not. Goldblat J held that such an agreement is sensible, moral and in accordance with modern medical practice. In respect of the medical practitioner's duty to disclose information concerning risk, the court held that if a doctor fails to inform a

157 1976 (3) SA 226 (C).

158 *Richter v Estate Hamman* 1976 (3) SA 226 (C) 232.

159 1994 (4) SA 408.

160 *Castell v De Greef* 1994 (4) SA 408 at 425.

161 1996 (C) SA 1134 at 1138.

pregnant patient that she is at greater risk than normal of having an abnormal or disabled child, or incorrectly informs her that she is not at greater risk when she reasonably requires such information in order to make an informed choice whether to terminate such pregnancy, he is delictually liable to her for the damages she has suffered by giving birth to an abnormal or disabled child. The fault element of the delict is to be found in the foreseen ability of harm which the doctor-patient relationship gives to the doctor.

Although doctors are encouraged to give as much detail as possible, this depends upon the circumstances of each case. It further depends upon the patient's temperament and health and the patient's intelligence and understanding. As to the patient's temperament and health, in the case of *SA Medical Dental Council v McLoughlin* [162] in which Watermeyer CJ observed that it *"may sometimes even be advisable for a medical man to keep secret from his patient the form of treatment which he is giving him."* [163]
As to the amount of information i.e. the extent of information a medical practitioner is obliged to furnish the patient, it was held in *Lymbery v Jefferies* [164] when Wessels JA remarked:

"All the surgeon is called upon to do is to give some general idea of the consequences. There is no necessity to point out meticulously all the complications that may arise." [165]

In a more comprehensive tone Neser J in *Rompel v Botha* 1953 (T) unreported, discussed in *Esterhuizen v Administrator, Transvaal* [166] set out the scope of information that ought to be disclosed:

"There is no doubt that a surgeon who intends operating on a patient must obtain the consent of the patient. In such cases where it is frequently a matter of life and death I do not intend to express any opinion as to whether it is the surgeon's duty to point out to the patient all the possible injuries which might result from the operation, but in a case of this nature, which may have serious results to which I have referred, in order to effect a possible cure for a neurotic condition, I have no doubt that a patient should be informed of the serious risks he does run. If such dangers are not pointed out to him then, in my opinion, the consent to the treatment is not in reality consent, it is consent without knowledge of the possible injuries. On the evidence defendant did not notify plaintiff of the possible dangers, and even if plaintiff did consent to shock treatment he consented without knowledge of injuries

162 1948 (2) SA 355 (A).

163 *SA Medical Dental Council v McLaughlin* 1948 (2) SA 355 (A) 366. See also *Richter v Estate Harman* 1976 (3) SA 226 (C) at 232.

164 1925 (AD) 236.

165 1925 (AD) 236.

166 *Lymbery v Jefferies* 1925 (AD) 236 at 240.

which might be caused to him. I find accordingly that plaintiff did not consent to the shock treatment." [167]

Endorsing the remarks made by Neser J in *Rompel v Botha* 1953 (T) (unreported) Bekker J in *Esterhuizen v Administrator, Transvaal* [168] stated that it would render the position of the medical profession intolerable if it were to be held that they owed a duty to patients of having to inform them, prior to any operation or treatment, of all the consequences, dangers and details of the risks inherent in the operation or treatment. He remarked:

"I do not pretend to lay down such general rule, but it seems to me, and this is as far as I need go for purposes of a decision in the present case, that a therapist, not called upon to act in an emergency involving a matter of life and death, who decides to administer a dosage of such an order and to employ a particular technique for that purpose, which he knows beforehand will cause disfigurement, cosmetic changes and result in severe irradiation of the tissues to an extent that the possibility of necrosis and a risk of amputation of the limbs cannot be excluded, must explain the situation and resultant dangers to the patient. No matter how laudable his motives might be and should he act without having done so and without having secured the patient's consent, he does so at his own peril." [169]

The following views were expressed by Ackerman J in *Castell v De Greef*: [170]

"It is clearly for the patient to decide whether she wishes to undergo the operation, in the exercise of the patient's fundamental right to self-determination. A woman may be informed by her physician that the only way of avoiding death by cancer is to undergo a radical mastectomy. This advice may reflect universal medical opinion and may be, in addition, factually correct. Yet, to the knowledge of her physician, the patient is, and has consistently been, implacably opposed to the mutilation of her body and would choose death before the mastectomy. I cannot conceive how the best interests of the patient (as seen through the eyes of her physician or the entire medical profession, for that matter) could justify a mastectomy or any other life-saving procedure which entailed a high risk of the patient losing a breast. Even if the risk of breast-loss were significant, a life-saving operation which entailed such risk would be wrongful if the surgeon refrains from drawing the risk to his patient's attention, well knowing that she would refuse consent if informed of the risk. It is, in principle, wholly irrelevant that her attitude is, in the eyes of the entire medical profession, grossly unreasonable, because her rights of bodily integrity and autonomous moral agency entitle her to refuse medical treatment. It would, in my view, be equally irrelevant that the medical profession was of the unanimous view that, under these circumstances, it was the duty of the surgeon to refrain from bringing the risk to his patient's attention." [171]

Since the decision in *Castell v De Greef* (1994), the doctor's obligation to disclose information to a patient surfaced again in the decision of *Broude v Mcintosh*[172], in which the

167 1957 (3) SA 710 (T).

168 *Rompel v Botha* 1957 (3) SA 710 (T) discussed in *Esterhuizen v Administrator, Transvaal* 1957 (3) SA 710 (T).

169 1957 (3) SA 710 (T) at 718.

170 1994 (4) SA 408.

171 *Castell v De Greef* 1994 (4) SA 408 at 420-421.

172 1998 (3) SA 80 (SCA).

court did not overturn the principle of informed consent laid down in the *Castell v De Greef* case. But, the court held that it was a strange notion that the surgical intervention of a medical practitioner whose sole object has been to alleviate the pain or discomfort of the patient, and who had explained to the patient what was intended to be done and obtained the patient's consent to it being done, should juridically be described, and juristically characterised, as an assault simply because the practitioner had omitted to mention the existence of a risk considered to be material enough to have warranted disclosure and which, if disclosed, might have resulted in the patient withholding consent.

In the case of *Jacobson v Carpenter-Kling* [173] an ear-nose and throat specialist was sued by the patient for damages arising from the lack of informed consent. It was alleged that there was a failure to provide information on the material risks inherent in the operation designed to relieve the patient's chronic sinusitis. Complications set in which required further corrective surgery. The court consequently relied on the decision of *Castell v De Greef* (1994) and found that it was sufficient for a doctor to indicate the body parts on which the operation would be performed and to indicate "danger areas" which might be affected, together with an indication that the required care would be exercised.

More recently the Supreme Court of Appeal in *Louwrens v Oldwage* [174] dealt with *inter alia* the aspect of informed consent in the surgical procedure performed by the defendant. The plaintiff went into hospital for surgery in the form of a laminectomy i.e. an operation to the back. After the operation he began to exhibit symptoms of claudication i.e. blockage of the arteries with resultant cramping in the left leg. The plaintiff blamed the defendant. The court *a quo* found for the plaintiff, the claudication being caused by defendant's surgical intervention. One of the issues raised on appeal was whether the Plaintiff had given informed consent to the surgical procedure performed by the Defendant. Mthiyane JA, delivering the judgement on behalf of the court, found that the defendant explained in detail to the plaintiff the surgical procedure he planned to do and which he eventually did. As to whether the plaintiff was warned of the risks involved, in compliance with the requirements enunciated in Castell v De Greef 1994 (4) SA 408 (C) at 425 H-I, Mthiyane JA found that as there was only a 2% chance of the risk occurring to the plaintiff, it was so negligible that it was not unreasonable for the defendant not to mention it. The doctor's failure did not constitute negligence. [175]

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173 1998 TPD (Unreported).

174 2006 (2) SA 161 (SCA).

175 In this regard the court relied upon the dictum of Richter and Another v Estate Hammann 1976 (3) SA 226 (c)

4.7 Summary and Conclusions

The law of contract has an important role to play in the doctor-patient relationship as well as the hospital-patient relationship, especially, private hospitals. The intention to contract is central to the question of whether or not a contract in fact came into being. In the doctor-patient relationship the contractual relationship still holds sway. Central to this, as was stated earlier, is the fact that the contractual relationship is a consensual one. Historically, the relationship is founded on trust. The doctor/hospital, influenced by their common law duties, including normative ethics, and their statutory duties which influence professional conduct undertakes to *inter alia* exercise reasonable care and skill towards the patient. The formation of the contract between the doctor/hospital and patient can only validly come into being provided certain requirements have first been met. The requirements desire consensus *ad litem. This* also includes firstly, the parties to the agreement must have the contractual capacity to enter into the contract, and secondly, the agreement must be one for performance. From which obligations arise. Generally the doctor/hospital is only expected to perform that which he/she/it had undertaken to do and nothing more, unless such undertaking was guaranteed.

Thirdly, the agreement between the doctor/hospital and the patient must not be against public policy or against good morals. Contracts against public policy and against good morals are generally unenforceable. In this regard it is most unfortunate that the Supreme Court of Appeal in the controversial dictum of *Afrox Healthcare v Strydom* persisted in placing the providing of medical services in the same category of other commercial services. This, it is submitted, regrettably, influenced the court to find that an exclusionary clause incorporated in a hospital admission form exonerating a hospital for liability arising from the hospital and its staff's negligence where the contrary was indicated, was not

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2326-11 in which a neuro-surgeon was found not to have been negligent in failing to warn the patient where on the evidence there was only a remote possibility of complications arising. The court said that the doctor's actions have to be tested by the standard of the reasonable doctor faced with the particular problem. In this regard Watermeyer J said the following: "*A doctor whose advice is sought about an operation to which certain dangers are attached – and there are dangers attached to most operations – is in a dilemma. If he fails to disclose the risks he may render himself liable to an action for assault, whereas if he discloses them he might well frighten the patient into not having the operation when the doctor knows full well that it would be in the patient's interest to have it. It may well be that in certain circumstances a doctor is negligent if he fails to warn a patient, and, if that is so, it seems to me in principle that his conduct should be tested by the standard of the reasonable doctor faced with the particular problem. In reaching a conclusion a Court should be guided by medical opinion as to what a reasonable doctor, having regard to all the circumstances of the particular case, should or should not do. The Court must, of course, make up its own mind, but it will be assisted in doing so by medical evidence.* F or a comprehensive discussion on the criticism of the decision by the Supreme Court of Appeal see Carstens and Pearmain (2007) 685ff.

against public policy. The point is argued elsewhere, but it needs to be emphasized here, that the court, in Afrox, ignored the deep running principles of the past, in that, as the doctor/hospital and patient relationship is founded on long standing ethics, the doctor/hospital's duty to exercise reasonable care towards the patient cannot validly be waived by the stroke of a pen, induced by an enterprise who stand in a powerful bargaining position compared to that of the patient. It will also be argued elsewhere that to allow this situation to prevail, is to ignore the profound changes the Constitution has brought to the South African legal system and international recognition of the need to protect consumers from unconscionable, unfair clauses in contract. It also ignores the social responsibilities of the doctor or hospital, in which, it is submitted, and the doctor and hospital stand in a position of trust.

Generally, unlike other commercial contracts, for example property transactions, no legal formalities are required to conclude a valid contract between the doctor/hospital and the patient. It is especially, where more serious operations are undertaken or the medical practitioner engages in unusual treatment of the patient, that it has become customary that the agreement is reduced to writing. Where, for example, a patient is admitted to hospital, the patient is required to sign an admission form which serves as an agreement between the medical practitioner/hospital and the patient.

The terms to the contract between the doctor/hospital and patient, whether in written form or orally, comprises different terms. Whether expressed or implied, when concluding the agreement, the doctor/hospital undertakes to treat the patient with the utmost care in treating and/or operating on the patient. The implied term “to exercise due care and skill” has its roots in the fiduciary relationship between the doctor/hospital and the patient in which the doctor/hospital is expected to exercise their professional skill with the utmost diligence and with the patient's interests being placed first. A further requirement in the formation of a contract between the doctor/hospital and patient is that there has to be an offer and acceptance. Unlike in commercial contract where conduct to achieve this end is distinct; in medical contracts this is not always discernable. Where, in written agreements such as the signing of admission forms or consent forms takes place, it is easy to determine that there has been offer and acceptance. The difficulty lies with unwritten agreements. This is where consent in whatever form serves as an aide. It has been stated before that consent is one of the material manifestations in bringing about consensus between the parties. In the modern world where rights issues are more prominent and the patient's consumer rights, as well as constitutional rights, receive greater emphasis, the patient's effective consent is fundamental consent, save for exclusions such as emergency situations

where this is not always possible, doctors and hospitals may incur liability in gigantic form.

The role of informed consent has become significant in the modern doctor/hospital-patient relationship. Besides creating and promoting a healthier relationship, informed consent serves as a tool to manage and respect the right to integrity and security as provided for by the Constitution and the common law. For informed consent, however, to be real, this has to be the imparting of appropriate information and the admission of knowledge of material risks of complications. The patient can then make an informed decision. Informed consent serves a twofold purpose, namely, it strengthens the doctor/hospital-patient relationship and it is essential for lawful intervention.

Once the formation requirements have been met and whatever formalities expected to be complied with has been adhered to, mutual obligations arise from the contractual relationship. These are then obligations, also referred to as duties, both the doctor/hospital and the patient are expected to carry out to comply with their contractual obligations. In Chapter Five the duties of the contracting parties will be considered. It needs to be stated here that one of the primary duties is for the doctor/hospital to exercise due care and skill which arises from their contractual relationship.

Chapter 5

The mutual duties and obligations between doctor/hospital and patient flowing from their contractual relationship

5.1 Introduction

This Chapter deals with the mutual duties and obligations between the doctor/hospital and the patient arising from, their contractual relationship. An investigation into the mutual duties, and obligations between the doctor/hospital and patient flowing from their contractual relationship is important for the purpose of the research undertaken with this thesis. The investigation reveals firstly, the nature of the degree of care and skill expected and undertaken by the doctor or hospital towards the patient. Secondly, the degree of care and skill expected of the doctor or hospital, towards the patient, is part of the primary or essential obligation undertaken by the doctor or hospital in terms of his/her/its contractual relationship with the patient. This is otherwise known in contractual terms, as the *essentialia* or *naturalia* of the contract. [1] It follows that the nature or essence of an agreement represents its end or purpose. [2] The *essentialia* in a contract between a doctor or hospital and patient is said to include, unless otherwise agreed, not to cure the patient or to guarantee a specific outcome, [3] but, an undertaking to examine, diagnose and treat the

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1 This concept stems from the Aristotelian notion that everything has a nature or essence from which certain obligation follow. See in this regard the writings of Gordley *The Philosophical Origins of Modern Contract Doctrine* (1991) 61, 67.

2 Gordley (1991) 63, 102, 166.

3 McQuoid-Mason and Strauss (1983) 114 Para 193; Strauss and Strydom (1967) 105-106; Strauss (1991) 40; Carstens and Pearmain (2007) 642ff; *Buls v Tsatsarolakis* 1976 (2) SA 891 (T) 193; *Kovasky v Krige* (1910) CTR 822; *Van Wyk v Lewis* 1924 (AD) 438 at 456.

patient against payment of compensation in the usual manner. To this end, the doctor or hospital in terms of the undertaking is to act with the degree of care and skill reasonably to be expected of an average practitioner in the field. [4] By acting in a careless, negligent manner, the doctor or hospital not only commits a breach of contract, but, is also liable in delict for loss suffered by the patient in consequence of negligent conduct. [5] Thirdly, the investigation will assist with the ultimate investigation into finding answers to the core issue, namely, whether an exemption clause or waiver, which purports to exempt a doctor or hospital from liability for lack of such care and skill, is contrary to the essence of the agreement and jeopardizes the attainment of the parties' basic purpose, *inter alia* an undertaking to employ a certain degree of care and skill.

The doctor/hospital's general duty towards the patient is discussed in this Chapter. This includes a brief discussion on whether the doctor/hospital is obliged to treat a patient. It also includes a discussion of the doctor/hospital's duty to inform the patient, which is concentrated on, but not restricted to, the nature, scope and consequences of the ailment or illness, the risks, danger, benefits and complications as well as alternatives to the proposed intervention. The discussion in this chapter also focuses on the nature of the doctor/hospital's duty to exercise due care and skill towards the patient and the doctor/hospital's obligation to execute the patient's instructions honestly, faithfully and with care. The exercise of due care includes the obligation that once the doctor/hospital commences treatment the treatment must be completed.

The relationship between, especially, the doctor and patient, is very much a personal one, in which intimate details are disclosed and discussed. For that reason a duty of confidentiality has been created which both the doctor/hospital and his/her/its staff must honour respect and obey. Besides the doctor/hospital acquiring duties and obligations from their contractual relationship, the patient similarly also receives obligations flowing from their relationship. The duty of the patient, besides paying the doctor/hospital professional fees, must make himself/herself available for treatment. The relationship between the medical practitioner/hospital/other healthcare provider and the patient is essentially a private

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4 McQuoid-Mason and Strauss (1983) 115 Para 193, 204; Strauss and Strydom (1967) 106, 111, 262; Strauss (1991) 40; See further the discussion of Naude and Lubbe "Exemption clauses - A rethink occasioned by Afrox Healthcare Bpk v Strydom" *SALJ* (2003) 441 at 445; *Mitchell v Dixon* 1914 AD 519; *Van Wyk v Lewis* 1924 (AD) 438; *Castell v De Greef* 1993 (3) SA 501 (C).

5 McQuoid-Mason and Strauss (1983) 114 Para 193; See also Carstens and Pearmain (2007) 619ff; Dada and McQuoid-Mason (2001) 22ff; Strauss (1991) 243; Claassen and Verschoor (1992) 13ff; Van Oosten (1996) Para 156; See further the discussion of Naude and Lubbe (2003) 445ff.

law matter, but it is very much governed by the law of obligations, in which the medical practitioner/hospital/healthcare provider is entrusted with a number of duties.

The first duty bestowed on the medical practitioner/hospital is to obtain the patient's consent before performing surgery or commencing treatment [6] as was previously discussed in Chapter 4. For consent however to be effective, and to comply with the requirements of informed consent, [7] the medical practitioner/hospital/other healthcare provider is obliged to make available to the patient sufficient information regarding the treatment and/or surgery, especially, the risks attached to the treatment and/or surgery. In this regard, although the medical practitioner/hospital/other healthcare provider is not obliged to disclose in detail all the complications, nevertheless, what is expected of him/her/it is to give the patient some general idea of the consequences, dangers and risks inherent in the operation and/or treatment, as well as, the nature and scope thereof. It is also indicated that the medical practitioner/hospital/other healthcare provider deals with alternatives (where available) and proposed interventions (where available).

The next duty involves the duration of the patient's treatment. Once the medical practitioner/hospital/healthcare provider undertakes to treat the patient, he/she/it must carry through and complete surgery and/or treatment, unless, the medical practitioner essentially makes other suitable arrangements or the patient is cured and does not require further

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6 The rationale for this duty has been discussed differently by the South African legal writers. See Dada and McQuoid-Mason (2001) 7 who express the view that `a patient has an absolute common law and constitutional right to his or her bodily integrity and security'. In this regard Section 12(1) of the *Constitution of South Africa Act* 108 of 1996 provides: *"Everyone has the right to bodily and psychological integrity, which includes the right:*

(a) to make decisions concerning reproduction;

(b) to security in and control over their body; and

(c) not to be subjected to medical or scientific experiments without their informed consent.

See also Carstens and Pearmain (2007) 881. See further Claassen and Verschoor (1992) 57 who stresses the duty of a doctor to obtain the patient's consent when declaring *`obtaining a patient's consent is presently accepted as an unavoidable prerequisite for the performance of any form of medical treatment, either therapeutically or diagnostically in nature'*. See also Strauss and Strydom (1967) 178; McQuoid-Mason and Strauss *LAWSA* (1983) Para191. Strauss (1991) 91 stress the common law right of a patient when he remarks: *"Legally speaking, the basic ground of justification for medical treatment is consent. Contra* Van Oosten *Encyclopaedia* (1996) 63 who stresses the point that, the prerequisite for the doctor obtaining the patient's consent lies in the contractual relationship between the doctor and patient. In this regard he states: *"Since the relationship between doctor/hospital and patient is, generally speaking, a contractual one and a contract presupposes consensus ad idem between the parties, the patient's effective consent is fundamental to lawful medical intervention."*

7 The nature and scope of the information which must be discussed by the doctor or hospital staff should now be assessed in context of legislative requirements as stated in Section 6 of the *National Health Act* 61 of 2003. For a comprehensive discussion on the role of the doctrine of informed consent see Carstens and Pearmain (2007) 877ff.

treatment or the patient makes it impossible for the medical practitioner to continue treating the patient. [8]

The doctor/hospital's duty to exercise due care and skill, as previously stated, is a core value in the doctor/hospital-patient relationship. Of all the legal obligations which the doctor/hospital incurs arising from the doctor/hospital-patient contractual relationship, the doctor's or hospital's duty to exercise reasonable care and skill rank the highest in order of significance.

This could either take the form of an expressed term of the agreement where the agreement between the parties is in writing, alternatively, an implied term, when an oral agreement between the parties exists. [9]

As to what is meant by "due care and skill", it is generally accepted that, as the work of a doctor requires some form of skill, the standard required of especially, the medical practitioner, is upgraded, calling for an activity of expertise. [10] But what is required of the medical practitioner is not the highest possible degree of skill, but, rather, a reasonable and competent degree of skill expected at the time from members of the branch of the profession to which he/she belongs. [11] In other words, the medical practitioner, unless he

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8 See Dada and McQuoid-Mason (2001) 6; See also Van Oosten Encyclopaedia (1996) 60 who state that *"where the doctor has taken charge of a patient a duty to complete the course of action embarked upon exists save in the following circumstances when the doctor will be relieved from the obligation to complete the case or to continue to treat the patient:*

(a) The patient has consented to the doctor's withdrawal from the case;

(b) The patient ignores advice or instructions, or refuses or fails to pay the doctor's fees."

9 See Claassen and Verschoor (1992) 13 - 14 who advocate that *".... the duty to exercise reasonable care and skill arises from the doctor/hospitals profession or vocation in that where the doctor possesses special knowledge or skill `the law demands such degree of capability as can reasonably be expected from a practitioner or such profession or vocation."* See also Strauss and Strydom (1967) 266 who adopts the same view. *Contra* Strauss "Duty to Care of Doctor towards Patient may arise independent of Contract." *SA Practise Management* Vol. 9 (1988) 18 in which the writer states that *"..... The duty of care in emergency situations may arise independent of any contract i.e., through medical ethics or depending on the circumstances in terms of a statutory duty."*

10 See Boberg *The Law of Delict* (1984) 346 who justifies the elevation of the standard of care as follows: *"Obviously the ordinary reasonable man test of negligence cannot be applied to an activity calling for expertise that the ordinary man does not possess. One cannot judge a surgeon's conduct by asking how a diligens paterfamilias would have operated, for either he would not have operated at all (which is most likely) or, if he would have operated (in some rare emergency), he would no doubt have done worse than even the most barbarous surgeon."*

11 See Van Oosten (1996) 82 who defines reasonableness in a medical context as: *"Not the highest possible degree of professional care and skill"* or *"the standard of the exceptionally able doctor but rather conduct with reasonable knowledge, ability, experience, care, skill and diligence is expected of the ordinary or average doctor endowed with the general level of knowledge, ability, experience, care, skill and diligence possessed and exercised by the*

guarantees to cure the patient, he is not expected to produce miracles. It is then accepted further, that doctors may make errors of judgement for as long as, such errors are reasonable. [12]

The degree of knowledge, experience, care and skill expected from that of a specialist as opposed to a general practitioner, is distinguished in, that if the doctor is a specialist, the test is that of the reasonable specialist in the branch of the profession to which he or she belongs, whereas, if the doctor is a general practitioner, the test is that of the reasonable practitioner. [13]

The degree of skill and care may very well be influenced by prevailing, universal and customary or usual practise of the profession, the place where the medical intervention or treatment is performed or given, the facilities available, etc.

Another duty of the medical practitioner/hospital/healthcare provider towards the patient is to carry out the patient's instructions honestly, faithfully and with care. The rationale behind this duty is said to arise from the medical practitioner's specialist expert knowledge, in which the medical practitioner finds himself in a relationship of particular trust with the patient. In other foreign jurisdictions this is often referred to as the fiduciary nature of the doctor-patient relationship, in which the medical practitioner is expected to act with the utmost good faith and loyalty and in which the medical practitioner cannot allow his/her personal interests to conflict with their professional duty. In this regard, the patient is

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profession, bearing in mind that a doctor is a human being and not a machine and that no human being is infallible."

12 See Van Oosten (1996) 82 who in this regard suggests that *"Legal liability for an error of judgement will be dependant upon the reasonableness or unreasonableness of such error."* Consequently the author suggests the following test to be applied: *"If it is a reasonable error of judgement that any doctor in the same position acting with the required care and skill could have made, no liability for negligence will attach. If it is an unreasonable error of judgement that no doctor in the same position acting with the required care and skill would have made, liability for negligence may follow."* See in this regard also Claassen and Verschoor (1992) 20 who state: *"The law does not require that a practitioner be infallible in his conduct, and an error of clinical judgement will not constitute negligence where the proper standard of care has been followed. A practitioner may be aware, after the occurring of an incident that his judgement was wrong, but as long as his conduct was reasonable, he will not be held liable."*

13 See Van Oosten Encyclopaedia (1996) 83; See also Claassen and Verschoor (1992) 15 who opine that *"A specialist is required to employ a higher degree of care and skill concerning matters within the field of his specialty than a general practitioner."* See also McQuoid-Mason and Strauss (1983) Par 199. *Contra* Gordon Turner and Price (1953) who formulate the attributes of the general practitioner and specialist as follows: *"The general practitioner should be reasonably skilled in all branches of medicine; the specialist should be particularly skilled in his speciality. But the skill required will, in accordance with general principle, be that of an average specialist, not that of an exceptionally able or gifted one."*

placed first, in the time-honoured traditions of service, duty and honour. [14]

A further duty the medical practitioner is expected to carry out is the duty of confidentiality in which the medical practitioner is prohibited from revealing any information which ought not to be divulged regarding the ailments of a patient unless there is a ground for justification present. Both medical ethics and medical law dictate that the patient has a right to privacy and the medical practitioner is under a duty of confidentiality. [15]

There are, however, a number of grounds for justification in which the disclosure of information regarding the ailments of a patient may be justifiable. The grounds include consent, privilege, court order, litigation between the parties or disciplinary proceedings, statutory authority or statutory duty, and public interest or *boni mores*.

Besides the doctor/hospital incurring obligations arising from their contractual relationship with the patient, the patient also acquires certain duties, albeit very limited. In this regard the duty of the patient toward the medical practitioner/hospital/healthcare provider is limited to paying the fees charged for the medical services and, besides that, to also make himself/herself available for treatment whenever expected to do so, by the medical practitioner. [16]

Before the doctor/hospital's general duty towards the patient is discussed, it is of paramount importance to briefly draw a distinction between public health services involving

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14 Carstens and Pearmain (2007) 321ff with reference to *Black's Law Dictionary* in which a fiduciary duty is defined as *"a duty to act for someone else's benefit while subordinating one's personal interests to that of the other person. It is the highest standard of duty implied by law"* supports the idea that in the doctor-patient relationship a fiduciary relationship can arise. The international writers have expressed strong views in favour of the fiduciary aspects of medical practice and in particular its usefulness in providing *"a dynamic tool for reshaping the doctor-patient relationship as means to finding a proper balance in the discourse between patient and doctor."* See Chapman (1984) 140 who describes the fiduciary relationship between the doctor and patient as *".... One in which the patient's interests are placed first and foremost in the time-honoured traditions of service, duty and honour."*

15 The foundation of its existence has been described by some writers as that founded in contract. See Van der Poel "Omissions and a Doctors Legal Duty to Warn Identifiable Sexual Partners of HIV Patients" *Responsa Meridiana* (1998) 21 who state that *"It is an implied term of the agreement between the doctor and his patient or the nurse and the patient that the doctor and/or nurse will save for certain exceptional circumstances guarantee the patient's right to confidentiality."* Other writers have founded the existence of this duty in the Hippocratic Oath which required the medical practitioner to preserve the confidence of patients. See Dada and McQuoid-Mason 2001 17.

16 See Strauss and Strydom (1967) 115 - 119 *"The patient must give his full co-operation by following the doctor's advice and instructions."* See also McQuoid-Mason and Strauss (1983) 145 who share the view that where the patient however fails to give his co-operation or fail to carry out instructions *`the practitioner cannot in any way force him to submit to treatment'.* This view is supported by Strauss and Strydom (1967) 116 who state: *"The doctor may not subject the patient to treatment against his will. Any attempt to do so vitiates consent."*

doctors employed by the hospitals, and doctors practising for their own account and private hospitals. In the former instance, health care services are in the main provided by public hospitals and medical practitioners in their employee, in terms of the state's constitutional obligation. [17] In the latter instance, the private hospital and private practitioners are independent entities whose existence is not state controlled but dependant upon the generation of own funds through the charging of professional fees to sustain their existence.

5.2 Doctor/Hospital's general duty towards the Patient

5.2.1 The Doctor/Hospital's duty to treat or not to treat

The question may be begged, is there an obligation in contract upon a doctor and/or hospital to treat a patient who knocks on their door? The answer lies in whether the patient consults a doctor in private practise, alternatively, whether the doctor is in the full time employ of a hospital or other health service provider in the public sector. Where a patient consults a doctor in private practise he enters into a contractual relationship with the doctor. When however, the patient presents for medical treatment (inclusive of an operation) by the staff at a hospital, be that a private or provincial hospital, a contractual relationship comes into being between the patient and the relevant hospital authority. [18] It is trite to say that, in private practise, where a patient consults a doctor or the staff at a private hospital the parties usually reach consensus and an agreement between the hospitals or doctor and the patient comes into being. [19] Contract is generally regarded in the private health care sector as the usual legal basis on which a patient obtains services from the provider, be that the doctor or the hospital or both. [20] This cannot be stated without question where a patient enters a public hospital, owned by provincial governments, in which health service delivery takes place in the public sector. [21] However, notwithstanding

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17 The right to emergency medical treatment and the right to access to health care are set out in Sections 27(3) and 27(1) (b) and (c) of the Constitution, respectively.

18 Dada and McQuoid-Mason (2001) 5; Strauss *SA Legal Handbook for Nurses and Health Personnel* (1992) 5; Christie (2001) 93-95; De Wet and Yates (1978) 307ff; Van Oosten (1996) 59; B*uls and Another v Tsatsarolakis* (1976) SA 85 (T).

19 Van Oosten (1996) 63; Strauss and Strydom (1967) 105; Strauss (1991) 3; Claassen and Verschoor (1992) 116; Gordon et al (1953) 69-70.

20 Carstens and Pearmain (2007) 413ff.

21 Carstens and Pearmain (2007) 382ff highlights the objections lodged against the notion that a contractual relationship does exist between the patient and public providers. One of the major objections to the notion entails that the existence of a contractual relationship between patient and public provider promote the notion that the state is "selling" healthcare goods and services and patients are "purchasing" them. They counter this argument by stating that a contractual relationship does not necessarily imply a commercial objective. The writers also argue

the criticism against the notion that a contractual relationship exists between the patient and the public service provider, it appears that there is general acceptance that such a relationship does exist. One of the strongest arguments in support of such a notion is advanced by Carstens and Pearmain [22], who believe that the concept of informed consent tends to strengthen the idea of a contractual relationship rather than delictual. The writers argue that the nature of informed consent includes, *inter alia,* the patient is to be fully informed of the nature of the proposed treatment, its consequences and the consequences of not having it, the risks associated with it is very much akin to the contractual principles of meeting of minds, contractual capacity are of involuntary reliance. This is further supported by the fact that the *National Health Act* [23] now regulates the nature and scope of the information which must be disclosed by every health care provider. In this regard the term "healthcare provider" is not restricted to public hospitals, but, includes a person providing health services in terms of any law *inter alia* the *Allied Health Professions Act*, [24] *Health Professions Act*, [25] the *Nursing Act*, [26] etc.

There is, however, a distinction in the application of the constitutional rights to access to healthcare services and the right not to be refused emergency medical services in the public sector, as opposed to the private sector. In the public sector, from a constitutional prospective, the state cannot refuse access to healthcare service to a person who has no alternatives available to them. [27] Private healthcare providers, unlike the state, as will be seen hereinafter, are not tasked by the Constitution with the progressive realisation of the right of access to healthcare services. [28]

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that a public provider-patient relationship is not always necessarily related to revenue generation or profit. Support for the argument that a contractual relationship may arise between a public hospital and patient can be found in the South African positive Law. In the case of *Behr v Minister of Health* 1976 (1) SA 891 (T) the court indicated that there was a general assumption that the relationship was at least `quasi-contractual'. In the case of *Shields v Minister of Health* 1974 (3) SA 276 (RA) the court accepted the fact that there was a contractual relationship which had arisen between the *Minister of Health and Shields*. The most recent case to recognize that a contractual relationship between a public provider and a patient comes into being is that of *Administrator, Natal v Eduardo* 1990 (3) SA 581 (A).

22 (2007) 404ff.

23 61 of 2003.

24 63 of 1983.

25 56 of 1974.

26 50 of 1978.

27 Carstens and Pearmain (2007) 379ff.

28 Carstens and Pearmain (2007) 380ff. The writers also argue that the question of how the constitutional rights of

It is also significant to note that private health establishments in South Africa, like public health establishments, are regulated by in terms of the *National Health Act*. [29] It should be noted further that although private practitioners and private hospitals operate on a for-profit basis, insofar as their ethical and professional norms and standards are concerned, they are regulated by the relevant legislation pertaining to their profession, which all are subordinate to the *National Health Act*. [30] Besides the *National Health Act*, [31] the *Health Professions Act*, [32] the *Nursing Act*, [33] etc, which regulate the medical profession, a code of ethical rules has also been drawn up in terms of the *Health Professions Act* [34] which promotes ethical conduct within the medical profession. [35] The enhancement of a strong commitment towards medical ethics and the maintenance of standards of good practise are significant in the quest to find answers to the core question undertaken by the research, namely, should one compromise ethics and standards to enforce exemption clauses or waivers.

Having investigated the role of the law of contract in health service delivery in the public sector as well as private sector and the influence of legislative measures, *inter alia,* the *National Health Act* [36] and *Code of Ethical Rules*, [37] the doctor's duty to treat or not to treat

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access to healthcare services and the right not to be refused emergency medical services apply in the context of the law of contract and to the private sector. Providers of healthcare services has so far not been canvassed in much significance except in the case of *Strydom v Afrox Healthcare Bpk* (2001) 4 ALL SA 618 (T) in which the ratio decidendi of the court in finding for the plaintiff was correct but not particularly well constructed.

29 61 of 2003; See also the discussion by Carstens and Pearmain (2007) 234ff who state that although the Act will eventually repeal its predecessor, the *Health Act* 63 of 1977, in its entirety, great parts of the latter Act and its regulations are currently still in operation.

30 61 of 2003; See the discussion by Carstens and Pearmain (2007) 234ff who regard the *National Health Act* as central to health legislation in South Africa (246). The Act also makes provision for the licensing of health establishments in both the public and private sectors in the form of certificates of need and allows the Minister of Health to prescribe minimum standards. This is yet to come into operation.

31 61 of 2003.

32 89 of 1997.

33 50 of 1978.

34 89 of 1997.

35 Carstens and Pearmain (2007) 267 persuasively advance the argument that the code of ethics reflect the spirit of medical professionalism with reference to core ethical values and standards of good practice.

36 61 of 2003.

37 These rules are made in terms of Section 49 of the *Health Professions Act* by the Health Professions Council. The rules were forwarded to the Minister of Health for approval in 2002 by virtue of GN717 dated 4 August 2006 but

will be looked at.

Private practitioners, legally speaking, can generally accept or refuse patients as they wish and there is no duty on them to treat people who are not already their patients. [38] An exception to the general rule is recognised and arises in emergency situations when they are expected to act. For example, a patient is brought to a doctor or hospital in an unconscious or semi-unconscious state. [39]

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has not been approved. See Carstens and Pearmain (2007) 205.

38 See McQuoid-Mason *LAWSA* Vol. 17 (1983) Par 190 who state that the reason behind the foretasted rule is received from the general rule namely *"there is no liability for a mere omission in South African Law, unless there is a positive duty to act, or the circumstances are such that society would regard the failure to act as unlawful."* See also Dada and McQuiod-Mason 2001 6; *Contra* Strauss (1991) 3 who states that, generally, there is neither *"a duty upon a doctor to accept a patient neither is there a general right to treat any person."* This, the author argues is based on the principle that *"legally the doctor's right to operate or treat is based entirely on the patient's consent ....."* This Van Oosten Encyclopaedia (1996) 57 advocates are in line with the international view namely: *"In terms of the principle of freedom of contract a private practitioner is a `free agent' who generally has `the right to accept or refuse patients as he chooses'."* For that reason, as a general rule, doctors have neither a professional right, nor, generally speaking a legal duty to intervene medically.

39 In these instances argue Dada and McQuoid-Mason (2001) 6 doctors *"are ethically required to assist people where the injured or ill person's life or health is seriously endangered, unless some other medical help is at hand or the physician's own life would be at risk. In such circumstances there may also be a legal duty to render medical assistance."* Apart from emergency situations, general practitioners may also assume a statutory duty over patients for example, vaccination, medical examination or treatment in own interest or for the purpose of public rights. See Van Oosten Encyclopaedia (1996) 57; See also Strauss (1991) 3; See further Regulation 13 under Sec 33(1) (j) of the Health Act 63 of 1977. This Act has now been repealed by the National Health Act 61 of 2003 although all the regulations have not been replaced which provides in certain circumstances doctors may have an ethical duty to treat or act in the best interests of the patient. This is particularly relevant today regarding HIV/AIDS patients. Refer to the Health Profession's Council of South Africa Guidelines for the Management of HIV/AIDS (2006). The management of patients with HIV infection or Aids required that *"ethically no doctor may refuse to treat any patient solely on the grounds that the patient is or may be HIV/AIDS infected."* The foretasted opinions regarding emergency treatment it is submitted, is consistent with Section 27(3) of the Constitution of the Republic of South Africa Act 108 of 1996 which provides *inter alia* that: *"No one may be refused emergency medical treatment."* As to what is meant by the term `emergency', See *Soobramoney v Minister of Health, Kwazulu Natal* (1998) 1 SA 765 (CC) at 778 wherein the court defines an emergency as *"a dramatic, sudden situation or event which is of passing nature in terms of time" and not a chronic terminal illness such as kidney disease requiring dialysis."* See further Van Oosten Encyclopaedia (1996) 60 who also supports the notion that *"a duty to intervene exists in emergency situations."* The author states that *"a failure by a doctor to render assistance in cases of a bomb blast or traffic accident may render the doctor civilly and/or criminally liable."* See further Strauss (1991) 3, 90, 254; See also The Health Profession's Council of South Africa's policy ruling, in terms of which a medical practitioner is obliged, in cases of emergency, to render assistance at all times. The South African Courts have in the past also voiced their opinion regarding the duty of the doctor towards his patient. See *Ex Parte Dixie* 1950 (4) 748 (W) at 751 where Millen J held with reference to a surgical operation, that as a matter of law: *"Such an operation cannot lawfully be performed without the consent of the patient, or, if he is not competent to give it, that of some person in authority over his person. The fact that he is a patient in this hospital does not entitle those in charge of it to perform any surgical operations upon him which they may consider beneficial. They would only be justified in performing an operation without consent where the operation is urgently necessary and cannot with due regard to the patient's interests, be delayed."* In *Stoffberg v Elliot* (1922) OPD 148 at 149 Watermeyer J with regard to the best interests of the patient stated: *"Now, in so far as the question of law is concerned, I must direct you that a man, by entering a hospital does not submit himself to such*

State doctors and medical officers on the other hand, may not refuse to treat patients whom they are bound to treat in terms of their contracts of employment, or under a statutory duty, as well as constitutional obligations imposed on them. [40]

Once the private practitioner has been consulted and he or she has undertaken to treat the patient, the practitioner assumes the following duties:

5.2.2 The Duty to Complete Treatment once Commenced

The doctor must carry through and complete treatment once commenced unless:

(1) The doctor can leave it in the hands of another competent practitioner;

(2) The doctor issues sufficient instructions for further treatment;

(3) The patient is cured or does not require further treatment;

(4) The patient refuses further treatment or insists on being discharged from hospital, provided the patient is mentally capable of doing so; and

(5) The doctor gives the patient reasonable notice that he or she intends to discontinue his or her practice, in which case the doctor should ensure that other facilities are

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surgical treatment as the doctors in attendance upon him may think necessary. He may submit himself for medical treatment, but I am not going into that; I am going to attempt to define the exact limit of medical treatment, because they do not seem to me to be material in this case, but he does not consent to such surgical treatment as the doctor may consider necessary. By going into hospital, he does not waive or give up his right of absolute security of the person; he cannot be treated in hospital as a mere specimen, or as an inanimate object which can be used for the purposes of vivisection; he remains a human being and he retains his right of control and disposal of his own body; he still has the right to say what operation he will submit to, and, unless his consent to an operation is expressly obtained, any operation performed upon him without his consent is an unlawful interference with his right of security and control of his own body, and is a wrong entitling him to damages if he suffers any." In *Castell v De Greef* 1994 (4) SA 408 Ackermann J expressed the following harsh word when looking at the best interests of the patient: *"I cannot conceive how the `best interests of the patient' (as seen through the eyes of her physician or the entire medical profession, for that matter) could justify a mastectomy or any other life-saving procedure which entailed a high risk of the patient losing a breast. Even if the risk of breast-loss were insignificant, a life-saving operation which entailed such risk would be wrongful if the surgeon refrains from drawing the risk to his patient's attention, well knowing that she would refuse consent if informed of the risk. It is, in principle, wholly irrelevant that her attitude is, in the eyes of the entire medical profession, grossly unreasonable, because her rights of bodily integrity and autonomous moral agency entitle her to refuse medical treatment. It would, in my view, be equally irrelevant that the medical profession was of the unanimous view that, under these circumstances, it was the duty of the surgeon to refrain from bringing the risk to his patient's attention."*

[40] See Dada and McQuiod-Mason (2001) 6 who express the view that *"a casualty official at a hospital is obliged to treat patients brought in for treatment."* See also McQuoid-Mason and Strauss (1983) Par 190; Carstens and Pearmain hold the view that in South Africa, public health services are traditionally the safety net into which all patients can fall, including those within the private sector who have exhausted their medical scheme benefits or whose membership of a scheme has been terminated for some reason or another. From a constitutional perspective the writers also hold the view that *"the State cannot refuse access to healthcare service to a person who has no alternatives available to them."* They also opine that *"this is a base line which materially alters the position of public providers of healthcare services in relation to their private counterparts."*

available. [41]

In the latter instance, it is submitted, the doctor should issue full instructions for further treatment and indicate his or her willingness to consult with the practitioner who takes over his duties (if any) in treating the patient. [42]

5.2.3 The Duty to Obtain the Patient's Consent

A doctor generally has no right to treat a patient unless the patient consents to such treatment. [43]

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41 See Dada and McQuiod-Mason (2001) 6; See also Van Oosten Encyclopaedia (1996) 60. See also Strauss and Strydom (1967) 113-114. Although the blacklisting of patients who have a record of bad debt may under certain circumstances be legally permissible. See Strauss (1991) 63-64 *Contra Todhill v Gordon* 1930 WLD 99. With regard to case law placing a duty to complete treatment once commenced see *Kovasky v Krige* (1910) 20 CTR 822, a case which involves the treatment of a nine month old infant for a haemorrhage following a circumcision operation, the Plaintiff alleged that the doctor was negligent in that the infant contracted gangrene after the physician allegedly withdrew from the case before the bleeding stopped. It was also alleged that the doctor did not return timeously after being called. Dismissing the Plaintiff's claim on behalf of the infant, Buchanan J said: *"..... it is proved that though the defendant was not long in attendance, he did remain until the haemorrhage had ceased. He remedied the evil which he had been called in to remedy. The next allegation is that he did not return within a reasonable time, not until he had been called upon to do so. I cannot see that there was any necessity for him to return: he had been called in to stop the haemorrhage, and he had done so. As a rule, doctors do not pay visits after they have done their work, unless they are especially asked to do so, on behalf of the patients."* See also the case of *Webb v Isaac* (1915) E.D.L. 273 the defendant set and splinted the patient's leg on a remote farm. He did not visit the patient again, being satisfied with reports given to him by a third party on the progress of the case, and being unwilling to "run up the fees" against the third party, who had guaranteed his remuneration and expenses. The leg shortened and twisted, as a result of which it became necessary to have it re-broken and re-set. The Court felt that he had been culpable in not re-attending the patient, but was not prepared to hold him liable, as it was satisfied that such re-attendance would not in the circumstances have affected the result in any way. See further Claassen and Verschoor (1992) 117 regarding the position where the treatment takes the form of a therapeutic series. The authors caution that *"the practitioner may not withdraw himself from the treatment before the completion of the whole process."* According to the authors *"withdrawal in this instance will expose the doctor to contractual claims and he may also be held liable delictually where the patient has suffered personal injuries as a result of the culpable interruption of treatment."* See also Strauss and Strydom (1967) 113.

42 See Gordon, Turner and Price (1953) 123.

43 A more detailed discussion on the different forms of consent and the requirements thereof follows hereinafter. For the legal writings see Dada and McQuiod-Mason (2001) 7. Van Oosten Encyclopaedia (1996) 63 who stresses the point that the prerequisite for the doctor obtaining the patient's consent lies in the contractual relationship between the doctor and patient. In this regard he states: *"Since the relationship between doctor/hospital and patient is, generally speaking, a contractual one and a contract presupposes consensus ad idem between the parties, the patient's effective consent is fundamental to lawful medical intervention."* This requirement is stringently applied so much so that Van Oosten Encyclopaedia (1996) 63 remarks: *"The legal consequences of a medical intervention performed without the patient's effective consent are that the doctor may incur liability for breach of contract, civil or criminal assault (a violation of bodily integrity) or negligence as the case may be,"* and further *"this applies irrespective of whether or not the intervention was administered with due care and skill and eventually proves to have been beneficial to the patient."* The ratio behind the latter thinking according to Van Oosten Encyclopaedia (1996) 64 lies in the fact that: *"The violation perpetrated by the doctor who performs the wrongful or unlawful intervention being one against the patient's physical integrity or dignitas/privacy rather than one against his or her health."* See also Carstens and Pearmain (2007) 875 who holds the view that social

5.2.4 The Duty to Inform the Patient

To be legally valid, consent must be based on substantial knowledge concerning the nature and effect of the act consented to. This is generally referred to as informed consent. [44] The

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development as well as constitutional development in South Africa were instrumental to the demand for free and informed decision-making. It is especially Chapter 2 of the Bill of Rights in the South African Constitution which contributed to the increased demand for bodily integrity, self determination, privacy, equality, information and administrative justices. For the case law South Africa, apart from the academic writings, has a high history of case law in which the patient's right to his or her bodily integrity and security has been protected. As far back as 1923 the question of implied consent to a surgical operation arose in the well-known case of *Stoffberg v Elliot* 1923 C.P.D. 148 in which the Plaintiff entered a hospital, conscious, and was subjected to a surgical operation resulting in his penis been removed during the operation, the surgeon claiming that the patient had had an incurable cancer of the penis hence the necessity to operate. In his summing up to the jury, Watermeyer J. said: *"Now, the declaration in this case alleges an unjustified, unexcused, and unconsented to interference: the plea admits an interference, but it says there was consent to the operation, but not an express consent, a contract implied by the fact that the man went into the hospital; it says the plaintiff was admitted for treatment, and thereby consented to undergo such surgical and medical treatment as was immediately necessary, and here we come really to the first issue between the parties. It is a question partly of fact and a question partly of law whether there was an implied consent to undergo such surgical treatment as was considered reasonable and necessary by the doctor. Now, in so far as the question of law is concerned, I must direct you that a man, by entering a hospital, does not submit himself to such surgical treatment as the doctors in attendance upon him may think necessary; he may submit himself for medical treatment, but I am not going into that. I am not going to attempt to define the exact limits of medical treatment, because they do not seem to me to be material in this case, but he does not consent to such surgical treatment as the doctor may consider necessary. By going into hospital, he does not waive or give up his right of absolute security of the person; he cannot be treated in hospital as a mere specimen, or as an inanimate object which can be used for the purposes of vivisection. He remains a human being, and he retains his rights of control and disposal of his own body; he still has the right to say what operation he will submit to, and unless his consent to an operation is expressly obtained, any operation performed upon him without his consent (sic) is an unlawful interference with his right of security and control of his own body, and is a wrong entitling him to damages if he suffers any."* In a more recent judgement of Ackerman J in *Castell v De Greef* 1994 (4) SA 408 at 420-421 the judge echoed the same sentiment but with respect in more modern terms: *"It is clearly for the patient to decide whether he or she wishes to undergo the operation, in the exercise of the patient's fundamental right to self-determination. A woman may be informed by her physician that the only way of avoiding death by cancer is to undergo a radical mastectomy. This advice may reflect universal opinion and may be, in addition, actually correct. Yet, to the knowledge of her physician, the patient is, and has consistently been, implacably opposed to the mutilation of her body and would choose death before the mastectomy. I cannot conceive how the `best interests of the patient' (as seen through the eyes of her physician or the entire medical profession, for that matter) could justify a mastectomy or any other life-saving procedure which entailed a high risk of the patient losing a breast. Even if the risk of breast-loss were insignificant, a life-saving operation which entailed such risk would be wrongful if the surgeon refrains from drawing the risk to his patient's attention, well knowing that she would refuse consent if informed of the risk. It is, in principle, wholly irrelevant that her attitude is, in the eyes of the entire medical profession, grossly unreasonable, because her rights of bodily integrity and autonomous moral agency entitle her to refuse medical treatment. It would, in my view, be equally irrelevant that the medical professor was of the unanimous view that, under these circumstances, it was the duty of the surgeon to refrain from bringing the risk to his patient's attention."* See also *Layton and Layton v Higginson* 1944 SR 48, 50; *Lampert v Hefer* 1955 (2) SA 507 (A) 508; *Esterhuizen v Administrator Transvaal* 718 ff; *S v Sikunyana* 1961 (3) SA 549(E), 551; *Richter v Estate Hammann* 232; *Burger v Administrator Kaap* 489; *S v Kite* 1994 (1) SACR (E) 14; *S v Binio* 1993 (2) SACR 553 (C) 561 - 562; *Fourie v Wilson* 1993 (N) (unreported, discussed by Strauss SA 1994 (2) SAPM (0).

[44] See McQuoid-Mason and Strauss *LAWSA* (1983) Volume 17 Par 196; See also Gordon, Turner and Price (1953) 157 who describe the substantial knowledge as `*The patient should have been left in no doubt as to the exact nature of the operation proposed.*' See also Claassen and Verschoor (1992) 62 who define informed consent as `*essential knowledge regarding the nature and effect of the proposed treatment.*' Informed consent is also

rationale for the existence of this doctrine has been described by our academic writers as ranging from the endorsement of patient autonomy as a fundamental right and the rejection of medical paternalism [45] to the scientific assessment of the case arising from the complexity of symptoms in which the doctor, on the basis of his knowledge, skill and experience plays a leading roll. [46]

The question may be begged, what information does the doctor have to disclose to the patient? The answer lies in both the common law writings as well as legislation. Although

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described by Van Oosten Encyclopaedia (1996) 67 - 68 as the `*knowledge and appreciation*' gained by the patient through `*appropriate information*' parted by the doctor as expert. See also Strauss (1991) 6; Dada and McQuoid-Mason (2001) 13; For other writings see Burchell "Informed Consent - Variations on a familiar theme" 1986 *M&L* 293; Van den Heever "The patients right to know" 1995 *De Rebus* 53; Carstens (1996) 430; Pearmain (2004) 742ff; Carstens and Pearmain (2007) 875ff.

45 See Van Oosten Encyclopaedia (1996) 68 - 69 who describes the purpose of informed consent as follows:

(a) to ensure the patient's right to self-determination and freedom of choice; and
(b) to encourage rational decision-making by enabling the patient to weigh and balance the benefits and disadvantages of the proposed intervention in order to come to an enlightened choice either to undergo or refuse it.

See also Carstens and Pearmain (2007) 877 with reference to the positive law including the cases of *Stoffberg v Elliott* 1923 CPD 148; *Esterhuizen v Administrator, Transvaal* 1957 (3) SA 710 (T); *Castell v De Greef* 1994 (4) SA 408 (C); *Broude v McIntosh* 1998 (3) SA 60 (SCA); *Jacobson v Carpenter-Kling* 1998 (T), unreported; *Oldwage v Louwrens* (2004) 1 ALL SA 532 (C); *McDonald v Wroe* unreported case no 7975/03 (CID); *Louwrens v Oldwage* 2008 (2) SA 161 (SCA) comments as follows on the rationale for the existence of the doctrine, namely, informed consent being the foundation or core of the patient/doctor relationship, emanating from the law of obligations and underscored by ethical considerations determines the atmosphere between doctor and patient i.e., whether there is a harmonious or acrimonious relationship. But the writers also spell out that the application of the doctrine in practice is often fraught with controversy more so because of the attitude of the physician who resist the patient autonomy model and clings to the paternalistic models. See page 877. Insofar as the positive law is concerned it is especially the more recent cases starting with *Castell v De Greef* 1994 (4) SA 408 which can be regarded as the *locus classicus*, which have now entrenched patient autonomy after importing the doctrine of informed consent into South African medical law. Since ousting medical paternalism in favour of patient autonomy and treating lack of informed consent as an issue of assault and not negligence, the Supreme Court of Appeal also had an opportunity in *Broude v McIntosh* 1998 (3) SA 60 (SCA) to revisit the application of the doctrine as stated in *Castell v De Greef*. Although the court questioned obiter the conceptual soundness to regard lack of informed consent as an assault, the court did not overturn the decision in *Castell v De Greef*. In two subsequent decisions in the Transvaal Provincial Division in *Jacobson v Carpenter-Kling* 1998 (TPD) Unreported and *Pop v Revelas* 1999 (WLD) unreported, reliance was placed on the Castell decision with regard to patient autonomy. The application, nature and scope of the doctrine of informed consent was recently restated in the decision of the Cape Provincial Division of the High Court in *Oldwage v Louwrens* (2004) 1 ALL SA 532 (C). The decision of Yekiso J was subsequently taken on appeal. In the case of *Louwrens v Oldwage* 2006 (2) SA 161 (SCA) the court questioned the decision of Yekiso J in the Oldwage case that a lack of informed consent constitutes an assault. The court however, did not overrule the decision of Castell. More recently, in the case of *McDonald v Wroe* Unreported case No 7975/03 (CPD) the court again placed reliance on the principles enunciated in *Castell v De Greef* to find that the plaintiff's right to bodily integrity was violated as she was subjected to surgery without her informed consent.

46 See Strauss (1991) 6. See also McQuoid-Mason *LAWSA* (1983) Volume 17 Par 196 who expresses the view that "*Because of the technical nature of most forms of medical treatment and surgical operations, there is a duty upon the practitioner to inform the patient." Contra* Claassen and Verschoor (1992) 58 who is critical as such "*vocational right"* may lead to a denial of a patient's right to self-determination and page 63 `*demanding from practitioners to obtain a patient's informed consent, the doctrine attempts to promote intelligent decision-making'*.

the requirements for the disclosure of information, to the patient by the doctor, have for many years been regulated by the common law and positive law, more recently, with the passing of the *National Health Care Act* [47] the nature and scope of the information which must be disclosed by the doctor should now be assessed in the context of legislative requirements as provided in Section 6 of the Act. [48]

It is suggested that in terms of the common law and legislative requirements, the doctor is obliged to give the patient a general idea, in broad terms [49] and in a lay person's language,

47 61 of 2003.

48 For a discussion on the common law requirements and legislative provisions on the information which need to be discussed see Carstens and Pearmain (2007) 883ff.

49 For the legal writings see Van Oosten Encyclopaedia (1992) 69 - The author suggests that `*there being no obligation to disclose in detail all the complications that may arise.*' See also Strauss Doctor, Patient and The Law (1991) 6 `*who states that it may be impractical to attempt giving the patient a general indication in layman's language of the diagnosis.*' For that reason, the `*full diagnosis must be given only where the patient stipulates this as a condition to giving his consent to an operation or treatment.*' In this regard Claassen and Verschoor (1992) 63 cautions that `*it is totally impractical to expect from a practitioner to convey to a patient his complete expert knowledge and insight.*' See also McQuiod-Mason and Strauss (1983) *LAWSA* Par 196 who expresses the view that `*a practitioner need not point out meticulously all the conceivable complications which may arise*'. See also the legislative provisions in terms of the National Health Act 61 of 2003 and the discussion by Carstens and Pearmain (2007) 888ff. For case law, although there is a scarcity of South African case law on the question to what extent a medical practitioner is obliged to furnish patients with information about the intervention or treatment, there are at least some indications in a number of court decisions of the scope of information required from medical practitioners. In this regard, Wessels JA in *Lymbery v Jefferies* 1925 (AD) 236 at 240, remarked: *"All the surgeon is called upon to do is to give some general idea of the consequences. There is no necessity to point out meticulously all the complications that may arise."* In the same view, but slightly more specific Neser J in *Rompel v Botha* (1953) (T) (Unreported) and discussed in *Esterhuizen v Administrator Transvaal* 1957 (3) SA 710 T 718) stated: *"There is no doubt that a surgeon who intends operating on a patient must obtain the consent of the patient. In such cases where it is frequently a matter of life and death I do not intend to express any opinion as to whether it is the surgeon's duty to point out to the patient all the possible injuries which might result from the operation, but in a case of this nature, which, may have serious results to which I have referred, in order to effect a possible cure for a neurotic condition, I have no doubt that a patient should be informed of the serious risks he does run. If such dangers are not pointed out to him then, in my opinion, the consent to the treatment is not in reality consent - it is consent without knowledge of the possible injuries. On the evidence defendant did not notify plaintiff of the possible dangers, and even if plaintiff did consent to shock treatment he consented without knowledge of injuries which might be caused to him. I find accordingly that plaintiff did not consent to the shock treatment."* Endorsing the remarks made by Neser J in *Rompel v Botha* supra Bekker J in *Esterhuizen v Administrator Transvaal* 1957 (3) SA 710 (T) emphasized that doctors owed a duty to patients of having to inform them prior to any operation or treatment, of all the consequences, dangers and details of the risks inherent in the operation or treatment when he remarked at 721 as follows: *"I do not pretend to lay down any such general rule; but it seems to me, and this is as far as I need go for purposes of a decision in the present case, that a therapist, not called upon to act in an emergency involving a matter of life or death, who decides to administer a dosage of such an order and to employ a particular technique for that purpose, which he knows beforehand will cause disfigurement, cosmetic changes and result in severe irradiation of the tissues to an extent that the possibility of necrosis and a risk of amputation of the limbs cannot be excluded, must explain the situation and resultant dangers to the patient - no matter how laudable his motives might be - and should he act without having done so and without having secured the patient's consent, he does so at his own peril."* In a more recent judgement and commenting on the doctor's duty to warn their patients, prior to operating on the plaintiff, of the natural risks and complications which might flow from such operation, and of any specific alternative procedures which might be

[50] of the nature, [51], scope, [52], consequences, [53] risks, dangers, complications, [54] benefits,

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followed in order to minimize, reduce or exclude such risks or complications Ackerman J in *Castell v De Greef* 1994 (4) SA 408 at 416 - 417 commenting on what Scott J stated in the judgement in the Court a Quo namely:

"(a) medical practitioner undoubtedly has a duty n certain circumstances to warn his patient of the risks involved in surgery or other medical treatment."

"(b) The difficulty is to determine when that duty arises and what the nature and extent of the warning

He dissents from Scott J's view when he held that a doctor is obliged to warn the patient consenting to medical treatment of a material risk inherent in the proposed treatment. He goes on to justify the recognition of the doctrine of informed consent when he commented: *"It is important, in my view, to bear in mind that in South African Law (which would seem to differ in this regard from English Law) consent by a patient to medical treatment is regarded as falling under the defence of volenti non fit injuria, which would justify an otherwise wrongful delictual act. (See, inter alia, Stoffberg v Elliott 1923 CPD 148 at 149- 5-; Lymbery v Jefferies 1925 AD 236 at 240; Lampert v Hefer NO 1955 (2) SA 507 (A) at 508; Esterhuizen's case supra at 718 -22; Richter's case supra at 232 and Verhoef v Meyer 1975 (TPD) and 1976 (A) (unreported), discussed by Strauss (op cit at 35-6))"It is clearly for the patient to decide whether he or she wishes to undergo the operation, in the exercise of the patient's fundamental right to self-determination."* The court continues its justification when Ackerman J at 425 states: *"In the South African context the doctor's duty to disclose a material risk must be seen in the contractual setting of an unimpeachable consent to the operation and its sequelae (see Van Wyk v Lewis 1924 AD 438 at 451; Correira v Berwind 1986 (4) SA 60 (ZH) at 63 and Verhoef v Meyer (supra at 32 et seq of the unreported Transvaal Provincial Division judgement and 26-9 of the unreported Appellate Division judgement.)) As van Oosten (op cit at 14-5) points out: `South African law generally classifies volenti non fit injuria, irrespective of whether it takes the narrower form of consent to a specific harm or the wider form of assumption of the risk of harm, as a ground of justification (regverdigingsgrond) that excludes the unlawfulness or wrongfulness element of a crime or delict."*For consent however to operate as a defence the court lay down the following requirements:

"(a) The consenting party must have had knowledge and been aware of the nature and extent of the harm or risk;

(b) The consenting party must have appreciated and understood the nature and extent of the harm or risk;

(c) The consenting party must have consented to the harm or assumed risk;

(d) The consent must be comprehensive, that is extending to the entire transaction, inclusive of its consequences." As to what constitutes a material risk the court formulates the test as follows: *"In the circumstances of a particular case: (1) a reasonable person in the patient's position, if warned of the risk, would be likely to attach significance to it, or (2) the doctor is or should reasonably be aware that he particular patient, if warned of the risk, would be likely to attach significance to it."*

[50] It has been held before that there is no obligation on the doctor to educate the patient up to the standard of the doctor's medical knowledge. See Castell v De Greef (1993) 518. However, the patient must understand. See Carstens and Pearmain (2007) 884 on the discussion of Section 6 of the National Health Care Act 61 of 2003.

[51] As to the nature of the disclosure it was touched on very briefly by Watermeyer J when instructing the jury in Stoffberg v Elliot 1923 CPD 148 when he comments: *"A man, by entering a hospital, does not submit himself to such surgical treatment as the doctors in attendance upon him may think necessary; he may submit himself for medical treatment, but I am not going into that; I am not going to attempt to define the exact limits of medical treatment, because they do not seem to me to be material in this case, but he does not consent to such surgical treatment as the doctor may consider necessary. By going into hospital, he does not waive or give up his right of absolute security of the person; he cannot be treated in hospital as a mere specimen, or as an inanimate object which can be used for the purposes of vivisection; he remains a human being, and he retains his rights of control and disposal of his own body; he still has the right to say what operation he will submit to, and, unless his consent to an operation is expressly obtained, any operation performed upon him without his consent is an unlawful interference with his right of security and control of his own body, and is a wrong entitling him to damages if he suffers any."* Section 6 of the National Health Act 61 of 2003 provides that the physician is obliged to disclose the nature, scope, consequences, risks, dangers, complications and benefit to the patient.

[52] Dealing with the scope of the measures and proposed treatment especially where radical treatment is proposed, it

disadvantages and prognoses [55] of, as well as the alternatives [56] to, the proposed intervention. [57]

5.2.5 The Doctor's/Hospital's duty to exercise due care and skill

As was seen earlier a contract normally gives rise to a complex of rights and duties, of which the expressed or implied contractual duty to exercise due care and skill, is but one. Of the legal obligations that arises from the doctor/hospital-patient contractual relationship, the doctor's or hospital's duty to exercise reasonable care and skill rank amongst the forerunners. [58] This duty may take the form of an express term of the agreement between

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was held in *Esterhuizen v Administrator Transvaal* 1957 (3) SA 710 (T) at 720 in which the doctor had failed to disclose the fact that, unlike previous treatments consisting of superficial radiotherapy, the proposed treatment involved radical radiotherapy that such conduct constitutes an assault on the patient arising from an absence of consent.

53 Doctors have also been held liable in actions for damages based on their negligence in failing to disclose to the patient that they had caused harm to the patient where they had taken remedial action arising from their negligent conduct. This contentious issue received the attention of our courts in *Prowse v Kaplan* 1933 EDL 257 in which a dentist was held liable for his conduct in failing to disclose to the patient that he had fractured her jaw in an attempt to rectify a dislocation which he had caused during a previous operation upon her. In other cases however *inter alia*, *Allott v Paterson and Jackson* 1936 SR 221 222 224, the court refused to uphold the contention that the dentist was negligent in not warning the patient that difficulties might be experienced in extracting his tooth, in order that a suitable anaesthetic might be administered.

54 Doctors were held liable in a number of cases where patients were not warned by doctors against potential risks, dangers and/or complications. In this regard see *Lymbery v Jefferies* 1925 AD 236 concerning sterility and burns as a result of radiotherapy; *Rompel v Botha* 1953 (A bone fracture as a result of electro-convulsive shock treatment); *Esterhuizen v Administrator Transvaal* 1957 (3) SA 410 T 719 concerning severe irradiation and ulceration of tissues, disfigurement, necrosis, cosmetic changes and amputation of limbs; *Verhoef v Meyer* 1953 (T) concerning an operation to remedy a retinal detachment; *Richter v Estate Hammann* (1976 (3) ST 226 (C) (loss of control of the bladder and bowel, loss of sexual feeling and loss of power in the right leg and foot); *Castell v De Greef* (1994) (discoloration of the areola, necrosis of the tissues, a discharge with an offensive odour, a staphylococcus aurous infection, pain, embarrassment and trauma, and further surgery to repair the damages). This requirement is now regulated by Section 6 of the National Health Act 61 of 2003.

55 See *Castell v De Greef* (1994) (c) on the doctor's duty to inform the patient of the necessity of subsequent intervention. This requirement is also regulated by Section 6 of the National Health Act 61 of 2003.

56 With regard to alternatives which may include no treatment at all see *Castell v De Greef* (1994) (C).

57 See Van Oosten (1989) 449 - 450 wherein the learned author suggests that; *"The information given to the patient regarding proposed intervention shall include: the available alternatives to the proposed intervention, the urgency and gravity of the proposed intervention; the degree of risk or danger that the proposed intervention entails ....."*.This requirement is now regulated by Section 6 of the National Health Act 61 of 2003

58 For legal writings see Strauss and Strydom (1967) 266; McQuoid-Mason and Strauss LAWSA (1983) Par 189; Gordon, Turner and Price (1953) 110; Carstens "Prophylaxis against medical negligence: A Practical approach May (1988) *De Rebus* 345; Van Dokkum "Medical Malpractice in South African Law" (1996) *De Rebus* 792; Van Oosten Encyclopaedia (1996) 54 - 55; Strauss (1991) 72 - 73; McKerron *The Law of Delict* (1971) 38; Van Oosten "Professional Medical Negligence in South African Legal Practise" *Medicine and Law* (1986) 18 - 19; Dada and McQuoid-Mason (2001) 22 - 23; See further Carstens and Pearmain (2007) 364. For case law see the

them which is normally included in a consent form. It may never even be discussed between them. Even in the absence of an express agreement between the doctor/hospital and patient, an implied term to exercise due care, as such, comes into being as soon as the contract between the doctor/hospital and the patient is concluded. [59]

As to the meaning of `due care and skill', our legal writers, as well as our courts, have over decades or so given meaning to the term. It is accepted generally amongst legal writers that, as the work of a doctor requires some form of skill, the standard or care required of the medical practitioner is upgraded, in that, the medical practitioner engages in an activity calling for expertise. [60]

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following South African cases in which our courts have recognised the doctor's duty to exercise reasonable care and skill: *Mitchell v Dixon* 1914 AD 519; *Van Wyk v Lewis* 1924 AD 438; *Allott v Paterson and Jackson* 1936 SA 221; *Kovalsky v Krige* (1910) 20 CTR 822; *Coppen v Impey* 1916 CPD 309; *Buls v Tsatsarolakis* 1976 (2) SA 891 (T), 893; *Applicant v Administrator Transvaal* 1993 (4) SA 733 (W); *Collins v Administrator Cape* 1995 (4) SA 73 (C); *Clinton-Parker v Administrator Transvaal* (1996) (2) SA 37 (W). See also *Lee v Schönnberg* (1877) 7 Buch 136; *Webb v Isaac* 1915 EDL 273, 276, 278, 279; *Dale v Hamilton* 1924 WLD 184, 199, 200, 203; *Byrne v East London Hospital Board* 1926 EDL 128, 158; *Ex parte Rautenbach* 1938 SR 150, 151; *R v Van Schoor* 1948 (4) SA 349 (C) 350, 352; *Esterhuizen v Administrator Transvaal* 1957 (3) SA 710 (T) 723 - 724, 726; *Dube v Administrator Transvaal* 1963 (4) SA 260 (T) 266 - 267, 268; *S v Mkwetshana* 1965 (2) SA 493 (N) 496 - 497; *Richter v Estate Hammann* 1976 (3) SA 226 (C) 232; *Blyth v Van den Heever* 1980 (1) SA 191 (A) 221; *Magware v Minister of Health* 1981 (4) SA 472 (Z) 476 - 477.

59 For legal writings see Claassen and Verschoor (1992) 13 - 14; For a comprehensive discussion on the tacit or implied terms in healthcare contracts see Carstens and Pearmain (2007) 362ff.

60 For legal writings see Boberg (1984) 346. See also McKerron (1971) 38; Neethling Potgieter and Visser (1996) 133; Van der Merwe and Olivier (1989) 142; Van der Walt (1979) 70. See further Van Oosten (1996) 81 - 82 who formulates the position as follows: *"The criteria used in measuring the conduct of the medical practitioner is no longer an objective test in which the hypothetical or fictitious reasonable person sets the standard but has shifted to a more subjective test in which the reasonable doctor in the same position as the individual doctor set the standard."* See also Carstens and Pearmain (2007) 364. For case law see one of the first decisions of *Lee v Schönnberg* (1877) 7 BUCH 136 the Cape High Court relying heavily on an English decision of *Lampher v Phipos* (1835) 8 C&P 475 laid down the following general rule: *"There can be no doubt that a medical practitioner, like any professional man, is called upon to bring to bear a reasonable amount of skill and care in any case to which he has to attend, and that where it is shown that he has not exercised such skill and care, he will be liable in damages."* In a later decision of *Kovasky v Krige* (1910) 20 822 CTR Sir John Buchanan also relied upon the English decision of *Lampher v Phipos* (1835) 8 C&P 475 when he remarked: *"The principles there laid down, have been applied in this court, and with them I entirely agree. As to capacity, Chief Justice Tindall said that every person who enters into a learned profession undertakes to bring to it the exercise of a reasonable care and skill. Speaking of a surgeon, he says he does not undertake that he will perform a cure, nor does he undertake to use the highest possible degree of skill, he undertakes to bring a fair, reasonable and competent degree of skill to this case."* The meaning of due `care and skill' received the attention of our courts inclusive of the local classicus of *Van Wyk v Lewis* 1924 AD 438 in which the court in Innes CJ at 443 put the position as follows: *"It was pointed out by this court, in Mitchell v Dixon 1914 AD at 525, that `a medical practitioner is not expected to bring to bear upon the case entrusted to him the highest possible degree of professional skill, but he is bound to employ reasonable skill and care.' And in deciding what is reasonable the court will have regard to the general level of skill an diligence possessed and exercised at the time by the members of the branch of the profession to which the practitioner belongs. The evidence of qualified surgeons or physicians is of the greatest assistance in estimating that general level."* And further: Wessels, J.A. in the same judgement on 461 stated: *"We cannot determine in the abstract whether a surgeon has or has not exhibited reasonable skill and care. We must place ourselves as*

The criteria used for measuring the conduct of the medical practitioner is, therefore, that of the reasonable expert, the reasonable practitioner or the reasonable specialist, whichever branch of the medical field is applicable. Although the degree of reasonableness is stated differently by our legal writers, what is generally accepted by them is that when the doctor agrees to administer treatment or perform an operation, he or she does not guarantee to cure the patient (unless the doctor so warrants) but to conduct himself or herself with reasonable knowledge, skill and diligence. [61]

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nearly as possible in the exact position in which the surgeon found himself when he conducted the particular operation and we must then determine from all the circumstances whether he acted with reasonable care or negligently. Did he act as an average surgeon placed in similar circumstances would have acted, or did he manifestly fall short of the skill, care, and judgement of the average surgeon in similar circumstances? If he falls short he is negligent." In a later case of *Castell v De Greef* 1994 (4) SA 408 CPD 416 Ackermann J stated with approval a number of earlier decisions: *"Both in performing surgery and his post-operative treatment, a surgeon is obliged to exercise no more than reasonable diligence, skill and care. In other words, he is not expected to exercise the highest possible degree of professional skill. (Mitchell v Dixon 1914 AD 519 at 525). What is expected of him is the general level of skill and diligence possessed and exercised at the time by members of the branch of the profession to which he belongs. See Van Wyk v Lewis 1924 AD 438 at 444; See also Blyth v Van den Heever 1980 (1) SA 191 (A) at 221A; S v Kramer and Another 1987 (1) SA 887 (W) at 893E - 895C; Pringle v Administrator, Transvaal 1990 (2) SA 379 (W) at 384I - 385E).* The said principle has also been discussed and more clearly defined in a number of reported criminal cases in which medical practitioners found themselves on trial. The elevated degree of care and skill expected of a doctor as an expert was formulated as follows by Steyn J in R v Van Schoor 1948 (4) SA 349 (C) 350: *"Coming to the case of a man required to do work of an expert as e.g. a doctor dealing with life or death of his patient, he too must conform to the acts of a reasonable man, but the reasonable man is now viewed in the light of an expert, and even such expert doctor, in the treatment of care and caution than in other circumstances."* The degree of skill expected of a medical practitioner was also defined as follows in *R v Van der Merwe* 1953 (2) PH H 124 (W) in which Roper J remarked: *"Negligence has a somewhat special application in the case of a member of a skilled profession such as a doctor, because a man who practises a profession which requires skill holds himself out as possessing the necessary skill and he undertakes to perform the services required from him with reasonable skill and ability. That is what is expected of him and that is what he undertakes, and therefore he is expected to possess a degree of skill which corresponds to the ordinary level of skill in the profession to which he belongs."* As to what constitutes reasonableness, in the same judgement of R v Van der Merwe Roper J remarked: *"In deciding what is reasonable regard must be had to the general level of skill and diligence possessed and exercised by the members of the branch of the profession to which the practitioner belongs. The standard is the reasonable care, skill and diligence which are ordinarily exercised in the profession generally."*

61 For legal writings see Van Oosten (1996) 82 who defines reasonableness in a medical context as: *"Not the highest possible degree of professional care and skill"* or *"the standard of the exceptionally able doctor but rather conduct with reasonable knowledge, ability, experience, care, skill and diligence is expected of the ordinary or average doctor endowed with the general level of knowledge, ability, experience, care, skill and diligence possessed and exercised by the profession, bearing in mind that a doctor is a human being and not a machine and that no human being is infallible."* The latter opinion together with the fact that medicine is viewed as a profession filled with inherent risks and dangers, have influenced legal critics in believing all medical mishaps and errors of judgement do not necessary constitute medical negligence. See Van Oosten (1996) 82. In so far as wrong diagnosis is conceded see Strauss (1991) 306 - 307 the author expresses the following opinion: *"Despite the advances of our century, medicine still is not - and probably never will be - an exact science comparable to mathematics. Much depends on the skill and experience of the individual practitioner."* And further: *"No inference of negligence can be made merely on the basis that the diagnosis was wrong. The courts have time and again pointed out how difficult it is to make a correct diagnosis. The language of the body is limited and the range of possible diseases almost limitless."* Gordon Turner and Price (1953) 109 lays down the following test: *"To establish liability it is not sufficient to prove that the diagnosis was wrong, let alone that other practitioners disagree with the*

The test for the standard of care expected of a medical practitioner is often formulated as: How would a reasonably competent practitioner in that branch of medicine have acted in a similar situation? If a reasonable practitioner would have foreseen the likelihood of harm and would have taken steps to guard against its occurrence but the medical practitioner whose conduct is under investigation failed to, his conduct would fall below the standard of care expected. [62]

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defendant's opinion. It must be shown that the first opinion was not only wrong but that it was given unskilful, and therefore the doctor was negligent in not exhibiting that degree of skill which is expected of an ordinary medical practitioner or, of course, of a specialist, if he is one." And further: *"A physician or surgeon possessing the requisite qualifications and applying his skill and judgement with ordinary care and diligence to the diagnosis and treatment of a patient is not liable for an honest mistake or error of judgement in making a diagnosis or prescribing the mode of treatment where there is ground for reasonable doubt as to the practise to be pursued. Where it is clear that the defendant erred in his diagnosis because of a perfunctory or careless examination of the patient, he will be held culpable."* See also Van Oosten (1986) Medicine and Law 22-24; Dada and McQuoid-Mason (2001) 22: *`That a doctor will not be liable for an error in diagnosis unless it is so palpable as to per se proof of negligence.'* See also Gordon Turner and Price (1953) 110. See further Strauss and McQuoid-Mason and Strauss (1983) Par 189 who describe reasonableness as *"the general level of skill and diligence possessed and exercised by members of the branch of the profession to which the practitioner belongs."* See further Strauss Doctor, Patient and The Law (1991) 95 who describes the duty of care of a doctor as *"a duty no greater than to treat the patient with due care and skill unless the doctor has expressly guaranteed that the patient will be healed by his treatment - something which the prudent doctor will generally not do."* See also Claassen and Verschoor (1992) 115 - 116. The authors state that when the physician agrees to administer the necessary treatment or perform an operation, he or she, generally, is not expected to cure the patient (unless the physician guarantees the result). Nevertheless, the physician has a duty *`to treat the patient with such measure of skill and competence as can reasonably be expected from a physician belonging to his branch of the profession.'* Where the physician does however guarantee that the patient will be cured and fails to achieve the result, the patient may be able to claim damages for breach of contract. See McQuoid-Mason and Strauss 17 LAWSA (1983) Par 189; Claassen and Verschoor (1992) 116; Strauss and Strydom (1967) 106 - 107; See also the discussion on the professional duty to heal or to care Carstens and Pearmain (2007) 642ff. For case law the aspect whether by undertaking a case, a doctor guarantees that the patient will be cured of the disease was first mentioned but not decided upon by Nicholas J in Buls v Tsatsarolakis 1976 (2) SA 891 (T) at 893 in which the Honourable Judge remarked: *"Generally speaking every man has a right that others shall not injure him in his person and that involves a duty to exercise proper care. Every man has a legal right to be healed. It is no doubt the professional duty of a medical practitioner to treat his patient with de care and skill, but does he, merely by undertaking a case, become subject to a legal duty, a breach of which founds an action for damages, to take due and proper steps to heal the patient? It is an interesting question but, because it was not argued and because it is not necessary for the purposes of the present decision to answer it, I shall not discuss it further."* In Chalk v Fassler (1995 WLD, unreported) the judge remarked that *"no comparison can be drawn between an agreement to repair a car and an agreement to treat a patient medically. In the light of modern technology motor cars are generally repairable if reasonable care and skill are used; surgery, however, holds the risk of failure."* In a recent reportable judgement of Castell v De Greef 1994 (4) SA 408 CPD 416 Ackermann J also dealt with this aspect when he stated: *"It must also be borne in mind that the mere fact that an operation was unsuccessful or was not as successful as it might have been or that the treatment administered did not have the desired effect does not, on its own, necessarily justify the lack of diligence, skill or care on the part of the practitioner. (Compare Van Wyk v Lewis supra 462). No surgeon can guard against every eventuality, although readily foreseeable, most, if not all, surgical operations involve to a greater or bigger extension element of risk, and from time to time mishaps do occur, and no doubt will continue to occur in the future, despite the exercise of proper care and skill by the surgeon."*

62 For the legal writings see Dada and McQuoid-Mason (2001) 23; See also McQuoid-Mason and Strauss LAWSA (1983) Par 189.

From the above it is clear that a reasonable expert standard has been created and the test of negligence distinguished between the standard of care and skill required of specialists as opposed to general practitioners. If the doctor is a general practitioner, the test is that of the reasonable practitioner. If the doctor is a specialist, the test is that of the reasonable specialist in the branch of the profession to which he or she belongs. [63]

Where a general practitioner engages in an undertaking, either treatment or an operation that requires a certain degree of training, knowledge, experience, skill, competence or diligence, knowing full well that he or she lacks such experience and expertise, the practitioner will be bound to his or her undertaking and judged accordingly. [64]
The degree of skill and care that can be expected is largely a question of evidence and may include factors such as the prevailing, universal, customary or usual practise of the profession, the place where the medical intervention or treatment is performed or given, the facilities available at the hospital where the medical intervention is performed, the financial resources of the hospital authority, the nature of the medical intervention or treatment, the different conditions or emergency situation in which the medical intervention takes place etc. [65]

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63 For legal writings see Van Oosten Encyclopaedia (1996) 83; See also Claassen and Verschoor (1992) 15. For case law concerning the principle that the medical practitioner's negligence conduct must be measured against the conduct of a reasonable skilled practitioner in his or her field was confirmed without reservation in an Appeal Court decision of *Mitchell v Dixon* 1914 AD 519 at 525 in which Innes ACJ stated that: *"A medical practitioner is not expected to bring to bear upon the case entrusted to him the highest possible degree of professional skill, but he is bound to employ reasonable skill and care, and he is liable for the consequences if he does not."* The foretasted principle has also been follows in a host of latter judgments. See in this regard: *Copan v Imply* 1916 CPD P309 at P314; *Esterhuizen v Administrator Transvaal* 1957 (3) SA 710 (T) 723 - 724; *Bulls v Tsatsarolakis* 1976 (2) SA 891 (T) 893 - 894; *Byrne v East London Hospital Board* 1926 EDL 128 at 157 - 158; *Dale v Hamilton* 1924 (WLD) 184 at 200; *Lymbery v Jefferies* 1925 (AD) 236 at 245; *Castell v De Greef* 1993 (3) SA 501(C). It has also been decided before by our courts that, what is expected is, however, not the highest possible degree of professional care and skill but rather what can be expected of the ordinary or average doctor applying the general level of knowledge, ability, experience, care, skill and diligence belonging to the branch of the profession to which the practitioner belongs. The position is set out as follows in the *locus classicus* of *Van Wyk v Lewis* 1924 (AD) 438 at 444 which role Innes CJ expressed himself as follows: *"It was pointed out by this Court, in Mitchell v Dixon, that a medical practitioner is not expected to bring to bear upon the case entrusted to him the highest possible degree of professional skill, but he is bound to employ reasonable skill and care."*

64 For the standard of conduct expected of a practitioner in these circumstances see Claassen and Verschoor (1992) 15 who express the opinion that *"his performance will then have to comply with the standard of conduct of a reasonable specialist belonging to the same specialty the practitioner professes to be a member of."* See also Van Oosten Encyclopaedia (1996) 83; See further Carstens May (1988) *De Rebus*; See further Dada and McQuoid-Mason (2001) 22.

65 See Van Oosten Encyclopaedia (1996) 54, 84; See also Claassen and Verschoor (1992) 14 -15, 18, 22; See further Strauss and Strydom (1967) 266, 268; See further also Gordon Turner and Price (1953) 110ff with regard to the locality where the practitioner finds himself practicing. Supporting the view expressed in Van Wyk v Lewis 1924 AD 438 at 457 namely: *"The ordinary medical practitioner should, as it seems to me, exercise the same degree of skill and care, whether he carries on his work in the town or the country, in one place or another. The*

A clear distinction is drawn in our case law between the degree of knowledge, experience, care and skill expected of a specialist as opposed to that of a general practitioner. Of a specialist, it is submitted; a greater degree of skill is expected than of a general practitioner. His or her standard of conduct is elevated to the reasonable expert standard. The distinction in expected conduct of a specialist, as opposed to that of a general practitioner, is stated in a number of cases. [66]

What is also of great importance is where the standard of conduct of a specialist is assessed; his conduct is measured against the reasonable specialist in terms of the branch of the profession to which he or she belongs. [67] A greater standard of care and skill is also

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fact that several incompetent or careless practitioners happen to settle at the same place cannot affect the standard of diligence and skill which local patients have a right to expect." The authors comment as follows: *"This must surely be correct. What difference can it possibly make to the skill and care required of a practitioner in himself, whether he is attending a patient in Cape Town or in some remote farm on the edge of the Kalahari Desert? The other view seems to arise from a confusion of thought between skill and care and the circumstances in which they must be exercised. A country practitioner may often be obliged to attend a patient in most difficult and trying circumstances; but sometimes a town practitioner is placed by an emergency in an equally unpleasant position."* See also Strauss and Strydom (1967) 268 – 270. *Contra* Carstens "The Locality Rule in cases of medical malpractice" De Rebus 1990 which I submit is the correct view. The writer states: *"While it is true that there is uniformity in the training of medical practitioners in this country today and that the standard of training is in all probability comparable with the best in the world, it cannot be denied that South Africa is a developing country and in many instances a Third World country. Therefore, though a doctor may be suitably qualified, possessing all the subjective qualities, training and capabilities to be a good doctor, should he be placed in a remote country district where there is a lack of medical facilities and infrastructure (the objective reality of the locality) to support the effective practice of First World medicine, this must surely be a factor to be taken into consideration when evaluating his conduct in cases of medical malpractice. Can one really equate the excellence, infrastructure, diagnostic and other equipment of for instance the Johannesburg General Hospital with those of a missionary hospital in a remote country district?"* The author goes on to state: *"The law still requires of a doctor a reasonable degree of skill, which is dependent on the particular circumstances of the case which he has under treatment. It is submitted that the locality rule is nothing but an added `particular circumstance' that must be given consideration when deciding whether the doctor's conduct was negligent or not. In my opinion the locality where a medical practitioner operates will always be relevant in cases of medical malpractice until such time when it can safely be stated that the medical facilities and equipment in this country are equally available and accessible, irrespective of whether the medical practitioner chooses to practice in the city or in the country."*

66 For case law see *R v Van der Merwe* 1953 (2) PHH 124 W in which Roper J drew a distinction as follows: *"When a medical practitioner is tried, the test is not what a specialist would or would not have done in the circumstances, because a general practitioner is not expected to have the same degree of knowledge and skill and experience as a specialist has. When a specialist tells you that he would do this, that and the other thing it does not follow that you must expect the general practitioner to act in the same way. But the question is what is the common knowledge in the branch of the profession to which, the accused belongs? What is the common knowledge and accepted practise among the general practitioners? When the specialist tell you what is common knowledge in the profession that is evidence which you are entitled to rely on, because the general practitioner is expected to be possessed of knowledge which is common in the profession."* This dictum was endorsed by Bekker J in *Esterhuizen v Administrator, Transvaal* 1957 (3) SA 710 at 723 - 724; The distinction in the standard of care expected from a specialist as reasonable expert as opposed to that of the general practitioner is also recognised in *Buls v Tsatsarolakis* 1976 (2) SA 891 (T) at 893 - 894; *S v Mkwetshana* 1965 (2) SA 493 (N) 496; *Pringle v Administrator, Transvaal* 1990 (2) SA 379 (WLD) at 384.

67 See *Van Wyk v Lewis* 1924 (AD) 438 at P444; *R v Van der Merwe* (1953) (2) PHH 124 (W); *Esterhuizen v Administrator Transvaal* 1957 (3) SA 710 at 723 - 724; *Buls v Tsatsarolakis* 1976 (2) SA 891 T at 893 - 894; *S v*

expected of a practitioner and/or nursing staff where more complicated medical procedures are executed. [68]

In certain instances our courts will also depart from the general rule of measuring the conduct of a specialist or medical practitioner in terms of the branch of the profession to which he or she belongs. Where the courts apply the principle *impurities culpae adnumeratur*, a general practitioner would be negligent if he or she undertook work requiring a certain degree of training, knowledge, experience, competence or skill associated with a specialist and which the general practitioner lacks and where the general practitioner knows full well that he or she lacks such qualities. [69]

5.2.6 The Doctor/Hospital's duty to execute the patient's instructions honestly, faithfully and with care

From what was stated earlier, the relationship between the doctor/hospital and patient is essentially a private law matter and is governed by the law of obligations, from which a Doctor/hospital is entrusted with a number of duties some of which have been discussed previously. From the agreement which comes into being between the doctor/hospital and patient a further duty arises, namely, the doctor/hospital will execute the patient's instructions honestly, faithfully and with care. [70]

Mkwetshana (1965) (2) SA 492 (N) at 496.

68 See *Collins v Administrator, Cape* 1995 (4) SA 73 (C) at 82 wherein Scott J emphasizes: *"The need for particular care and vigilance in the case of the paediatric tracheotomy patient is obvious.* But cautions the court: *"But a standard of excellence cannot be expected which is beyond the financial resources of the hospital authority."*

69 In one of the first cases decided in South Africa in which this rule was applied Kotze J in *Coppen v Impey* 1916 CPD 309 stated the position as follows: *"Unskilfulness on his part is equivalent to negligence and renders him liable to a plaintiff, who sustained injury there from, the maxim of law being imperitia culpae adnumeratur (Inst 4 3 7; Van Leeuwen Het Rooms-Hollandsche Recht 4 39 4; Voet Commentarius d Pandectas 9 2 23). The English Law agrees with our own, as may be gathered from what was said by a great master of the common law of England, Tindal CJ in Lampher v Phipos (8 C&P 475), and from numerous other decisions."* The rule was also applied in the criminal law case of *S v Mkwetshana* 1965 (2) SA 483 (N) 496 in which a young intern at a hospital was charged on a count of culpable homicide in which the accused raised his inexperience as part of his defence. The appeal court in rejecting his defence showed us the position as follows at 497: *"Either the appellant had insufficient knowledge and experience of the drug, in which case it was negligence on his part to administer it; if he knew little, if anything, about it he was subjecting his patient to a considerable risk. For him to have done that in the light of his experience, and particularly his inexperience of the drug and its uses, marks him as being negligent."* Other cases in which this rule was used where a doctor engaged in an undertaking that required a certain degree of training, knowledge, experience, skill, competence or diligence when in truth he lacked such qualities. He was judged by his undertaking. See *Dale v Hamilton* 1924 WPD 184 at 203; *R v Van der Merwe* 1953 (3) PH H12 4 (W); *Byrne v East London Hospital Board* 1926 ECD 128 at 157 - 158; *R v Van Schoor* 1948 (4) SA 351 - 352; *Buls v Tsatsarolakis* 1976 (2) SA 891 T at 893 – 895.

70 See Van Oosten Encyclopaedia (1996) 53, 55; See also Claassen and Verschoor (1992) 116; See further Strauss and Strydom (1967) 111 who supports the theory advocated by De Wet and Van Wyk (1992) 308 namely

Because of the doctor's specialised expert knowledge and the highly confidential nature of his services, the doctor is said to find himself in a relationship of particular trust [71] and skill in which the doctor is expected to exercise reasonable care during his or her treatment of the patient.

The trust position, being referred to in foreign jurisdictions as the fiduciary nature of the doctor-patient relationship, which entails that doctors have an obligation to their patients to act with the utmost good faith and loyalty and never allow their personal interests to conflict with their professional duty. [72]

Very little has been written whether a fiduciary relationship exists between a doctor and patient in South Africa. Although a doctor's fiduciary duty exists in the company law sphere, [73] no reason exists in logic why such duty should not be recognised, by our courts,

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generally where a mandate is given in terms of an agreement between two parties, a relationship of trust is created between the mandator and the mandatory which results in the mandatory, when executing the mandate promote the interests of the mandator without boosting his own interests. Carstens and Pearmain (2007) 947ff persuasively argue that at the heart of the relationship between a health professional and the patient is the fiduciary position between them in which trust between the patient and provider is critical for the ultimate wellbeing of the patient. They go on to say that *"if a patient does not trust a healthcare professional, he/she is unlikely to take the latter's advice concerning treatment or to believe a diagnosis."* The Health Professions Council has also published a set of professional guidelines which has an ethical basis and which require that health practitioners *inter alia* honour the trust of their patients as the practitioner is in a position of power over a patient he/she should avoid abusing his or her position. The guidelines are available at http://www/hpcsa.co.za/hpcsa/default.aspx: a copy of the guidelines is attached as an annexure at the back of the book of Carstens and Pearmain (2007).

71 See Strauss and Strydom (1967) 111; See also Claassen and Verschoor (1992) 116.

72 See Picard and Robertson (1990) 4 -6; See also Chapman (1984) 81 who quotes from Gisborne: *"An Enquiry into the Duties of Men in the Higher and Middle Classes of Society in Great Britain, Resulting from Their Respective Stations, Professions, and Employment."* (1794) 396 of the original work. In his chapter on physicians, Gisborne discusses rules of professional etiquette, and of gracious doctor-to-doctor conduct, truth-telling in the clinical setting and other matters. Then, setting out his main theme, he stated: *"Diligent and early attention and an honest exertion of his best abilities are the primary duties which the physician owes to his patient. The performance of them is virtually promised, for he knows that it is universally expected when he undertakes the case of the sick man, and consequently, if he neglects to fulfil them, he is guilty of a direct breach of his engagement."* He goes on to say that the physician's concern for the patient's recovery must be uninfluenced by private and personal considerations, and that he must shun "all affectation of mystery." Contra Martin Norton's view expressed in 1980 "Ethics in Medicine and Law: Standards and Conflicts" *Med. Trial Technique Quart*. (1980) Annual: 376. namely: *The moral responsibility to our patient, to society, and to those who, in their despair, seek out aid, not our responsibility to our profession, or to our personal convenience or aggrandizement. This does not imply self-deprivation but rather a return to idealism, to that truly fiduciary relationship which places the client/patient first and foremost in the time-honoured traditions of service, duty, and honour."* More recently Mankesines and Deaken *Tort Law* 4ed (1999) 85, recognizing the fiduciary nature of the doctor-patient relationship states that: *"the doctor in this relationship commands a pre-eminent position due to his superior knowledge, ""As a result of this, the relationship manifests aspects of a fiduciary nature giving rise to a duty of loyalty to the patient."*

73 See Cilliers and Benade (1982) 327 who recognizes that a director stands in a fiduciary relationship to this company with the result that he has a duty to act in good faith towards his company to exercise his powers as director for the benefit of the company and to avoid a conflict between his own interests and those of the

in the medical law sphere in South Africa.

5.2.7 The Hospital's general duty towards the Patient

The non-delegable duty of a hospital exists as an independent legal ground in South African on which hospital liability is founded. [74]

Generally the non-delegable duties are founded on statutes, [75] situations which are

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company. Should the director transgress such a relationship and as a result thereof damages are suffered the director may be legally liable arising from the said relationship. See however the more recent writings of Carstens and Pearmain (2007) 947-948 regarding the fiduciary relationship between the health professional and the patient. See further the professional guidelines issued by the Health Profession's Council published as an annexure at the back of the textbook of Carstens and Pearmain (2007) in which the health service provider is called upon to honour the trust of his/her/its patients and not abuse his/her/its position of power.

74 See Cronje-Retief (2000) 418.

75 See Cronje-Retief (2000) 418 who states in South Africa a wide variety of statutes regulate health care, health and the treatment of persons or patients in general. In this regard the author states the hospital generally has a duty to use reasonable care in the maintenance of safe and adequate facilities and equipment which also includes the following duties (1) the hospital must exercise reasonable care to maintain safe physical premises, buildings, grounds and environment for patients, medical staff and guests. (2) The hospital must exercise reasonable care in providing safe, proper and sufficient equipment, stocks, medication and food. The use of defective equipment which causes injury or death, leads to direct hospital liability. In this regard the hospital owes a duty (duties) to patients to provide proper equipment since equipment directly affects patient's lives and their well-being. The provision of defective equipment, and failure to repair it, would also constitute non-compliance with this duty. (3) The hospital must exercise reasonable care in providing a safe and proper system regarding the provision and handling of medication, drugs, prescriptions and doctor's orders for necessary medicines and injections. (4) The hospital has a duty to provide a proper system to effectively control infection and contagious diseases. See also Gordon Turner and Price (1953) 130 - 136; See further Claassen and Verschoor (1992) 150; The other duties according to Cronje-Retief (2000) 419 include *inter alia* to oversee all persons who practice medicine within its walls as to patient care which also included the following duties: (i) The hospital has a duty to exercise reasonable care by overseeing (traditionally supervising) patient care. In this regard the hospital has to persist in ascertaining continually whether all personnel are still competent by providing training and courses, and by following up all necessary information which may indicate the contrary. Hospitals are held liable on account of that which they had known or should have known which affects the competency of personnel/staff and ultimately affects the quality of patient care which is rendered. (ii) The hospital has a duty to exercise reasonable care in the provision of patient care. This includes (1) the hospital may under certain circumstances not refuse to admit a patient, and should not move the patient. (2) Prompt and suitable treatment should be provided after a patient is admitted to a hospital. (3) A hospital could be liable for discharging a patient too soon. (3) Patients should be prevented from falling out of bed especially children and the elderly. (3) The hospital must provide adequate staff.
Other duties include: (iii) the hospital should provide proper and safe systems to safeguard all persons, including patients, from patients who have a tendency to commit suicide, or behave abnormally, are violent or do window-leaping, or are criminals. (iv) The hospital has a duty to exercise reasonable care in the provision of specialized patient care. (v) The hospital has a duty to compile and maintain proper medical records. (vi) The hospital must provide reasonably competent specialists and ensure that they are qualified and competent enough to provide such specialized services or expertise. Hospital privileges may only be granted to such competent and qualified medical professionals and privileges should be restricted or refused when there is evidence which indicates the contrary. (vii) The hospital has a duty to provide reasonable emergency care when providing such services. (viii) Hospitals have a duty to employ only qualified, trained and competent non-physician staff such as nurses, X-ray and laboratory technicians and other staff. See also Claassen and Verschoor (1992) 106 - 107; Gordon Turner and Price (1953) 127 - 128; Van der Walt (1979) 72; Van der Walt and Midgely (1997) 139 - 141; Van Dokkum

inherently dangerous; by virtue of the common law, as a result of advertising, reputation or public policy and expectation, and in terms of other *indicta*.

5.3 THE PATIENT'S DUTY TOWARDS THE DOCTOR/HOSPITAL

5.3.1 The Patients general duty towards the Doctor/Hospital

5.3.1.1 Legal Writings

It has often been said that where a doctor/hospital enters into an agreement with the patient in terms of which the doctor undertakes to treat the patient, the patient must also perform his part of the agreement. Writers generally are adamant, the patient's duty besides paying the fees [76] to the doctor/hospital amount to nothing more than making

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(1996) De Rebus 253. In so far as healthcare is concerned, it is especially the *National Health Act* 61 of 2003 which play a pivotal role in prescribing the duties bestowed on hospitals to exercise their obligations in treating patients with care and the necessary skill. Note particularly sections 2 and 3 dealing with the objects and responsibilities for health. In both sections the protection, promotion, improvement and maintenance of health is emphasized. See further the general duties of healthcare providers in the public and private sectors discussed by Carstens and Pearmain (2007) 379ff; 413ff. For South African case law endorsing the hospital's duties see *Lower Umfolozi District War Memorial Hospital v Lowe* 1937 NPD 31. *In casu*, the nurse had placed a warm water bottle in the bed of a patient who was recovering from the effects of an anaesthetic, after undergoing a liver operation. As a result his right leg was severely burnt, for which he claimed damages. The court recognized the duty of the hospital to make sound selection of staff in that the only duty that was repeatedly acknowledged being owed to patients by a hospital was: *"the duty of the hospital to select duly qualified nurses or medical staff, by using due care and skill. This duty has been acknowledged and upheld by most legal systems and is the most common in terms of usage and historically, the first (direct) duty ever to be created in Hillyer."* See also *Lymbery v Jefferies* 1925 AD 236, the radiologist Mr Ensor, was unqualified but had a long practical experience. He nevertheless severely burnt the plaintiff. The action was, however, instituted against Dr Jefferies who had sent the Plaintiff to Mr Ensor. The court found that he was in charge of the radiology department at Pretoria Hospital. It is submitted that the action should have been instituted against the hospital (1) on the ground of direct liability for having selected an unqualified radiologist, or, (2) on the ground of vicarious liability for the negligence of the hospital's employee. In a similar case of *Byrne v East London Hospital Board* 1926 EDL 128 the court was also asked to pronounce on the hospital's negligence in securing a radiologist to assist with the operation. In this case, the radiologist was qualified but lacked experience. The radiologist, Dr Hollis, had burnt the doctor, who operated (plaintiff), as well as the patient whom he had operated on and a nurse. The operation was performed on the patient's hand, whilst the radiologist screened it under an X-ray plant which was operated by him. At the time of his appointment (as radiologist) Dr Hollis discontinued an X-ray course after attending only two lectures on X-ray work. He had indicated on his application form that he was attending such a course but did not reveal discontinuance of the course to the defendants. Dr Hollis did, in giving evidence, profess to be ignorant and inexperienced when employed and at the date of the operation. He had only been assisted by the previous radiologist for two months.

Graham JP relied on the Hillyer case and its application in the Hartl case and found that the board was not negligent in the appointment of Dr Hollis. The board had every reason to suppose that they had procured in the person of Dr Hollis the services of a competent and zealous radiologist. On account of the authorities he had referred to, he did not find the hospital liable. This conclusion was drawn in spite of the fact that he had previously found that *`circumstances surrounding the operation tend to show either incompetency or negligence on his part.'*

[76] See Van Oosten Encyclopaedia (1996) 71 - The author states that the patient or the person responsible for the maintenance of such patient shall be responsible for payment of the doctor/hospital's account after the delivery of a detailed account provided of course the account accurately reflects the services rendered. The fees payable shall also be in accordance with the prescribed tariffs as provided for by the *Medical, Dental and Supplementary Health Service Professions Act* 6 of 1974 unless otherwise agreed to between the parties involved. In that event where

himself or herself available for treatment. [77]

5.3.1.2 **Case Law**

The only case I came across in South African law which dealt with the doctor's remedy for breach of contract, arising from the patient's failure to present himself for treatment, is that of *Myers v Abrahamson*. [78] In this case, the doctor claimed payment of the balance of his fees in respect of a verbal agreement of service entered into between the doctor and patient. The patient filed a counterclaim, claiming the return of certain disbursements already paid to the doctor.

5.4 The Patient's Right to Information

The recognition and acceptance of the patient autonomy model by our legal writers, [79] the

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the doctor wishes to exceed the tariffs usually charged for such services, the doctor is obliged to inform the patient before he/she commences the rendering of the professional services. See also Section 53(6) of the *Medical, Dental and Supplementary Health Service Professions Act*. See also Strauss and Strydom 117 who take the view that a patient who remains in default for non payment is in breach of the contractual agreement and may be sued for the capital amount as well as any interests which may accrue as a result of the responsible patient or person's failure to make timeous payment. See also Claassen and Verschoor (1992) 117 who express the opinion that in certain circumstances the patient may withhold payment for example *"where a practitioner commits breach of contract the patient is exempted from his obligation to remunerate the physician for his services."* See also Gordon, Turner and Price (1953) 74; See further Dada and McQuoid-Mason (2001) 6.

77 See Strauss and Strydom (1967) 115 – 119; Strauss and Strydom (1967) 116; See McQuoid-Mason and Strauss *LAWSA* (1983) 145 with regard to the remedy of the doctor in the circumstances in that: *"The doctor may sue the patient for breach of contract in the form of mora creditoris."* See also Strauss and Strydom (1967) 116; Claassen and Verschoor (1992) 117; See further McQuoid-Mason and Strauss (1983) 145 who suggest the doctor's claim for damages against the defaulting patient may be calculated by taking the fee which the doctor would have earned for attending to the patient, less any sum he actually earned. This is a view also supported by Gordon, Turner and Price (1953) 74. See also Dada and McQuoid-Mason (2001) 6. Besides the academic writings, the *National Health Act* 61 of 2003 also lay down duties in respect of users which they must obey which duties include:

> *"(a) adhere to the rules of health establishment when receiving treatment or using health services health establishment;*
> *(b) subject to section 14 provide the healthcare provider with accurate information pertaining to his or her health status and co-operate with healthcare providers when using health services;*
> *(c) treat healthcare providers and health workers with dignity and respect; and (d) sign a discharge certificate or release of liability if he or she refuses to accept recommended treatment."*

78 1952 (2) SA 121 (C) at 127 - The court held: *"The measure of damages accorded wrongfully dismissed employee is the actual loss suffered by him represented by the sum due to him for the unexpired period of the contract less any sum he earned or could reasonably have earned during such latter period in similar employment."*

79 See Van Oosten (1996) 68-69 who classifies the rationale of the patient's right to information as: *"Ensuring the patient's right to self-determination and freedom of choice and to encourage rational decision-making by enabling the patient to weigh and balance the benefits and disadvantages of the proposed intervention in order to come to an enlightened choice either to undergo or to refuse it."* See also Van Oosten (1989) 58 449-450; Strauss and Strydom (1967) 212-213; Claassen and Verschoor (1992) 62-63; See further Dada and McQuoid-Mason (2001); Carstens and Pearmain (2007) 313ff-875ff.

courts [80] and national legislation, [81] entrenches a greater right to the patient to be supplied with sufficient information in order for him or her to make informed decisions.

The need to supply the patient with sufficient information arises particularly from the technical nature of most forms of medical treatment and surgical operations which are at times accompanied by medical risks. [82]

There are however factors which may influence the patient's right to information. Such factors which have been identified include, *inter alia,* the patient's desire for information, [83] the patient's temperament and health, [84] the patient expressly or impliedly waives his or her right to information. [85]

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80 For the consequences that may arise where the medical practitioner fails/refuses and/or neglects to recognize the patient's right to information see *Dube v Administrator Transvaal* 1963(4) SA 264 (T) in which the court held that a failure to inform the patient clearly and unambiguously after setting the patient's arm in plaster, that if anything abnormal is noticed, the patient is to return to the hospital immediately, constitutes negligence by the hospital. See *Soumbabis v Administrator of the Orange Free State* 1989(0) (unreported, discussed in Strauss (1991) 4 26) wherein which it was highlighted a failure to advise a diabetes patient with a foot injury not to use his foot but to rest it resulted in the doctor incurring liability for negligence. See also *Ramsaroop v Moodley* (1991) (N) Unreported a failure to inform the patient to have a sperm count before resuming intercourse with his wife without contraception after having undergone a vasectomy. See also *Friedman v Glicksman* (1996) (1) SA 11 in a failure to correctly advise the patient of a greater than normal risk or danger of giving birth to a handicapped or disabled child in order to enable her to make an informed choice whether to proceed with or terminate her pregnancy may render the doctor liable for damages. See further *Castell v De Greef* (1994) 408 at 520-421; *Broude v McIntosh* 1998 (3) SA 60 (SCA); *Jackson v Carpenter-Kling* 1998 (T) Unreported; *Oldwage v Louwrens* (2004) 1 ALL SA 532 (C); *McDonald v Wroe* Unreported (CPD; *Louwrens v Oldwage* 2006 (2) SA 161 (SCA).

81 The *National Health Act* 61 of 2003 in Chapter 2 of the Act deals specifically with the rights and duties of the users. Section 6 in particular deals with the user's right to full knowledge of the procedures, treatment and consequences so that he/she can make an informed choice.

82 See Strauss (1984) 8-9; See also Claassen and Verschoor (1992) 62-63; See further McQuoid-Mason and Strauss *LAWSA* Volume 17 (1983) 149. For case law see *Castell v De Greef* (1994) 408 at 418.

83 See Van Oosten (1996) 7. The author takes the view that when dealing with an inquisitive patient, the doctor is obliged to give more detail than usually expected from the doctor.

84 See Strauss (1984) 8. The author advocates restrictions on the supply of information in certain instances including where the patient's state of mind is such that full awareness of the severity of his condition or of the drastic nature of the treatment indicated, would be therapeutically detrimental to the patient. See also *Castell v De Greef* (1994) (4) 408 at 427.

85 See Van Oosten (1996) 71. The author recognizes that in some instance medical paternalism inhibits the flow of information to the patient in that it is a recognised fact in practice that, despite the patient's right to self-determination, he has the outmost faith and confidence in the doctor, so much so, that the patient relies fully on the doctor to make decisions on his or her behalf. The patient then prefers to have little or any information about the medical procedure and waives his right thereto. See Claassen and Verschoor (1992) 36 69 who state that in instances where the patient himself or herself indicates that he or she does not wish to be informed of the nature of the proposed treatment, the risks involved or the probable consequences, the medical practitioner is exempted

5.5 The Doctor's Duty of Confidentiality

Because of the nature of the doctor-patient relationship the patient has a fundamental need for privacy. Should this need be respected the patient is encouraged to freely disclose his/her symptoms and condition to the doctor. A patient will, however, be unwilling to do so unless the patient has some form of guarantee that the doctor will not share such confidential information with others. Moreover, health is also described, by the writers Carstens and Pearmain, [86] as one of the most sensitive areas for many people when it concerns issues of privacy. It follows that where the health information of a patient is not protected and a lack of privacy occurs, it could harm a patient in many ways. [87] On the other hand, there may be a need to protect innocent members of society from threatening health risks due to irresponsible patient behaviour, the need to contain diseases that are highly contagious and potentially have a significant impact on public health. In those circumstances, it may be necessary, in public interests, to publish information which otherwise would have been confidential. In these instances the patient's right to privacy is disregarded in order to protect, for example, the lives of health professionals and the public at large. [88]

Besides the patient's rights to privacy and confidentiality being protected by the common law, such rights are also protected by legislation. [89]

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from his or her duty to disclose.

86 (2007) 943ff.

87 Carstens and Pearmain (2007) 943 expresses the opinion that a lack of privacy of the patient's health information may adversely impact upon larger prospects and employment status, adversely impact upon their own state of mental health, lead to victimization and stigmatization in the broader environment and cause problems in spousal or parent-child relationships.

88 Carstens and Pearmain (2007) 1000ff.

89 Commencing with the Constitution, section 14 of the Constitution although it does not definitively define the right to privacy to a patient it does give some scope; See Carstens and Pearmain (2007) 953ff. See also the *Promotion of Access to Information Act* 2 of 2000 which prohibits the disclosure of personal information in the absence of prior consent. See sections 34 and 67 of the Act. It also deals specifically with health records sections 30 and 61 of the Act. The *National Health Act* 61 of 2003 also contains extensive provisions that support and uphold the patient's right to privacy. With regard to confidentiality this Act stipulates that all information concerning a user, including information relating to his or her health status, treatment or stay in a health establishment is confidential. It goes on to provide that no person may disclose any such information unless:

- the user consents to that disclosure in writing;
- a court order or any law requires that disclosure; or
- non-disclosure, of the information represents a serious threat to public health.

See section 14(2). The Health Provisions Council in its published guidelines referred to supra deals specifically with an accused right to privacy and confidentiality when requiring that practitioners *inter alia*: *"..... Recognize the right of patients to expect that they will not pass on any personal and confidential information they acquire in the course of their professional duties, unless they agree to disclosure, or unless there is a good and*

Universally then, certain protective measures have been put in place which encourage the free flow of information. [90]

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overriding reason for doing so. (Examples of such reasons may be any probable and serious harm to an identifiable third party, a public health emergency, or any overriding and ethically justified legal requirements.) Do not breach confidentiality without sound reason and without the knowledge of the patient ....."

90 For legal writings see McQuoid-Mason and Strauss *LAWSA* (1983) Par 200 who state *`if this were not so patients would be unwilling to make certain disclosures to the physicians and this could inhibit their treatment.'* See also Van Oosten Encyclopaedia (1996) 90 who expresses a similar fear in that unless patients can freely divulge certain confidential information to their doctors, without fear that *`such facts become public policy'*, infected members of the public wills not *`come forward to be counselled and treated.*' See also Dada and McQuoid-Mason (2001) 17; Carstens and Pearmain (2007) 943ff. The patient's right to privacy, is a well recognized principle in other countries and internationally gathered from the Universal Documentation of Human Rights, the International Covenant on Civil and Political Rights (ICOPR); the World Medical Association's International Code of Medical Ethics which requires that: *"A physician shall preserve absolute confidentiality on all he knows about his patient even after the patient had died."* The Declaration of Helsinki of the World Medical Association also provides that in medical research, doctors must protect human life, health, privacy and dignity. For case law see *Jansen van Vuuren v Kruger* 1993 (4) SA 842 (A), the facts of which can briefly be stated as follows: A doctor told another doctor and a dentist while playing golf that one of the patients had HIV/AIDS. The patient had asked his doctor not to disclose the facts to anyone. The second doctor had once done a locum for the first doctor and the dentist had treated the patient. Neither the second doctor nor the dentist was treating the patient at the time. The court in looking at the purpose and function of the doctor's duty of confidentiality stated at 850 as follows: *"According to the rules of the SA Medical and Dental Council (the Council) it amounts to unprofessional conduct to reveal any information which ought not to be divulged regarding the ailments of a patient with the express consent of the patient. (Rule 16, is to be found in, Strauss Doctor, Patient and The Law 3rd ed (1991), at 454). The reason for the rule is twofold. On the one hand it protects privacy of the patient. On the other it performs a public interest function. This was recognised in X v Y and Others (1988) 2 ALL ER 648 (QB) at 653a-b where Rose J said: `In the long run, preservation of confidentiality is the only way of assuring public health; otherwise doctors will be discredited as a source of education for future individual patients "will not come forward if doctors are going to squeal on them." Consequently, confidentiality is vital to secure public as well as private health, for unless those infected come forward they cannot be counselled and self-treatment does not provide the best care.' A similar view was expressed by the Supreme Court of New Jersey in Hague v Williams (1962) 181 Atlantic Reporter 2d 345 at 349: `A patient should be entitled freely to disclose his symptoms and condition to his doctor in order to receive proper treatment without fear that those facts become public property. Only then can the purpose of the relationship be fulfilled."* In *Financial Mail (Pty) Ltd v Sage Holdings Ltd* 1993 (2) SA 451 (A) the court put it quite strongly when observing that there is a public interest in preserving confidentiality in regard to private affairs and in discouraging the leaking of private and confidential information, unlawfully obtained, to the media and others. It was also held in the *Christian Lawyers Association v Minister of Health (Reproductive Health Alliance)* as *amicus curiae* 2005 (1) SA 509 (T) matter that informed consent is not given to the common law. It forms the basis of the doctrine of *violent fit injuries* that justifies conduct that would otherwise have constituted a delict or crime if it took place without the victim's informed consent. Similarly, in a more recent judgement involving the *Minister of Heath, Manto Tsabalala-Msimang*, and the court with strong reference to Section 14 of the Constitution recognizes that *"human beings have a right to have a sphere of intimacy and autonomy which should be protected from invasion."* See *Manto Mbazana Edmie Tshabalala-Msimang and the Medi Clinic Ltd v Mondli Makyana, Jocelyn Maker, Megan Power and Johnnic Publications* unreported case no 18656/07 (WLD) 3. In this case the court relies heavily on the *Natural Health Act* 61 of 2003 in finding that the possession of the private and confidential medical records by the Sunday Times and by its employees was unlawful. See Page 17, and further, on the effect of sections 14, 15, 16, 17 of the Act, the court emphasizes that *"..... where a person acquires knowledge of private facts through a wrongful act of intrusion, any disclosure of such facts by such person or by any person in principle, constitutes an infringement of the right to privacy."*

The protective measures put in place are that of medical ethics [91] and medical law [92]which dictate that the patient has a right to privacy and that the doctor is under a duty of confidentiality. [93] Where a medical practitioner discloses information regarding a patient's private affairs and he or she has no defence to such disclosure, the medical practitioner may incur civil or criminal liability as his or her

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91 See McQuoid-Mason and Strauss *LAWSA* (1983) Par 200; See also Van Oosten Encyclopaedia (1996) 90; See further Dada and McQuoid-Mason (2001) 17; Carstens and Pearmain (2007) 947ff on the influence of ethics. See further The Health Professions Council Rules regarding the patient's right to privacy and the doctor's duty of confidentiality and in particular Rule 16 which prohibits divulging any information regarding a patient which ought not be divulged, except with the express consent of the patient or, in the case of a minor, with the written consent of his or her parent or guardian, or in the case of a deceased patient, with the written consent of his or her next-of-kin or the executor of his estate.

92 Medical Law bestows a legal duty of medical confidentiality on the doctor not to divulge certain information regarding the patient. See McQuoid-Mason and Strauss *LAWSA* (1983) Par 200; See also Van Oosten Encyclopaedia (1996) 90; See further Dada and McQuoid-Mason (2001) 17. In a number of cases our courts have also imputed a legal duty on doctors in respect of patient's private affairs, for example disclosure that the patient was suffering from a sexually transmitted disease. See *Parkes v Parkes* 1916 CPD 702; Disclosure of the Patient's Mental State of Health. See *Ex Parte James* 1954 (3) SA 270 (SR); Disclosure of patient's fitness to be awarded custody of children in a divorce trial. See *Botha v Botha* 1972 2 SA 599 (N); Disclosing of physical abuse of detainees. See *Davis v Additional Magistrate Johannesburg* 1989 (4) SA 299 (W); Disclosure that the patient was suffering from Aids. See *McGeary v Kruger and Joubert* (1991) (W) Unreported. See also *Jansen van Vuuren v Kruger* 1993 (4) SA 842 (A).

93 The foundation of its existence has been described by some writers as that founded in contract. See Van der Poel (1998) 21. Other writers have founded the existence of this duty in the Hippocratic Oath which required the medical practitioner to preserve the confidence of patients. See Dada and McQuoid-Mason 2001 17. *Contra* Van Oosten Encyclopaedia (1996) 91 who state that *"the legal duty of medical confidentiality usually arises from common law but may also be imposed by statute,"* i.e. Section 33 of *The Human Tissue Act* which provides: *"33. Prohibition of publication of certain facts - (1) No person shall publish to any other person any fact whereby the identity of -*

(a) a deceased person whose body or any specific tissue thereof has been donated;
(b) the donor of the body of a deceased person or any specific tissue thereof;
(c) a living person from whose body any tissue, blood or gamete has been removed or withdrawn for any purpose referred to in section 19; or
(d) the person who has given his consent to the removal of any tissue, blood or gamete from the body of a living person for such a purpose, may possibly be established, unless consent thereto was granted in writing by the deceased person concerned prior to his death, or after his death by a person referred to in section 2(2) (a)."

Contra Dada and McQuoid-Mason (2001) 17 who express the view that *`a breach of confidence by a doctor or health professional may be an infringement of the patient's common law and constitutional rights.'*

In terms of Section 14 of the *Constitution Act* 108 of 1996 *"Privacy 14Everyone has the right to privacy, which includes the right not to have -*

(a) their person or home searched;
(b) their property searched;
(c) their possessions seized; or
(d) The privacy of their communications infringed."

See the comprehensive work of Carstens and Pearmain (2007) 943ff in which the writers highlight, especially the influence of the *National Health Act* 61 of 2003 which deals with the patient's right to privacy and confidentiality.

act constitutes *iniuria*. [94]

5.5.1 Defences to Breach of Confidentiality

The patient's right to privacy and the doctor's duty of confidentiality are, however, not absolute rights but rather relative, in that, the law recognises certain actions of disclosure as justifications which may operate as defences to the doctor's invasion of the patient's private sphere or disclosures of the patient's private affairs. [95]

The defences include consent, [96] privilege, [97] court order, litigation between the parties or

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94 For a discussion on the legal position as per legal writings see Van Dokkum "Should Doctor-Patient Communications be privileged?" Nov (1996) *De Rebus* 748. For case law supporting the view that such conduct constitute iniuria see the cases of *McGeary v Kruger and Joubert* (1991) (N) Unreported and *Jansen van Vuuren v Kruger and Another NNO* 1993 (4) SA 842 (A). It has also been held that conduct is defamatory. See *Ex Parte Rautenbach* (1938) SR 152-153. It has also been held where the conduct results in patrimonial loss such may even be a breach of contract. See *Jansen van Vuuren v Kruger and another NNO* (1993) (5) SA 842 (A) at 848-849. See further *Parkes v Parkes* 1966 (CPD) 702 and *Botha v Botha* 1972 (2) SA 999 (N).

95 For legal writings see Van Oosten Encyclopaedia (1996) 92; See also Strauss (1991) 106; See further Dada and McQuoid-Mason (2001) 20; See further Van Dokkum (1996) 748; See also McQuoid-Mason and Strauss *LAWSA* (1983) Volume 17 2000. For a very comprehensive discussion on the justification on acts of disclosure in certain circumstances see Carstens and Pearmain (2007) 982ff. For case law our courts have also recognised that the patient's right to privacy and the doctor's duty of confidentiality are not absolute rights. In this regard the court in *Jansen van Vuuren v Kruger* 1993 (4) SA 842 (A) at 850 stated: *"The duty of a physician to respect the confidentiality of his patient merely ethical but is also a legal duty recognised by the common law. See Melius de Villiers - The Law of Injuries at 108. As far as present day law is concerned, the legal nature of the duty is accepted as axiomatic. See for example, Sasfin (Pty) Ltd v Beukes 1989 (1) SA 1 (A) at 31F - 33C; Neethling Persoonlikheidsreg 3rd ed at 236; McQuoid-Mason - The Law of Privacy in South Africa at 193-4. However, the right of the patient and the duty of the doctor are not absolute but relative. See S v Bailey 1981 (4) SA 187 (N) at 189 F-G; Sasfin case supra; Sage Holdings Ltd v Financial Mail (Pty) Ltd 1991 (2) SA 117 (W) at 129H-131F; Financial Mail case supra at 462F-463B. One is, as always, weighing up conflicting interests and, as Melius de Villiers (loc cit n 29) indicated, a doctor may be justified in disclosing his knowledge `where his obligations to society could be of greater weight than his obligations to the individual' because the action of injury is one which pro publica utilitate exercetur'. To determine whether a prima facie invasion of the right of privacy is justified, it appears that, in general, the principles formulated in the context of a defence of justification in the law of defamation ought to apply. See McQuoid-Mason (op cit at 218); Neethling (op cit at 247). It is therefore not surprising that the defences pleaded by the first defendant in justification have the foundation of defamation defences, namely privilege, truth and public benefit and in general terms, the boni mores"* In the more recent case of *Tshabalala-Msimang and Medic Clinic Ltd v Modli Makhanya and Others* Unreported case no 18656.07 (WLD) the court with reference to the Financial Mail (Pty) Ltd v Sage Holdings Ltd case emphasized especially, "the *overriding considerations of public interest which would permit publication."* See page 26-27. In this regard the court stresses the fact that the public has the right to be informed of current news and events concerning the lives of public persons such as politicians and public officials. The court also emphasizes the purpose of the press, namely, *"..... to advance the public interest by publishing facts and opinions without which a democratic electorate cannot make responsible judgements."*

96 See Van Oosten Encyclopaedia (1996) 92 who advocates that `*consent in this regard may take the form of a contract between the patient and a third party in terms of which the doctor is under a duty to disclose the patient's private affairs to such third party'*. An example used by the author is where a contract between employer and employee exists that the latter may be examined by and reported on by the former's doctor. See also Strauss (1991) 107-108; McQueen-Mason and Strauss *LAWSA* (1983) Par 2001; *Contra* Carstens and Pearmain (2007) 982ff who regards consent as a unilateral act which may be provoked at any time.

disciplinary proceedings, [98] statutory authority or statutory duty, [99] emergency situations, public interest or *boni mores*. [100]

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97 See Van Oosten Encyclopaedia (1996) 92 who stated that this type of defence is justified based upon `*the legal, social or moral right or duty to communicate and receive such information.'* See also McQuoid-Mason and Strauss *LAWSA* (1983) Par 200 who used the example namely a disclosure to a patient's spouse that the patient is suffering from a venereal disease. It is submitted that the same applies to a situation where the spouse is diagnosed as HIV positive. Carstens and Pearmain (2007) 984 with reference to therapeutic privilege justifies the recognition of this defence as having a significant role to play in certain circumstances. The writers use an example of a minor who has been sexually abused by the parents or other family members in whose custody they find themselves. It is ironic the person who may be responsible for providing consent may be the transgressor here it may be in the minor's interests that the healthcare provider invoke therapeutic privilege and not communicate the condition or medical evidence to the person who is suspected of having transgressed. For case law see the obiter dictum comments of Watermeyer CJ in *SA Medical and Dental Council v McLoughlan* 1948 (2) SA 355 at 366 when he stated: *"It may sometimes be advisable for a medical man to keep secrets from his patient the form of treatment which he is giving him."* See also the case of *VRM v The Health Professions Council of South Africa* (2003) Jol.119 44 (T).

98 See Van Oosten Encyclopaedia (1996) 92 who state that although ethically the doctor is under a duty to protest to such breach of confidentiality, nevertheless once an order is made compelling the doctor to make such disclosure he/she is obliged to give such evidence. See also Strauss (1991) 112 with regard to this defence. The author opine that *"a doctor who is either a defendant or plaintiff in a civil matter or an accused in a criminal matter or implicated in disciplinary proceedings may invoke this defence where such evidence would be relevant."* See also Van Oosten Encyclopaedia (1996) 93; McQuoid-Mason and Strauss LAWSA (1983) Par 200. See further the comments of Carstens and Pearmain (2007) 998ff when the authors state that where the law compels disclosure or there is an obligation to disclose in the course of legal processes such as litigation or disciplinary proceedings this can be raised as a defence in a claim for invasion of privacy. For relevant case law see *Parkes v Parkes* 1916 CPD 702; *Botha v Botha* 1972 (2) SA 559 (N); *Davis v Additional Magistrate Johannesburg* 1989 (4) SA 303 (W); *S v Forres* 1970 (2) SA 597 (C).

99 Carstens and Pearmain (2007) 997ff very aptly describe the recognition of this defence as *"one cannot be punished by the law for obeying the law. If legislation requires the disclosure of certain confidential information and the disclosure is made consistently with the relevant legal provision then a claim for an invasion of privacy cannot succeed."* The confidentiality of health information as was seen earlier is recognized by the South African legislation. In this regard section 14(2) of the National Health Act 61 of 2003 stipulates that a person may not disclose any information unless:

" (a) the user consents to the disclosure in writing;
(b) a court order or any law requires that disclosure; or
(c) non-disclosure of the information represents a serious threat to public health".

Other legislation includes section 90 of the *National Health Act* which empowers the Minister of Health to make regulations concerning identifiable medical conditions. Section 33 of the *Health Act* 63 of 1977 gives some indication of the kind of regulations that the Minister may make in the public interest with regard to common diseases. For other legislation see Section 79 of the *Criminal Procedure Act* 51 of 1977, Section 13 of the *Mental Health Act* 17 of 2002, Section 42(1) and (5) of the Child Care Act 74 of 1983 provides for in certain instances for the disclosure of the patient's private affairs for example the medical examination or medical treatment to persons reasonably suspected to be suffering from communicable diseases or a psychiatric evaluation of an accused in a criminal prosecution in order to determine if he or she is fit to stand trial or patients suffering from dangerous mental illness or child abuse cases. See further McQuoid-Mason and Strauss *LAWSA* (1983) Par 200; Van Oosten *Encyclopaedia* (1996) 93.

100 See Van Oosten Encyclopaedia (1996) 93 - 94 who expresses the view that `*in emergency situations alternatives where public interest or the boni mores so dictate, an invasion of the patient's private sphere or a disclosure of the patient's private affairs may be justified.'* for example, where information is given relating to a spouse suffering from a sexually transmissible disease. See also the comprehensive writings of Carstens and Pearmain (2007) 1000ff. The auditors state that the right to privacy would be subject to the duty to protect the health and lives of

5.6 Summary and Conclusions

It is evident from the chapter that, arising from the contractual relationship between the doctor/hospital and patient are numerous duties and obligations bestowed on both the doctor/hospital and the patient. The question of whether the doctor or hospital is obliged to treat the patient was explored, albeit very briefly. The answer to this lies in the fact that a clear distinction has to be drawn between public hospitals, with doctors in their employ and private doctors who practise for their own account and private hospitals. In the situation public hospitals and doctors in their employ find themselves, they are obliged to treat patients as they are state run and they are bound by their constitutional obligations. In the situation involving private doctors and private hospitals, save for emergency situations, they are not obliged to treat patients. They can, therefore, generally accept or refuse patients as they wish. This chapter also included a brief discussion on the doctor/patient's duty to obtain the patient's consent before commencing treating the patient or performing surgery. It also included a brief discussion on what information the doctor/hospital is obliged to make available to the patient before the patient is said to make an informed decision resulting in informed consent. It is clear that sufficient information has to be given regarding the proposed treatment and/or surgery, especially, the risks attached the inherent dangers and any alternatives that may be suggested.

Other clear and distinct duties and obligations which emerged from the discussions in this chapter include the duty to treat the patient, which in turn focused on the duration of the treatment and the nature and extent of the treatment. It is clear from the discussion in this chapter that unless the patient makes treatment impossible, the doctor/hospital is obliged to see the treatment through, once he/she/it has started their treatment of the patient, until the patient is cured or the practitioner makes other suitable arrangements. It is also clear from the discussion in this chapter that the nature and extent of the treatment to be administered is that of the exercise of a duty of due care and skill. Of all the duties arising from the contractual relationship, this is a core value inherent in the doctor-patient

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members of the public where they are in clear and present danger for example the outbreak of deadly haeborlagic fever such as Ebola, or to control cholera. The same applies it is submitted to a situation where an HIV/Aids patient refuses, after being advised to do so, to disclose his condition then in such event the doctor is obliged to do so. Public interests or the boni mores as a justification may occur in a custody battle where the interests of a child in divorce proceedings are at stake. See *Botha v Botha* 1972 (2) SA 559 (N); It may also be used as a defence where the interests of other health care workers are threatened. See *McGeary v Kruger and Joubert* (1991) (W) Unreported; *Jansen van Vuuren v Kruger* 1993 (4) SA 342 at 850; See also the important case of *C v Minister of Correctional Services* 1996 (4) SA 292 (T). Information to others regarding a patient's interests may also be justifiable for example disclosure in cases of mental illness associated with suicidal tendencies or terminal illness in a dying patient. See in this regard also Strauss (1991) 22; See further Gordon, Turner and Price (1953) 52-53.

relationship. For that reason, even in instances where it is not expressly agreed to, the duty to exercise due care and skill arises in the form of an implied term. The nature of the standard of care to be exercised is not the highest possible degree of skill, but rather a reasonable and competent degree of skill expected of the branch of the profession to which the doctor or specialist belongs. Therefore, there is also a clear distinction between the standard expected of the doctor, as opposed to the specialist. Furthermore, the doctor or hospital is not expected to produce miracles and does not, save where they guarantee results, warrant that the patient will be cured.

A further duty highlighted during the discussion in this chapter is that the doctor or hospital is to carry out the patient's instructions honestly, faithfully and with care. The rationale behind this is said to arise from the specialist knowledge which the doctor or hospital staff has. This in turn creates a relationship of trust between the doctor/hospital and the patient. This is referred to in other jurisdictions as the fiduciary nature of the doctor/hospital-patient relationship, in which the former is expected to act with the utmost good faith and loyalty, in which the personal interest of the doctor or hospital shall not conflict with their professional duty. It will be argued in a later chapter that, although not part of our jurisprudence, it ought to become part. It will also be argued that this is a factor which must be considered when assessing the validity of exclusionary clauses in hospital contracts.

Besides the fore stated duties, there is a further duty which is imputed to the doctor/hospital arising from their contractual relationship with the patient. The duty of confidentiality commences as soon as the patient consults the doctor or the hospital for treatment. The nature of the duty of confidentiality prohibits the doctor or hospital staff from revealing information which ought not to be divulged regarding the ailments of the patient unless there is a ground for justification, for example, consents, privilege, court order or public interest.

The patient, on the other hand, also incurs obligations arising from the patient's relationship with the doctor or hospital. The obligations are, however, limited or restricted to, paying the fees charged for medical services and to make himself/herself available for treatment.
The discussions in this chapter, as well as the preceding Chapters 3 and 4, covered the nature of the contractual relationship between the doctor/hospital and the patient. The discussions included the formation of the contractual relationship and the accompanying requirements, as well as all the formalities that need to be complied with. The discussions also included a detailed discussion of the obligations that flow from such a contractual

relationship and the duties that flow from the relationship. One of the primary duties that flow from such a relationship is that of the doctor/hospital's duty of care which arises *ex contractu*. This duty is inherent to the doctor/hospital-patient relationship and can be expressly agreed to. In the absence of such an express agreement it also arises by implication, flowing from the inherent duty of care.

The following chapter will consider the inherent duty of care which the doctor/hospital has towards his/her patient outside a contractual sphere. What will be considered will be the nature of the duty. The standard of care of the doctor, as opposed to a specialist, will also be considered, as well as influencing factors, *inter alia,* the locality rule will be looked at. This chapter is a build-up to Chapter 7, in which the limitation or exclusion of the duty of care of doctors/hospitals will be discussed.

Chapter 6
The Doctor/hospital's general duty of care towards the patient

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6.1 Introduction

It was stated before that besides the duty of care owed to their patients in contract, [1] doctors/hospitals/other health care providers also owe their patients a duty of care in delict. [2] The duty of care arises quite independently of any contract, or, it may exist side by side with the contractual obligation. [3] Whatever the position, it is submitted that there is really one duty, generating alternative or concurrent remedies or cause of action. [4]

In order to acquire a greater understanding of the doctor's duty of care and to what extent codes of ethical conduct influence the standard of behaviour of the practitioner's , it is necessary to look briefly at the nature of the doctor's duty of care, the doctor's standard of

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1 See generally our legal writers in: Gordon Turner and Price (1953) 75 FF; Strauss and Strydom (1967) 106 FF; Strauss (1991) 3ff; McQuoid-Mason and Strauss (1983) Volume 17 *LAWSA* 144 - 145; Van Oosten Encyclopaedia (1996) 54 - 55; Claassen and Verschoor (1992) 115 - 116; Dada and McQuoid-Mason (2001) 5; Carstens and Pearmain (2007) 413ff. See generally the following case law: *Van Wyk v Lewis* (1924) AD 448, 469-470. *Allott v Paterson and Jackson* (1936) 224; *Kovalsky v Krige* (1910) 204 TR pp. 822, 823; *Coppen v Impey* (1916) CPD pp. 309, 314; *Buls v Tsatsarolakis* 1976(2) SA pp. 891(T), 893; *Applicant v Administrator Transvaal* 1993(4) SA pp. 733(W) 738; *Collins v Administrator Cape* (1998) (4) SA 73, 81-82 .

2 See generally Gordon Turner and Price (1953) 108. The authors opine that the doctor's liability for delict is not dependent upon the existence of a contract between the parties at all; See also Strauss and Strydom (1967) 266; McQuoid-Mason and Strauss (1983) LAWSA Volume 17 151; Claassen and Verschoor (1992) 118; Van Oosten (1996) 57; Dada and McQuoid-Mason (2001) 22; Strauss (1991) 36 - 37, 331. See further Strauss: "Duty of Care of Doctor towards Patient may arise Independent of Contract." SA Practise Mann. Vol. 9 155 2 (1988). Carstens and Pearmain (2007) 489ff; for case law see: *Correira v Berwind* 1986(4) SA 60 66ff: *Van Wyk v Lewis* (1924) AD pp. 443-444; 455-456; *Collins v Administrator Cape* (1995) (4) 73, 81; *Buls v Tsatsarolakis* 1976(2) SA 891(T).

3 See Claassen and Verschoor (1992) 115 - 124. The authors takes the view that in contract, the duty of care arises from the agreement between the patient and physician which involves *"the physician who undertakes to execute the patient's instructions honestly, faithfully and with care, which standard of care as a specialized expert is to exercise reasonable care and skill during his treatment of the patient."* In delict, someone who enters a profession or vocation which, requires special knowledge or skill for example a physician *"The physician is burdened with a duty of care to exercise reasonable skill and care during the treatment of the patient."* See also Neethling, Potgieter and Visser (1989) 4 - 5. The authors opine: *"There is no fundamental difference between a delict and a breach of contract, and the injured party can choose to act on the one or the other."*

4 See Claassen and Verschoor (1992) 118; the authors use the example of a surgeon who for example performs an operation in an improper manner. The surgeon according to the authors *"would firstly be guilty of breach of contract because he does not perform properly in terms of the agreement. Secondly, the commission of an unlawful act is also present because the surgeon injures the patient's rights of personality regarding the integrity of his person, despite the contract."* See also Neethling et al (1989) 5. For case law see *Van Wyk v Lewis* (1924) AD 438; *Correira v Berwind* 1986 (4) SA 60 63 66. With regard to concurrence of remedies see Claassen and Verschoor (1992) 125 who opine that: *"One of the same acts may lead to different claims for which different remedies are available."* The authors continue that where the remedies available to the patient are delictual and contractual in nature *"the Plaintiff may choose between the one and the other or sue in the alternatives."* See also Van der Merwe and Olivier (1985) 462 463 and 467; See further Neethling et al (1989) 213-214.

care and the elevated standard of care of the medical specialist.

A greater understanding of the doctor's duty of care will also assist in determining whether a doctor/hospital/other health care provider may lawfully limit or exclude his/hers or its duty of care? An answer to the aforementioned is of particular importance for the focal point of this thesis.

6.2 THE NATURE OF THE DOCTOR/HOSPITAL'S DUTY OF CARE

6.2.1 SOUTH AFRICA

6.2.1.1 Legal Writings

As a starting point the question needs to be begged, where does this duty come from? The origin of the doctor's duty of care, as was previously stated, is founded in normative ethics, various ethical codes, regulations and the Hippocratic Oath itself, which dates back almost to the days when medical practice first emerged. It has its first traces, although rather rudimentary, during the ancient period [5] and continued during the Greek period, when, with the rise of intellectual levels, ethics and rights actions were documented, which included the Hippocratic Oath. The doctor's duty of care continued to be recognised during the Roman Era, when, for the first time, Ulpianus, in his writings, recognised that the doctor's duty of care arises *ex contractu* as well as under the *Lex Aquilia*. [6] This continued to be the position in the Post Roman Era and similarly represents the position today.

In terms of the ethics of the profession, [7] it appears therefore, that a physician is under a general duty to act and to treat a patient. Although such a duty is not expressly imposed by the Oath of Hippocrates, nevertheless, the Geneva Declaration of 1968 imposes such a duty, which physicians have to swear to, amongst others: *"I shall treat human life with the greatest respect; even when I am deceived, I shall not exercise my knowledge of medicine*

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5 See Cronje-Retief (2000) 25; Sanbar et al (1995) 6; Rhodes (1985) 11 - 12; See also Porter (1999) 54-61; See further the comprehensive work of Carstens and Pearmain (2007) 607ff on the origin and development of medical negligence.

6 See Amundsen (1973) 17 - 25; Carstens and Pearmain (2007) 611ff.

7 See Picard et al (1996) 1; See also Holdsworth (1923) 385; See further Jones (1998) 18; Mason and McCall-Smith (1991) 14-17; Ficarra (1995) 117; Skegg (1988) 8; *Contra* Midgley "Ethical and Legal Duties" (1990) *De Rebus* 525. The writer points out the role of codes of ethics as follows: *"Codes of Ethical conduct record standards of behaviour against which practitioners conduct can be reassured."* The writer continues: *"Their purpose is to ensure client's welfare and they also create duties in respect of the profession and the public at large."* More recently Carstens and Pearmain (2007) 263 opine that medical ethical values include professional competence, compassion, justice, confidentiality, human rights, truthfulness which serve the interests of the patients.

in conflict with the laws of humanity." [8]

Whatever the moral or ethical consequences may have been for a physician who refused to give medical help to a sick or injured person, it was generally accepted that he would not incur criminal or delictual liability merely by virtue of such refusal. [9]

The traditional approach that a person could not be held liable by virtue of a mere omission, it is submitted, no longer holds sway in South African law. Today it is accepted that a mere omission can, in fact, lead to delictual as well as criminal liability where the circumstances are such that the person concerned could personally be expected to intervene. [10]

6.2.1.2 **Case Law**

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8 Geneva Declaration 1968.

9 See Voet in *Commentaries ad Pandectas* 9.2.3 as translated by Gane. *The Selective Voet being the Commentary on the Pandectas* (1955 - 1958). The eminent Roman-jurist by the turn of the 17th century wrote, although *"it would suit the duty of the good man to come to help the imperilled fortunes of his neighbour, if he can do it without hurt to himself."* Nevertheless, wrote the writer, *"A doctor who refuses to attend a patient cannot be held liable under the Aquilian law."* See also Strauss - Doctor, Patient and The Law (1991) 23 who states the traditional view of our law was that *"failure on the part of someone to act `positively' to ward off danger from another (or to protect the latter's interests otherwise) generally could not lead to any liability on the part of the former."* It is for that reason that Strauss op cit 24 states that: *"In our law the doctor's right of refusal was traditionally `mere omission'."* The author however places a *caveat* in that *"in certain instances liability for an omission can be incurred for example where the defendant has by a positive act created a potentially dangerous situation and refrains from taking steps to avoid the danger; where the defendant has assumed control over a dangerous object and then neglects to exercise proper care over it; where the defendant is under a statutory duty to act and neglects to do so; where the defendant has by contract assumed certain duties and fails to carry them out."* See also Van Oosten (1996) 59 - 61; See further Strauss and Strydom (1967) 175; Gordon Turner and Price (1953) 123; McQuoid-Mason and Strauss (1983) 190; Claassen and Verschoor (1992) 38 - 39 117.

10 See Strauss (1991) 24 - 25. The author holds the view that there are instances when the courts may part with the traditional view in that: *"A court may now well hold a doctor liable for harm suffered by an injured or ailing person, where the doctor was aware of his condition and unreasonably refused or failed to attend."* According to Strauss op cit 25, in establishing whether or not a failure to act was unreasonable, the court will be guided by factors such as: *"(1) The doctor's actual knowledge of the patient's condition; (2) the seriousness of the patient's condition; (3) the professional ability of the doctor to do what is asked of him; (4) the physical state of the doctor himself (he is a human being and if he is completely exhausted, superhuman efforts will not be demanded of him); (5) the availability of other doctors, or even of nurses and paramedics; (6) the interests of other patients; (7) whether attending to the patient would expose the doctor to danger; (8) whether the patient is desirous or not to be treated; (9) professional ethical considerations."* As to the latter factor Strauss emphasizes that professional ethical considerations *"cannot be underrated"* in that the rules of the South African Medical and Dental Council (now the South African Professional Health Services Council) as with other international codes of ethics have repeatedly underlined *"the duty of the doctor to respect and protect human life."* This protection is today also guaranteed by the Constitution of the Republic of South Africa Act 108 of 1996. See Section 11. For a duty to act imposed by statute, see Regulation 13 under Section 33(1)(j) of the Health Act; Section 47(1)(b) of the Health Act; (Now replaced by the Health Care Act 61 of 2003); Section 42(1) and (5) of the Child Care Act. (Now replaced by the Children's Act 38 of 2005). For a discussion on the liability for omissions in general, see also Boberg "Liability for Omissions" (1982) 11 BML 194.

The well-established traditional expression that a mere or pure omission cannot found liability is well embedded in the South African case law. [11]

It was particularly since the case of *Silva's Fishing Corp (Pty) Ltd v Maweza* [12] that the courts adopted a less dogmatic approach in applying the traditional rule. The courts commenced to adopt the standpoint that prior conduct may create a legal duty to guard against any foreseeable harm and to take reasonable steps in so doing. In this case the defendant was the owner of a fishing fleet. A boat put out to sea under the command of an employee of the defendant. The crew on board was engaged by the employee and the profits of the catch were to be divided on a certain basis among the defendant, his employee and the crew. The engine of the vessel failed and it drifted for nine days until wrecked in a storm. The husband of the plaintiff was drowned. The widow claimed damages from the owner of the boat.

The majority of the judges decided that the defendant's provision of a boat and his concurrence in the voyage which was also to this financial benefit, constituted potentially noxious conduct on the part of the defendant. The court held that what arose from this conduct was a duty not only to provide a reasonably safe boat, but also adequate alternative means of propulsion or suitable means of rescuing the crew of a drifting boat or both. In the minority judgement, the control of the boat, which the defendant exercised through his employees on board, was accepted as the source of a duty to take reasonable steps to rescue the endangered crew. The defendant's failure to act was clearly a breach of that duty.

In a subsequent case of *Administrator Cape v Preston* [13] the appellant had, in a cattle district, constructed a cutting in a national road which was designed to accommodate an overhead bridge for transport. After completion of the cutting, the bridge was built by the railways administration. A herd of cattle, driven along the national road, stampeded as a result of the noise of a train crossing the bridge and two fell from the top of the cutting onto the road. The plaintiff claimed damage from the appellant. The court decided that the

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11 See *Halliwell v Johannesburg Municipality* 1912 (AD) 654 at 670-5; *Cape Town Municipality v Clohessy* 1922 (AD) 41; *De Villiers v Johannesburg Municipality* 1926 (AD) 401 at 405; *SAR&H v Estate Saunders* 1931 (AD) 276 281; *Minister of Forestry v Qwathlamba (Pty) Ltd* 1973 (3) SA (A) 80-81; *Silva Fishing Corp (Pty) Ltd v Maweza* 1957 (2) SA 264 (A); *Peri Urban Area Health Board v Munarin* 1965 (3) SA 367 at 373.

12 1957 (2) SA 265 (A).

13 1961 (3) SA 562 (A).

construction of the cutting alone, leaving out of account the noise of trains crossing the bridge, did not constitute a potential danger to cattle. The cutting became a potential hazard when the bridge was subsequently built. Although the bridge was not built by the appellant, the court nevertheless concluded that the conditions created by the appellant's previous conduct in constructing the cutting constituted the potential danger to cattle traversing the road. The construction of the cutting, as part of a project which included a bridge over the cutting, was therefore accepted as an act from which a duty of care arose.

The doctrine of the duty of care was further applied in the case of *Minister of Forestry v Quathlamba (Pty) Ltd,* [14] the court decided that once an owner of landed property in a rural area, which is under his control, becomes aware that a fire has broken out on or has spread to his property, and he ought reasonably to have foreseen the possibility of harm to others if no precautionary measures were taken, there rests upon him a duty to take reasonable steps to control or extinguish the fire. The court held the scope of the duty, and whether it has been breached depends on the particular circumstances of the case. Some of the considerations which must, *inter alia,* be taken into account are: the point of time when the landowner became aware of the fire, the stage when he should reasonably have foreseen the likelihood of the fire spreading beyond the confines of his property and the resources available to him to combat the fire.

Although the courts recognised the concept that a duty to act, it so recognised the duty to act, only in certain specific instances. However, in *Minister van Polisie v Ewels* [15] the appellate division clearly rejected the concept that a duty to act only arises in certain specific instances. The court expressed the view that our law has developed to a stage where an omission is regarded as wrongful when the circumstances of the case are such that, not only does the omission incite moral indignation, but, the legal convictions of the community also require a legal sanction. The inquiry into the existence of a duty to act does not involve the *bonus paterfamilias* test, but simply the question whether, with reference to all the circumstances of the case, a duty arises. In this case, the court had no hesitation in pronouncing that such a duty rested on a policeman who refrained from protecting a person who was being assaulted. The court, in arriving at this conclusion, took into account the statutory duties of a policeman, the fact that the assault took place on the premises of the police station, the particular relationship of protection between a policeman and an ordinary person, and the fact that the defendant could, without difficulty, have intervened on behalf

14 1973 (3) SA 69 (A).

15 1975 (3) SA 590 (A).

of the assaulted plaintiff.

Liability for omissions in a medical context received the attention of our courts since the case of *Kovalsky v Krige* [16] in which the plaintiff alleged *inter alia* that the doctor was negligent in not remaining with the patient until the situation was safe to leave. A similar allegation was relied upon in *Webb v Isaac*. [17] In *Mitchell v Dixon* [18] the alleged omission was based on the breaking of a needle of a syringe used during exploration of the chest cavity for suspected pneumonia-thorax.

In the leading case of *Van Wyk v Lewis* [19] which involved a swab which was sewn up in a patient, the very omission to detect the swab before sewing up the patient formed the basis of the claim for liability. The omission to ensure that a specimen, taken out during surgery reached a research institute formed the basis of alleged liability in the case of *Hewat v Rendell*. [20]

Allegations of medical liability arising from an omission by the medical practitioner or hospitals through the action of their staff members continued to receive the attention of the courts without the courts pronouncing thereon. [21]

It was however only in 1981, when the courts, following the Ewels judgement, pronounced that an omission in medical law cases gives rise to liability. In *Magware v Minister of Health NO* [22] Smith J based his judgement in favour of the patients largely on the Ewels ruling. The Judge held there was a moral and professional duty on the part of the casualty staff to act reasonably towards the patient. Taking into consideration the special relationship which

16 (1910) 20 CTR 822.

17 (1915) (EDL) 273.

18 (1914) AD 519 at 530.

19 (1924) (AD) 438.

20 1925 (TPD) 679.

21 See *Prowse v Kaplan* 1933 EDL 257; *Allott v Paterson & Jackson* 1936 SR 281; *R v Van Schoor* 1948 (4) SA 349 (C) 352; *R v Van der Merwe* 1953(2) PH H 124(W); *Dube v Administrator Transvaal* 1966 (4) SA 260 (T); *S v Mkwetshana* 1965(2) SA 493(N), 497; *St Augustine Hospital (Pty) Ltd v Le Breton* 1975(2) SA 530(D); *Buls v Tsatsarolakis* 1976 (2) SA (T) 895; *Richter v Estate Hammann* 1976(3) SA 226(C) at 230-231; *Blyth v Van den Heever* 1980(1) SA 191(A).

22 1981 (4) SA 472.

existed between the staff of the hospital and the patient, the Judge concluded: *"on a consideration of the facts and what could be expected of the casualty medical staff as compared with the consequences of inaction and having regard to the conceptions prevailing in this country, there was a legal duty to act reasonably."* [23]

The principle enunciated has subsequently been followed in a number of judgements. [24]

6.2.1.3 **Legal Opinion**

(1) Besides recognizing the duty of care owed to their patients by medical practitioners/hospital/other healthcare providers in contract, our legal writers and the courts alike, likewise, recognize their duty of care towards their patients even in the absence of a contractual agreement. [25]

(2) Though the duty of care arises quite independently of any contract it may however, exist side by side with the contractual obligation. [26]

(3) The origin of the doctor/hospital/other healthcare provider-patient relationship is founded in normative ethics, ethical codes and the Hippocratic Oath. [27]

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23 *Magware v Minister of Health NO* 1981 (4) SA 477.

24 See in this regard the cases of *Correira v Berwind* 1986 (4) 60; *Pearce v Fine* 1986(D) (unreported, discussed in Strauss (1991) 273 ff.); *Soumbabis v Administrator of the Orange Free State* 1989(O) (unreported, discussed in Strauss (1991) 262-263); *Pringle v Administrator Transvaal* 1990 (2) SA 379 (W); *Castell v De Greef* (1994) (4) SA 448; *Collins v Administrator Cape* 1995 (4) SA 73 CPD; *S v Kramer* (1987) (1) SA 887(W). For the liability that arises from the non-performance of a contractual duty to act see: *Edouard v Administrator Natal* 1989 (2) 368 (A); *Administrator Natal v Edouard* 1998 (3) SA 551 (AD); *Friedman v Glicksman* 1996 (1) SA 1134 (WLD); *Clark v Hurst NO* 1992 (4) SA 636 (D).

25 Gordon, Turner and Price *Medical Jurisprudence* (1953) 108, Strauss and Strydom *Die Suid-Afrikaanse Geneeskundige Reg* (1967) 266, McQuoid-Mason and Strauss *LAWSA* Volume 17 (1983) 151, Claassen and Verschoor *Medical Negligence* (1992) 118, Van Oosten Encyclopaedia (1996) 57; Dada and McQuoid-Mason *Introduction to Medico-Legal Aspects* (2001) 22; Strauss *Doctor, Patient and The Law* (1991) 36-37; Strauss "Duty of Care of Doctor towards Patient may arise independent of Contract" *SA Practise Man*. Vol 9 155.2 (1988). See further Carstens and Pearmain Foundational Principles of South African Medical Law (2007) 413ff-489ff. For case law see *Correira v Berwind* 1986 (4) SA 60 (Z) 66; *Van Wyk v Lewis* 1924 (AD) 438 at 443-444; 455-456; *Collins v Administrator Cape* 1995 (4) SA 73 (C) 81; *Buls v Tsatsarolakis* 1976 (2) SA 891 (T).

26 Claassen and Verschoor *Medical Negligence* (1992) 115ff; See also Neethling, Potgieter and Visser *Deliktereg* (1989) 4-5. The writers opine that there is no fundamental difference between a delict and breach of contract and the party who feels aggrieved can make an election. Carstens and Pearmain *Foundational Principles of South African Medical Law* (2007) 406ff.

27 Picard *Legal Liability of Doctors and Hospitals in Canada* (1996) 7, Holdsworth *History of English Law* 1923 (385), Amundsen :The Liability of the Physicians in Roman Law" *International Symposium on Society, Medicine and Law Edited by Karplus* (1973) 17-25; Jones Medical Negligence (1998) 18; Mason and McCall-Smith Law and Medical Ethics (1991) 14-17; Ficarra "Ethics in Legal Medicine" A Chapter dedicated in Sanbar et al Legal Medicine (1995) 117; Skegg Law Ethics and Medicine (1988) 8; Midgley "Ethical and Legal Duties" De Rebus August (1990) 525 all writers put a premium to the roll normative ethics and ethical cases play in setting standards of behaviour against which medical practitioner's conduct are reassured which help towards ensuring the patient's welfare. It

(4) Although it was generally accepted in South Africa that a mere omission by a medical practitioner would not result in the criminal or delictual liability merely by virtue of such refusal. Today this no longer holds sway in South African Law, as today, unlike yesteryear, it is accepted that a mere omission can lead to delictual as well as criminal liability where the circumstances are such that the medical practitioner is expected to intervene. [28]

6.2.2 ENGLAND

6.2.2.1 Introduction

Before the nature of the doctor's duty to take care is looked at in more detail, it is important to look briefly at the origin of the doctor's duty of care and its development.

Historically, in English Law, the doctor's duty of care was derived from his status and common calling. [29] The profession of surgeons, like the profession of Apothecary, Barber

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also imposes a general duty on the medical practitioner to act and to treat a patient. Although the Hippocratic Oath is silent on the general duties of the doctor on when to act, The Declaration of Geneva (1968) however, does impose a general duty especially where human life is threatened. See also the comprehensive work of Carstens and Pearmain Foundational Principles of South African Medical Law (2007) 60ff.

[28] This was the common law position. See *Commentaries ad Pandectas* 9.2.3 as translated by Gane which became the traditional view in South Africa. cf. Strauss *Doctor, Patient and the Law* (1991) 23, Van Oosten Encyclopaedia (1996) 59-61, Strauss and Strydom *Die Suid-Afrikaanse Geneeskundige Reg* (1967) 175, Gordon, Turner and Price *Medical Jurisprudence* (1953) 123; McQuoid-Mason and Strauss *LAWSA* (1983) Par 190, Claassen and Verschoor *Medical Negligence* (1992) 38-39, 117. See further Carstens and Pearmain *Foundational Principles of South African Medical Law* (2007) 325ff, 506ff. For case law see the *dicta* of *Haliwell v Johannesburg Municipality* 1912 (AD) 654 at 670-5; *Cape Town Municipality v Clohessy* 1922 (AD) 41; *De Villiers v Johannesburg Municipality* 1926 (AD) 401 at 405; *SAR & H v Estate Saunders* 1931 (AD) 276 281; *Minister of Forestry v Qwathlanba (Pty) Ltd* 1973 (3) SA (A) 80-81; *Silva Fishing Corp (Pty) Ltd v Maweza* 1957 (2) SA 264 (A); *Peri Urban Area Health Board v Munarin* 1965 (3) SA 367 at 373; *Administrator Cape v Preston* 1951 (3) SA 562 (A) in which the South African courts made it clear that a mere omission cannot find liability. *Contra* however, the landmark decision of *Minister van Polisie v Ewels* 1975 (3) SA 590 (A) when the Appellate Division (as it was known then) rejected the concept that a duty to act only arises in certain specific instances. The court consequently held that a mere omission is regarded as wrongful when the circumstances of the case are such that not only does the omission incite moral indignation but the legal convictions of the community also require a legal sanction. For case law in a medical context in which our courts have held that a mere omission by a doctor or hospital staff to do something expected of them see *Kovasky v Krige* (1910) 20 CTR 822; *Webb v Isaac* (1915) (EDL) 273; *Mitchell v Dixon* (1914) AD 519; *Van Wyk v Lewis* (1924) AD 43; *Hewat v Rendell* (1925) TPD 679, *Magware v Minister of Health NO* 1981 (4) SA 472; *Correira v Berwind* 1986 (4) 60 ZHC; *Pearce v Fine* 1986 (D) (unreported, discussed in Strauss (1991) 273ff); *Soumbabis v Administrator of the Orange Free State*; 1989 (O); (unreported, discussed in Strauss (1991) 262-263; *Pringle v Administrator Transvaal* 1990 (2) SA 379 (W); *Castell v De Greef* (1994) (4) SA 408; *Collins v Administrator Cape* 1995 (4) SA 73 CPD; *S v Kramer* (1987) (1) SA 887(W). See *Sedma v Executive Member Gauteng* 2002 (1) SA 776 (T); *Van der Walt v De Beer* 2005 (5) SA 151 (C); *Louwrens v Oldwage* 2006 (2) SA 161 (SCA); *McDonald v Wroe* Unreported (2006) CPD case number 7975/03. For the liability that arises from the non performance of a contractual duty to act see *Edouard v Administrator Natal* 1989 (2) 368 (1); *Administrator Natal v Edouard* 1998 (3) SA 551 (AD); *Friedman v Glicksman* 1996 (1) SA 1134 (WLD); *Clark v Hurst NO* 1992 (4) SA 636 (D).

[29] See Holdsworth (1923) 385 - 386. The author sees this as one of the first attempts to place legal constraints and

and Smith, was a `common calling', the exercise of which imposed on its practitioners a duty to use proper care and skill. [30] At first the exercise of the calling was not dependent on any contractual relationship between the surgeon and his patient. [31]

For that reason the liability of the medical man was said to be delictual in its origin, and the exercise of the calling was seen as a matter of public policy, in respect of which, ethics played a major role. [32]

In modern law the pendulum has swung in that the duty of care is no longer attributable to the "medical man's" status as such, liability today arises from a breach of contract. The duty of care also forms part of the general liability for the tort of negligence. [33]

The same principle applies in relation to hospitals and other medical institutions. [34] The

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expectations upon those who practiced medicine as a protecting measure in favour of those who received treatment in that *"once the medical man"* engaged in this `common calling' he was subjected to *"a local rule which developed in that a duty was placed upon the `medical man' to use proper care and skill."* See also Fitzherbert (1534) 94 D. See further Kennedy and Grubb (1998) 285 - 286; See further Teff (1995) 159-160, 173-180; See further Picard and Robertson (1996) 1 – 3.

30 See Fitzherbert (1534) 94 D. See also Wright (1993) 6.

31 See Holdsworth (1923) 428-432; See also Wright (1993) 6.

32 See Holdsworth (1903) 386-448; See also Wright (1993) 6.

33 The authors hold the view that from the doctor-patient relationship arises an "implied contractual duty to act at all times in the best interests of the patient." Following the dictums of Lord Templeton in *Sidaway v Governors of Bethlem Royal Hospital* (1985) A.C. 871, 904B; Jackson and Powell (1997) 592 Footnote 11 endorses the principle namely `the relationship between the doctor and patient is contractual in origin' in which the doctor *"obedient to the high standards set by the medical profession impliedly contracts to act at all times in the best interests of the patient."* See also Lewis *Medical Negligence* (1988) 123. The author supports the view that *"the physician's duty to take all due care of the patient arises from the relationship of doctor and patient."* See further Wright (1993) 7 who describes the relationship between doctor and patient as a `special relationship'. See further Jones *Medical Negligence* (1996) 30. The author takes the view that *"such is the relationship between the doctor and patient"* that it *"clearly satisfies any test based upon foresee ability of harm, proximity of the relationship between plaintiff and defendant"* that *"it be just and reasonable to impose a duty of care".*

34 See Jones (1996) 30. The writer states that the usual starting point for any discussion of the duty of care in the tort of negligence is the decision of *Donoghue v Stevenson* (1932) A.C. 562 and the famous dictum of Lord Atkin at 580 in which he stated:*" You must take reasonable care to avoid acts or omissions which you can reasonably foresee would be likely to injure your neighbour. Who, then, in law is my neighbour? The answer seems to be persons who are so closely and directly affected by my act that I ought reasonably to have them in contemplation as being so affected when I am directing my mind to the acts or omissions which are called in question."* Commenting on the above dictum Jones (1996) 30 identifies the special relationship between the doctor and patient as satisfying the *"test based upon foresee ability of harm and proximity which arises from such relationship."* See also Jones (1996) 21; See further Jackson and Powell (1997) 13 who supports the theoretical basis for the duty of care in English Law as enunciated by Lord Atkin, in *Donoghue v Stevenson* (1932) AC 562 in that the phrase *"injure your neighbour"* means nothing else than *"to cause some kind of physical or*

delictual remedy of *assumpsit* evolved, in which a patient, who sustained an injury by reason of a lack of skill or care by the medical law, could claim damages from the medical man. [35]

In time concepts of contract became more advanced, with the result, the delictual origin of the liability became somewhat obscured and the duty of care of the medical man arose from the contractual relations between the medical man and his patient. [36]

6.2.2.2 **Legal Writings**

There is broad consensus amongst English writers that the doctor/hospital's duty of care arises in tort, [37] or out of contract [38] or in certain circumstances in tort and simultaneously

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psychological harm to the plaintiff." See further Dugdale and Stanton *Professional Negligence* (1989) 90; See further Scott *The General Practitioner and the Law of Negligence* (1995) 7. The author relying on the case of Donoghue v Stevenson (1932) AC 562 views the patient as the doctor's legal neighbour in the following light: *"If it can be shown that the doctor should realize that a patient might be affected by the treatment then it establishes automatically the neighbour principle."* The author continues: *"Any treatment, or lack of it, will obviously affect the patient."* For that reason the author comments further: *"The effect of this is that there is normally no difficulty for a patient who is suing his doctor to demonstrate the first element in his action; that a duty of care did exist."* For a discussion of the origin of the duty of care and the nature and scope of such a duty in general terms see the English writings of Harpwood Principles of Tort Law (1997) 1; Winfield and Jolowitz on *Tort* (1994) 3 69-70; Street on *Torts* (1993) 17; Charzworth-Percy on *Negligence* (1977) 12; Hepple and Matthews *Tort: Cases and Materials* (1985) 40. See Wright (1993) 11-12. The author holds the view that: *"The hospital which receives a patient into its care undertakes towards the patient certain obligations, notwithstanding that its services may be rendered gratuitously or pursuant to an arrangement to which the patient is not a party, as is the case of National Health Service hospitals; indeed the duty owed to a non-paying patient will normally be the same as that owed to a paying patient."*

35 See Wright (1993) 6; the author states that *"in such cases the consideration for the medical man assuming a duty of care and skill was said to lie in the fact that the patient has submitted himself to the other's care."* See also Kennedy and Grubb (1998) 294 who express the view that *"the basis for this duty to take care is an `undertaking' of care of the person as a patient."* This follows the view expressed by Nathan *Medical Negligence* (1957) 8 as far back as 1957 when he summed up the undertaking of care implied by the law as:*" The medical man's duty of care arises..... quite independently of any contract with his patient. It is based simply upon the fact that the medical man undertakes the care and treatment of the patient."* Later Nathan continues: *"It is clear that the duty of care which is imposed upon the medical man arises quite independently of contract. It is a duty in tort which is based upon the relationship between the medical man and his patient, owing its existence to the fact that the medical man has assumed responsibility for the care, treatment or examination of the patient, as the case may be."* Commenting on the above Kennedy and Grubb (1994) 68, the authors associate themselves with the views expressed above and perceive this to *"reflect the position of English Law, as far as it goes, as regards the hospital doctor."* See further Kennedy and Grubb (1998) 294 who commenting on the views expressed by Nathan advocates that the language of "undertaking" and "assumption of responsibility" reflects *"the modern approach of the courts when imposing positive duties of care, particularly upon professionals."*

36 See Holdsworth (1923) Vol. (iii) 448-450; See also Wright (1993) 6; See further Jackson and Powell (1997) 592

37 See Wright (1993) 10. The writer opines that a duty in tort *"is based upon the relationship between the medical man and his patient, owing its existence to the fact that the medical man has assumed responsibility for the cure, treatment or examination of the patient, as the case may be."* See also Nathan (1957) 8 - 10 discussed in the introduction; See also Kennedy and Grubb (1994) 64 67 - 69 who states that in England this occurs predominantly where an individual becomes a patient of a general practitioner *"through mechanism created under the National*

out of contract. [39] It has also been stated before by the English legal writers that

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Health Service Regulations." In that instance the duty of care of the general practitioner arises *"after there had been a request for services and the general practitioner has become aware of the need for medical services."* A further instance arises where the patient attends a hospital as an in-patient or out-patient. Where the doctor or hospital *"has undertaken the care and treatment of the patient"* the duty of care arises. See Taylor *Medical Malpractice* (1980) 28 who also takes the view that *"the general practitioner owes a duty of care to patients on his National Health Service list"* as well as "emergency cases". Likewise the hospital or hospital doctor owes a duty to the patients in the wards as well as an accident and emergency department. See further Kennedy and Grubb (1998) 286. The writers take the view that *"it is generally accepted that within the National Health Services today there is no contractual relationship between a doctor and patient nor is there a contractual relationship between the patient and the hospital."* Therefore a general practitioner's duty of care towards his or her patients is derived from the regulations contained in the terms of service contained in Schedule 2 of the National Health Service Act 1992" provided of course *"there is a direct or indirect request for `care' from the patient"* and *"the general practitioner assumes responsibility of the patient"* or the *"obligation under the Regulations is a continuing one."* See further McHale and Fox (1997) 148 – 149; Jackson and Powell (1997)10ff.

38 See Wright (1993) 10. The writer advocates that in general terms, the doctor's duty of care towards his or her patient arises from *"the implied term of the contract."* See also Kennedy and Grubb (1998) who recognize the implied terms in contract in that doctors are expected *"to exercise reasonable care and skill when diagnosing, advising and treating patients"* and in the case of hospitals, *"to provide for example adequate staff and facilities."* The terms implied in the contract in respect of services or goods provided to patients are founded in the relationship between doctor (and hospital) and patient. According to Kennedy and Grubb (1998) 292 the terms are founded in the Supply of Goods and Services Act of 1982. The writers continue that *"as many obligations, are statutory, they cannot be excluded."* See also Jones (1996) 20 25 27-28; See further Kennedy and Grubb (1994) 70-71; See further Martin Law relating to Medical Practise (1979) 138; See further Jackson and Powell (1997) 591-592 who view the implied contractual duty *"to act at all times in the best interest of the patient."* See further Dugdale et al (1984) 4-5. For a discussion on the express terms of an agreement, between doctor/ hospital and patient, see Kennedy and Grubb (1998) 288. The writers take the view that the terms expressly agreed to between the doctor/hospital and patient are not restrictive in nature nevertheless they are however *"subjected to the constraints of public policy."* See also Jones (1996) 24 - 25 who relying on the Unfair Contract Terms Act 32(1) of 1977, holds the view that: *"A person cannot, however, by a contractual term or by notice exclude or restrict liability for death or personal injury resulting from negligence. Unfair Contract Terms Act 1977, s2 (1). Any attempt to exclude or restrict liability for other forms of loss or damage resulting from negligence is subject to a test of reasonableness."* See further Kennedy and Grubb (1994) 70. The authors place limitations to what the parties may purport to agree through express terms. In that regard the author's state: *"They cannot, for example, agree to do that which would be regarded as contrary to public policy, for example, selling an organ (see infra) or to waive those obligations implied by the law* See further Dugdale et al (1989) 5 445. Although the writers recognize that certain terms agreed to may provide that liability for negligence is excluded or united in some respect the effect thereof *"may be considered unethical"* especially *"to offer professional services whilst at the same time limiting liability." Contra* Wright (1993) 15 who expresses the view that: *"It is conceivable, for example, though perhaps scarcely probable, that in individual medical man might seek by his contract with the patient to limit or exclude his liability for negligence. A more likely possibility is that an institution such as a private nursing home might make a similar attempt. There can be no doubt that a properly drafted provision in the contract could, if sufficiently brought to the patient's notice, effectively limit or exclude such liability."*

39 See Wright (1993) 10 who is of the view that even where a contractual relationship exists between the medical man and his patient, *"a duty in tort will exist."* The writer continues to describe the concurrence of a duty in tort and a duty arising out of the contract when he states: *"Thus in any case where there is a contract between the medical man and the patient there will exist side by side a duty in tort and a duty arising out of the contract."* See also Jones (1996) 20 who recognizes the concurrence of the duty to take care arising from contract especially where "*a doctor provides private treatment he or she also owes a concurrent duty in tort to the patient."* See also Nelson-Jones and Burton (1995) 25-26; See further McHale and Fox (1997) 149 who recognize the *"contemporaneous contractual duty"* in addition to his/her tortuous duty to take care.

Notwithstanding, the duty of care, being derived from contract or in tort or both, the nature of the duty, is the same, namely, to exercise reasonable care. [40]

Generally the doctor's duty to exercise reasonable care does not include a successful outcome of the procedure or treatment nor does he/she guarantee the outcome, unless, the doctor has expressly guaranteed a particular result. [41] Since, as previously stated, there is a concurrent duty in contract, as well as in tort, the patient's claim may be pleaded in both contract and in practice where there is a breach of such duty. [42]

6.2.2.3 **Case Law**

One of the earliest recorded cases based on a malpractice action, bears the date 1329 and was decided by one of the King's Circuit Courts. Although the record is scanty and fails to provide the names of the Plaintiff and Defendant, nevertheless, Judge William De Demon was asked to hear this matter in which the Defendant, a healer of some sort, in treating an eye ailment with herbs, allegedly caused the loss of the eye. The Plaintiff brought this action, using the trespass writ but alleging that whilst the Plaintiff was under the care of the Defendant, the patient died. The Judge who decided the case found the *case was technically improper and found against the Plaintiff and stated:*

"I saw a case where a man in Newcastle was arraigned before me and my associate Justices assigned, for the death of a man, and I asked the reason for the indictment and it was said that he [physician] had injured a man [patient] who was under his care, so that he [patient] died four days later. When I saw that he [physician] was a man of that occupation, and did not do the thing feloniously but against his will, I told him to go on his way. I put

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40 See Jones (1996) 20 who states: *"The doctor's contractual obligations are usually no greater than the duties owed in tort."* See also Nelson-Jones and Burton (1995) 26 who opine that *"the courts have construed the implied contractual duty of care as identical to the duty of care owed in tort."* Commenting on the nature of the implied contractual duty of care and the duty which exists in tort, Wright (1993) 11 states: *"The duty is the same namely a duty to exercise reasonable care in the circumstances."* See also McHale et al (1997) 149 who express the view that: *"The duty is almost identical in substance in that the doctor is obliged to exercise reasonable care and skill."* See further Flemming *The Law of Torts* (1992) 167 - 169 who opine: *"There is no essential distinction, in the field of medical practise, between the duty of care and skill owed by the physician to his patient in contract and in the tort of negligence."* See further Kennedy and Grubb (1998) 291 who sees this as an indistinguishable duty.

41 See Jones (1996) 20; See further Nelson-Jones and Burton (1995) 26; Wright (1993) 11.

42 See Jones (1996) 24; although the writer recognizes the possibility that a doctor may guarantee a particular result, *"this is likely to be a rare occurrence."* See also Kennedy and Grubb (1994) 71-72; See further Jackson and Powell (1997) 592. The writers state that the English Court are generally loath to find that a doctor guaranteed a result as *"medicine is perhaps the classic example of a profession in which results are not guaranteed and are not expected to be guaranteed."* Despite that the authors recognize the possibility that a medical practitioner may *"in any given case contract that the proposed treatment will be successful."* See further Kennedy and Grubb (1996) 289. Although it is possible for the doctor to contractually to guarantee the outcome of the treatment, *"The doctor must use explicit and unequivocal words"* before a court will construe the contractual terms in favour of the patient.

it to you that if a smith, who is [also] a man of occupation, drives a nail into your horse's hoof so that you lose your horse, you will never have recovery against him [smith]. Nor shall you have." [43]

From the judgement of Justice De Demon it can be inferred that from the physician or veterinarian's relationship with his or her patient a duty of care arises. Where the physician or veterinarian, acting within the usual professional relationship, injures or kills the patient (human being or horse) but does not intend to do so, he is not liable. For that reason negligent or ignorant conduct would, therefore, not impose liability. [44]

In another case of *Stratton v Swanlond* (known as the surgeon's case of 1375), decided during the fourteenth century, the court highlighted *inter alia* the physician and veterinarian's duty to take care. In this case Robert and Agnes of Stratton, man and wife, sued John Swanlond, a surgeon, who had treated Agnes's wounded hand with unsatisfactory therapeutic results. The Plea Rolls of King's Bench say that Swanlond guaranteed "well and competently" to cure the wound, an allegation that he denied. Instead, he claimed, he reattached a hand that was virtually severed, but did not guarantee a cure. As in the Plea Roll account, the surgeon is also alleged to have been negligent and in breach of unwritten covenant.

Chief Justice John Cavendish using a horse-doctor analogy stated:

"And if a smith undertakes to cure a horse, and the horse is harmed by his negligence or failure to cure in a reasonable time, it is just that he should be held liable. But if he does all he can and applies himself with all due diligence to the cure, it is not right that he should be guilty therefore, (even) though there is no cure." [45]

In a later judgement of *Slater v Baker and Stapleton,* [46] a surgeon in the employ of the St Bartholomew Hospital was sued for damages arising from his alleged negligent treatment of a patient. His conduct arose from the straightening of the patient's leg by using an experimental apparatus. The court finding in favour of the patient remarked: *"For anything that appears to the court, this was the first experiment made with the new instrument, and if it was, it was a rash action, and he who acts rashly acts ignorantly: and although the*

43 See Chapman (1984) 56 for a discussion on the case.

44 See Chapman (1984) 56.

45 See Chapman (1984) 59 for a discussion on the court's shift in deciding the "Professional provider is liable if he is negligent and he does not employ `all due diligence' in treating his patient", a far cry from Justice De Demon's earlier view that *"the physician is liable when injury or death results from treatment, only if he intends to do harm."*

46 (1767) 95 ER 860.

defendants in general may be skilful in their respective professions as any two gentlemen in England, yet the Court cannot help saying, that in this particular case they have acted ignorantly and unskilfully, contrary to the known usage of surgeons." [47]

In a much later judgement in the case of *Lampher v Phipos,* [48] Tindal CJ attributed the surgeon's duty of care to his skilled profession when he stated:

"Every person who enters into a learned profession undertakes to bring to the exercise of it a reasonable degree of care and skill. He does not undertake, if he is an attorney, that at all events you shall gain your case, nor does a surgeon undertake that he will perform a cure, nor does he undertake to use the highest possible degree of skill." [49]

The use of some special skill or competence arising from the skilled medical professional also received the attention of the court in the case of *Bolam v Friern Hospital Management Committee* [50] in which McNair J held:

"Where you get a situation which involves the use of some special skill or competence, then the test as to whether there has been negligence or not is not the test of the man on the top of a Clapham omnibus, because he has not got this special skill. The test is the standard of the ordinary skilled man exercising and professing to have that special skill. A man need not possess the highest expert skill; it is well established law that it is sufficient if he exercises the ordinary skill of an ordinary competent man exercising that particular art." [51]

It has also been stated by the courts that no contractual relation is necessary for a duty of care to be imposed on the physician. In *R v Bateman* [52] it was stated that the physician:

"owes a duty to the patient to use diligence, care, knowledge, skill and caution in administering the treatment. No contractual relation is necessary, nor is it necessary that the service be rendered for reward. The law requires a fair and reasonable standard of care and competence." [53]

The court goes on to state that the duty of care is rather attributed to the skilled profession when Lord Hewat remarked:

"If a person holds himself out as possessing special skill and knowledge and he is consulted, as possessing such

47 *Slater v Baker and Stapleton* (1767) 95 ER 860.

48 (1838) 8 C @ P 475.

49 *Lampher v Phipos* (1838) 8 C # P475.

50 (1957) 1 WLR 582, 586.

51 *Bolam v Friern Hospital Management Commission* 1957 (1) WLR 582 586.

52 (1925) 94 L.J.K.B. 791.

53 *R v Bateman* (1925) 94 L.J.K.B. 791.

skill and knowledge, by or on behalf of a patient, he owes a duty to the patient to use due caution in undertaking the treatment. If he accepts the responsibility and undertakes the treatment and the patient submits to his direction and treatment accordingly, he owes a duty to the patient to use diligence, care, knowledge..... " [54]

The principle that the duty to take care arises independently of contract, but is determined by the performance of the act, has also arisen in the case of *Everett v Griffiths*. [55]

"It would apply to a doctor treating a member of the household of the other party to the contract, as it would, in my judgement, apply to a doctor acting gratuitously in a public institution, or in the case of emergency in a street accident, and its existence is independent of the volition of the patient, for it would apply though the patient were unconscious or incapable of exercising a conscious volition." [56]

The duty of care may arise, especially in hospital cases, where, upon acceptance of the patient, the hospital authorities inherit a duty to treat the patient with care. This formed the subject matter in the case of *Cassidy v Ministry of Health* [57] in which Lord Denning remarked:

"[W]hen hospital authorities undertake to treat a patient and themselves select and appoint and employ the professional men and women who are to give the treatment, they are responsible for the negligence of those persons in failing to give proper treatment, no matter whether they are doctors, surgeons, nurses, or anyone else. Once hospital authorities are held responsible for the nurses and or radiographers as they have been in Gold's case (Gold v Essex County Council 1942 2 ALL E.R. 237), I can see no possible reason why they should not also be treated as for the house surgeons and resident medical officers and their medical staff." [58]

After setting out the basis for the vicarious liability of the hospital, his Lordship continued to consider the aspect whether there was negligence or not. He continued:

" ..... The hospital authorities accepted the plaintiff as a patient for treatment and it was their duty to treat him with reasonable care. They selected, employed, and paid all the surgeons and nurses who looked after him. He had no say in their selection at all. If those surgeons and nurses did not treat him with proper care and skill, then the hospital authorities must answer for it, for it means that they themselves did not perform their duty to him.

> *I decline to enter into the question whether any of the surgeons were employed only under a contract for services, as distinct from a contract of service. The evidence is meagre enough in all conscience on that point, but the liability of the hospital authorities should not, and does not; depend on nice considerations of that sort. The plaintiff knew nothing of the terms on which they employed their staff. All he knew was that he was treated in the hospital by people whom the hospital authorities appointed, and the*

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54 *R v Bateman* (1925) 94 L.J.K.B. 791.

55 (1920) 3 K.B. 163, 213; See also *Banbury v Bank of Montreal* (1918) A.C. 626 657.

56 *Everett v Griffiths* (1920) 3 K.B. 163 213.

57 (1951) 1 ALL E.R. 574; (1951) 2 K.B. 343; (1951) W.L.R. 147 Lord Denning cited his statement in two subsequent decisions namely *Roe v Minister of Health* (1954) 2 QB 66 and *Jones v Manchester Corporation* (1957) 2 ALL E.R. 125.

58 *Cassidy v Ministry of Health* (1951) 1 ALL E.R. 574; 1051 2 KB 343; (1951) W.L.R. 147.

hospital authorities must be answerable for the way in which he was treated." [59]

The doctor's general duty of care was also emphasized in the case of *Sidaway v Bethlem Royal Hospital Governors* [60] in which Lord Diplock relying on the Bolam test recognized the doctor's duty of care:

"In English jurisprudence the doctor's relationship with his patient which gives rise to the normal duty of care to exercise his skill and judgment to improve the patient's health in any particular respect in which the patient has sought his aid, has hitherto been treated as a single comprehensive duty covering all the ways in which a doctor is called upon to exercise his skill and judgement in the improvement of the physical or mental condition of the patient for which his services either as a general practitioner or specialist have been engaged." [61]

6.2.2.4 **Legal Opinion**

(1) Although originally the doctor's duty of care arose from his status and common calling, [62] this is no longer the position today, for the doctor/hospital/other healthcare provider's liability today, arises from a breach of contract, [63] alternatively from the general liability for the tort of negligence, [64] or both. [65]

(2) The nature of the duty of care, whether derived from contract or in tort, is the

59 *Cassidy v Ministry of Health* (1951) 1 ALL E.R. 574; 1951 2 KB 343; (1951) W.L.R. 147.

60 (1985) AC 871; (1985) 1 ALL 643, 657.

61 *Sidaway v Bethlem Royal Hospital Governors* (1985) AC 871; (1985) 1 ALL 643 657.

62 Holdsworth *History of English Law* Vol. (iii) (1923) 385-386, Kennedy and Grubb *Principles of Medical Law* (1998) 285-286, Teff *Reasonable Care* (1995) 159-160, 173-180, Picard and Robertson *Legal Liability of Doctors and Hospitals in Canada* (1996) 1-3, Wright *Medical Malpractice* (1993) 6. For case law see *Lampher v Phipos* (1938) A C & P 475, *Bolam v Friern Hospital Management Committee* (1957) 1 WLR 82.

63 Legal writings in England, generally, advocate the existence of an implied contractual duty to act with due care and in the best interests of the patient. See Jackson and Powell *Professional Negligence* (1997) 592, Lewis *Medical Negligence* (1988) 123; Wright *Medical Malpractice* (1993) 7, Jones *Medical Negligence* (1996) 30, Dugdale and Stanton *Professional Negligence* (1989) 90, Scott *The General Practitioner and the Law of Negligence* (1995) 7.

64 The duty of care is founded on the principle of assumpsit in that by undertaking to treat the patient the doctor/hospital assumes responsibility for the care, treatment or wellbeing of the patient, as the case may be see Wright *Medical Malpractice* (1997) 6, Kennedy and Grubb *Principles of Medical Law* (1998) 294, Nathan *Medical Negligence* (1957) 8, Kennedy and Grubb *Medical Law: Text with Materials* (1994) 68. For case law see *R v Bateman* (1925) 94 L.J. K.B. 791, *Everett v Griffiths* (1920) 3 K.B. 163, 213, *Banbury v Bank of Montreal* (1918) A.C. 626, 657, *Cassidy v Minister of Health* (1951) 1 ALL E.R. 574; (1951) 2 K.B. 343; (1951) W.L.R. 147, *Roe v Minister of Health* (1954) 7 QB 66.

65 English legal writers generally recognize the concurrence of a duty in tort and in contract. See Wright *Medical Malpractice* (1997) 6, Jones *Medical Negligence* (1996) 20, Nelson-Jones and Burton *Medical Negligence Case Law* (1995) 25-26; McHale and Fox *Health Case Law* (1997) 149.

same, namely, to exercise reasonable care and skill. [66]

(3) The doctor/hospital's duty to exercise reasonable care does not include a successful outcome of the procedure or treatment nor does he/she/it guarantee the outcome, unless, the doctor/hospital has expressly guaranteed a particular result. [67]

6.2.3 UNITED STATES OF AMERICA

6.2.3.1 Introduction

The American Common Law with regard to the doctor's duty of care towards his or her patient was very much influenced by English Law. [68]

Historically, as under early English Law, the liability of a physician for failure to exercise professional skill and care, in American Law, was based on the notion that the physician's profession was a "public" or "common" calling. [69] The general public perceived those who entered this common calling to be reasonably competent in it. [70]

With the development of the American Law of Contract, the American Courts increasingly chose to assess the physician's liability in terms of contract concepts. [71]

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66 Jones *Medical Negligence* (1996) 4, Jones *Medical Negligence* (1991) 19, Nelson-Jones and Burton *Medical Negligence Care Law* (1995) 25-26, Wright *Medical Malpractice* (1993) 11, McHale et al *Health Care Law* (1997) 149, Flemming *The Law of Torts* (1992) 167-169, Kennedy and Grubb *Principles of Medical Law* (1998) 291. See the dictum *Sidaway v Bethlem Royal Hospital Governors* (1985) AC871, (1985) 1 ALL 643, 657.

67 Jones *Medical Negligence* (1996) 241; Jones *Medical Negligence* (1991) 19, Kennedy and Grubb *Principles of Medical Law* (1994) 71-72, Jackson and Powell *Professional Negligence* (1997) 592, Kennedy and Grubb *Principles of Medical Law* (1996) 289. Though the legal writers recognize the possibility that a doctor may guarantee a particular result, they are loathe to acknowledge the presence of such a guarantee unless clear evidence is present. For case law see *Lampher v Phipos* (1838) 8 C&O 475.

68 See Peters et al *Law of Medical Practise in Michigan* (1981) 150. The authors claim the early American Courts very much looked to English Court decisions and legal values for precedential guidance.

69 See Peters et al (1981) 150 The authors opine that the philosophy behind the liability arising from the common calling is founded in the common calling and because the public was being served which result in *"special duties were imposed by law and the physician was answerable for mistakes, because the physician undertook the care of the patient in the course of a public calling."*

70 See Shea and Sidley *Law and Ethics* (1985) 183 quoting from Fitzherbert (1534) who summarized the position as *"it is the duty of every artist to exercise his art rightly and truly as he ought."* See further Arterburn: "The Origin and First Test of Public Callings" *University of Pennsylvania Law Review* Vol. 75 (1927) 411 412. See further Silver: "One Hundred Years of Harmful Error: The Historical Jurisprudence of Medical Malpractice" (1992) *Wisconsin Law Review* 1193, 1205. The author opines that *"the medieval medical malpractice cases were thus based on negligence and little else."*

71 See Peters et al (1981) 150.

The development in the law of contract in America was accompanied by another development in the United States, namely, the moving away from assessing the physician's liability based on the traditional physician's supposed duties to possess such skill as is normally possessed by others of his calling, towards the concept of reasonable care with customary medical practice equated with it. [72]

The fore stated transformation caused negligence to receive a distinct judicial recognition as a separate tort, causing the historical liability of a physician based on the notion of the physician's professional calling to become extinct. [73]

Today, the first requirement in establishing negligence is for the plaintiff to prove the existence of a legal relationship between him- or herself and the defendant. [74]

Arising from the legal relationship between the parties concerned is a duty, generally referred to as a duty to use due care. [75]

The duty may arise from a special relationship, as for example, the relationship between a physician and a patient. [76]
The duty to use due care may arise out of a physician's voluntary act of assuming the care

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72 See Silver (1992) 1212-1213. The writer points out that in the latter half of the nineteenth century with the development as afore indicated the common law position with regard to medical malpractice changed in that *"the common law then purported to provide that a physician's duty is not measured by the ordinary rule of reasonableness, but rather by professional custom. The doctor is bound to do no more than follow ordinary practise within the profession."* See also Peters et al (1981) 150 who states that *"..... approximately a century and a half ago, negligence received a distinct judicial recognition as a separate tort"* in which *"the reasonable man's standard is modified for medical malpractice actions in mal-practitioner which negligence is determined by comparing the behaviour (acts or omissions) of the alleged medical with that of the reasonable and prudent practitioners of medicine."*

73 Peters et al (1981) 150.

74 Pozgar *Legal Aspects of Health Care Administration* (1996) 14.

75 See Pozgar (1996) 14. The author defines the duty as *"a legal obligation of care, performance or performance imposed on one to safeguard the rights of others."* The legally protected rights in America for the last 600 years according to Hoffman in the chapter on "Torts" published in the *American College of Legal Medicine - Legal Medicine* (1991) 41 are based on *"the individuals person, property and reputation which must not be interfered with or invaded."*

76 See Pozgar (1996) 14. See also the *American College of Legal Medicine* (1991) 43 119; See further Shear and Sidley *Law and Ethics* (1985) 184. The author states: *"By virtue of his special relationship to patients, the health professional owes to patient's a special degree of protection from harm. He must protect others from deficiencies in the practice of his profession by adhering to the standards of the profession."*

of a patient [77] or by statute [78] or by contract between the physician and patient. [79]

6.2.3.2 **Legal Writings**

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77 See Voigt - "Physician-Patient Relationship" A Chapter published in the *American College of Legal Medicine* (1991) 208. The author states that as general rule physicians are not legally compelled to treat strangers. What is required is the creation of a physician-patient relationship or some other special relationship. In the so-called "sidewalk" cases when the physician voluntarily assumes the care of a patient, the physician owes a duty of due care to the patient. Contra Holder *Medical Malpractice Law* (1975) 7. The author states that as a general rule a physician in private practice has the right to refuse to see a patient, although if he sees the patient at all in the case of an emergency, he must provide at least temporary care. This approach aligns itself with the so-called "good Samaritan law" principle. See Alton *Malpractice* (1977) 29. The author opines that this principle *"is designed to encourage physicians to treat injured persons they encounter in emergency situations."* Once the physician has assumed the care of a patient he is seized with that patient until the physician is sure someone qualified has taken over or until the emergency situation no longer exists. See further Peters et al (1981) 153-154; See further Moore and Kramer *Medical Malpractice: Discovery and Trial* (1990) 5. The authors express the view that hospital's, likewise, are under no obligation or duty to render services until an agreement to treat has been reached between the hospital authorities and the patient. Where, however, there is an emergency, *"the physician is connected with a governmental agency, hospital, or medical facility that has a specific obligation to treat members of the public; or a hospital physician is required to accept all patients referred without qualification."*

78 See Waltz and Inbau (1971) 17 ; The authors express the view that as *"the medical profession and the general public, obviously, have a deep and continuing interest in the quality of medical and related health services, one way of doing so is to regulate the quality of vital services."* The physicians and hospital's duty of care is therefore controlled by professional canons of ethics, licensing laws, criminal laws prohibiting and punishing unauthorized practice of medicine, regulations, common law standards of professional conduct enforced by the courts, etc. It is especially the licensing laws which Waltz et al (1971) 18 views as a control mechanism exercised by the Government to promote "public health, welfare and safety" and which are designed to "protect the public from incompetent and unethical practitioners". According to the authors (1971) 19 licensing laws have also been put in place to regulate the minimum qualifications of physicians as well as there standards of conduct for entry into and retention of those in the occupation. It further provides for license revocation or suspension in respect of both physicians and hospitals in certain circumstances. The American Medical Association in their *Principles of Medical Ethics* (1957) also promote physicians/hospital's duty of care by setting standards of proficiency and propriety which are according to Waltz et al (1971) 29 as demanding as the licensing statutes. Sections 1, 4, 6 of the Principles of Medical Ethics (1957) read as follows: *"Section 1: The principal objective of the medical profession is to render service to humanity with full respect for the dignity of man. Physicians should merit the confidence of patients entrusted to their care, rendering to each a full measure of service and devotion." "Section 4: The medical profession should safeguard the public and itself against physicians deficient in moral character or professional competence. Physicians should observe all laws, uphold the dignity and honour of the profession and accept its self-imposed disciplines. They should expose, without hesitation, illegal or unethical conduct of fellow members of the profession. "Section 6: A physician should not dispose of his services under terms or conditions which tend to interfere with or impair the free and complete exercise of his medical judgment and skill or tend to cause a deterioration of the quality of medical care."* See also Sanbar et al (1995) 7 - 8.

79 The duty of care according to Holder (1975) 3 may arise from an express contract between the physician/hospital and patient. The duty of care is however, not dependant on an express agreement. In certain instances the duty arises from an implied contract. Holder (1975) 3 ascribes the existence of the duty as that which may be *"inferred by the law as a matter of reason and justice from their acts or conduct."* See also Waltz et al (1971) 40 - 41; See further Furrow et al (1995) 234 - 236; Crawford Morris and Moritz (1971) 135; Hill and McMenamin "Contracts, Agency and Partnership" A chapter in *American College of Legal Medicine, Legal Medicine* (1991) 62 - 63; Sidley (1985) 183. See further Peters et al (1981) 150 - 151. The authors describe an implied contract as *"not a true contract ..... it is an obligation imposed by law, to do justice in respect of activities engaged in by the physician and the patient."* See further Moore and Kramer (1990) 4 - 5; See also Southwick and Sleep *The Law of Hospital and Health Care Administration* (1988) 29.

American Legal writers generally agree that a physician/hospital's liability for medical malpractice arises from either a breach of contract [80] or in tort. [81]

The contract between the physician and patient may either be express [82] or implied. [83] There is a broad consensus amongst American writers that whether the physician/hospital enters into a contract with a patient or not, what flows from their relationship when the physician/hospital accepts the patient as a patient is a duty of care. [84]

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80 See Waltz and Inbau (1971) 50 who advocate that: *"The physician-patient relationship is ordinarily considered to be based on contract, express or implied."* See also Furrow et al (1995) 234; See further Sanbar et al (1995) 62 - 63; See further Voight "Physician-Patient Relationship" published in *American College of Legal Medicine* (1991) 208 - 209. The author states that: *"From the traditional physician-patient relationship which is based on the nature of the relationship, is implied a contract between the physician and patient."* See further Holder (1975) 1. The author relying on the physician-patient relationship opines that: *"It is generally considered to be a contractual one ...."* See further Sidley (1985) 183; See further Southwick and Slee (1988) 28 -29.

81 See Waltz and Inbau (1971) 40; the authors state that in certain instances "*claims against physicians are usually expressly in terms of negligent conduct."* In other words: *"The plaintiff claims not that the defendant violated their contract but that he committed a `tort'."* See also Furrow et al (1995) 237 who opine that: *"The liability of health care providers is governed by negligence principles."* See further *American College of Legal Medicine* (1991) 43 119 130 132. See further Holder (1975) 40. The author regards negligent actions as species of "tort" law, which is defined as: *"A violation of a duty imposed by general law or otherwise upon all persons occupying the relation to each other which is involved in a given transaction."* See further Southwick and Slee (1988) 52.

82 Express agreements between physician and patient according to American writers are not formalistic in nature. Writing is also not a prerequisite in establishing a legal relationship between the physician and patient. See Furrow et al (1995) 235. See also Waltz and Inbau (1971) 40 who expresses the view that: *"Occasionally the contract between the doctor and patient may be a formal, written contract."* Hill and McMenamin in the chapter "Contracts, Agency, and Partnership" published in *American College of Legal Medicine* (1991) 63 opines that expressed contracts have been utilized in the past where doctors have made *"an expressed promise to perform a specific procedure, cure the patient within a specific time, or achieve a certain result."* See further Bianco and Hirsh "Consent to and Refusal of Medical Treatment" published in *American College of Legal Medicine* (1991) 274. The authors opine that it is especially in hospital contracts that expressed consent occurs which are often in writing. See further Moore and Kramer (1990) 5.

83 Implied agreements between the physician and patient are the most common form in the physician-patient relationship. See Waltz and Inbau (1971) 40 – 41; The authors states that usually: *"The agreement simply arises by implication from the behaviour of the parties for example a person who places himself in the hands of a private physician for treatment implies a willingness to pay for the services he receives, and the physician, of course, impliedly undertakes to perform competently the services required by any patient he accepts."* See also Furrow et al (1995) 235. The authors state that when a pathologist accepts to render services he is bound by certain implied contractual obligations to properly perform his or her medical function. See also Holder (1975) 3; See further Sidley (1985) 183; See further Peters et al (1981) 151; Southwick and Slee (1988) 23.

84 See Waltz and Inbau (1971) 41; the authors express the view that: *"The duty towards the patient is a duty which the law imposed on the physician ..... a standard of care."* The nature of the physician's legal duty towards his/her patient is expressed as follows by Waltz and Inbau (1971) 42 namely: *"A physician has the obligation to his patient to possess and employ such reasonable skill and care as are commonly had and exercised by reputable, average physicians in the same general system or school of practice in the same or similar localities."* The duty imposed upon the physician according to Southwick and Slee (1988) 28 are: *"A special legal duty which arises from the physician-patient relationship."* See also Furrow et al (1995) 237 who describes the legal duty of the

6.2.3.3 **Case Law**

In America the inherent duty or implied duty of a doctor's obligations towards his patient, in the absence of a contractual agreement, is set out in the landmark decision of *Pike v Honsinger* [85] which down the years has been followed quite regularly by other courts. In this decision the court held: "A physician and surgeon, by taking charge of a case, impliedly represents that he possesses, and the law places upon him the duty of possessing, that reasonable degree of learning and skill that is ordinarily possessed by surgeons and physicians in the locality in which he practices, and which is ordinarily regarded, by those conversant with the employment, as is necessary to qualify him to engage in the business of practicing medicine and surgery. Upon consenting to treat a patient, it becomes his duty to use reasonable care and diligence in the exercise of his skill and the application of his learning to accomplish the purpose for which he was employed. He is under the further obligation to use his best judgement in exercising his skill and applying his knowledge. The law holds him liable for an injury to his patient resulting from want of the requisite skill and knowledge or the omission to exercise reasonable care or failure to use his best judgement..... " [86]

The principle enunciated in the case of Pike was extended by the Supreme Court of Indiana in 1938, in the case of *Adkins v Ropp* [87] in which the court held: "When a physician and

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physician towards his/her patient: *"Expressing the required degree of care, skill and diligence."* See also Morris and Moritz (1971) 135. Hospitals according to Furrow et al (1995) 297 are generally held to a national standard of care in *"maintaining its facilities, providing and maintaining medical equipment, hiring, supervising and retaining nurses and other employees, and to have in place providing to protect patients."* See also Ferger "Liability of Health Care Entities for Negligent care" a chapter published in *American College of Legal Medicine* (1995) 157. See further Hoffman in the Chapter on "Torts" in the *American College of Legal Medicine* (1991) 43 who described the legal duty of physicians and hospitals as: *"The standard established by law for the protection of others."* See further Holder (1975) 40 - 41. Flamm in the chapter "Health Care Provider as a Defendant" published in *American College of Legal Medicine* (1995) 119 132 described the legal duty of the physician as: *"A duty to act in accordance with the specific norms or standards established by their profession, commonly referred to as "standards of care" to protect their patient's against unreasonable risk."* See further Shea and Sidley (1985) 183. Peters et al (1981) 151 153; see further Moore and Kramer (1990). The authors view the legal duty of the physician as: *"The responsibility to assume the welfare of his patient in all phases of his treatment."* McClellan *Medical Malpractice Law: Tactics and Ethics* (1983) 31 48 suggests that as it often poses a threshold problem for the courts to compare the conduct of the physician, the modern trend *"is to apply a national standard of care to doctors, especially those practicing in a medical specialty."*

85 49 NE 760 New York (1898).

86 *Pike v Hosinger* 49 NE 760 New York (1898). For cases in which the dictum of Pike was followed see *Gilette v Tucker* 67 Ohio St 106 (1902); *Rytkonen v Lojacano* 269 Mich 270 (1934); See also *Keuchler v Volgmann* 180 Wisc 192 (1923) in which it was held: "The rule is that a physician is required to exercise only that degree of care, diligence, judgement and skill which other physicians of good standing of the same school or system of practise usually exercise in the same or similar circumstances, having due regard to the advanced state of the medical profession at the time in question."

87 14 NE 2d 727 Indiana 727 (1938).

surgeon assumes to treat and care for a patient, in the absence of a special agreement, he is held in law to have impliedly contracted that he possesses the reasonable and ordinary qualifications of his profession and that he will exercise at least reasonable skill, care and diligence in his treatment of him. This implied contract on the part of the physician does not include a promise to effect a cure and negligence cannot be imputed because a cure is not effected, but he does impliedly promise that he will use due diligence and ordinary skill in his treatment of the patient, so that a cure may follow such care and skill, and his degree of care and skill is required of him not only in performing an operation or administering first treatments, but he is held to the like degree of care and skill in the necessary subsequent treatments unless he is excused from further service upon due notice by the patient himself." [88]

Sometime later in the case of *Armstrong v Svoboda* [89] the Supreme Court of California heard a medical negligence case and emphasized the duty of care which the medical practitioner owes his patient. The facts of this case can briefly be stated as follows:

An electrocardiogram made when a patient complained of chest pains indicated possibly serious cardiac abnormalities. The physician did not tell the patient anything about the results, nor did he prescribe rest or any treatment. A week later, when the chest pains recurred and were worse, the patient called him and the physician told him to go to the hospital. He did not, however, tell him to go in an ambulance, so the patient walked down several flights of stairs and rode to the hospital in his car. Examination revealed that he had had a heart attack several days before. Open heart surgery was required to repair the damage. He sued and recovered damages from the physician.

The court subsequently held that the physician did not exercise due care in that: *"…. a duly careful, reasonably prudent physician would have told his patient about the electrocardiogram results and would have hospitalized him immediately."*

Although the courts in the United States of America have continuously held that the physician owes his patient a duty of care, the standard of care has never included the working of miracles or total success whenever treatment is undertaken. In the absence of an express contractual promise, the physician is not considered a guarantor of good results.

88 *Adkins v Ropp* 14 NR 2d 727 Indiana 727 (1938).

89 49 CAL RPTR 707, CAL 1966.

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In a case in Kansas the Supreme Court of Kansas in *Noel v Proud* [91] upheld the trial judge's refusal to dismiss the Appellant's case. The facts of the case can briefly be stated as follows: The physician Proud undertook the treatment of plaintiff Noel for ear trouble, advising him that he should undergo stops mobilization operations. But Doctor Proud, for some reason, went further. He allegedly told his patient that `while the operations might not have any beneficial effect on [his- hearing, his hearing would not be worsened as a result." Three operations were performed. Not only did Noel's hearing fail to improve, it got much worse. He sued his doctor alleging the breach of an express contractual warranty that his hearing would not worsen as a consequence of the operations.

The court consequently found for the Appellant on the basis that the facts relied upon by the Appellant supported that the Respondent guaranteed a result which ultimately was not achieved.

A breach was also found to have occurred in the case of *Ghilmet v Campbell* [92] in which the doctor promised a particular result which failed to materialize. In this case the physician treated the patient for a bleeding ulcer. The physician had allegedly told the patient prior to the operation: *"Once you have an operation it takes care of all your troubles. You can eat as you want to, you can drink as you want to, you can go as you please. Dr Arena and I are specialists, there is nothing to it at all - it's a very simple operation. You'll be out of work three to four weeks at most. There is no danger at all in this operation. After the operation you can throw away your pill box."* [93]

The patient suffered serious after-effects. The court subsequently found for the plaintiff on the basis that the physician had breached the agreement in which he guaranteed a result.
By embarking upon treatment, the physician by implication or impliedly represents that he has the necessary training, knowledge and skill and that he/she will employ these assets in the way any reputable physician ordinarily would. [94]

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90 *Armstrong v Svoboda* 49 CAL RPTR 701, CAL 1964.

91 367 P 2d 61 (S.Ct. Kans 1961. See also *Ramberg v Morgan* 218 N.W. 492 (S.CT.IOWA 1928); *Williamson v Andrews* 270 N.W. 6 (S.CT.MINN 1936); *McBride v Roy* 58 P. 2d 886 (S.CT.OKLA 1936).

92 188 N.W. 2d 601 (Mich 1971).

93 Guilmet v Campbell *188 N.W. 2d 601 (MICH 1971).*

94 Richton v Sargent 27 NH 460 (S.CT.NH 1853), McLandless v Mowha 22 PA (10 HARIS) 261 (S.CT. PA 1853).

The duty of care may also require the prudent and careful physician to consult with other medical practitioners including a physician who may previously have treated the patient. This was the issue in the case of *Largess v Tatem* [95] in which the following facts came to light namely:

An elderly woman broke her hip. Her family physician, a general practitioner, referred her to an orthopaedic surgeon, who inserted a nail in the fracture. The orthopaedist took over her care while she was in the hospital but returned her to the supervision of the family physician when she was dismissed. The general practitioner knew that the orthopaedist's instructions during hospitalization excluded weight-bearing, but he made no inquiry of the orthopaedist as to instructions for himself or the patient at the time of dismissal. She walked on the affected leg since she had had no instructions to the contrary. The device broke and further surgery became necessary. She sued the family doctor. The court found that he failed in his duty of due care when he did not consult with the orthopaedist as to instructions in the case.

The court found that the physician had failed in his duty of care when he did not consult with the orthopaedist when it was indicated.

In a similar case in that of *Langford v Kosterlitzo* [96] the High Court of California was asked to consider whether the physician's failure to consult with a surgeon who had previously operated on the patient constituted negligence. In this case the facts that played out are the following:

A patient had a piece of bone removed from his nose and his optic nerve was unprotected. He consulted another physician a considerable time after surgery for treatment of asthma. He told the second physician about the nasal surgery and the name of the surgeon who had performed it. The second physician did not call the surgeon to inquire about the operation or any of its effects. During his treatment of the asthmatic condition, the optic nerve was damaged and the patient lost the sight of that eye. The court held that the physician's failure to consult with the prior surgeon before beginning treatment constituted negligence.

The court consequently held that the physician's failure to consult with the prior surgeon before beginning to treat the patient, when indicated, constituted negligence.

The physician's duty of care, in some instances, also embraces the referral of the patient to a specialist for diagnosis or treatment and to allow the specialist to take over in cases which so warrant, the failure whereof constitute negligence. [97]

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95 211 A 2d 398 VT. 1972.

96 290 PAC 80, CAL 1930.

97 *Logan v Field* 75 Mo APP 594, Mo 18 98; Benson *v Dean* 133 NE 125, NY 1921.

One of the most important duties a physician and/or a hospital owes his patient under the general concept of due care is the doctor/hospital obligation to keep abreast of new developments in medicine. In the first case of *Darling v Charleston Community Memorial Hospital,* [98] involving a hospital in Illinois, the hospital was held liable for the negligence of one of its staff physicians who set a fractured leg in an emergency. The physician admitted, at the trial, that he had not read a book on orthopaedics in 10 years, but, he had not asked for consultation when obvious postoperative signs of difficulties developed.

In the second case, *Reed v Church,* [99] involving a doctor and in which medication permanently affected a patient's eyesight. Medical literature had contained numerous articles indicating the possibility of such a side effect but, the physician, who prescribed it, had not read any of the articles. The court consequently found that he was negligent in failing to keep up with and be aware of developments in the field.

6.2.3.3 **Legal Opinion**

(1) The doctor's duty of care towards his or her patient which serves as a protective measure in preventing harm to the patient and to act in the patient's best interests, is very much recognised by the American legal writers and the American courts, alike.

(2) The duty of care towards the patient is said to arise from different notions inter alia:

(2) (1) The special relationship between a physician and a patient results in the creation of a protective bond between the physician and the patient in which the physician is obliged to protect the patient from harm and, in so doing, to adhere to the standards of the profession. [100]

(2) (2) there are other critics who advocate that the duty of care between the physician/hospital and the patient only comes into being when the

98 200 NE 2d 149, Ill NE 2d 253, Ill 1965.

99 8 SE 2d 285, LA 1940.

100 See Pozgar *Legal Aspects of Health Care Administration* (1996) 14, Sidley *Law and Ethics* (1985) 184; Waltz and Inbau *Medical Jurisprudence* (1971) 17, Southwich and Slee *The Law of Hospital and Healthcare Administration* (1988) 29, Furrow et al *Health Law* (1995) 237, Morris and Moritz *Doctor and Patient and the Law* (1971) 135, Hoffman in the Chapter on "Tort" in the *American College Legal Medicine* (1991) 43, Holder *Medical Malpractice Law* (1975) 40-41; Flamm in the Chapter "Health Care Provider as a Defendant" Published in the *American College of Legal Medicine* (1995) 119 12. According to the writers, both physicians and hospitals have the duty towards their patients and to act in accordance with the specific norms or standards established by the profession in respect of physicians and the accreditation system and licensing practises in respect of hospitals.

physician/hospital has assumed the care of the patient. [101]

(2) (3) the duty of care arises in terms of the provisions of certain statutes designed to promote public health, welfare and safety. [102]

(2) (4) the physician/hospital's duty of care is said to also arise by contract express or implied, between the physician/hospital and the patient. [103]

(2) (5) Even in the absence of a contractual agreement between the doctor/hospital and the patient, it is advocated that the duty of care nevertheless arises from the mere relationship between the physician/hospital and the patient. [104]

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101 This notion finds its existence in the general rule which prevails in America namely physicians/hospitals are not legally compelled to treat strangers save in emergency situations. See Vogt "Physician-Patient Relationship" A Chapter published in the *American College of Legal Medicine* (1991) 208, Holder *Medical Malpractice Law* (1975) 7, Alton *Malpractice* (1977) 29, Peters et al *The Law of Medical Practise in Michigan* (1981) 153-154, Moore and Kramer *Medical Malpractice: Discovery and Trial* (1990) 5.

102 The medical profession in America with its accompanying standards of conduct, minimum qualifications for physicians, licensing laws and professional canons of ethics is very much governed by regulations and statutory provisions. The rationale behind the regulations, statutory provisions and canons of ethics is to promote the physician's/hospital's duty of care by setting standards of proficiency and propriety. See Waltz et al *Medical Jurisprudence* (1971) 17-19, 29; Sanbar et al *Legal Medicine* (1995) 7-8, See also the American Medical Association *Principles of Medical Ethics* (1957) 54ff.

103 For a duty of care arising from an express contract see Holder Medical Malpractice Law (1975) 3, Furrow et al *Health Law* (1995) 235, Waltz and Inbau *Medical Jurisprudence* (1971) 40, Hill and Momenamin "Contracts, Agency and Partnership" A Chapter published in the *American College of Legal Medicine* (1991) 63. Bianco and Hirsh "Consent to and Refusal of Medical Treatment" A Chapter published in the *American College of Legal Medicine* (1991) 274, Moore and Kramer *Medical Malpractice: Discovery and Trial* (1990) 5. The advantage of expressed agreements in relation to the doctor/hospital's duty of care is said to be, it produces certainty as to what procedure will be followed, what treatment is prescribed and what results are aimed at. The duty of care, in the absence of an express agreement, arises impliedly from the contract entered into between the hospital/physician and the patient. The implied agreement is often inferred from the conduct of the doctor/hospital and the patient. See Waltz and Inbau *Medical Jurisprudence* (1971) 40; Furrow et al *Health Law* (1995) 235; Holder *Medical Malpractice Law* (1975) 3; Sidley *Law and Ethics* (1985) 183; Peters et al *The Law of Medical Practise in Michigan* (1981) 151; Southwick and Slee *The Law of Hospital and Healthcare Administration* (1988) 23.

104 The duty of care in these circumstances is said to be a duty which the law imposes upon the physician/hospital. See Waltz and Inbau *Medical Jurisprudence* (1971) 41, Southwick and Slee *The Law of Hospital and Healthcare Administration* (1988) 28. Furrow et al *Health Law* (1995) 237, Morris and Moritz *Doctor and Patient and The Law* (1971) 135, Hoffmann in the Chapter on "Torts" in the *American College of Legal Medicine* (1991) 43, Holder Medical *Malpractice Law* (1975) 40-41, Flamm in the Chapter "Healthcare provider as a Defendant" published in the *American College of Legal Medicine* (1995) 119 132, Shea and Sidley *Law and Ethics* (1985) 183, Peters et al *The Law of Practise in Michigan* (1981) 151-153, Moore and Kramer *Medical Malpractice: Discovery and Trial* (1990) 7. It is a legal duty aimed at the protection of the public against the impropriety of physicians and hospitals. The inherent duty or implied duty of a physician in the absence of a contractual agreement is dealt with in the landmark decision of *Pike v Hosinger* 49 NE 760 New York (1998) in which the

3. The nature and scope of the doctor's/hospital's duty of care towards his/her patient is said to include the following:

(3) (1) the duty of care has never included the working or miracles or total success wherever treatment is undertaken. [105] This, of course, is subject to the physician/or surgeon not warranting or guaranteeing a result. Should he/she, however, guarantee a result and fails to achieve the guaranteed result, the physician/or surgeon will be liable for damages based on breach of contract.[106]

(3) (2) the duty of care includes that by embarking upon the treatment of the patient, the physician gives out that he/she has the necessary training, knowledge and skill which he/she will utilize in treating the patient. [107]

(3) (3) in certain instances, where the situation so warrants, the physician is obliged to consult [108] the medical practitioners including a practitioner who may previously have treated the patient. [109]

(3) (4) Where the case so indicates, there is a duty on the physician to refer the patient to a specialist.

(3) (5) the physician surgeon is obliged to keep abreast of new developments in medicine. [110]

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court held that by the mere fact that the physician and surgeon taking charge of a case, the physician and surgeon inherits a duty to use reasonable care and diligence towards the patient. See also the case of *Adkins v Ropp* 14 NE 2d 727 Indiana 727 (1938). For other cases in which the implied duty of the physician is dealt with see *Gilette v Tucker* 67 OHIO ST 106 1902, *Rytkonen v Lojacano* 269 MICH 270 (1934), *Keuchler v Volgman* 180 WISC 192 1923, *Armstrong v Svoboda* 49 CAL RPTR 701, CAL 1966.

105 It has been held on numerous occasions by the American courts that physicians are not considered as guarantors of good results. See *Ramberg v Morgan* 218 N W 492 (S.CT.IOWA 1928); *Williamson v Andrews* 270 N.W. 6 (S.CT.MINN 1936), *McBride v Roy* 58 P. 2d 886 (S.CT.OKLA 1936).

106 *Noel v Proud* 367 P. 2d 61 (S.CT.KANS 1961); *Guilmet v Campbell* 188 N.W. 2d 601 (MICH 1971).

107 *Leighton v Sargent* 27 NH 460 (S.CT.NH 1853); *McLanders v Mcwha* 22 (10 Haris) 261 (S.CT.PA 1957).

108 *Largess v Tatem* 211 A 2d 398 VT 1972; *Langford v Kosterlito* 290 PAL 80, CAL 1930.

109 *Bolam v Field* 75 MO APP 594, MO 18 1898; *Denson v Dean* 133 NE 125, NY 1921.

110 *Darling v Charleston Community Memorial Hospital* 200 NE 2d 149, 211 NE 2d 253 ILL 1965; *Reed v Church* 8 SE 2d 285 LA 1940.

6.3 THE DOCTOR'S/HOSPITAL'S STANDARD OF CARE

6.3.1 SOUTH AFRICA

6.3.1.1 Legal Writings

It is generally accepted amongst legal writers that, as the work of the doctor/hospital requires some form of skill, the standard of care required of the medical practitioner is upgraded, in that, the medical practitioner engages in an activity calling for expertise. [111]

In the light of the above, the criteria used in measuring the conduct of the medical practitioner are no longer an objective test, in which the hypothetical or fictitious reasonable person sets the standard. [112] The criteria applied have shifted to a more subjective test, in which the reasonable doctor in the same position as the individual doctor sets the standard.

The criteria used for measuring the conduct of the medical practitioner are that of the reasonable expert - the reasonable practitioner or the reasonable specialist whichever branch of the medical field is applicable.

In deciding the question of reasonableness, our courts have regard to the meaning attached thereto by our legal writers. [113]

The test for the standard of care expected of a medical practitioner is often formulated as:

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111 See Boberg (1984) 346; McKerron (1971) 38; Neethling Potgieter and Visser (1996) 133; Van der Merwe and Olivier (1989) 142; Van der Walt (1979) 70; Van Oosten (1996) 81 - 82; See further Carstens and Pearmain (2007) 619.

112 Boberg (1984) 346. The author formulates the ratio for the shift in the criteria as follows: *"Obviously the ordinary reasonable man test of negligence cannot be applied to an activity calling for expertise that the ordinary man does not possess. One cannot judge a surgeon's conduct by asking how a diligens paterfamilias would have operated, for either he would not have operated at all (which is most likely) or, if he would have operated (in some rare emergency), he would no doubt have done worse than even the most barbarous surgeon."* See further Carstens and Pearmain (2007) 619ff.

113 See Van Oosten (1996) 82 who defines reasonableness in the medical context as: *"Not the highest possible degree of professional care and skill"* and further *".... the standard is thus based not on what can be expected of the exceptionally able doctor"* but*".... reasonable knowledge, ability, experience, care, skill and diligence"* is expected of *".... the ordinary or average doctor endowed with the general level of knowledge, ability, experience, care, skill and diligence possessed and exercised by the profession, bearing in mind that a doctor is a human being and not a machine and that no human being is infallible."* See also Gordon Turner and Price (1953) 110; Strauss (1984) 36ff; See further Strauss and McQuiod-Mason LAWSA (1983) 151. The author describes reasonableness as *"the general level of skill and diligence possessed and exercised by members of the branch of the profession to which the practitioner belongs."* See also Dada and McQuiod-Mason (1983) 21 -22; See further Strauss (1991) 95. The author takes the view that the duty of care of a doctor is *"a duty no greater than to treat the patient with due care and skill, unless the doctor has expressly guaranteed that, the patient will be healed by his treatment - something which the prudent doctor will generally not do."* Carstens and Pearmain (2007) 619ff.

How would a reasonably competent practitioner in that branch of medicine have acted in a similar situation? If a reasonable practitioner would have foreseen the likelihood of harm and would have taken steps to guard against its occurrence but the medical practitioner whose conduct is under investigation failed to, his conduct would fall below the standard of care expected. [114]

6.3.1.2 **Case Law**

One of the first cases, in South Africa, in which the court was asked to deal with the degree of skill and care required of a medical practitioner, is to be found in the Cape decision of *Lee v Schonberg*. [115] Relying heavily on an English decision of *Lampher v Phipos,* De Villiers CJ lays down the following general rule:

"There can be no doubt that a medical practitioner, like any professional man, is called upon to bring to bear a reasonable amount of skill and care in any case to which he has to attend; and that where it is shown that he has not exercised such skill and care, he will be liable in damages." [116]

In a later decision of *Kovasky v Krige* [117] the court was again called upon to pronounce upon the degree of skill and care expected of a medical practitioner. Sir John Buchanan also relied upon the English decision of *Lampher v Phipos* when he remarks:

"The principles there lay down have been applied in this court, and with them I entirely agree. As to capacity, Chief Justice Tindal said that every person who enters into a learned profession undertakes to bring to it the exercise of a reasonable care and skill. Speaking of a surgeon, he says he does not undertake that he will perform a cure, nor does he undertake to use the highest possible degree of skill, he undertakes to bring a fair, reasonable and competent degree of skill to his case." [118]

The principle that the medical practitioner's negligence conduct must be measured against the conduct of a reasonable skilled practitioner in his or her field was confirmed without reservation in an Appeal Court decision of *Mitchell v Dixon* [119] in which Innes ACJ stated that:

"A medical practitioner is not expected to bring to bear upon the case entrusted to him the highest possible degree

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114 See Dada and McQuoid-Mason (2001) 23; See also McQuoid-Mason and Strauss (1983) 151; Carstens and Pearmain (2007) 619ff.

115 (1877) 7 BUCH 136.

116 See *Lee v Schönberg* (1877) 7 BUCH 136.

117 (1910) 20 CTR 822.

118 See *Kovalsky v Krige* (1910) 20 CTR 823.

119 1914 AD 519 at 525.

of professional skill, but he is bound to employ reasonable skill and care; and he is liable for the consequences if he does not." [120]

The fore stated principle has also been followed in a host of latter judgements. [121]
It has also been decided before by our courts that, what is expected is, however, not the highest possible degree of professional care and skill but rather what can be expected of the ordinary or average doctor applying the general level of knowledge, ability, experience, care, skill and diligence belonging to the branch of the profession to which the practitioner belongs.

The position is set out as follows in the *locus classicus* of *Van Wyk v Lewis* [122] in which Innes CJ expressed himself as follows:

"It was pointed out by this Court, in Mitchell v Dixon, that `a medical practitioner is not expected to bring to bear upon the case entrusted to him the highest possible degree of professional skill, but he is bound to employ reasonable skill and care'. And in deciding what is reasonable the Court will have regard to the general level of skill and diligence possessed and exercised at the time by the members of the branch of the profession to which the practitioner belongs. The evidence of qualified surgeons or physicians is of the greatest assistance in estimating that general level."

And further: Wessel, J.A. said:
"We cannot determine in the abstract whether a surgeon has or has not exhibited reasonable skill and care. We must place ourselves as nearly as possible in the exact position in which the surgeon found himself when he conducted the particular operation and we must then determine from all the circumstances whether he acted with reasonable care or negligently. Did he act as an average surgeon placed in similar circumstances would have acted, or did he manifestly fall short of the skill, care, and judgement of the average surgeon in similar circumstances? If he falls short he is negligent." [123]

The said general principle has also been discussed and more clearly defined in a number of reported criminal cases in which medical practitioners found themselves on trial.

The elevated degree of care and skill expected of a doctor as an expert was formulated as follows by Steyn J in *R v Van Schoor*: [124]

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120 *Mitchell v Dixon* 1914 AD 519 at 525.

121 *Coppen v Impey* 1916 CPD 309 at 314; *Esterhuizen v Administrator Transvaal* 1957 (3) SA 710 (T) 723 - 724; *Buls v Tsatsarolakis* 1976 (2) SA 891(T) 893 -894; *Byrne v East London Hospital Board* 1926 EDL 128 at 157 - 158; *Dale v Hamilton* 1924 (WLD) 184 at 200; *Lymbery v Jefferies* 1925 (AD) 236 at 245; *Castell v De Greef* 1993(3) SA 501(C).

122 1924 (AD) 438 at 444.

123 *Van Wyk v Lewis* 1924 (AD) 438 at 444.

124 1948 (4) SA 349 (C) 461 to 462; See also *Webb v Isaac* (1915) 275, 276, 278, 279; *Coppen v Impey* 1916 CPD 309 at 314; *Esterhuizen v Administrator Transvaal* 1957 (3) SA 710 (T) 723-724; *Buls v Tsatsarolakis* 1976

"Coming to the case of a man required to do work of an expert as e.g. a doctor dealing with life or death of his patient, he too must conform to the acts of a reasonable man, but the reasonable man is now viewed in the light of an expert, and even such expert doctor, in the treatment of his patients, would be required to exercise in certain circumstances a greater degree of care and caution than in other circumstances." [125]

The degree of skill expected of a medical practitioner was also defined as follows in *R v Van der Merwe* [126] in which Roper J remarked:

"Negligence has a somewhat special application in the case of a member of a skilled profession such as a doctor, because a man who practises a profession which requires skill holds himself out as possessing the necessary skill and he undertakes to perform the services required from him with reasonable skill and ability. That is what is expected of him and that is what he undertakes, and therefore he is expected to possess a degree of skill which corresponds to the ordinary level of skill in the profession to which he belongs." [127]

As to what constitutes reasonableness, in the same judgement Roper J, remarks:

"In deciding what is reasonable regard must be had to the general level of skill and diligence possessed and exercised by the members of the branch of the profession to which the practitioner belongs. The standard is the reasonable care, skill and diligence which are ordinarily exercised in the profession generally." [128]

The same principle applies also to anyone else who performs a medical function [129] and is not only restricted to medical practitioners.

6.3.1.3 **Legal Opinion**

(1) It is generally accepted by our legal writers [130] and our courts [131] that, as the work

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(2) SA 891 (T) 893-894; *Byrne v East London Hospital Board* 1926 EDL 126 at 157-158; *Dale v Hamilton* 1924 (WLD) 184 at 200; *Lymbery v Jefferies* 1925 (AD) 236 at 245; *Castell v De Greef* 1993 (3) SA 501 (C).

125 *R v Van Schoor* 1948 (4) SA 349 (C) 350.

126 1953 (2) PH H 124 (W).

127 *R v Van der Merwe* 1953 (2) PH H 124 (W).

128 *R v Van der Merwe* 1953 (2) BH H 124 (W).

129 In the case of *S v Mahlalela* 1966 (1) SA 226 (A) the accused was a herb doctor who had concocted a herb mixture which he had administered to the deceased, a 7-year old girl, as a consequence of which, she died due to vegetable poisoning and who was subsequently convicted of culpable homicide. The Court subsequently held that the accused, by reason of his profession as a herb doctor, acquired sufficient knowledge of the nature and qualities of the trees and plants from which he extracted herb medicine, occupied the position of a reasonable expert, who would have known the herb mixture to be poisonous and would have foreseen death as a possible consequence of his conduct.

130 See Boberg *The Law of Delict* (1984) 346; McKerron *The Law of Delict* (1971) 38; Neethling Potgieter and Visser *Deliktereg* (1996) 133; Van der Merwe and Olivier *Die Onregmatige Daad in die Suid-Afrikaanse Reg* (1989) 142; Van der Walt *Delict: Principles and Cases* (1979) 70; Van Oosten *Encyclopaedia* (1996) 81-82; Carstens and Pearmain *Foundational Principles of South African Medical Law* (2007) 619ff.

of a doctor and specialist require some form of skill, the standard of care required from the doctor and specialist or hospital is no longer that of a hypothetical or fictitious reasonable person.

(2) What is now required is a more subjective test in which the reasonable doctor or specialist, in the same position as the individual doctor or specialist, set the standard, often referred to as the reasonable expert, be that the reasonable doctor or the reasonable specialist, depending on which branch of the medical field is applicable. [132]

(3) Reasonableness in the medical context is defined by our legal writers, [133] and the courts alike, [134] as not the highest possible degree of professional care and skill, but rather, the ordinary or average doctor or specialist endowed with the general level of knowledge, ability, experience, care, skill and diligence possessed by the doctor or specialist in that branch of the medical profession applicable.

6.3.2 **ENGLAND**

6.3.2.1 **Legal Writings**

As a general starting point, it must be noted, that in assessing professional negligence in the medical sphere, it is common cause that the standard of skill and care is elevated to the level of the members of the profession and not measured in terms of the reasonable man or

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131 For case law see *Lee v Schönberg* (1877) 7 BUCH 136, *Kovasky v Krige* (1910) 20 CTR 822, *Mitchell v Dixon* 1914 (AD) 519. See also *Coppen v Impey* 1916 CPD 309 at 314; *Esterhuizen v Administrator Transvaal* 1957 (3) SA 710 (T) 723-724; *Buls v Tsatsarolakis* 1976 (2) SA 891 (T) 893-894; *Byrne v East London Hospital Board* 1926 EDL 126 at 157-158; *Dale v Hamilton* 1924 (WLD) 184 at 200; *Lymbery v Jefferies* 1925 (AD) 236 at 245; *Castell v De Greef* 1993 (3) SA 501 (C); *R v Van der Merwe* 1953 (2) PH H 124 (W).

132 See Boberg *The Law of Delict* (1984) 346; Carstens and Pearmain *Foundational Principles of South African Medical Law* (2007) 619ff. For case law see *R v Van der Merwe* 1953 (2) PH 4124 (W).

133 Van Oosten *Encyclopaedia* (1996) 82, Gordon Turner and Price *Medical Jurisprudence* (1991) 110; Strauss and McQuoid-Mason *LAWSA* 1983 Vol. 17 Par 151, Dada and McQuoid-Mason *Introduction to Medico-Legal Aspects* (2001) 21-22, Strauss *Doctor Patient and The Law* (1991) 95; Carstens and Pearmain *Principles of South African Medical Law* (2007) 617ff.

134 For case law see *Mitchell v Dixon* 1914 (AD) 59 at 525. See also *Coppen v Impey* 1916 CPD 309 at 314; *Esterhuizen v Administrator Transvaal* 1957 (3) SA 710 (T) 723-724; *Buls v Tsatsarolakis* 1976 (2) SA 891 (T) 893-894; *Byrne v East London Hospital Board* 1926 EDL 126 at 157-158; *Dale v Hamilton* 1924 (WLD) 184 at 200; *Lymbery v Jefferies* 1925 (AD) 236 at 245; *Castell v De Greef* 1993 (3) SA 501 (C); *Van Wyk v Lewis* 1924 (AD) 438 at 444; *R v Van der Merwe* 1953 (2) PH H 124 (W).

the man on the Clapham omnibus as often referred to by the writers and the courts alike. [135]

Insofar as the qualified medical practitioner is concerned, broad consensus exist amongst English writers that the qualified medical practitioner will be liable in an action for negligence if he fails to exercise that degree of care and skill which is to be expected of the medical practitioner of the class to which he belongs. [136]

6.3.2.2 **Case Law**

In what is possibly the leading authority in English case law, McNair J, in the case of *Bolam v Friern Hospital Management Committee* [137] dealt with the standard of the reasonable professional, including, the doctor, and the specialist. The facts of the case were briefly the following: Mr Bolam was a patient who suffered from depressive illness. His general practitioner referred him to a consultant psychiatrist, who recommended electro-convulsive therapy. There was a school of thought which believed that muscle relaxant drugs should be used during the convulsion, with the intention of preventing the occurrence of fractures. However, the psychiatrist to whom Mr Bolam was referred belonged to a different school of thought, who believed that there were side effects to the use of such drugs and that they outweighed the possible benefits. Mr Bolam duly underwent the treatment without the relaxants, but he, unfortunately, found that both his hips had been fractured in the process. He therefore sued the psychiatrist, together with the anaesthetist, for negligence in terms of failure to use the muscle relaxants.

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135 See Jackson and Powell (1997) 52; See also Scott (1995) 19. The author in justifying the elevated standard beyond that of the man on the Clapham omnibus states: *"In medical negligence cases, it would be unfair to the defending doctor to impose the expectations too high a standard and it would be correspondently unfair to the plaintiff to expect him to accept a lower standard."* See further Kennedy and Grubb (1998) 336. The authors motivate the elevated standard of the doctor as follows: *"An individual who professes a special skill is indeed, nor by the standard of the man on the Clapham omnibus, but by the standards of his peers. For the `reasonable man' is substituted the `reasonable professional'; be it doctor, lawyer, accountant, architect etc."* See further Wright (1993) 30. The author in elevating the standard of care and skill of professional people including the doctor opine that: *"The standard applicable is not the conduct of the reasonable law man but the conduct of the reasonable member of that profession or calling."*

136 See Wright (1993) 20. The writer motivates the expectations of the average practitioner in that: *"He will not be judged by the standards of the least qualified member of his class, or by those of the most highly qualified, but by the standards of the ordinarily careful and competent practitioner of that class."* See also Scott (1995) 16. The author opines that generally general practitioners have statutory obligations in terms of the regulations set out in the Family Health Services authority which provide that the general practitioners owes the patient *"a duty to exercise all reasonable skill and care of the kind to be expected of a general practitioner." Contra* Kennedy and Grubb (1998) 237 who prefer that the standard ought to be measured against the reasonable competent practitioner with reference to the "hypothetical reasonable doctor".

137 1957 2 ALL ER 118.

McNair J, in what is now widely known as the `Bolam Test', and subsequently approved by the House of Lords on a number of occasions and what is now regarded as the touchstone of liability for medical negligence, directed the jury as follows:

"But where you get a situation which involves the use of some special skill or competence, then the test whether there has been negligence or not is not the test of the man on the Clapham omnibus, because he has not got the special skill. The test is the standard of the ordinary skilled man exercising and professing to have that special skill. A man need not possess the highest expert skill at the risk of being found negligent, it is sufficient if he exercises the ordinary skill of an ordinary competent man exercising that particular art." [138]

McNair J dismissing the plaintiff's action held:

"A doctor is not guilty of negligence if he has acted in accordance with the practice accepted as proper by a responsible body of medical men skilled in that particular art. Putting it the other way round, a doctor is not negligent if he is acting in accordance with such a practice, merely because there is a body of opinion that takes a contrary view." [139]

The test demands that the defendant acts in accordance with accepted practice, which means the practice followed by a responsible body of medical opinion.

In *Hunter v Hanley* [140] a Scottish judgment referred to in the Bolam case, Lord President Clyde dealt with the question of different professional practices as follows:

"In the realm of diagnosis and treatment there is ample scope for genuine difference of opinion and one man clearly is not negligent merely because his conclusion differs from that of other professional men, nor because he has displayed less skill or knowledge than others would have shown. The true test for establishing negligence in diagnosis or treatment on the part of a doctor is whether he has been proved to be guilty of such failure as no doctor of ordinary skill would be guilty of it acting with ordinary care." [141]

Where there is more than one common practice, as the Bolam test contemplates, the medical practitioner will be exonerated from liability if he/she shows that he/she followed one of the practices. In *Maynard v West Midlands Regional Health Authority* [142] Lord

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138 *Bolam v Friern Hospital Management Committee* (1957) 2 ALL ER 118 121. This case clearly established the precedent that doctors, and indeed other people with special skills, are to be judged against the standards of their colleagues who do the same kind of work.

139 *Bolam v Friern Hospital Management Committee* (1957) 2 ALL ER 118.

140 1955 SC 200 204-5.

141 *Hunter v Hanley* 1955 SC 200 204-5. The principle enunciated in this case was met with approval in the cases of *Maynard v West Midlands Regional Health Authority* (1984) 1 WLR 534; *Bolam v Friern Hospital Management Committee* (1957) 2 ALL ER 118; *Sidaway v Bethlem Royal Hospital* (1985) AC 871; *Whitehouse v Jordan* (1980) 1 ALL ER 650.

142 (1984) 1 WLR 634.

Scarman held:

"It is not enough to show that there is a body of competent professional opinion which considers that theirs was a wrong decision, if there also exists a body of professional opinion, equally competent, which supports the decision as reasonable in the circumstances. Differences of opinion and practice exist, and will always exist in the medical as in other professions. There is seldom any one answer exclusive of all others to problems of professional judgement. A court may prefer one body of opinion to the other; but that is no basis for a conclusion of negligence." [143]

But Lord Scarman, in the Maynard case, suggested that if uncertainty prevails as to which body of professional opinion to choose from, the `seal of approval' would fall on a distinguished body of professional opinion, held in good faith, would acquit the defendant of negligence. The approach followed by Scarman in the Maynard case was even more apparent in Lord Scarman's speech in *Sidaway V Bethlem Royal Hospital Governors* [144] where he stated:

"The Bolam principle may be formulated as a rule that a doctor is not negligent if he acts in accordance with a practice accepted at the time as proper by a responsible body of medical opinion even though other doctors adopt a different practice. In short, the law imposes the duty of care, but the standard of care is a matter of medical judgement." [145]

6.3.2.3 **Legal Opinion**

(1) In England, as is the position in South Africa, the standard of care and skill is also elevated beyond the measure of the reasonable man (or the man on the Clapham Omnibus as often referred to by the English writers and the courts alike). [146]

(2) What is also required is more a subjective test, in which the standard of care of the doctor or specialist is measured according to the class to which the doctor and specialist belongs. [147]

(3) But, likewise, the doctor or specialist will not be judged by the standards of the least qualified member of his class nor by those of the most highly qualified. In the

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143 *Maynard v West Midlands Regional Health Authority* (1984) 1 WLR 634.

144 (1985) 1 ALL E.R. 643 (A.C.).

145 *Sidaway v Bethlem Royal Hospital Governers* (1985) 1 ALL E.R. 643 (A.C.).

146 Jackson and Powell *Professional Negligence* (1997) 52; Scott *The General Practitioner and the Law of Negligence* (1995) 19; Kennedy and Grubb *Principles of Medical Law* (1998) 336; Wright *Medical Malpractice* (1993) 30; for case law see *Bolam v Friern Hospital Management Committee* 1957 2 ALL ER 118 at 121.

147 Wright *Medical Malpractice* (1993) 20, Scott *The General Practitioner and the Law of Negligence* (1995) 16; Kennedy and Grubb *Principles of Medical Law* (1998) 237. For case law see *Bolam v Friern Hospital Management Committee* 1957 2 ALL ER 118 at 121; *Maynard v West Midlands Regional Health Authority* (1984) 1 WLR. 634, *Sidaway v Bethlem Royal Hospital Governors* (1985) 1 ALL E.R. 643 (AC).

class to which he/she belongs, what is expected of him/her is the standard of ordinarily careful and competent medical practitioners of that class. [148]

6.3.3 UNITED STATES OF AMERICA

6.3.3.1 Legal Writings

In measuring the doctor's standard of care, the core opinion in legal writings in the United States of America is that a physician is not considered, by the law, to be holding himself out as the most highly qualified of physicians. Nor does a physician in accepting a patient tacitly declare that he possesses the highest level of skill. [149]

What is expected of him/her as a physician, however, is to employ such reasonable skill and care as are commonly exercised by advanced physicians in the same general school of practice and in the same locality or in localities substantially similar to it. [150]

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148 Wright *Medical Malpractice* (1993) 20. For case law see *Hunter v Hanley* 1955 SC 200 at 204-205. The principle enunciated in this case was the approval in the cases of *Maynard v West Midlands Regional Health Authority* (1984) 1 WLR 534; *Bolam v Friern Hospital Management Committee* (1957) 2 ALL ER 118; *Sidaway v Bethlem Royal Hospital* (1985) AC 871; *Whitehouse v Jordan* (1980) 1 ALL ER 650.

149 See Waltz and Inbau (1971) 45; See also Furrow et al (1995) 237. The authors state that: *"A physician is not required to exercise the highest degree of care possible."* What is required of the physician is that he holds himself out as *"a reasonable physician under similar circumstances."* See *American College of Legal Medicine* (1991) 43. See also Southwick and Slee (1988) 52. The authors describe the standard of care as *"..... reasonable and ordinary care, skill and diligence as physicians and surgeons in good standing in the same neighbourhood, in the general line of practice, ordinarily exercised in like uses."* The writers Hill and McMenamin in "Contracts, Agency, and Partnership" a chapter published in *American College of Legal Medicine* (1991) 62 in acknowledging the fiduciary relationship between physician and patient based on contract holds the view that in accepting the patient *"the physician impliedly promises the patient that he or she will exercise that degree of skill ordinarily possessed by his or her colleagues and practice according to accepted standards."* See also Peters et al (1981) 155-156; See also Moore and Kramer (1990) 6-7; See further Holder (1975) 3. The author states that in the absence of any other undertaking by the physician the courts usually hold that the physician made *"that he has the normal degree of skill, care and knowledge and that he will use all three in treating the patient."* Holder (1975) at 43 formulates the standard against which conduct a physician who allegedly transgressed its reasons namely: *"The reasonably prudent physician or surgeon, acting under the same circumstances."* See also Peter et al (1981) 153. The standard set to be achieved is formulated by Shea and Sidley (1985) 95ff: *".... nor is he required to exercise extraordinary skill and care, nor even the highest degree of skill and care possible. (Not all persons can be extraordinary in their ability to perform their profession). The law requires only what is reasonable under the circumstances."* See also Potgar et al (1996) 47.

150 The application of the so-called `locality rule' which has as a result the localization of the standard of care and skill to a geographical area is widely recognised by the American legal writers. See *American College of Legal Medicine* (1991) 132-133. See further Holder (1975) 53. The author holds the view that the ratio behind establishing the rule stem from the fact that: *" ... physicians practicing in isolated rural areas, for example, should not be expected to be as well trained and up-to-date as a physician in an urban environment."* Southwick and Slee (1988) 56 also recognize that in certain cases physicians would not be responsible for providing certain care *"if the necessary facilities or resources were not available." contra* Waltz and Inbau (1971) 64. The writers hold the view that the traditional `locality rule' is losing ground in the modern era in that *"the education and training which he has received in institutions in which the method and scope of instruction and the technique in training are substantially uniform."* The writers are also of the opinion that the very reason for introducing the `locality rule' was founded in communications being slow or non-existent has in modern times changed in that: *" .... it has lost much of it significance today with the increasing number and excellence of medical schools, the free inter change of scientific*

What emerges from the fore stated) is that by accepting a patient, the physician or surgeon impliedly represents that he has the necessary training, knowledge, and skill and that he will employ these attributes in the way any reputable physician ordinarily would. But it does not entail that the physician or surgeon guarantees total success whenever treatment is undertaken. [151]

In the absence of an express contractual promise, the physician is not, however, considered a guarantor of good results. [152]

6.3.3.2 **Case Law**

The first reported American malpractice action decided upon by a court in Connecticut, America was that of *Cross v Guthery*. [153] The plaintiff averred that his wife died from a mastectomy performed in a negligent manner by the physician. The court found for the Plaintiff and held that the physician performed the operation in the most unskilful, ignorant and cruel manner, contrary to all well-known rules and principles of practice in such cases. [154] Although the court does not motivate what is deemed to be "well-known principles of practice", it can safely be assumed that, in finding in favour of the plaintiff, the court, by implication, found that the physician deviated from the acceptable standard of care at the time of the operation and in so doing, he failed to exercise reasonable care and skill. Instead the operation was carried out in a cruel manner causing a lot of pain.

The case which is regarded as the *locus classicus* in American Case Law concerning the

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information, and the consequent tendency to harmonize medicine standards throughout the country." See also Furrow et al (1995) 238 who opine that most jurisdictions have moved from the `locality rule' to a natural standard for specialists. However the standard of practice for general practitioners will still be based on the local community or a similar community. See also Peters et al (1981) 155-157; See further Southwick and Slee (1988) 56.

151 See Waltz and Inbau (1971) 46. The authors opine that: *"The working of miracles is no more expected of the medical profession than of any other calling."* See also Alton (1977) 24 who warns physicians against the consequences of guaranteeing a result or a cure in that *"if an unavoidable complication occurs, preventing the anticipated result, the physician has still breached his obligation and are liable."* See also Southwick and Slee (1988) 42.

152 See Furrow et al (1995) 237. The authors state that: *"A physician is not a guarantor of good results."* See also *American College of Legal Medicine* (1991) 63 122-123 208. The authors state that: *"Without a specific warranty, courts will not infer that a physician guaranteed the success of treatment."* See also Holder (1975) 3. The author opines that: *"Where however, a physician does guarantee results, and the results are not obtained, he is liable for breach of warranty even if he has used the highest skill."*

153 *Cross v Guthery* 2 Root 90 (C Court 1794).

154 *Cross v Guthery supra* 91.

duty of care of a physician towards his/her patient and the standard of care required is that of *Pike v Honsinger*. [155] The facts of this case can briefly be sketched as follows: "The patient had been kicked in the knee by a horse and claimed that the defendant had set it in a negligent manner, resulting in a failure of the bones to unite. The court said:

"The law relating to malpractice is simply and well settled, although not always easy of application. A physician and surgeon, by taking charge of a case, impliedly represents that he possesses, and the law places upon him the duty of possessing, that reasonable degree of learning and skill that is ordinarily possessed by physicians and surgeons in the locality in which he practices, and which is ordinarily regarded by those conversant with the employment as is necessary to qualify him to engage in the business of practising medicine and surgery. Upon consenting to treat a patient, it becomes his duty to use reasonable care and diligence in the exercise of his skill and the application of his learning to accomplish the purpose for which he was employed. He is under the further obligation to use his best judgement in exercising his skill and applying his knowledge. The law holds him liable for an injury to his patient resulting from want of the requisite skill and knowledge or the omission to exercise reasonable care or the failure to use his best judgement. The rule in relation to learning and skill does not require the surgeon to possess that extraordinary learning and skill which belong only to a few men of rare endowments, but such as is possessed by the average member of the medical profession in good standing. The rule of reasonable care and diligence does not require the use of the highest possible degree of care and to render a physician and surgeon liable, it is not enough that there has been a less degree of care than some other medical man might have shown or less than even he himself might have bestowed, but there must be a want of ordinary and reasonable care, leading to a bad result." [156]

The Pike judgement is of great importance in that, the principle enunciated in this case, set a standard of care which includes, firstly, that the physician possesses a reasonable degree of learning and skill which he will apply with reasonable care and diligence, and secondly, the physician is not expected to possess extraordinary learning and skill, but, rather as is possessed by the average member of the medical profession in good standing. Therefore, what is expected of the physician is reasonable care and skill.

The Supreme Court of Indiana broadens this definition in 1938 in the case of *Adkins v Ropp*. [157] This case involved a patient who had lost the sight of one eye. He claimed that the defendant had been negligent in removing a foreign body from it and the eye had then become infected as the result of the negligence. The defendant argued that the infection was an unavoidable result of the original injury. That court said:

"When a physician and surgeon assumes to treat and care for a patient, in the absence of a special agreement, he is held in law to have impliedly contracted that he possesses the reasonable and ordinary qualifications of his profession and that he will exercise at least reasonable skill, care and diligence in his treatment of him. This implied contract on the part of the physician does not include a promise to effect a cure and negligence cannot be imputed because a cure is not effected, but he does impliedly promise that he will sue due diligence and ordinary skill in his treatment of the patient so that a cure may follow such care and skill, and this degree of care and skill is required of him, not only I performing an operation or administering first treatments, but he is held to the like degree of care

155 49 NE 760 New York (1898).

156 *Pike v Honsinger* 49 NE 760, NY. 1898.

157 14 NE 2d 727, Ind. 1938.

and skill in the necessary subsequent treatments unless he is excused from further service by the patient himself, or the physician or surgeon upon due notice refuses to further treat the case. In determining whether the physician or surgeon has exercised the degree of skill and care which the law requires, regard must be had to the advanced state of the profession at the time of treatment and in the locality in which the physician or surgeon practices."

The Adkins case expanded on the Pike judgement in that a physician is not expected to guarantee a cure. Therefore, a physician will not incur liability if an adverse and unforeseeable result ensues for as long as the physician exercised due care and skill.

The physician will incur liability if he does not supply subsequent treatment unless he is excused from further service by the patient himself, or the physician or surgeon upon due notice, refuses to further treat the case.

The fore stated conduct, is measured against that of the average reasonable physician or Surgeon, in the locality in which he practices, and, at the state of advance of the profession at the time of treatment.

6.3.3.3 **Legal Opinion**

(1) The degree of care and skill expected of a physician and a specialist, as is the position in England and South Africa, is also elevated beyond that of a reasonable person. [158]

(2) The standard of care is also measured in terms of a subjective test in which the standard of the physician or specialist in question is measured against the degree of care and skill ordinarily possessed by his or her colleagues and practice according to accepted standards (referred to often as the ordinary care, skill and diligence as physicians and surgeons in good standing in the same neighbourhood, in the general line of practice). [159]

(3) The physician or surgeon is also not judged by the highest degree of care and skill nor the lowest on the grid, but rather, on what is reasonable under the

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158 See Waltz and Inbau *Medical Jurisprudence* (1971) 45, Furrow et al *Health Law* (1995) 237; Southwick and Slee *The Law of Hospital and Healthcare Administration* (1988) 52, Hill and McMenamin "Contracts, Agency and Partnership" A Chapter published in the *American College of Legal Medicine* (1991).

159 See Waltz and Inbau *Medical Jurisprudence* (1971) 45, Furrow et al *Health Law* (1995) 237; Southwick and Slee *The Law of Hospital and Healthcare Administration* (1988) 52, Hill and McMenamin "Contracts, Agency and Partnership" A Chapter published in the *American College of Legal Medicine* (1991); Peters et al *The Law of Medical Practise in Michigan* (1981) 155-156; Moore and Kramer *Medical Malpractice: Discovery and Trial* (1990) 6-7, Holder *Medical Malpractice Law* (1975) 3, 43, Shea and Sidley *Law and Ethics* (1985) 195ff, Potgar et al *Legal Aspects of Healthcare Administration* (1996) 47. For American case law see the leading case of *Pike v Honsinger* 49 NE 760 New York (1898); *Adkins v Ropp* 14 NE 2d 727 Ind. 1938.

circumstances. [160]

6.4 THE ELEVATED STANDARD OF CARE OF THE MEDICAL SPECIALIST

6.4.1 SOUTH AFRICA

6.4.1.1 Legal Writings

It is generally the opinion amongst our legal writers that the experience, knowledge and the degree of care and skill required from a general medical practitioner to assess whether his or her conduct constitutes negligence, is not the same as that required from a medical specialist. [161]

Of the specialist is expected a greater degree of skill than that of a general practitioner. [162] But, notwithstanding this greater expectation required from the specialist, his or her conduct nevertheless, is measured against the average or reasonable specialist attached to the branch of the profession to which he or she belongs. [163]

6.4.1.2 Case Law

A clear distinction is drawn, in our case law, between the degree of knowledge, experience, care and skill expected of a specialist, as opposed to that of a general practitioner.
Of a specialist, a greater degree of skill is expected than that of a general practitioner. [164]

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160 See Waltz and Inbau *Medical Jurisprudence* (1971) 45, Furrow et al *Health Law* (1995) 237; Southwick and Slee *The Law of Hospital and Healthcare Administration* (1988) 52, Hill and McMenamin "Contracts, Agency and Partnership" A Chapter published in the *American College of Legal Medicine* (1991); Peters et al *The Law of Medical Practise in Michigan* (1981) 155-156; Moore and Kramer *Medical Malpractice: Discovery and Trial* (1990) 6-7, Holder *Medical Malpractice Law* (1975) 3, 43, Shea and Sidley *Law and Ethics* (1985) 195ff, Potgar et al *Legal Aspects of Healthcare Administration* (1996) 47. For American case law see the leading case of *Pike v Honsinger* 49 NE 760 New York (1898); *Adkins v Ropp* 14 NE 2d 727 Ind. 1938.

161 See Van Oosten (1986) 19; See also Van Oosten (1996) 83; Carstens 1996 Unpublished LLD Thesis (1996) 157; Carstens and Pearmain (2007) 623ff.

162 See Gordon Turner and Price (1953) 113. The writers argue the ratio behind such greater expectancy arises from the fact that *"a specialist by definition holds himself out as possessing greater skill in his speciality than can reasonably be expected from the doctor, whose practise covers a much wider field."* The writers add *"the specialist should be particularly skilled in the speciality"*. See also Strauss and Strydom (1967) 268; Neethling Visser and Potgieter (1996) 134; Van der Walt (1974) 69; Dada and McQuiod-Mason (2001) 22; McQuiod-Mason and Strauss (1983) 151; Carstens (1996) 137; Carstens and Pearmain (2007) 623ff.

163 See Gordon Turner and Price (1953) 113. The author caution that the skill required of the specialist is *"that of an average specialist, not that of an exceptionally able of gifted one."* See also Strauss and Strydom (1967) 124. The authors share the view *"the yardstick for measuring the conduct of the specialist should be the branch of the profession to which the specialist belongs."* Carstens and Pearmain (2007) 623.

164 *Van Wyk v Lewis* (1924) (AD) 438 at 457.

His or her standard of conduct is elevated to the reasonable expert standard. The distinction in the expected conduct of a specialist, as opposed to that of a general practitioner, is stated as follows by Roper J in the case of *R v Van der Merwe*. [165]

> *"When a medical practitioner is tried, the test is not what a specialist would or would not have done in the circumstances, because a general practitioner is not expected to have the same degree of knowledge and skill and experience as a specialist has. When a specialist tells you that he would do this, that and the other thing it do not follow that you must expect the general practitioner to act in the same way. But the question needs to be begged what is the common knowledge in the branch of the profession to which the accused belongs? What is the common knowledge and accepted practice among the general practitioners? When the specialists tell you what is common knowledge in the profession that is evidence which you are entitled to rely on, because the general practitioner is expected to be possessed of knowledge which is common in the profession."* [166]

As a consequence thereof, he or she will be judged with the reasonable expert standard and may, very well, incur liability for negligence, being ascribed to his or her want of knowledge, experience, skill and diligence. [167]

What is, however, of further importance, is where the standard of conduct of a specialist is assessed; his conduct is measured against the reasonable specialist in terms of the branch of the profession to which he or she belongs. [168] A greater standard of care and skill is also expected of a practitioner and/or nursing staff where more complicated medical procedures are executed. [169]

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165 1953 (2) PH H 124 (W). This dictum was endorsed by Bekker J in *Esterhuizen v Administrator, Transvaal* 1957 (3) SA 710 (T) at 723 - 724; The distinction in the standard of care expected from a specialist, as a reasonable expert, as opposed to that of the general practitioner, is also recognised in *Buls v Tsatsarolakis* 1996 (2) SA 891 (T) 893 - 894; *S v Kruger* (1976) (3) SA 290 (O); *S v Mkwetshana* (1965) (2) SA 493 (N) at 496; *Pringle v Administrator, Transvaal* (1990) (2) SA 379 (W) at 384.

166 *R v Van der Merwe* 1953 (2) PH 11 124 (W).

167 The position is described as follows in the case of *Coppen v Impey* 1916 CPD 314 in which Kotze J stated: *"Before doing so it will be advisable to state succinctly the law applicable to the responsibility of a medical man in the treatment of his patient. While, on the one hand, he does not undertake to perform a cure, or to treat his patient with the utmost skill and competency, he will, on the other hand, be liable for negligence or unskilfulness in his treatment; for holding himself out as a professional man, he undertakes to perform the service required of him with reasonable skill and ability. Unskilfulness, on his part is equivalent to negligence and renders him liable to a plaintiff, who has sustained injury there from, the maxim of the law being imperitia culpae adnumeratur."* See also *Byrne v East London Hospital Board* 1926 EDL 138, 143, 153, 158; *R v Van Schoor* 1948 (4) SA 349 (C) at 351 - 352. In the case of *S v Mkwetshana* 1965 (2) 493 the court summarizes the position as follows: *"Either the appellant had insufficient knowledge and experience of the drug, in which case it was negligence on his part to administer it; If he knew little, if anything, about it he was subjecting his patient to a considerable risk. For him to have done that in the light of his inexperience, and particular his inexperience of the drug and its uses, marks him as being negligent."*

168 See *Van Wyk v Lewis* (1924) (AD) 438 at 444; *R v Van der Merwe* 1953 (2) PHH 103; *Esterhuizen v Administrator, Transvaal* 1957 (3) 710 T at 723 - 724; *Buls v Tsatsarolakis* 1976 (2) SA 891 (T) at 893 - 894; *S v Mkwetshana* (1965) (2) 493 (N) at 496.

169 See *Collins v Administrator Cape* 1995 (4) SA (CPD) 73 at 82. In this case Scott J emphasized *"the need for particular care and vigilance in the case of the paediatric tracheotomy patient."* But cautioned the court *"but a standard of excellence cannot be expected which is beyond the financial resources of the hospital authority."*

6.4.1.3 **Legal Opinion**

(1) In South African Law a clear distinction is made between the experience level, level of knowledge and the degree of care and skill required from a general medical practitioner as opposed to the specialist. [170]

(2) Of the specialist is expected a greater degree of skill than that of the general medical practitioner. [171]

(3) Nonetheless, the conduct of the specialist is measured against the average or reasonable specialist attached to the branch of the profession to which he or she belongs [172]

6.4.2 **ENGLAND**

6.4.2.1 **Legal Writings**

The English writers share the view that when a medical man holds himself out as being a specialist in a particular field, whether it is in the treatment of certain conditions or in the use of certain apparatus or in any other way, he/she will necessarily be judged by higher standards than the ordinary practitioner, who does not profess any such specialized skill. [173]

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170 Van Oosten "Professional Negligence in South African Legal Practise" (1986) *Medicine and Law* 19; Van Oosten *Encyclopaedia* (1996) 83; Carstens "Die Strafregtelike en Deliktuele Aanspreeklikheid van die Geneesheer op Grond van Nalatigheid" (An Unpublished Thesis - LLD) (1996) 137ff. See also *Van Wyk v Lewis* (1924) (AD) 438 at 457; *R v Van der Merwe* 1953 (2) PH H 124 (W); *Esterhuizen v Administrator Transvaal* 1957 (3) SA 710 (T) 723-724; *Buls v Tsatsarolakis* 1996 (2) SA 891 (T) 893-894; *S v Kruger* 1976 (3) SA 290 (O); *S v Mkwetshana* 1965 (2) SA 493 (N); *Pringle v Administrator, Transvaal* 1990 (2) SA 379 (W) at 384; Carstens and Pearmain *Foundational Principles of South African Medical Law* (2007) 623.

171 Gordon Turner and Price *Medical Jurisprudence* (1953) 113; Strauss and Strydom *Die Suid-Afrikaanse Geneeskundige Reg* (1967) 268; Neethling et al *Deliktereg* (1996) 134; Van der Walt *Delict: Principles and Cases* (1979) 69; Dada and McQuoid-Mason *Introduction to Medico-Legal Aspects* (2001) 22; McQuoid-Mason and Strauss *Lawsa* Vol 17 (1983) Par 151; Carstens "Die Strafregtelike en Deliktuele Aanspreeklikheid van die Geneesheer op Grond van Nalatigheid" (An unpublished thesis - LLD) (1996) 137. See also *Van Wyk v Lewis* (1924) (AD) 438 at 457; *R v Van der Merwe* 1953 (2) PH H 124 (W); *Esterhuizen v Administrator Transvaal* 1957 (3) SA 710 (T) 723-724; *Buls v Tsatsarolakis* 1996 (2) SA 891 (T) 893-894; *S v Kruger* 1976 (2) SA 290 (O); *S v Mkwetshana* 1965 (2) SA 493 (N); *Pringle v Administrator Transvaal* 1990 (2) SA 379 (W) at 384; Carstens and Pearmain *Foundational Principles of South African Medical Law* (2007) 623.

172 *Van Wyk v Lewis* (1924) (AD) 438 at 444; *R v Van der Merwe* 153 (2) PH H 103; *Esterhuizen v Administrator, Transvaal* 1957 (3) 710 (T) at 723-724; *Buls v Tsatsarolakis* 1976 (2) SA 891 (T) at 893-894; *S v Mkwetshana* 1965 (2) SA 493 (N) at 496.

173 See Wright (1993) 22. The writer also emphasizes that: *" .... here again the specialist will be required to attain not to the very highest degree of skill and competence but to the ordinary level obtaining amongst those who specialise in the same subject."* See also Scott (1995) 33 who clearly distinguishes between the elevated standard of the specialist as opposed to the general practitioner in that "a higher standard" is expected from a surgeon. The author opines that the Bolam decision was referring "to specialism" in that "*the doctors concluded in that cases were psychiatrists and anaesthetists, and their treatment would have to be compared with that of the other doctors in that particular speciality."* See further Kennedy and Grubb (1998) 358. The authors opine that a

Where a medical practitioner generally does not possess the relevant qualifications, expertise or skill but he/she nevertheless undertakes the treatment of a patient, he/she will come under the same duty of care, since, by undertaking the treatment, he/she effectively represents that he/she does possess the skills. [174]

Where a general practitioner engages in activities which required the knowledge and skill of a specialist, whilst he/she does not possess the required attributes, resulting in the Patient, suffering damages, he/she would be negligent and held liable. [175]

6.4.2.2 **Case Law**

English courts have consistently held that the standard of conduct expected from a general practitioner differs from that of a specialist.

In the case of *Sidaway v Governors of Bethlem Royal Hospital* [176] the court recognized the elevated standard of conduct of the specialist when the court by way of Lord Bridge stated:

"The language of the Bolam test clearly requires a different degree of skill from a specialist in his field than from a general practitioner. In the field of neuro-surgery it would be necessary to substitute for the Lord President's phrase `no doctor of ordinary skill', to phrase `no neuro-surgeon of ordinary skill'. All this is elementary and, in

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specialist is required *".... to achieve the standard of care of a reasonably competent specialist in his field, exercising `the ordinary skill of his speciality'."* The authors also caution: *"The standard of care within a specialist field is that of the ordinary competent specialist, not the most experienced or most highly qualified within the specialty."*

174 See Jones (1996) 34-35. The writer takes the view that in such event "the duty derives from the fact that he/she holds himself/herself out as someone competent and undertakes legal responsibility to that extent." See also Wright (1993) 20 who opines that: *"..... where a person represents that he is possessed of special skill or knowledge in the conduct of a profession or calling, the law demands of him that he in fact possesses that skill and knowledge, and the very fact that a man carries on a profession or calling, the practice of which requires special skill or knowledge, constitutes a representation on his part that he possesses the requisite qualifications."*

175 See Winfield and Jolowicz on Tort (1994) 88. The authors in recognizing the Roman law doctrine of *imperitia culpae adnumeratur* states: *"The rule imperitia culpae adnumeratur is just as true in English law as in Roman law. The rule must however be applied with some care to see that too high a degree of skill is not demanded. A passerby who renders emergency first-aid after an accident is not required to show the skill of a qualified surgeon. It is notable that in most professions and trades each generation convicts its predecessor of ignorance and there is a steady rise in the standard of competence incident to them. The surgeon must exercise such care as accords with the standards of reasonably competent medical men at the time but he is not an insurer against every medical slip. He must keep himself reasonably up to date and cannot obstinately and pig-headedly carry on with the same old technique if it has been proved to be contrary to what is really substantially the whole of informed medical opinion."* See also Percy Charlesworth (1977) 970 who holds the view that: *"The competent practitioner will know when a case is beyond his skill, and thereupon it becomes his duty either to call in a more skilful person or to order the removal of the patient to a hospital where skilled treatment is available."* See further Jackson and Powell (1997) 296; Martin (1979) 360.

176 (1985) 1 ALL ER 643 (A.C.).

light of the two recent decisions of this House, firmly established law." [177]

The separate distinction in the standard of care between the doctor and specialist is recognized in the case of *Landu v Werner* [178] in which Sellers LJ held:

"A doctor's duty is to exercise ordinary skill and care according to the ordinary and reasonable standards of those who practise in the same field of medicine. The standard for the specialist is the standard of the specialists. A doctor is not negligent if he has acted in accordance with a practice accepted as proper by a responsible body of medical men skilled in the particular act." [179]

The interpretation of the Bolam test as per Lord Scarman was not agreed on by Lord Bridge in the *Sidaway* [180] decision when he said:

"…. The issue whether non-disclosure in a particular case should be condemned as a breach of the doctor's duty of care is an issue to be decided primarily on the basis of expert medical evidence, applying the Bolam test. Of course, if there is a conflict of evidence whether a responsible body of medical opinion approves of non-disclosure in a particular case, the judge will have to resolve that conflict. But, even in a case where, as here, no expert witness in the relevant medical field condemns the non-disclosure as being in conflict with accepted and responsible medical practice, I am of opinion that the judge might in certain circumstances come to the conclusion that disclosure of a particular risk was so obviously necessary to an informed choice on the part of the patient that no reasonably prudent medical man would fail to make it." [181]

In the case of *Whitehouse v Jordan* [182] the court was confronted with the question of whether a specialist should be completely exculpated after the delivery of a baby caused severe damages. The facts are to be stated briefly as follows: The defendant was in charge of the plaintiff's delivery. The plaintiff, Stuart Whitehouse, was born with severe and

177 *Sidaway v Bethlem Royal Hospital Governors* (1985) 1 ALL E.R. 643 (A.C.).

178 (1961) 105 SJ 1008.

179 *Landu v Werner* (1961) 105 SJ 1008.

180 (1985) 1 ALL ER 643 662-3.

181 See *Sidaway v Bethlem Royal Hospital Governors* (1985) 1 ALL ER 643 662-3. See also the comments of Sir John Donaldson MR in the Court of Appeal (1984) 1 ALL ER 1018, 1028 in the Sidaway case on appeal when he stated: *"The definition of the duty of care is a matter for the law and the courts. They cannot stand idly by if the profession, by an excess of paternalism, denies its patients a real choice. In a word, the law will not permit the medical profession to play God."* He goes on to state: *"In an appropriate case a judge would be entitled to reject a unanimous medical view if he were satisfied it was manifestly wrong and that the doctors must have been misdirected themselves as to their duty in law. Thus a practice must be `rightly' accepted as proper by the profession." The second approach by Lord Bridge and Sir John Donaldson appear to be the correct approach in that a more objective judgement would ensure less partisan of the medical profession. This view is preferred by Kennedy and Grubb (1998) 341-2 who express the opinion that "a court may condemn every universally followed practice concerning risk disclosure as negligent on the basis that the hypothetical reasonable doctor would not have adopted it. There is no reason to confine this approach to risk disclosure since the majority of their Lordship in Sidaway said that the Bolam test applied to all aspects of the doctor's duty of care diagnosis, advice and treatment."*

182 (1981) 1 ALL E.R. 265 (1981) 1 W.L.R. 246.

irreparable brain damage, following a high risk pregnancy. After Stuart's mother had been in labour for 22 hours, the defendant decided to carry out a test to see whether forceps could be used to assist the delivery. He made six attempts to deliver the baby with the forceps before quickly and competently proceeding to a caesarean section. Acting through his mother, as next friend, the plaintiff claimed damages for negligence alleging (i) that the defendant had been negligent in pulling too long and too hard with the forceps - the six attempts with the forceps had taken some 25 minutes - and (ii) that in doing so he had caused the brain damage.

Lord Edwin D-Davies applying the Bolam test held that:

"Where you get a situation which involves the use of some special skill or competence, then the test as to whether there has been negligence or not is not the test of the man on the top of a Clapham omnibus because he has not got this special skill. The test is the standard of the ordinary skilled man exercising and professing to have that special skill. If a surgeon fails to measure up to that standard in any respect (clinical judgement or otherwise), he has been negligent and should be so adjudged." [183]

Lord Fraser in particular in assessing the standard of conduct expected of a specialist stated:

"A failure to exercise the standard of skill expected from the ordinary competent specialist having regard to the experience and expertise that specialist holds himself out as possessing." [184]

English case law recognizes the Roman law doctrine *imperitia culpae adnumeratur* in that a qualified person may be held liable for undertaking a case for which he knew, or should have known, he did not have the required expertise.

In the case of *R v Bateman* [185] Lord Hewat CJ stated:

"It is no doubt, conceivable that a qualified man may be held liable for recklessly undertaking a case which he knew, or should have known, to be beyond his powers." [186]

In the case judgement Lord Hewat CJ held:

"The unqualified practitioner cannot claim to be measured by any lower standard than that which is applied to a

183 *Whitehouse v Jordan* (1981) 1 ALL E.R. 264 (1981) 1 W.L.R. 246.

184 *Whitehouse v Jordan* (1981) 1 ALL E.R. 267 (1981) 1 W.L.R. 246.

185 (1925) 94 L.J.K.B 791, 791.

186 *R v Bateman* (1925) L.J.K.B. 791, 791.

qualified man." [187]

6.4.2.3 **Legal Opinion**

(1) In England, the conduct of a general medical practitioner in medical negligence cases is adjudged differently from that of a specialist. [188]

(2) The specialist will be judged by a higher standard than that of the general medical practitioner, as it is generally accepted that the general medical practitioner does not possess the same qualification, expertise or specialized skill as that of the specialist. [189]

(3) The standard of conduct of the specialist is, nevertheless, measured by expected conduct or practice of the ordinary competent specialist without expecting too high a standard of care and skill. [190]

6.4.3 **UNITED STATES OF AMERICA**

6.4.3.1 **Legal Writings**

The acceptable levels of training, knowledge and skill required, by law, of a specialist are not the same as that of a physician. [191] It has generally been accepted, by the legal writers

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187 *R v Bateman* (1925) L.J.K.B. 791, 794; See also *Pippen v Shephard* 1822 ER. 400, 409; *Jones v Fay* (1865) 4f AL F 5 25; See further *Bolam v Friern Hospital Management Committee* (1957) 1 WLR 582; *Chin Keow v Government of Malaysia* supra 813; *Roe v Ministry of Health* (1954) 2 OB 6.

188 Wright *Medical Malpractice* (1993) 22; Scott *The General Practitioner and the Law of Negligence* (1995) 33; Kennedy and Grubb *Principles of Medical Law* (1998) 358. For case law see *Sidaway v Governors of Bethlem Royal Hospital* (1985) 1 ALL ER 643 (A.C.); *Landu v Werner* (1961) 105 SJ 1008; *Whitehouse v Jordan* (1981) 1 ALL. E.R. 265 (1981) 1. W.C.R. 246.

189 Wright *Medical Malpractice* (1993) 22; Scott *The General Practitioner and the Law of Negligence* (1995) 33; Kennedy and Grubb *Principles of Medical Law* (1998) 358. For case law see *Sidaway v Governors of Bethlem Royal Hospital* (1985) 1 ALL ER 643 (A.C.); *Landu v Werner* (1961) 105 SJ 1008; *Whitehouse v Jordan* (1981) 1 ALL. E.R. 265 (1981) 1. W.L.R. 246.

190 Wright *Medical Malpractice* (1993) 22; Kennedy and Grubb *Principles of Medical Law* (1998) 358. *Landu v Werner* (1961) 105 SJ 1008; *Whitehouse v Jordan* (1981) 1 ALL. E.R. 265 (1981) 1. W.L.R. 246.

191 See Kramer and Kramer (1983) 5 quoting from the *Corpus Juris Secundum*: *"A physician holding himself out as having special knowledge and skill in the treatment of a particular organ, disease or type of injury is bound to bring to the discharge of his duty to a patient employing him as such specialist, not merely the average degree of skill possessed by general practitioners, but that special degree of skill and knowledge possessed by physicians who devote special study and attention to the treatment of such organ disease or injury, regard being had to the state of scientific knowledge at the time."* Commenting thereon the authors opine: *"When the doctor is a specialist, he is bound to exercise the degree of skill and knowledge that is ordinarily possessed by similar specialists, and not merely the degree of skill and knowledge of a general practitioner."* See also Holder (1975) 55. The author expresses the standard of care a specialist has to adhere to as that of the *"reasonably careful and prudent specialist in his field"* as opposed to *"the reasonably careful and prudent physician."* See also McCoid "The Care required of Medical Practitioners" 1959 *Van der Bilt. Law Review* 549. The writer draws the distinction of the

in America, that the standard and degree of care and skill, expected judicially, of the specialist is higher than that expected of a general reasonable practitioner. [192]

Where a general practitioner gives himself/herself out as a specialist, or where a general practitioner fails to refer a patient to a specialist in circumstances which warrant such referral, and at the same time he or she knows that he/she does not possess the required care and skill of a specialist required in the circumstances to treat the patient, his/her conduct may be regarded as negligent. In such event, the conduct of the general practitioner/physician will be measured against that of the reasonable specialist and not the general reasonable physician. [193]

6.4.3.2 **Case Law**

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standard expected from a specialist as opposing to the physician as follows: *"A physician who holds himself out as having special knowledge and skill in the treatment of a particular organ or disease or injury is required to bring to the discharge of his duty to the patient employing him as such specialist not merely the average degree of skill possessed by general practitioners but that special degree of skill and care which physicians similarly situated who devote study and attention to the treatment of such organ disease, or injury ordinarily possess, regard being had to the state of scientific knowledge at the time."* See further Peters et al (1981) 156; See further Southwick and Slee (1988) 58.

192 The physician's legal duty is stated in a generalized way by the legal writers as employing such reasonable skill and care exercised by the average physician. See in this regard Waltz and Inbau (1971) 42 45; See also Furrow et al (1995) 237; See further Morris and Moritz (1971) 135; *American College of Legal Medicine* (1991) 43 62-63; The duty of the physician is described by the College of *Legal Medicine* (1991) 119 as: *"This duty requires that a physician possess and bring to bear on the patient's behalf that degree of knowledge, skill, and care usually exercised by a reasonable and prudent physician under similar circumstances, given the prevailing state of medical knowledge and available resources. In other words, physicians owe their patients a duty to act in accordance with the specific norms or standards established by their profession, commonly referred to as "standards of care" to protect their patients against unreasonable risk."* See further Holder (1975) 3 and at 43 who describes the duty of the physician as: *"The physician must have adequate knowledge and skill and use it with adequate care in his dealings with a patient. The reasonably prudent physician or surgeon, acting under the same circumstances is the standard by which his conduct will be judged."* See further Kramer and Kramer (1983) 6 11; Sidley and Shea (1985) 183-184.

193 See Rheingold and Davey *Standard of Care in Medical Malpractice Cases* (1975) (Red Conason) 16. The author state: *"Within the field of medicine there are numerous specialities. The specialist is to be judged by the higher standard of care, skill and knowledge possessed and used by like specialists, and not those of the `average' physician who might be a general practitioner. The specialist is expected to know more and to be able to do more within his speciality. One who holds himself out as a specialist is to be held to that specialist's care, just as one who holds himself out generally to be a licensed practitioner must come up to the standard pretended to."* See also Holder (1975) 55. The author states that: *"The standard to which a specialist must adhere to is quite a bit broader than that which the courts consider reasonable to expect from a non-specialist."* See further Waltz and Inbau (1971) 44. The authors hold the view that referrals to specialists in modern day are necessary as the general practitioner despite his good intentions may be ill-equipped to treat the patient due to the fact that: *"The general practitioner today cannot keep up with all the latest developments in every phase of medicine and surgery."* If he does treat the patient and not refer the patient to the specialist as indicated *"he does so at his peril."* But the physician's adoption of speciality does not ease the standard of care governing his or her standard of conduct. Quite the contrary, the authors advocate in that: *"If a practitioner holds himself out as a specialist, he will undoubtedly be held to a higher degree of skill and knowledge than a general practitioner."* See further Holder (1975) 43 47; Moore and Kramer (1990) 7; Southwick and Slee (1988) 57-58.

There are a number of cases in which the American courts have clearly distinguished between the standard and degree of care and skill expected of a specialist, as opposed to a general practitioner, in which it was held that a higher standard and degree of care and skill is expected of the specialist. The general principle in this regard was enunciated in the case of *Belk v Schweizer* [194] in which the court held:

"A physician who holds himself out as having special knowledge and skill in the treatment of a particular organ or disease or injury is required to bring to the discharge of his duty to the patient employing him as such specialist not merely the average degree of skill possessed by general practitioners but that special degree of skill and care which physicians similarly situated who devote study and attention to the treatment of such organ disease, or injury ordinarily possess, regard being had to the state of scientific knowledge at the time." [195]

The broader standard of knowledge and skill of a specialist is also recognized in the case of *Bullock County Hospital Association v Fowler*. [196] The facts concerned a resident in obstetrics and gynaecology who was allegedly negligent in performing a circumcision. In the course of the trial, he testified that he had performed between 600 and 800 circumcisions prior to the one which was involved in the suit. The court, therefore, held that he would be considered a specialist even though he had not completed his training. In comparing the standard required of a specialist with that of a general practitioner, the court stated: *"It would not seem at all unreasonable to hold him to a higher standard of care than that required of a general practitioner, although he has only completed one-third of his residency. The difference between the duty owed by a specialist and that owed by a general practitioner lies not in the degree of care required but in the amount of skill required. It would stand to reason that one who had performed between 600 and 800 circumcisions would, and should, be expected to have more skill in performing such operations than would a general practitioner."* [197]

It has also been decided, in American Law, that a general practitioner who undertakes to treat a case that clearly lies within the field of a special branch of medicine, will be held liable for failure to use skill equal to that of a specialist.

In the case of *Monahan v De Vinny* [198] the facts can be stated briefly as follows:

194 149 SE 2d 565, NO 1966.

195 *Belk v Schweizer* 149 SE 2d 515, NO 1966.

196 183 SE 2d 586, GA 1971.

197 *Bulloch County Hospital Association v Fowler*, 183 SE 2d 586, GA 1971.

198 223 A.D. 547, 229 N.Y.S. 60 (3 DEPT 1928).

"The defendants were chiropractors who treated plaintiff unskilfully, as a result of which he became paralysed. The court stated that the defendants were illegally practicing medicine in violation of the Education Law so that *"in an action of this kind they must be held to the same standards of skill and care as prevail amongst those who are licensed."*

The court referred to N.Y. Educ. Law §6501(4) which defined the practice of medicine:

"A person practices medicine within the meaning of this article, except as hereinafter stated, who holds himself out as being able to diagnose, treat, operate or prescribe for any human disease, pain, injury, deformity or physical condition, and who shall either offer or undertake, by any means or method, to diagnose, treat, operate or prescribe for any human disease, pain, injury, deformity or physical condition."

In a later judgement of *Larsen v Yelle* [199] the court was confronted with the following facts:

The plaintiff who had sustained a colles fracture of the right wrist claimed that the defendant, a general practitioner, who had treated him, was negligent in not referring him to a specialist when it was indicated. The plaintiff further claimed that the general practitioner's failure to refer him to the specialist resulted in the loss of usage of the wrist.

The court after assessing the facts stated the legal position as follows:

"It is true that one of the requirements which the law exacts of general practitioners of medicine is that if, in the exercise of the care and skill demanded by those requirements, such a practitioner discovers, or should know or discover, that the patient's ailment is beyond his knowledge or technical skill, or ability or capacity to treat with a likelihood of reasonable success, he is under a duty to disclose the situation to his patient, or to advise him of the necessity of other or different treatment. If under such circumstances, the general practitioner fails to inform the patient and undertakes to treat what he should refer to a specialist, he will be held to that standard of care required of the specialist. That is, in order to escape liability for injury caused by his treatment, the treatment he himself administered to the patient must at a minimum comply with that degree of skill, care, knowledge and attention ordinarily possessed and exercised by specialists in good standing under like circumstances." [200]

From the fore stated it is clear that the Roman doctrine of *imperitia culpae adnumeratur*, as in English and South African Law, still very much forms part of American Law. [201]

6.4.3.3 **Legal Opinion**

(1) The distinct difference in levels of training, knowledge and skill between a physician and a specialist is widely recognised by the American legal writers and the courts. [202]

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199 310 MINN 521 246 WW 2d 841 (1976).

200 See *Larsen v Yelle* 310 MINN 521 246 NW 2d 841 (1976).

201 See W. Page Keeton Prosser and Keeton on the *Law of Torts* (1984) 161.

202 Kramer and Kamer *Medical Malpractice* (1983) 5; Holder *Medical Malpractice Law* (1975) 55; McCoid "The Care required of Medical Practitioners" 1959 *Van der Bilt Law Review* 549; Peters et al *The Law of Medical Practise in Michegan* (1981) 156; Southwick and Slee *The Law of Hospital and Healthcare Administration* (1988) 58. For case law see *Beck v Schwezier* 149 SE 2d 565, NO 1966; *Bullock County Hospital Association v Fowler* 183 SE

(2) The standard and degree of care and skill expected judicially of the specialist is higher than that expected of a general practitioner. [203]

(3) The standard of care of a specialist is however, not the highest standard of care but rather a reasonable standard. The conduct of the specialist is measured against that of the reasonable specialist. [204]

6.5 LOCALITY WHERE TREATMENT TAKES PLACE

6.5.1 SOUTH AFRICA

6.5.1.1 Legal Writings

From the foregoing it emerged that it is a well-established principle in our law that a medical practitioner is not expected to bring to bear upon the case entrusted to him, the highest possible degree of professional skill, but, he is bound to employ reasonable skill and care. [205]

The standard of care and skill required of a general practitioner is not the same as those required of a specialist, or vice versa. If the doctor is a specialist, the test is that of the reasonable specialist in terms of the branch of the profession to which he or she belongs. If on the other hand the doctor is a general practitioner to the branch he/she belongs. [206]

2d 586 GA 1971; *Lansen v Yelle* 310 MINN 521 246 WW 2d 841 (1976).

203 Waltz and Inbau *Medical Jurisprudence* (1971) 42, 45; Furrow et al *Health Law* (1995) 237; Morris and Moritz *Doctor and Patient and The Law* (1971) 135; *American College Legal Medicine* (1991) 43 62-63; Holder *Medical Malpractice Law* (1975) 3 43. For case law see *Beck v Schweizer* 149 SE 2d 565, NO 1966; *Bullock County Hospital Association v Fowler* 183 SE 2d 586, GA 1971.

204 Rheingold and Daley *Standard of Care in Medical Malpractice Cases* (1975) 16; Holder *Medical Malpractice Law* (1975) 55; Waltz and Inbau *Medical Jurisprudence* (1971) 44; Holder *Medical Malpractice Law* (1975) 43 47; Southwick and Slee *The Law of Hospital and Healthcare Administration* (1988) 57-58; Moore and Kramer *Medical Malpractice: Discovery and Trial* (1990) 7.

205 See the legal writings of Van Oosten (1996) 54-55 82; Claassen and Verschoor (1992) 115; Strauss *Doctor, Patient and The Law* (1984) 306-307; Gordon, Turner and Price (1953) 109; Van Oosten (1986) 18-19 22; McQuoid-Mason and Strauss *LAWSA* (1983) Para 185; Strauss (1991) 72-73 95; Strauss and Strydom (1967) 266; Carstens (1988) 345; Van Dokkum (1996) 792; McKerron (1971) 38; Dada and McQuoid-Mason (2001) 22-23; Carstens and Pearmain (2007) 623.

206 For the legal writings see: Van Oosten *Encyclopaedia* (1996) 83; Claassen and Verschoor (1992) 15; McQuoid-Mason and Strauss LAWSA (1983) Par 199; Gordon, Turner and Price (1953) 109, 113; Carstens (1988) 396; Dada and McQuoid-Mason (2001) 22; Boberg (1984) 346; McKerron (1971) 38; Carstens (1996) 137; Strauss and Strydom (1967) 124 268; Carstens and Pearmain (2007) 623.

The geographical situation in South Africa, in which so many hospitals are situated in rural country towns and rural tribal areas, often with very poor infra-structures and inferior diagnostic and other equipment, leads one to pose the question, namely, what standard of care and skill is required of a medical practitioner who practices in the country town or rural tribal area?

Although our legal writers generally recognize the principle that the practitioner who treats the patient in a country town is required to exercise some degree of care and skill towards his or her patient, no unanimity exists, amongst our writers, whether the standard of care and skill expected of the medical practitioner in the country town or rural tribal area ought to be the same as that of the medical practitioner who practices in the city. [207] Put

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207 See in this regard the unanimity amongst the writers who recognize the principle that the application of the so-called "locality rule" in cases of negligence results in the professional standard expected judicially from medical practitioners being localized with regard to the medical knowledge, care and skill generally accepted in that specific geographical area. See Strauss and Strydom (1967) 268-270; Van der Walt (1979) 71; Boberg (1984) 353 and especially, Gordon, Turner and Price (1953) 112-113. The writers support the principle enunciated in the dictum of Innes C.J. in *Van Wyk v Lewis* (1924) AD 438 at 444 namely: *"The ordinary medical practitioner should exercise the same degree of skill and care, whether he carries on his work in the town or the country, in one place or another."* Relying on the uniform training of doctors in South Africa, Gordon et al (1953) at 112-113 come to the following conclusion: *"This must surely be correct. What difference can it possibly make to the skill and care required of a practitioner in himself, whether he is attending a patient in Cape Town or in some remote farm on the edge of the Kalahari desert? The other view seems to arise from a confusion of thought between skill and care and the circumstances in which they must be exercised. A country practitioner may often be obliged to attend a patient in most difficult and trying circumstances; but sometimes a town practitioner is placed by an emergency in an equally unpleasant position. In the American case of Turner v Stoker, it was said: "Of course, the Court understands that the physician practising in a village and in small communities does not have the opportunities and resources to give the same treatment and diagnosis as what may be called the city physician. The village physician must observe his patient by candle and lamp light; he does not have the advantage of the röntgen ray and other instrumentalities that are afforded in the great cities with sanatoriums."* The authors continue: "*These propositions seem to be eminently reasonable, but when the Court follows them with the proposition "and of course the same treatment and degree of care would not be applied to a physician practising in such a community as to one practising in a city," it must be confessed that it seems to be a non sequitur." Contra Carstens "The Locality Rule in cases of medical malpractice": De Rebus (1990) 421-423. The writer holds the view that a distinction should be drawn between the subjective abilities (such as skill, education and knowledge) and the objective circumstances in which he finds himself in a particular locality. Whilst Carstens acknowledges "the uniformity in the training of medical practitioners today"* nevertheless he argues that *"the lack of medical facilities and infrastructure in the country towns or rural areas are factors which must be taken into consideration when evaluating a practitioner's conduct in cases of medical malpractice."* The writer continues: *"The locality where a medical practitioner operates will always be relevant in cases of medical malpractice until such time when it can safely be stated that the medical facilities and equipment in this country are equally available and accessible, irrespective of whether the medical practitioner chooses to practise in the city or in the country."* See also the persuasive argument advanced by Carstens and Pearmain (2007) 638 when they state that a distinction should be drawn between the subjective competence and ability of a physician (ability with regard to training, experience and skill), and the objective circumstances of the particular locality where the physician practiced or is employed. Although medical practitioners in South Africa today undergo uniform training, comparable with international standards, it cannot be denied that South Africa is a developing country and in many respects even an emerging or third world country. Further, although the physician may be well qualified and equipped the fact that he/she is placed in a remote rural area without the supporting medical facilities or infrastructure would influence the assessment of the doctor's conduct. The writers suggest that one cannot compare the infrastructure, diagnostic and other equipment for

differently, the question may be begged whether the standard of care and skill expected of the medical practitioner is influenced by the particular locality where the practitioner happens to reside or practice?

6.5.1.2 **Case Law**

There is no unanimity in our case law whether, the locality where the medical practitioner practices and treats a patient, is relevant when determining his or her professional liability arising from negligence. [208]

6.5.1.3 **Legal Opinion**

(1) There is no unanimity amongst the South African writers whether the standard of care and skill expected of a medical practitioner practicing in, for example, a city, is the same as that of a doctor practicing in a country town.

(2) It is, however, generally accepted that the medical practitioner who treats the patient in a country town is required to exercise some degree of care and skill towards his or her patient. [209]

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example at Johannesburg General Hospital with the facilities of a mission hospital/clinic in a remote rural area. The aforementioned approach in my mind is the correct approach especially in view of the fact that South Africa is a third world country in which poverty and indigence are dominant.

208 In the *locus classicus* on professional negligence namely *Van Wyk v Lewis* (1924) 438 the court dealt with the so-called locality issue. The court was divided in that different views were expressed. Innes C.J. on the one hand expressed the view that it made no difference where the practitioner practices. The Chief Justice goes on to say: *"The ordinary medical practitioner should, as it seems to me, exercise the same degree of skill and care, whether he carries on his work in the town or the country, in one place or another. The fact that several incompetent or careless practitioners happen to settle at the same place cannot affect the standard of diligence and skill which local patients have the right to expect."* Wessels J.A. on the other hand adopted a different view, the thrust of his argument being one cannot expect the same care and skill of a medical practitioner doing duty in a country town as opposed to one doing duty in a large hospital in the city. Wessels J.A. at 457 states: *"It seems to me, however that you cannot expect the same skill and care of a practitioner in a country town in the Union as you can of one in a large hospital in Cape Town or Johannesburg. In the same way you find with leading surgeons in the large hospitals of London, Paris and Berlin. It seems to me, therefore, that the locality where an operation is performed is an element in judging whether or not reasonable skill, care and judgement have been exercised."* The only other case in which the relevance of locality came under discussion is that of *Webb v Isaacs* 1915 (EDL) 273 in which the Court at 276 remarked: *"There are excellent reasons for this rule of law, because it seems to me that if the law required in every case that a practitioner should have the highest degree of skill, it would lead to this result, that in remote country districts and even in country districts at no very great distance from the large centres, it would be impossible to find a country practitioner who would take the risk of attending a patient, if he was always expected to exercise the highest degree of skill obtainable in the medical profession."*

209 See the legal writings of Van Oosten *Encyclopaedia* (1996) 54-55, 82; Claassen and Verschoor *Medical Negligence* (1992) 115; Strauss *Doctor Patient and The Law* (1984) 306-307; Gordon, Turner and Price *Medical Jurisprudence* (1953) 109; Van Oosten "Professional Medical Negligence in South African Legal Practise" *Medicine and Law* (1986) 18-19 22; McQuoid-Mason and Strauss *Lawsa* (1983) Par 185; Strauss *Doctor Patient and The Law* (1991) 72-73 95; Strauss and Strydom *Die Suid-Afrikaanse Geneeskundige Reg* (1967) 266; Van

(3) Some writers hold the view that the duty of care and skill placed upon a medical practitioner in the country town or rural tribal area ought to be the same as that of the medical practitioner who practices in the city. [210]

(4) More recently, the legal writer, Carstens, persuasively argues that a distinction should be drawn between the subjective abilities such as skill, education and knowledge and the objective circumstances in which the medical practitioner finds himself/herself in a particular locality, which may differ from that of the city. What is especially relevant is lack of medical facilities and infrastructure in the country towns or rural areas. [211]

(5) The opinion expressed by Carstens, it is submitted, is the preferred view, particularly in view of the prevailing situation in South Africa, a third world country in which poverty and indigency are dominant.

(6) There is also no unanimity in our case law whether the locality where the medical practitioner practices and treats a patient is relevant in determining the practitioner's professional liability arising from negligence. [212]

6.5.2 ENGLAND

6.5.2.1 Legal Writings

In England there is a movement towards developing protocols and, particularly, practice

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Dokkum "Medical Malpractice in South African Law" *De Rebus* April 1996; McKerron *The Law of Delict* (1971) 38; Dada and McQuoid-Mason *Introduction to Medico-Legal Aspects* (2001) 22-23; Carstens and Pearmain *Foundational Principles of South African Medical Law* (2007) 636ff.

210 Strauss and Strydom *Die Suid-Afrikaanse Geneeskundige Reg* (1967) 268-270; Van der Walt *Delict: Principles and Cases* (1979) 71; Boberg *The Law of Delict* (1984) 353; Gordon Turner and Price *Medical Jurisprudence* (1953) 112-113. Carstens and Pearmain *Foundational Principles of South African Medical Law* (2007) 636ff. The afore stated writers rely heavily on the dictum of Innes CJ in *Van Wyk v Lewis* (1924) AD 438 at 444 in reaching their view.

211 Carstens "The Locality Rule in cases of Medical Malpractice" *De Rebus* (1990) 421-423; See also the well motivated argument presented by Carstens and Pearmain (2007) 638.

212 In the *locus classicus* on professional negligence namely *Van Wyk v Lewis* (1924) 438 the court was divided in deciding whether the locality rule ought to be adopted or not. Innes CJ on the one hand expressed the view that it made no difference where the practitioner practices, the same degree of skill and care is required to be exercised. Wessels JA on the other hand, adopted a different view namely one cannot expect the same care and skill of a medical practitioner doing duty in a country town as opposed to one doing duty in a large hospital in the city. See also the case of Webb v Isaacs 1915 (EDL) 273 in which the court held there ought to be a distinction between the standard of conduct between the country town practitioner and that of the practitioner of the city.

guidelines, the aim of which is to standardize medical responses and inform doctors (and others) of the available options to treat patients. [213]

The obligations imposed by the 1992 Regulations have also assisted in providing uniformity in determining the scope and content of the doctor's duty at common law, regardless of where they practice. [214]

Another way of ensuring uniformity in the medical profession, in England, is the obligation placed on doctors to keep up to date with the new developments in their particular field. [215]

6.5.2.2 **Case Law**

Although the English Courts have recognised the challenges facing medical practitioners, in practice, in keeping abreast with new developments in their particular field and to make a reasonable effort to keep up to date, [216] nevertheless, the courts have been very cautious in blaming medical practitioners from doing so arbitrarily. [217]

In the case of *Thompson v Smith Ship Repairers (North Shields) Ltd* [218] Mustell J stated:

"That where a practitioner practises medicine but is slow in initiating or seeking out knowledge of facts which are not really relevant to him, "the court must be slow to blame him for not ploughing a lone furrow ..... "

In *Lawfourd v Charing Cross Hospital* the facts were the following: the Plaintiff developed brachial palsy in an arm following a blood transfusion. In the court a quo the defendant's were held liable on the basis that the anaesthetist had failed to read an article published in the Lancet six months earlier, concerning the best position of the arm when using a drip.

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213 See Kennedy (1998) 284.

214 See Kennedy (1998) 295.

215 See Kennedy (1998) 353-354. Though the writer recognizes that a doctor cannot realistically be expected to read every article in every medical journal, where a particular risk has been highlighted on a number of occasions "the practitioner will ignore it at his peril."

216 See *Stokes v Guest, Keen & Nettlefold (Bolts & Nuts)* (1968) 1 WLR 1 776 at 783 in which Swanwick J remarked: *"Where there is developing knowledge, (the defendant) must keep reasonably abreast of it and not be too slow to apply it."*

217 See *Roe v Minister of Health* (1954) 2 QB 66 in which the court cautions that although a doctor cannot realistically be expected to read every article, where a particular risk has been highlighted on a number of occasions the practitioner will ignore it at his peril.

218 (1953) the Times 8 December.

On appeal the Court of Appeal reversed this decision, taking the view that it would be too great a burden to require a doctor to read every article appearing in the current medical press. The Court of Appeal also found it was wrong to suggest that a practitioner was negligent simply because he did not immediately put into operation the suggestions made by the contributor to the medical journal. Although the time might come when a recommendation was so well proved and so well accepted, that it should be adopted.

In *Gascozne v Ian Sheridan & Co* [219] Mitchell J commented that a `shop floor gynaecologist' had a responsibility to keep himself generally informed on mainstream changes in diagnosis, treatment, and practice through the mainstream literature, such as the leading textbooks and the Journal of Obstetrics and Gynaecology. The court found it was, however, unreasonable to suppose that he had had an opportunity to acquaint himself with the contents of obstetrics journals.

6.5.2.3 **Legal Opinion**

(1) England, being a first world country, makes no distinction in the practice of medicine between a medical practitioner practicing medicine in the city as opposed to one who practices medicine in a country town.

2) Protocols and practice guidelines have been developed in England and adopted which bring about a uniform standard of the doctor or specialist duty of care, regardless of where they practice. [220]

(3) Doctors and specialists in this way are expected to keep abreast with the new developments in their particular fields. [221]

6.5.3 **UNITED STATES OF AMERICA**

6.5.3.1 **Legal Writings**

Until quite recently, the so-called, `locality rule' was recognised and applied as a matter of

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219 (1994) J. MED. L.R. 437-447.

220 See Kennedy *Treat me Right-Essays in Medical Law and Ethics* (1998) 284-295.

221 See Kennedy *Treat-me-Right Essays in Medical Law and Ethics* (1998) 353-354. For case law see *Stokes v Guest, Keen & Nettlefold (Bolts & Nuts)* (1968) 1 WLR 776 at 783. But warns the courts the doctor cannot realistically be expected to read every article where a particular risk has been highlighted. See *Roe v Minister of Health* (1954) 2 QB 66; *Thomson v Smith Ship Repairers (North Shields) Ltd* (1953) The Times 8 December 1953; *Lawford v Charing Cross Hospital* (1994) J.MED L.R. 437-447.

law in the United States of America. [222]

The `locality rule' operates by applying the standard test in comparing the due care and skill exercised by the particular physician in reference to that of other physicians in his geographical area. [223]
What is of significance is that the skill and knowledge of a physician practicing in, for example, an isolated rural area was, in theory, not put on the same plateau as the well trained and up-to-date physician who found himself/herself practicing in an urban environment.

Although it is generally accepted that in medical malpractice cases regard will be had to the physical and geographical circumstances of each case, [224] it does not appear that the `locality rule' is really used any longer in American Law. [225]
Alternatively the rule has been watered down significantly, in that, there is broad consensus amongst the writers that there ought to be a movement away from the rule and that a uniform standard be created and enforced at national level. [226]

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222 See Holder (1975) 53; Alton (1977) 22; See also Hoffman "Medical Malpractice" A Chapter in *American College of Legal Medicine* (1991) 132-133; Furrow et al (1995) 238; Waltz and Inbau (1971) 67-68.

223 See Holder (1975) 53 who states that traditionally the standard test was *"that degree of care which other physicians exercise in the same or similar communities"*; Other writers including Alton (1977) 22 following the Pike decision formulates the standard of care of the physician as *"that reasonable degree of learning and skill that is ordinarily possessed by physicians and surgeons in the locality where he practises."* See also Hoffman - "Medical Malpractice" A chapter published in *American College of Legal Medicine* (1991) 133 who equates the standard of care with the standard of care in the "same locality" or "similar locality". A similar equation is used by Waltz and Inbau (1971) 64 in which they claim: *"We usually say, today, that a medical man has the obligation to his patient to possess and employ such reasonable skill and care as are commonly had and exercised by reputable, average physicians in the same general system or school of practice in the same or similar locality."* See also Southwick (1988) 54. The author describes the `locality rule': *"That rule which measures the standard of care in a given instance solely by the practices of other physicians in the same locality."* Locality in this regard according to the author 54 footnote 8 means: *"The same community or a wider area which is still in the general vicinity where the physician practises. The term is generally used in contrast to a national standard."* See further Furrow et al (1995) 238. The writers base the standard: *"..... on the local community or a similar community."*

224 See Holder (1975) 53; see also Waltz and Inbau (1971) 64 who express the view that the justification for the original formulation of the so-called `locality rule' was based on the presumption that: *"The rural and small-town practitioner was less adequately informed and equipped than his big-city brother."*

225 See Alton (1977) 21. The author recognizes that in certain instances regard would be had to: *"The absence of sophisticated machinery for the treatment of the patient in smaller communities."* See also Furrow et al (1995) 238. The authors advocate that in certain instances the *"..... Trier of fact will be allowed to consider the facilities, staff and equipment available to the practitioner in the institution."* Waltz and Inbau (1971) 67 also recognize that in certain instances *"the lack of equipment and facilities available to the physician in his particular locality would be a factor that the judges could take into account in assessing the propriety of his conduct."*

226 See Waltz and Inbau (1971) 64 who advocate that: *"The `locality rule' is about to disappear almost completely."* See also Furrow et al (1995) 238. The authors believe *"most jurisdictions have moved from the `locality rule' to a*

The original application of the `locality rule' impacted upon the nature and scope of medical evidence presented by experts in malpractice litigation. In this regard, in its original formulation, the `locality rule' literally demanded that a medical expert testifying for the plaintiff in a malpractice action must have practiced in the defendant's community. [227]
The underlying reason therefore stems from the fact that a physician from another geographical area would not be familiar with the circumstances of the area in which the defendant finds himself. Therefore, for example, a general practitioner practicing in New York City would not be defined to posses the expertise of a practitioner practicing in Dry Gulch, New Mexico with a population of 600. [228]

Likewise, although two cities may be situated in two geographical areas, 22 miles apart, a general practitioner practicing in one may not testify regarding the acceptable practices in the other. [229] This clearly led to absurd results. For that reason the American legal writers have taken the stance that, notwithstanding the general practitioner's locality where he/she practices, with nationwide advances in medical training, uniform practices and the improvement in communications, his/her evidence as an expert may be used to prove negligence in malpractice cases involving a general practitioner in another geographical area. [230]

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national standard." See further Hoffman "Medical Malpractice" - a chapter published in American College of Legal Medicine (1991) 133. According to Hoffman, *"with improved medical facilities and board certification, the `locality rule' for medical negligence has been abandoned in many jurisdictions."* See further Holder (1975) 54 who holds the opinion that physicians in small towns should not rely upon the `locality rule' and so gain advantage *"in being a little more careless."*

227 See Waltz and Inbau (1971) 65 who advocates the relaxing of the `locality rule' the main reasons being: *"The nationwide advances being made in medical training, the method and scope of instructions as well as the improvement of communications and transportation."* The authors continue: *"There is also the free exchange of scientific information and the consequent tendency to harmonize medical standards throughout the country."* See also Pozgar (1996) 41-42. See also Furrow et al (1995) 238; See further Hoffman "Medical Malpractice" - A chapter published in *American College of Legal Medicine* (1991) 133; *Contra* Holder (1975) 54-55 who opine that many states still apply the `locality rule' to general practitioners, however, with specialists *"national standards are applied".* See further Southwick (1988) 55.

228 See Waltz and Inbau (1971) 64; Furrow et al (1995) 242; See also Pozgar (1996) 41; Waltz and Inbau (1971) 46.

229 See *Coburn v Moore* 68 NE 2d 5 (MASS) (1946) In this case the Supreme Court of Massachusetts decided in 1940 that a general practitioner who practices in Boston may not give expert evidence in respect of alleged negligence against a general practitioner practicing in Brocton some 22 miles from Boston.

230 See Waltz and Inbau (1971) 67-68; See also Furrow et al (1995) 242; See further Holder (1975) 54 who expresses the view that: *"In most jurisdictions today, the local standard of practice is considered only one factor presented for the jury's determination and is not in and of itself determinative of the presence or absence of negligence."* There is therefore no reason why the general practitioner cannot give evidence as an expert.

6.5.3.2 **Case Law**

The American courts, through the years, have had ample opportunity to consider the application of the `locality rule'. In one of the first cases *Murphy v Little,* [231] the court looked at various factors influencing the existence of the `locality rule' and concluded:

"Reasons for the more narrow rule which might have been obtained in the time past, where transportation was difficult, medical schools and hospitals often inaccessible and doctors licensed to practice with little or no formal training, no longer have any validity. Medical practitioners frequently receive a part or all of their education in states other than the one in which they settle to practice. There are doubtless areas of medicine where knowledge of proper treatment is limited geographically by prevalence of the disease or by reason of special facilities for study, but the human race has suffered from broken bones for as long as it has been in existence." [232]

In one of the most frequently quoted decisions dealing with medical negligence in America, namely *Pike v Honsinger,* [233] the court of appeals of New York, reversing the decision of the Lower Court and ordering a new trial, stated that:

"A physician impliedly represents that he possesses that reasonable degree of learning and skill ordinarily possessed by physicians in the locality. Furthermore, the court held, "it becomes his duty to use reasonable care and diligence in the exercise of his skill and his learning."

But, continues the court:

"He is bound to keep abreast of the times, and departure from approved methods and general use, if it injures the patient, will render him liable. Finally, the court required the physician to give "proper instructions to his patient in relation to conduct, exercise, and use of an injured limb." [234]

The advancement of medical science, uniform training provided for trainee physicians at medical schools in America, greater mobility in the medical sphere and a more effective geographical distribution of medical knowledge in the medical profession, are all contributing factors why the `locality rule' is not effectively enforced today.

In the case of *Montgomery v Stary* [235] the Supreme Court of Florida commented as follows on the development of the medical profession in general:

"This rule (i.e. the locality rule) was originally formulated when communications were slow or virtually non-existent and ..... it has lost much of its significance today with the increasing number and excellence of medical schools,

231 112 GA APP (1965) 517 145 SE 2d 760.

232 *Murphy v Little* 112 GA APP (1965) 517 145 SE 2d 760.

233 49 N.E. 716 (1898).

234 *Pike v Honsinger* 49 N.E. 716 (1898).

235 84 SO.2d 34 (S. CT.FLA. 1955).

the free interchange of scientific information, and the consequent tendency to harmonize medical standards throughout the country." [236]

In the case of *Viita v Dolan* [237] the court commented as follows on the narrowing of the gap between the country doctor and that of city doctor:

"Frequent meetings of medical societies, articles in the medical journals, books by acknowledged authorities, and extensive experience in hospital work put the country doctor on more equal terms with his city brother. He would probably resent an imputation that he possessed less skill than the average physician or surgeon in the large cities, and we are unwilling to hold that he is to be judged only by the qualifications that others in the same village or similar villages possess." [238]

In *Zills v Brown* [239] the broader standard is preferred as a substitute for the traditional rule. The court highlights various reasons for the `locality rule's' disappearance:

"Locality rules have always had the practical difficulties of: (1) a scarcity of professional people in a locality or community qualified to testify; and (2) treating as acceptable a negligent standard of care created by a small and closed community of physicians in a narrow geographical region. Distinction in the degree of care and skill to be exercised by physicians in the treatment of patients based upon geography can no longer be justified in light of the presently existing state of transportation, communications, and medical education and training which results in a standardization of care within the medical profession. There is no tenable policy reason why a physician should not be required to keep abreast of the advancements in his profession." [240]

With regard to the practice of hospitals, irrespective of where they are situated, the courts in America have increasingly adopted the view that the practice of medicine should be national in scope.

In *Dickenson v Milliard* the court stated:

"Hospitals must now be licensed and accredited. They are subject to statutory regulation. In order to obtain approval they must meet certain standard requirements. It is no longer justifiable, if indeed it ever was, to limit a hospital's liability to that degree of care which is customarily practised in its own community. Many communities have only one hospital. Adherence to such a rule, then, means the hospital whose conduct is assailed, is to be measured only by standards which it has set for itself." [241]

The parents, in *Wickliffe v Sunrise Hospital*, sued the hospital for the wrongful death of

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236 *Montgomery v Stary* 84 SO 2d 34 (S. GT.FLA.1955).

237 132 Minn. 128 155 NW 1077 (1916).

238 *Viita v Dolan* 132 Minn. 128 155 NW 1077 (1916).

239 382 So. 2d 528, 532 (ALA.1980).

240 *Zills v Brown* 382 So. 2d 528, 532 (ALA.1980).

241 *Dickenson v Mailliard 191 ILL. 374 153 NE.*

their teenage daughter, who suffered respiratory arrest while recovering from surgery. The Supreme Court of Nevada held that the level of care to which the hospital must conform is a nationwide standard. The hospital's level of care is no longer subject to narrow geographic limitations under the so-called locality rule; rather, the hospital must meet a nationwide standard. [242]

The principle and the `locality rule' in general, were given the death knell in 1968 in the case of *Brune v Belinkoff*. [243] The court held:

"We are of the opinion that the `locality rule' of Small v Howard which measures a physician's conduct by the standards of other doctors in similar communities is unsuited to present day conditions. The time has come when the medical profession should no longer be Balkanized by the application of varying geographic standards in malpractice cases. Accordingly Small v Howard is hereby overruled. The present case affords a good illustration and the inappropriateness of the locality rule to existing conditions. The Defendant was a specialist practising in New Bedford, a city of 100 000 which is slightly more than 50 miles from Boston, one of the medical centres of the nation, if not of the world. This is a far cry from the country doctor in Small v Howard, who ninety years ago was called upon to perform difficult surgery. Yet the trial court judge told the jury that the skill and ability of New Bedford physicians were fifty percent inferior to those obtained in Boston. The Defendant should be judged by New Bedford standards, `having regard to the current state of advance of the profession'. This may well be carrying the rule in Small v Howard to its logical conclusion, but it is we submit a reductio ad absurdum of the rule." [244]

But, notwithstanding the definite rejection of the so-called `locality rule' by the American Courts, some courts in America continued to disregard the expert evidence of medical practitioners, in instances where they testify in medical negligence cases regarding the conduct of another practitioner in another geographical area. In this regard the Supreme Court of Mississippi, as recently as 1983, in the case of *King v Murphy,* [245] held that the evidence of an experienced orthopaedic surgeon who practices in Florida, Miami, is inadmissible in that the surgeon from Florida is not familiar with the acceptable medical practice in Mississippi.

This decision resulted in severe criticism. In a water-shed case, the Supreme Court of Mississippi, in the case of *Hall v Hilburn,* [246] settled the issue in preferring a national medical standard above the local medical standard, espoused by supporting of the `locality rule'.

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242 *Wickliffe v Sunrise Hospital 1 W.L.R. 246.*

243 235 NE 2d 793 (MASS).

244 *Brune v Belinkoff* 235 NE 2d 793 (MASS).

245 424 So 2d 547 (MISS 1983).

246 466 So 2d 856 (MISS 1985).

The court remarks as follows:

"We would have to put our heads in the sand to ignore the nationalization of medical education and training. Medical school admission standards (and curricula) are similar across the country. Internship and residency programs for those entering medical specialities have substantially common components. Nationally uniform standards are enforced in the case of certification of specialists. Physicians are far more mobile than they once were. They have ready access to professional and scientific journals and seminars for continuing medical education from across the country. The medical centres in Memphis, Birmingham, Mobile, New Orleans and other nearby areas in adjoining states are a very real part of the Mississippi-centred universe of hospitalization, medical care and treatment and other health related services. All above informs our understanding and articulation of the competence-based duty of care. The content of the duty of care must be objectively determined by reference to the availability of medical and practical knowledge which would be brought to bear in the treatment of like or similar patients under like or similar circumstances by minimally competent physicians in the same field, given the facilities, resources and options available. The content of the duty of care may be informed by local custom but never subsumed by it. Generally, where the expert lives or where he or she practices his or her profession has no relevance per se with respect to whether a person may be qualified and accepted by the court as an expert witness." [247]

Although the `locality rule' in respect of the competency of a medical expert in medical negligence cases is no longer rigidly applied, according to the Hall decision, the unique circumstances of each case may be an influencing factor in deciding medical negligence cases in America.

6.5.3.3 **Legal Opinion**

(1) The so-called `locality rule' was until quite recently recognized and applied as a matter of law in the United States of America. [248]

(2) The `locality rule' operated by applying a different standard of care and skill in respect of physicians and surgeons, depending on the locality where they practice. [249]

(3) But in time, the `locality rule' has been watered down, so much so, that there is broad consensus amongst the legal writers and the courts that, because of the wide-run standard created at material level, there is a movement away from the

247 *Hall v Hillburn* 466 So 2d 856 (MISS 1985).

248 Holder *Medical Malpractice Law* (1975) 53; Hoffman `Medical Malpractice" A Chapter in the *American College of Legal Medicine* (1991) 132-133; Furrow et al *Health Law* (1995) 238, Waltz and Inbau *Medical Jurisprudence* (1971) 67-68. For the recognition of the locality rule in case law see *Murphy v Little* 112 GA APP (1965) 517 145 SE 2d 760; *Pike v Honsinger* 49 N.R. 716 (1898).

249 Holder *Medical Malpractice Law* (1975) 53; Hoffman `Medical Malpractice" A Chapter in the *American College of Legal Medicine* (1991) 133; Furrow et al *Health Law* (1995) 238, Waltz and Inbau *Medical Jurisprudence* (1971) 67-68; Southwick and Slee *The Law of Hospital and Healthcare Administration* (1988) 54; For case law see *Murphy v Little* 112 GA APP (1965) 517 145 SE 2d 760; *Pike v Honsinger* 49 N.R. 716 (1898).

rule. [250]

6.6 Summary and Conclusions

It is evident from the chapter that the doctor/hospital's general duty of care is a significant component of the doctor/hospital-patient relationship. The doctor/hospital's general duty of care arises even in the absence of a contractual agreement. The rationale for the existence of the doctor/hospital's duty of care towards his/her/its patient has been stated before, namely, it serves as a protective measure in preventing harm to the patient and to act in the patient's best interest. Where the doctor/hospital fails in this duty he/she/it faces liability at the hands of the law.

The origin of the doctor/hospital's duty of care is founded in normative ethics and complemented by various ethical codes, regulations and the Hippocratic Oath itself.

In terms of the ethics of the profession it appears that, in general terms, the doctor is under a duty to act and to treat a patient. It is also evident that, traditionally, the doctor/hospital could not incur criminal or delictual liability merely by virtue of such a refusal. This stemmed from the traditional approach that a person could not be held liable by virtue of a mere omission. But in modern day, the situation has changed, as, today, it is generally accepted that a mere omission can, in fact, lead to delictual, as well as criminal liability, where the circumstances are such that the doctor/hospital concerned could be expected to intervene.

It is also evident from the chapter that the nature of the general duty of care is to exercise reasonable care. But, the duty to exercise reasonable care does not include a successful outcome of the procedure or treatment embarked upon, nor does he/she/it guarantee the outcome, unless the doctor/hospital guarantee such result. It is only in the latter instance that the doctor/hospital may incur liability, if he/she/it does not successfully provide the procedure or treatment undertaken.

It is further evident from the chapter that it is generally accepted that the work of the doctor/hospital requires some form of skill. The standard of care and skill required of the

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250 Waltz and Inbau *Medical Jurisprudence* (1971) 64-65; Furrow et al *Health Law* (1995) 238; Hoffman "Medical Malpractice" A Chapter published in the *American College of Legal Medicine* (1991) 133; Holder *Medical Malpractice Law* (1975). The American courts have also decided in a number of cases against the usage of the `locality rule'. The advancement of medical science, uniform training standards for trainee physicians at medical schools and the more effective geographical distribution of medical knowledge in the medical profession are all factors that influenced the American Courts. See *Montgomery v Stary* 84 SO 2d 34 (S.CT.FLD 1955); *Viita v Dolan* 136 MINN 128 155 NW 1077 (1910); *Zills v Brown* 382 SO 2d 528, 532 (ALA 1980); *Dickenson v Maelliard* 191 ILL 374 153 NE; *Wickliffe v Sunrise Hospital 1 W.L.R 246.; Brune v Belinkoff* 239 NE 2d 797 (MASS); *Hall v Hilburn* 466 So 2d 85 (MISS 1985).

doctor/hospital is not that of the ordinary man in the street, or as has been accepted in the legal parlance, the hypothetical or fictitious reasonable person. The standard of care is somewhat elevated to the branch of the profession to which he/she belongs. What is required is a more subjective test in which the conduct of the doctor/hospital is measured in terms of the reasonable doctor or reasonable specialist or reasonable hospital, depending on which branch of the medical field is applicable.

It is also evident from this chapter that the term `reasonable' in the medical context does not call for the highest possible degree of professional care and skill but rather the ordinary or average standard, expected of a professional person, with the general level of knowledge, ability, experience, care, skill and diligence. Therefore, by embarking upon a procedure of treatment of the patient, the doctor/hospital, by implication or impliedly, represents to the patient that he/she/it has the necessary training, knowledge and skill and that he/she/it will employ same.

As alluded to earlier, the conduct of the ordinary medical doctor in medical negligence cases is adjudged differently from that of a specialist. A clear distinction is made between the experience levels, level of knowledge and the degree of care and skill required from a general medical practitioner as opposed to the specialist. Of the specialist is expected a greater degree of skill than that of the general medical practitioner. Nonetheless, the conduct of the specialist is measured against the average of reasonable specialist attached to the branch of the profession he or she belongs to.

The standard of conduct of the general doctor or specialist in South Africa is also influenced by the geographical situation in the country, given the facilities in the rural country towns and rural tribal areas, often with poor infra-structures and inferior diagnostic and other equipment, differs markedly from that found in the cities. Although there is no unanimity, it does appear that the preferred view is that a distinction ought to be drawn between the subjective abilities such as skill, education and knowledge and the objective circumstances in which the medical practitioner finds himself/herself in a particular locality, which may differ from that of the city. What is especially relevant is lack of medical facilities and infrastructure in the country towns or rural areas.

The same position clearly does not exist in the other jurisdictions chosen for the research undertaken with this thesis.

The following chapter will consider whether the doctor/hospital, in any way, limit or exclude

it/his/her general duty of care, given the fact that the doctrine of *volenti fit non iniuria* and the concept "assumption of risk" are generally recognised, in the law of delict, as grounds of justification or defences in the general sense. What will be considered is whether, in the medical field, a doctor/hospital may limit or exclude his/her/its liability, which would otherwise have been regarded as tortuous or delictual conduct.

CHAPTER 7

LIMITING OR EXCLUDING THE DOCTOR/HOSPITAL'S GENERAL DUTY OF CARE

7.1 Introduction

In the preceding Chapter it was made clear that in South Africa, England, United States of America and other jurisdictions, the concept `duty of care', is deeply embedded in their law, be it an expressed or implied duty of care derived from contract or that the duty of care prevails in the general sense. What was also observed from the preceding Chapter is a standard of care is created, arising from the special relationship between the doctor/hospital

and patient. Members of the medical profession/hospital are expected to respect honour and observe a reasonable standard of care. They may be held liable in law, for their failure to observe the duty to take care. Despite the aforesaid, it is common cause that all the fore stated jurisdictions have safety mechanisms in place, commonly known as defences. These defences include, but are not restricted to, the doctrines of *volenti non fit iniuria* and voluntary assumption of risk.

In this Chapter, an investigative discourse is conducted on whether the doctor's/hospital's duty of care may in any way be limited or excluded. This discourse will take place against the background of the recognized defences including *volenti non fit iniuria* and voluntary assumption of risk, which are widely recognized in the jurisdictions of England, the United States of America, as well as, South Africa. From the discussions that follow it is clear, that the main purpose for the existence of the defences is said to relieve a person of what would otherwise have been regarded as tortuous or delictual conduct. The effect thereof is that the defendant finds himself/herself exonerated from liability, or put differently, relieved of a legal duty to the plaintiff. The doctrines of *volenti non fit iniuria* and voluntary assumption of risk, which serve as grounds for jurisdictions, therefore, in general terms, to limit or exclude the duty of care, in appropriate circumstances.

It is clear that these defence mechanisms are not new concepts. The doctrine of *volenti non fit iniuria* has its origin in the classical Roman times and was received in English law in the early 14th century. [1] Since then the maxim has been accepted in many common law

[1] Strauss: "Toestemming tot benadeling as verweer in die Strafreg en die Deliktereg". A doctoral thesis (University of South Africa) (1961) 2-6. The author takes the view that, although the maxim in its present wording does not appear in the Roman sources, nevertheless, the closest formulation thereof appears in the *Corpus Iuris Civilis* in which Ulpianus writes: *"nulla iniuria est quae in volentem fiat*". See also the *Digesta* D.47.10.1.5. Strauss (1961) 1 in demonstrating the principle, in consenting one may exonerate another party from liability. The writer uses the example of a Roman who consents to him losing his freedom by being sold as a slave. In that event he exonerates the purchaser against any liability. The Cannon Law formulated the maxim as: *"scienti et consentienti non fit iniuria neque dolus*. See *Sext. V, De Regulis Iuris*, 28. See also the writings of Winfield on *Torts* (1954) 27 who states the maxim in its present form *volenti non fit iniuria* can be traced back to a reportable English decision in the year 1305. See also *De Legibus Angliae Ed. Woodbine* (1942) 286. The most common English translation of the maxim *volenti non fit iniuria. According* to Prosser *Handbook of the Law of Torts* (1955) 82 is founded in *"to one who consents no wrong is done"*. See also Strauss (1961) 1-2 who, when comparing the writings of the Roman Dutch jurists Voet, Matthaeus and Schorer prefers Schorer's formulation of *volenti non fit iniuria* which has the closest resemblance to the modern day formulation. De Groot 3.35.8 formulated the principle as follows: *"Die willig werdt beschadigt niet gehouden en werd voor beschadigt"* whilst Moorman in 6.1.3.3 himself formulated the principle as: *"Dat niemandt met zynen wil ongelyk wordt aangedaen."* Strauss Toestemming tot Benadeling (1961) 5 translates the maxim *volenti non fit iniuria* in Afrikaans as: *"Aan hom wat wil (willig is) geskied geen onreg nie."* Literally translated in English it means `no man can complain of an act which he has expressly or impliedly consented to'. Carstens and Pearmain (2007) describes the maxim of *volenti non fit iniuria* as *"no harm is done to someone who consents thereto"*. The authors describe the maxim as the most important legal ground of justification, subject off course to the legal requirements and exceptions.

jurisdictions including England, the United States of America and South Africa. [2]

In so far as the doctrine of *volenti non fit iniuria* is concerned, the rationale underlying the recognition of the maxim is strongly based on individualism, in which the individual is left to work out his/her own destiny. The courts are, therefore, not keen to protect the consenting party against his/her own folly in permitting others to do him/her harm. It has been stated, many times before, that a person who willingly consents to the defendant's act, in the form of either a specific harmful act or an activity involving a risk of harm, cannot complain that a delict has been committed against him or her.

The maxim "voluntary assumption of risk", equally has a long history. This defence, which is also regarded as a manifestation of the spirit of individualism, has its roots in the English common law centuries ago. Its origin is said to stem from the protection which the doctrine afforded employers, in a capitalist environment, against potential claims arising from the injuries sustained by employees, arising from the wrongdoings of other employees. The doctrine, as with *volenti non fit iniuria,* is firmly entrenched in that jurisdiction. [3] In time however, this defence found disfavour amongst the courts and the legal writers alike, especially in England, as it was perceived to bring about `monstrous' results. Monopolies and the powerful were seen in triumph against the poor and vulnerable. [4]

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2 Strauss (1961) 3. The writer states that this doctrine after its reception in the different legal systems has been deeply entrenched in the English, American and South African respective legal systems. The maxim, according to Strauss (1961) 5, centres around the *volenti* principle which, is known in English and American Law as "consent". In English Law the word "assent" is used synonymously with the word "consent". In American Law the American Restatement (Torts) Par.49 (a) makes a distinction between the two terms. In this regard whilst "assent" emphasizes the manifestation of a person's willingness without making the act legal, with "consent" on the other hand it constitute "an assent" given under the circumstances makes it legally effective. Strauss (1961) 5 emphasizes the South African legal system has followed the English Law concept resulting in the maxim being based on "consent".

3 Strauss (1961) 68; See also Bohlen "Voluntary Assumption of Risk", 20 *Harvard Law Review*, (1910) for the reception of this maxim in the American Law and the results it brought with the advancement of industry and business. The maxim as early as 1943 found favour with the American Courts. The Supreme Court decision of *Tiller v Atlantic Coast Line Ry. Co* 318 U.S. 54 (1943) 49 acknowledges the rationale for the existence of the doctrine as follows: *"To insulate the employer as much as possible from bearing the `human overhead' which is an inevitable part of the cost - to someone - of the doing of industrial business."* The American legal writers followed the same path as the courts in preferring the maxim `assumption of risk' to that of the doctrine of *volenti non fit iniuria*. See Strauss (1961) 68. See also Bohlen (1910) 63.

4 Strauss (1961) 68-69; See also James "Assumption of Risk" *Yale Law Journal* (1952) 141 153. James recognizes the existence of the maxim as *"the strengthening of the notion of social insurance and techniques for effecting broad distribution of enterprise liability."* The curtailment of the wide use of the maxim is described by Street *The Law of Torts* (1955) 173, as, *"social attitudes, with increased paternalism and reaction against laissez-faire make unlikely the success of the defence in suits against their employers."* See further Peterson "The Joker in the Federal Employers Liability Act, 80" *Central Law Journal* (1915) 5.

The application of the maxim *volenti non fit iniuria,* in its general application, is not applied carte blanche without some restriction being placed on the maxim. In certain instances restrictions or limitations are placed on the successful utilization of the defence. From the discourse in this Chapter, it is clear, that, in order to successfully rely on this defence, certain requirements must first be met. In this regard, the consent of the party who consented to the harm, or consented to run the risk of intentional harm, is of paramount importance. For consent to operate successfully as a defence, certain requirements must first be satisfied, *inter alia,* the consenting party must have had knowledge and been aware of the nature or extent of the harm or risk; its use must be recognized by law and not be regarded as *contra bonos mores*. Consent to harm or the risk of harm will, however, not escape sanction from our courts where the prevailing convictions of the community question the lawfulness of such consent.

The factors which often sway the legal convictions of the community, as will be seen from the discussions, include the nature and extent of the interest involved, the motives of the parties and the social purpose of the consent or assumption of risk. Another independent factor, which some of the writers hold to influence societal convictions, is the so-called `contracting out of liability' cases. Such an attempt is viewed by some courts and writers alike as grossly unprofessional and, there for, void, as they are seen as being against public policy. [5]

It is clear from the discourse in this Chapter that, in England, the legal writers and the courts have made it quite clear that in consenting to the risk of injury, the plaintiff does not necessarily consent to negligence, nor does he/she consent to an illegal act or agreement which is against public policy.

The English Unfair Contract Terms Act 1977, impacts on *volenti non fit iniuria* as a defence, as, the Act prohibits clauses which are aimed at, excluding or limiting liability or breach of a duty of care, resulting in death or personal injuries.

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5 Van der Walt and Midgely Delict*: Principles and Cases* (1997) 69-70. The writers ascribe the restrictions placed on consent in certain instances as influenced by the prevailing legal convictions of the community. See also Gordon et al (1953) 188-189. The writers are especially critical of the so-called `contracting out of liability cases.' The inclusion of a clause in a contract releasing a practitioner from any legal obligation to show due skill and care, would, be grossly unprofessional. Gordon et al (1953) 188-189 suggest courts should regard those contracts as void and against public policy. For a similar view see Van Oosten Encyclopaedia (1986) 88; Claassen and Verschoor (1992) 102-103; Strauss and Strydom (1962) 175ff, 209ff; Van der Merwe and Olivier (1989) 92-93; Joubert *The Law of South Africa* Vol. 8 (1995) 116-117; Boberg *The Law of Delict* (1984) 729. Neethling, Potgieter and Visser *Law of Delict* (2001) 82-83. For case law see the case of *Morrison v Anglo Deep Gold Mines Ltd* 1905 TS 775.

Likewise, in the United States of America, both the American legal writers and the courts do recognise the doctrine of *volenti non fit iniuria* as a defence. Consent is also regarded as an important element of the defence. The effect of consent in this context is, it negates the wrongful event of the defendant's act and deprives the plaintiff of a civil claim afterwards. But, the use of the defence is also restricted or limited; this is usually the case when public interest is contravened.

It will be seen in this Chapter that voluntary assumption of risk as a defence is also recognised in the jurisdictions of South Africa, [6] England [7] and the United States of America. [8] The effect of voluntary assumption of risk as a defence, like that of consent, negates wrongfulness. The legal writers and the courts alike lay down certain requirements which must first be met before it can be said that voluntary assumption of risk has succeeded as a defence.

In this regard, it must be shown that the plaintiff had knowledge of the risk of harm, and that the plaintiff appreciated the nature and extent of the risk involved and notwithstanding, freely and voluntary assumed the risk.

In America in particular, restrictions or limitations are placed on this form of defence, especially, where the parties stand in an unequal bargaining position to each other, or,

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6 Some writers in South Africa have expressed the view that `voluntary assumption of risk' it is an extension of the doctrine of `*volenti non fit iniuria*' in that it takes the wider form. See Van Oosten The Doctrine of Informed Consent (1989) 14; Van der Walt (1979) 51; McKerron (1971) 67; Van der Walt and Midgley (1997) 68; Joubert *LAWSA* Volume 8 (1995) Par 89. *Contra,* Van der Merwe and Olivier (1989) 95. The writers opine that voluntary assumption of risk does not involve itself with consent to harm *per se* but rather consent to the risk of harm; Boberg (1984) 724 criticizes the extension as `creating a nest of troubles'.

7 Although not much has been written about this defence by the English writers, it is used inter changeably however, with *volenti non fit iniuria* as a defence. See Winfield and Jolowicz (1969) 688. The writers recognize the defence in stating: *"If the circumstances warrant the inference that the plaintiff has voluntarily assumed the risk of the defendant's negligence he cannot sue."* See also Brazier (1993) 80ff. The writer draws a distinction between *volenti non fit iniuria* and assumption of risk as a defence when he states: *"Whilst volenti non fit iniuria includes consent to an invasion of a specific interest assumption of risk includes a willingness on the part of the plaintiff to run the risk of injury from a particular source of danger."*

8 The term `assumption of risk' has also been used inter changeably with the doctrine of `*volenti non fit iniuria*' in American law. See Page and Keeton Prosser and Keeton on the Law of Torts (1984) 480; See also Keeton "Assumption of Risk in Products Liability Cases" 1961, 22 *LA.L.REV*. 122. The writer classifies assumption of risk into no less than six different categories namely: express, subjectively consensual, objectively consensual, by consent to conduct or condition, associational, and imposed. See further Bohlen "Voluntary Assumption of Risk" 1968 20 *Harv.L.Rev* 14 91; Wade "The Place of Assumption of Risk in the Law of Negligence" 1961 22 *LA.L.REV.* 5; Green "Assumed risk as a defence" 1961 *LA.L.REV*. 77.

where the agreement is against public interest or public policy.

The doctrine of assumption of risk, as will be seen from this Chapter, is recognised in America as a fully fledged defence, provided it is shown that the plaintiff was made aware of the risk present and the plaintiff fully understood the nature of the risk, and notwithstanding, the plaintiff freely and voluntarily chose to incur the risk. But, notwithstanding the requirements as stated hereinbefore being present, there are instances in the United States of America in which the defendant will not escape liability. Factors which militate against the recognition of the defence "assumption of risk" under the aforementioned circumstances include, where the defendant is under a public duty or a legal duty, in terms of a statute, to exercise a duty of care, one party is at such disadvantage in bargaining power, the effect of which, is to put the one party at the mercy of the other party's negligence and that the former party is allowed to contract out of his/her own negligence in breach of his/her duty of care in respect of the latter party.

Whether a deceased breadwinner's voluntary assumption of risk, that caused his/her death, can validly be raised as a defence to an action by his/her dependants seems to be fairly settled. Although this has sparked off fierce debate in the past, especially, in the South African jurisdiction, the position seems to be that, as the dependants have an independent, non-derivative right, defences such as waiver of action or voluntary assumption of risk, which would have negates the breadwinner's claim for injuries had he/she lived, will not avail against the dependants. Therefore, despite the deceased breadwinner's consent, the dependant's claim for loss of support is unaffected. Another reason for the limitation of such a defence is founded on the premise that, constitutionally, a basic duty exists that a parent, guardian or ward etc, should at all time act in the minor's best interests. [9]

In England the position seems to be regulated by statute, namely, the Unfair Contract

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[9] See Boberg (1984) 732. The writer opines that: *"whilst it would no doubt be proper to consent on the minor's behalf to a reasonable risk involved in useful vocational training, or subject him to surgery for the sake of his health or (probably) appearance, it is submitted that consent to harm or its risk without corresponding benefit is an abuse of the guardian's authority and hence ineffective."* This, according to Boberg (1984) 732 740, accords with public policy and the principle of reasonableness. For that reason, consent is regarded as ineffective where it is *contra bonos mores*. Likewise in order to qualify in terms of the *volenti* doctrine consent can only be given to conduct reasonable under the circumstances. In this regard Boberg (1984) 732 gives an example where: *"..... if the guardian's consent took the form of a pre-accident contractual waiver (e.g. tacit acceptance of a `patient's ride at their own risk' clause), the minor child could surely escape it ..... cannot be prejudiced by an unreasonable consent given improperly on his behalf."* The above stated is, it is submitted, in line with Section 28(2) of the 1996 Constitution Act 108 of 1996 which provides: *"28(2) a child's best interest is of paramount importance in every matter concerning the child."* This foretasted principle was laid down in the South African courts as long ago as 1908 in the case of *Jameson's Minors v CSAR* 1908 TS 575 and followed consistently in other dicta, the last of which, albeit obiter appeared in the more recent case of *The Johannesburg Country Club v Stott and May NO* 2004 (5) SA (SCA).

Terms Act 1977, which enables dependants to claim successfully for loss of support despite the parents, guardian or ward assuming the risk of harm. The dependants therefore retain their autonomous and non-derivative claim. Although not regulated by statute, the common law position in America is similar to South Africa, in that, dependants retain their autonomous and non-derivative claim.

But the defences of *volenti non fit iniuria* and voluntary assumption of risks have not been restricted to general application outside the medical terrain.

What has emerged over a period of time is for hospitals to make use of consent forms, in admission procedures, wherein, the hospitals insert exculpatory clauses, couched in different wording, in an attempt at exculpating themselves from any liability, whatever form negligence takes.

The exculpatory clauses, also known as indemnity clauses or waivers of liability, are then, ultimately, used as a defence by the defendant against the plaintiff in order to escape liability.

In this Chapter it will also become clear that the defence of *violent non fit injuries,* as a ground of justification for medical interventions, is recognised, by the legal writers and the courts alike, in the South African and English jurisdictions. The American jurisdiction prefers the doctrine of "assumption of risk" as a defence. The recognition of the defence stems from the contractual relationship between the doctor/hospital/healthcare provider and the patient, in which the consent of the patient plays a fundamental roll. The absence of consent from the patient himself/herself, or someone acting on the patient's behalf, has the effect that the medical intervention is wrongful or unlawful, unless some form of justification is present. The legal consequences that flow there-from are, the medical practitioner/hospital/healthcare provider may be criminally prosecuted for assault and/or face civil action for damages.
The presence of consent, on the other hand, has the effect that an act, which is *prima facie* actionable, deprives the plaintiff of the right afterwards to complain of it. The maxim applicable, in such cases, is known as *volenti non fit iniuria*.

But, as with the application of the defence in general terms, in a medical context, the maxim *volenti non fit iniuria* may only be raised successfully as a defence if it is shown, *inter alia*: that the patient did have sufficient knowledge of the procedure to be followed; the patient appreciated the consequences and nevertheless, consented thereto; the consent given must be recognised by law. That is, it must conform to the dictates of society, the

so-called *boni mores*.

In the so-called "contracting out of liability" cases involving medical practitioners, the South African legal writers are divided on the legal consequences. Those who are ardent followers of the doctrine of freedom of contract hold the view that the effect of these agreements is; the contract is valid. They caution that contractants should not afterwards be heard to complain against their own folly. They rely heavily on the doctrine of *caveat subscriptor* - `let the buyer beware'. The other camp of legal writers persuasively argues that although the consent by the patient may clearly be established, nonetheless, those circumstances can only protect the medical practitioner against a claim of assault. Any attempt by a medical practitioner/hospital to contract out of liability for malpractice, ought to be declared void as against public policy, leaving the patient's right to sue for damages unimpaired. [10]

The writers, in this regard, contend that no medical practitioner/hospital should be released from his/her/its obligation to show due skill and care, for such conduct would be grossly unprofessional and void as against public policy. Other factors influencing their thinking include: the unequal bargaining position the patient occupies in relation to, especially, the medical practitioner, the latter occupying a position of trust; the fiduciary relationship between the medical practitioner and the patient; the influence of normative ethics and other ethical codes; medico-legal considerations and constitutional demands.

But, despite an overwhelming opinion by South African legal writers, the Supreme Court of Appeal nonetheless, in the case of *Afrox Healthcare Bpk v Strydom* 2002 (6) SA 21 SCA decided, contrary to popular opinion, that through exculpatory agreements hospitals can relieve themselves from liability. As this issue forms the core of the research undertaken in this thesis, an in-depth and comprehensive discussion will follow in Chapter 14.

With regard to the English legal position, this Chapter will also carry a discussion of the doctrine of *volenti non fit iniuria* as a defence mechanism in the medical context. Although

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10 Gordon Turner and Price (1953) 153ff 188ff; *Contra* Van Oosten *Encyclopaedia* (1996) 88 who holds the view that *"provided they are stated in unambiguous terms, exemption clauses are enforceable unless they exclude liability for intentional medical malpractice in which case they will be regarded by the courts as contra bonos mores and, hence null and void."* Whether or not a clause excluding liability for gross medical negligence will be upheld is according to Van Oosten *" ..... at least open to doubt."* See also Strauss (1991) 305; Claassen and Verschoor (1992) 102-103; Burchell and Schaffer (1977) *Businessman's Law* 109-15. *Contra* Cronje-Retief (2000) 440-41 who holds the view that with regard to hospitals making use of exemption clauses *" ..... big institutions, corporations or other groups with unrestricted financial resources and adequate insurance exempt themselves from liability of such contracts, are effectively contra bonos mores, against public policy and or public interest and should be declared invalid by our courts."* See further the instructive writings of Carstens and Pearmain (2007) 458ff.

the doctrine of *volenti non fit iniuria* is recognised as a defence in a medical context, certain requirements must first be met before a defendant will be successful in raising the defence. The requirements, as in South Africa, include, sufficient information must be given, by the medical practitioner, regarding the nature and scope of the medical treatment, to the patient, for the patient to form an understanding thereof. Should the patient have knowledge and sufficient understanding of the consequences, and notwithstanding, consents to the treatment, the defendant will have reasonable prospects of succeeding with the defence. But, the defence is not unlimited. Regardless of consent being given by the patient, certain legislative restrictions place a limitation on contractual freedom. In terms of the Unfair Contract Terms Act of 1977, a medical practitioner/hospital is not free to exclude or restrict his/her/its liability for death or personal injury resulting from negligence.

In this Chapter it will be seen that, in the United States of America, some legal writers recognise the doctrine of *volenti non fit iniuria* as a fundamental principle of the common law. With reference to the recognition of the defence against medical negligence however, most writers prefer the defence of assumption of risk. Consequently, the defence in a medical context will be discussed in this Chapter under the defence of voluntary assumption of risk.

Assumption of risk as a defence, in a medical context, as will be seen from the discourse in this Chapter, has received very scant attention from South African legal writers and the courts. The legal position appears, it is submitted, to be: societal dictates demand that in exercising his/her profession, the medical practitioner ought not to be allowed to compromise the degree of care and skill expected of the medical practitioner. The same is applied to hospitals and other healthcare providers. A relaxation thereof would lead to a negation of recognised medical norms and ethics. [11]

This Chapter also sets out the English position. English legal writers, and their courts, lay

[11] Strauss and Strydom (1967) 320-321. The writers rely upon the trust position of the medical practitioner and the patient in which the medical practitioner through his/her expert knowledge dominates the relationship. The patient is dependent upon the medical practitioner's judgement and conduct. Societal dictates demand that in exercising his/her profession, the medical practitioner ought not be allowed to relax the decree of care and skill expected of him/her as a practitioner, notwithstanding, the patient consenting thereto. To allow that so the authors argue would be tantamount to giving the patient the authority to license the practitioner to deviate from recognised medical norms and ethics. This clearly would be against public policy or the so-called *boni mores*. See also the instructive writings of Carstens and Pearmain (2007) 458ff who state that healthcare professionals are ethically obliged by their professional rules to take due and proper care and exercise their professions with diligence was used by the Supreme Court of Appeal to justify the presence of such a clause, when it should have been used to strike it down. They go on to say *"the professional rules and standards which are applied to health professionals are an indication of what it means to be a professional in the first place. Members of the public expect to be treated in a professional manner and up to a certain standard when they seek out the service of a registered professional because if they did not, they might as well go to Joe Public for the same services."*

down similar requirements. But the defence will not succeed, even though all the requirements have been met, where statutory restrictions are placed on the conduct of the parties, for example, the Unfair Contract Terms Act 1977, which prohibits the exclusion of liability for death or personal injury caused by negligence. The same principle is advocated when a physician and patient have reached an express agreement that the patient will voluntarily assume the risk of harm.

In a medical context, the doctrine of "assumption of risk", in America, blends into the issue of informed consent and waiver of liability. Assumption of risk, in this context, as will be seen in this Chapter, operates in this way; the patient consents to treatment and/or surgery, notwithstanding acquiring the knowledge and understanding of possible harmful consequences, which the treatment and/or surgery may hold for him/her. But, it has been stated quite frequently by the American legal writers, that the defence of assumption of risk will be unsuccessful, despite the patient's consent, where the physician's diagnosis or treatment fall below the expected standard of due care and skill. It follows, therefore, that should the physician advise the patient of the risks and then provide improper care, the physician cannot successfully invoke the defence on the ground that the patient had assumed the risk. Waivers of liability and other attempts at exculpating medical practitioners/hospitals/healthcare providers from liability, as with assumption of risk and negligence, have been treated with disdain by the American legal writers and the courts in that, `contracting out of negligence' is treated as void, against public interests or *contra bonos moros* in the United States of America.

7.2 Limiting or Excluding Liability as a Ground of Justification in general

7.2.1 The Doctrine of *volenti non fit iniuria* in general

7.2.1.1 SOUTH AFRICA

7.2.1.1.1 Legal Writings

The maxim *" volenti non fit iniuria ",* is recognised by our legal writers as a ground for justification which excludes the wrongfulness of a defendant's conduct, in circumstances in which the plaintiff's legally protected interests may be adversely affected through consent. [12] Several definitions have been given by our legal writers to the maxim. [13]

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12 See McKerron (1971) 67 who recognizes the application of the maxim in *"cases where a person has consented to run the risk of unintentional harm, which would otherwise be actionable as attributable to the negligence of the person who causes it."* The author goes on to use the following example namely: *"Consent to run the risk of being hurt as a participant in, or as a spectator at, a football or cricket match, or a motor racing meeting."* Joubert et al *The Law of South Africa* (1995) Para 89 acknowledges the justification of the maxim as a defence in our law of delict as *"a ground of justification (which) excludes the wrongfulness of the defendant's conduct. It indicates conclusively that interference with the plaintiff's legally protected interests was reasonable, and therefore lawful in the circumstances."* Recognition of this maxim are also given by other legal writers including Van der Merwe and Olivier (1989) 89; Van der Walt (1979) 51. The author states that although recognised in South Africa, the

The rationale underlying the recognition of this maxim is strongly based on individualism, in which, the individual is left to work out his/ own destiny and the courts are not concerned with protecting him or her, from his/her own folly, in permitting others to do him/her harm. [14]

South African Law generally classifies the maxim *"volenti non fit iniuria"* into two forms, namely, in its narrower form; it takes the form of consent to a specific harm, [15] whereas in its wider form it takes the form of an assumption of risk of harm. [16]

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defence is today applied with *"greater caution and circumspection."* See further Van Oosten (1989) 13 ff; Strauss (1961) 48 ff 63 74 286 332 ff; Burchell, Milton and Burchell *South African Criminal Law and Procedure* Vol. 1 (1997) 369; Boberg (1984) 724; De Wet *Strafreg* (1985) 94; Snyman *Strafreg* (1986) 131-132; Neethling Potgieter and Visser (2001) 82-83; Strauss and Strydom (1967) 317; Strauss (1991) 323; Carstens and Pearmain (2007) 875.

13 See McKerron (1971) 67 who formulates the maxim as *"no man can complain of an act which he has expressly or impliedly assented to."* See also the definition of Van der Walt and Midgley (1997) 68 who formulates the maxim as *"an injury is not done to one who consents."* The definition of Boberg (1984) 724 and Hutchinson et al (1991) 662 are couched in similar terms namely *"a willing person is not wronged." Contra* Joubert *The Law of South Africa* (1995) 112 who formulates the meaning of the maxim in the following broad terms namely: *"A person who willingly consent to the defendant's act, in the form of either a specific harmful act or an activity involving a risk of harm, cannot complain that a delict has been committed against him."* For a similar definition see Van der Walt (1979) 50; See also Carstens and Pearman (2007) 875.

14 McKerron (1971) 67 cautions that *"no man can complain of an act which he has expressly or impliedly assented to"* or simply put by Boberg (1984) 724 *"a willing person is not wronged."* See also Hutchinson et al (1991) 662; See further Van der Walt and Midgley (1997) 112-113 who recognize an individual's right to self-determination in stating: *"A person who willingly consents to the defendant's act, in the form of either a specific harmful act or an activity involving a risk of harm, cannot complain that a delict has been committed against him or her."* See also Strauss and Strydom (1967) 182. Although the writers acknowledge that the maxim is founded in individualism, in a society, in which the freedom of the individual is valued and in which it is respected that each individual is entitled to work out his own destiny, nevertheless, the maxim is subject to reservations and restrictions. See Gordon et al (1953) 188 who acknowledge that whilst the individual in terms of the maxim has a freedom of choice to "*consent to an act prima facie wrongful and cannot afterwards complain of it"*, nonetheless limitations are placed in certain instances, for example in the so-called "contracting out" of liability cases.

15 Strauss *Toestemming tot Benadeling* (1961) 48ff 63 74 286 332ff equates consent to *"a specific harm to assumption of the risk of harm"*; See also Van Oosten - Informed Consent (1989) 14. Van Oosten supports Strauss's opinion that *"without eventual harm, there can be no question of delictual liability." Contra* McKerron (1971) 67ff. The writer does not relate the defence to any specific event of delict, but simply deals with it under `general defences'. See further Loubser in the *Law of South Africa* (1995) 8 (ed Joubert) Par 79; Van der Walt and Midgley (1997) 89; Boberg (1984) 724; Van der Merwe and Olivier (1985) 89; 96-97; Neethling et al (2001) 82-83; Snyman (1986) 131-132; Visser and Vorster *General Principles of Criminal Law through the Cases* (1987) 186. For examples illustrating its functions in the narrower form, see Boberg (1984) 724. The writer notes *"the participation in a contact sport or the performance of a surgical operation"* as typical examples of the narrower form. See also Strauss (1961) 7; McKerron (1971) 67; Neethling Potgieter and Visser (2001) 883; Van der Walt (1979) 51; Van Oosten *Informed Consent* (1989) 14.

16 For an illustration of the maxim, in the wider form, see Strauss - Toestemming tot Benadeling (1961) 50. The writer identifies *"consent to possible risks of side-effects after an operation"* as an example of the wider form of consent; See also Neethling et al (1989) 883; See further Van Oosten *Informed Consent* (1989). The writer expresses the view that the term voluntary assumption of risk, sometimes also denote contributory intention, which, likewise, constitutes a complete defence (by excluding the alleged wrongdoings fault), or contributory

But, regardless of whatever form it takes, it remains a ground for justification which excludes the unlawfulness or wrongfulness element of a crime [17] or delict. [18]

For consent to operate successfully as a defence, certain requirements must first be satisfied, *inter alia,* consent must be free and voluntary; the person who consents must be capable in law of consenting; the consenting party must have had knowledge and been aware of the nature and extent of the harm or risk; the consenting party must have appreciated and understood the nature and extent of the harm or risk; the consent given must be clear and unequivocally; its use must be recognised by law, and not be regarded as *contra bonos mores*. [19]

It is especially the latter requirement which is of great significance to the central theme of the investigation into the validity of exclusionary clauses in hospital contracts. [20]

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negligence, which affects the apportionment of damages.

17 Van Oosten *Informed Consent* (1989) 15. The writer holds the view that: *"Since a crime primarily constitutes a violation of the community's interests, consent does not ordinarily justify criminal conduct, which renders the application or the defence rather more limited in criminal law than in the law of delict."* See also McKerron (1971) 73; Burchell Milton and Burchell (1983) 369; Snyman (1986) 131; Visser and Vorster (1987) 186.

18 Van Oosten *Informed Consent* (1989) 15 who states that: *"volenti non fit injuries (unlike in the case of a pactum de non pretend in anticpando does not necessarily turn upon a wrongful act, nor is it founded upon an agreement, contract, negotiation or `bargain' between the parties, although they have the same effect."* See also Strauss Toestemming tot Benadeling (1961) 64ff. The writer also holds the view that voluntary assumption of risk must be distinguished from a specific agreement in terms of which, a person who may have a claim for damages in future, abandons that claim, i.e. the so-called `agreement not to sue' or *pactum de non petendo in anticpando*. Strauss *Toestemming tot Benadeling* (1961) 64 on the other hand states although such an agreement is sometimes established in terms of the *volenti* doctrine; it still does not constitute assumption of risk. See also Van der Walt and Midgley (1997) 95, Joubert (1995) Vol. 8 Par.69; Van der Walt (1979) 51; Van der Merwe and Olivier (1985) 101; Neethling et al (2001) 90; *Contra* Boberg (1989) 734.

19 See the comprehensive discussion on all the requirements by Van Oosten The Doctrine of Informed Consent (1989) 17ff; Strauss Toestemming tot Benadeling (1961) 8ff; Neethling et al (2001) 98; Van der Merwe and Olivier (1989) 93ff; Van der Walt (1979) 51ff; Van der Walt and Midgley (1997) 68ff; Joubert The Law of South Africa (1995) 8 Par.89; Snyman (1986) 133; See further Carstens and Pearmain (2007) 883ff. The National Health Act 61 of 2003 lays down legislative requirements that need to be adhered to and against which a physician's conduct is assessed.

20 Van der Walt (1979) 53-54 advocates for restrictions to be placed on `consent to or assumption of a risk' in instances where as a result of *"the prevailing legal convictions of the community with regard to the lawfulness of the particular conduct in question"* it is considered that such consent is invalid and *contra bonos mores*. Factors which often sway the legal convictions of the community comprise the nature and extent of the interest involved the motives of the parties and the social purpose of the consent or assumption of risk. See also Gordon et al (1953) 188-189 who regard the so-called `contracting out of liability cases' as another factor which influence societal convictions. In this regard the writers hold the view that: *"No practitioner would include in such a contract a term releasing him from any legal obligation to show due skill and care, for such conduct would be grossly unprofessional and deserving of disciplinary action by the Medical Council. But even if a practitioner did purport to contract out of liability for malpractice, it may be considered at least probable that the Courts would declare such a contract void as against public policy, leaving the patient's right to sue for damages unimpaired. In such a case it*

From the foregoing it is clear that, generally, our writers, in accepting the maxim *"volenti non fit iniuria"*, indicate their willingness to recognize the individual's freedom of will and capacity to regulate, unilaterally, his/her rights. Put differently, generally, the freedom of the individual is valued and respected.

But, as was stated earlier, the application of the maxim is not without reservations or restrictions. Put differently, individual freedom in certain instances is curtailed.

What is of paramount importance in medical practise is the requirement that, where a patient consents to medical treatment or surgery, no lawful consent will be obtained unless the consenting party knows and appreciates the nature, scope, consequences, rights, dangers and complications which the proposed treatment or medical intervention may bring, and, he/she appreciates what it is that he or she consents to. The requirement is better known, in medical circles, today as informed consent by the patient. [21]
Where the doctor, however, treats a patient, or performs an operation on the patient, without first obtaining the patient's consent, the doctor may be sued successfully for an assault on the patient based on negligence. [22]

7.2.1.1.2 **Case Law**

The maxim *"volenti non fit iniuria"* has its roots firmly embedded in the South African Case Law. The application of the maxim as a defence can be traced back to 1877, when in the case of *Steel v Pearmain,* [23] the court was asked to decide whether the defendant was liable for an injury sustained by the plaintiff during participation in sport. The court held:

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could be argued that society cannot allow a medical practitioner to take such an advantage of his patient, in regard to whom he stands in a position of such power." For a similar approach see Van Oosten Encyclopaedia (1996) 88; Claassen and Verschoor (1992) 102-103; Strauss and Strydom (1967) 324-325. See further Van der Merwe and Olivier (1989) 92-93; Van der Walt and Midgley (1997) 69; Joubert *Law of South Africa* Vol 8 (1995) 116-117; Boberg (1984) 729; Strauss Toestemming tot Benadeling (1961) 8-9 416; Van Oosten The Doctrine of Informed Consent (1989) 17; Snyman (1986) 131-132; Neethling et al (2001) 89; Carstens and Pearman (2007) 468 instructively argue that there are certain obligations which should be inescapable as expressed by the *boni mores*. Such situations arrive especially where the bargaining power of the contracting parties is so unequal.

21 For the detailed discussion see Chapter 4 pages supra. See also Van Oosten "Informed Consent" (1989) 11-69; See also Van Oosten Encyclopaedia (1996) 67-70; Van Oosten "Castell v De Greef and The Doctrine of Informed Consent: Medical Paternalism ousted in favour of Patient Autonomy" 1995 *De Jure* 164ff; See further Boberg (1984) 751; Neethling et al (2001) 98ff; Strauss (1991) 14ff; Strauss "Bodily Injury and the Defence of Consent" 1964 *SALJ* 179; Strauss 1987 *TSAR* 1.

22 See Boberg (1984) 751; Neethling et al (2001) 94ff; Strauss (1991) 324; Van Oosten "Informed Consent" (1989) 56ff; Van Oosten (1995) *De Jure* 166.

23 1877 NLR 22.

"Accidental injuries suffered in sport or by one taking part therein, at the hands of another also taking part therein, even though caused by want of skill, are not set down to culpa and are not actionable. Steel v Pearmain 1877 22." [24]

In a subsequent case of *Spires v Scheepers* [25] in which the defendant was sued for damages arising from an attack, by his ostrich, upon the plaintiff. The court held that the defendant was not liable for the attack by his ostrich, upon the plaintiff, because the plaintiff had accepted the risk.

The maxim also formed the basis of the defence of the defendant in the case of *Davids v Mendelsohn,* [26] in which the plaintiff sought damages arising from a roof collapsing incident. The defendant, relying on the maxim, averred that the plaintiff, a tenant, was *a volens* to risk of the roof collapsing on her whilst she remained on the premises, whilst the roof was being repaired. The court held: *"She knew the risk she was incurring by remaining in the house while the repairs were being executed, and she preferred the risk to the inconvenience of going elsewhere."* And further: *" ..... but the injury was occasioned by her own fault in remaining on the premises with full knowledge of the danger and after being warned to go. If ever there was a case to which the maxim of the English law, volenti non fit iniuria, would apply, this is one."* [27]

Although the courts at first did not extend the application of the maxim to cases where a statutory duty was breached, this however, became a recognised principle in the case of *Morrison v Anglo Deep Gold Mines Ltd*. [28]

The facts of this case can briefly be stated as follows: The employees entered into an agreement with the employer. The contract provided, *inter alia,* that the employer, in consideration of insuring his servant against injuries caused by the negligence of a fellow-workman, shall be free from liability in respect of such interests. The question to be determined was whether it was legal for an employer to limit his liability for injury caused to a servant by the negligence of fellow-workmen. Innes CJ in his judgement recognised the maxim *volenti non fit iniuria* when he stated: *"Now it is a general principle that a man*

24 *Steel v Pearmain* 1877 NLR 22.

25 1883 EDC 173.

26 1898 15 SC 367.

27 *Davids v Mendelssohn* 1898 15 SC 367.

28 1905 TS 775.

contracting without duress, without fraud, and understanding what he does, may freely waive any of his rights." Innes C.J. however, cautioned that in certain instances the law recognized some acts as vitiating voluntary consent. One of those is the giving of consent must be contrary to public policy. Innes C.J. goes on to state: *"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."*

In considering whether it was against public policy to limit the liability of the company, in respect of the consequences of a breach of the mining regulations, the court, referring to Griffiths v Earl of Dudley 9 QBD 357 in which it was held that: *" ..... the doctrine volenti non fit iniuria did not apply where there was a breach of statutory regulations."*

Innes C.J. concludes:

"The general rule is that any person may waive rights conferred by law solely for his benefit. Cuilibet licet renuntiare jure pro se introducto. But 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. 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."

Mason J concurring added the following:

"That claim for compensation is the private right of the man himself. He may compromise it or abandon it, when once it has arisen."

Commencing on the principle in the so-called "contracting out" of liability cases, Mason J commented as follows:

"It may be fairly argued that it is against public policy to allow a man to contract out of liability for injury done to persons by those in his employment and that argument, so far as I understand it, raises two grounds: first, that the permission to contract out may make employers careless of the safety of their servants, so that such permission is against public interest, and the second is the ground given in the American decision quoted during the argument, that it would fill the land with disabled and impoverished workmen."

The court continues:

"Now in our law it is a principle that agreements contra bonos mores will not be enforced, and that is in reality the same as the English maxim as to contracts against public policy. It is a wide reading and not well defined principle, and the courts always recognise the difficulties and dangers of the doctrine. For this argument to succeed on the ground of public policy it must be shown that 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 interests of the public."

Mason J concludes, in rejecting the American dicta, when he states, in the following terms,

that the doctrine *volenti non fit iniuria* ought to be available, even where there has been a breach of statutory regulations, provided the agreement is not contrary to public policy:

"Personally I am unable to appreciate the reasons why, if a man is held to waive by conduct a claim for compensation under the common law in regard to a dancer which may prove most fatal in character, he cannot waive by express agreement this claim in the case of some trifling breach of regulations by which he may get some trifling scratch." [29]

The recognition of the doctrine of *volenti non fit iniuria* also received the attention of the court in the case of Waring & Gillow Ltd v Sherborne. [30] Not only did the court recognise the maxim, Innes C.J. also laid down certain criteria which had to be met before a litigant could successfully utilize the maxim *volenti non fit iniuria* as a defence.

For the first time the essential elements of knowledge, appreciation and prevailing consent were realized as main criteria. In this regard Innes C.J. stated:

"The maxim volenti non fit iniuria embodies a principle which, when confined within right limits, is both just and equitable. A man who consents to suffer an injury can as a general rule have no right to complain. He who, knowing and realizing a danger, voluntarily agrees to undergo it, has only himself to thank for the consequences. But like so many other maxima, the one under consideration needs to be employed cautiously and with circumspection. The principle is clear, the difficulty lies in the application of it, in deciding, in other words, under the circumstances of each particular case whether the injured man was volens to undertake the risk. A consideration of the grounds upon which the doctrine rests, and of the cases in which its scope has been discussed, leads to the conclusion that in order to render the maxim applicable, it must be clearly shown that the risk was known, that it was realised, and that it was voluntarily undertaken. Knowledge, appreciation, consent - these are the essential elements." [31]

Other matters in which the South African courts have pronounced on the validity of the maxim, *"volenti non fit iniuria",* as a defence, include Lampert v Hefer NO [32] in which the court stated:

"These are the defences of volenti non fit iniuria and contributory negligence respectively; I merely quote two passages taken at random for it is trite law that our system recognizes both defences." [33]

In considering voluntary assumption of risk as a defence, the court concluded that there are many instances in which voluntary assumption of risk and *volenti non fit iniuria,* as

29 *Morrison v Anglo Deep Gold Mines Ltd* 1905 TS 775.

30 1904 TS 340.

31 1955 (2) SA 507 (A).

32 *Lampert v Hefer NO* 1955 (2) SA 507 (A). This was the start of what Boberg (1984) 724 call the start of "grafting another limb on to the *volenti* principle and which has since been a nest of troubles."

33 *Lampert v Hefer N.O.*1955 (2) SA 507 (A).

defences, overlap.

This was also the approach by the Appellate Division (as it was known then) in the case of *Santam Insurance Co Ltd v Vorster* [34] in which Ogilvie Thompson CJ held at 774:

"The rule that no injury is committed against one who consents is as old as Digest 47.10.15. In modern times this rule is conveniently and more usually expressed by the maxim volenti non fit iniuria. The defence indicated by the maxim is undoubtedly recognized in our law. The maxim comprehends a wide field. In its simplest forms of which express consent to a surgical operation or the tacit consent of participants in a contact sport such as rugby, football afford clear illustrations - the defence gives rise to little or no difficulty. In practise it is the application of this volens defence in what are conveniently known as `risk' cases which presents problems. In such cases the defence is variously designated the `voluntary assumption', `voluntary acceptance' or `voluntary encountering' of risk, or risk of injury..... "

The effect of the defence of the maxim *volenti non fit iniuria* is put as follows by Ogilvie Thompson CJ:

"There exists a considerable weight of authority to the effect that, if established, the volens defence eliminates any duty of care, or as some writers prefer to put it, negatives the commission of any actionable unlawful act, and, consequently, that it would operate entirely to exclude any claim by dependants (see e.g. McKerron op cit 70-3, Strauss `Aspekte' ( ); Van der Merwe & Olivier op cit 95, 135; Schwietering op cit 144; and cf. also Salmon Torts 15 ed 665, and Walker The Law of Delict of Scotland 1966 ed vol. II 731) Contrary views are however not entirely lacking (see Macintosh & Stand op cit 62ff, and Price (1949) 66, SALJ 269 at 271-3 and (1952) 15 THRHR 68 at 80). Bearing in mind the peculiar nature of the dependant's action in our law. I express no opinion on this controversy, and wish to record that nothing in this judgement should be regarded as leaving the position of a possible claim by dependants anything but open; for future decision as when it should arise." [35]

Our courts have also recognised the requirement, namely, in order to succeed with a defence of *volenti non fit iniuria,* or voluntary assumption of risk, as a ground of justification, the consent to or assumption of risk must not be considered *contra bonos moros*. In determining whether consent is *contra bonos mores,* the courts will consider the prevailing legal convictions of the community with regard to the lawfulness of the particular conduct.

Our courts as far back as 1904, in the case of *Morrison v Anglo Deep Gold Mines Ltd,* [36] recognised that, despite a person's autonomy and freedom of will to do on certain conduct, there are, notwithstanding, *"..... Certain exceptions to that rule, and certainly the law will not recognize any arrangement which is contrary to public policy."*

In the case of Morrison, the court weighed up several factors in determining whether the

34 1973 (4) SA (A).

35 *Santam Insurance Co Ltd v Vorster* 1973 (4) SA 764 (A) at 777.

36 1905 TS 775.

arrangement was contrary to public policy, *inter alia "…. the observance of a statute which affects not only the individual, but other members of a statute affecting the safety of the workforce may make employers careless of the safety of their servants."* [37]

In the case of *Santam Insurance Co Ltd v Vorster* [38] the court considered the "reprehensibility" of the "dicing" consent as a factor. Citing two English decisions the court stated:

"I agree with the observation of Lord Bramwell (in Smith v Baker & Sons (1891) AC 325 (HL)) which was cited with approval by Davis J in the National Meat Supplies v Spittal at 505, that a man may be volens to encounter the natural dangers of a business but not those superadded by negligence'." [39]

In *S v Collett* [40] the court considered whether a defence of consent, arising from an agreement by a servant, that his master may inflict corporal punishment upon him, was a valid and recognized defence, the court rejected the defence. Relying on the following factors namely, "the infliction of corporal punishment by a master on his servant being contrary to public policy" and "the unequal bargaining of the servant when concluding the agreement". The court held:

"In truth, it seems to us that the infliction of corporal punishment by a master on his servant is clearly contrary to public policy and bonos mores. In the relationship of master and servant the role of the master is, of course, a dominant one and that of the servant is a subservient one. Even in the field of contract it has been long recognised that public policy requires that he be protected from the disadvantageous consequences of agreements which he may have felt obliged to enter into with his master, the reason being that as a servant he is not contracting on equal terms with his master."

Subsequently in rejecting the defence the court concluded:

"It is to our minds quite inconceivable that public policy would ever permit a master to circumvent the ordinary process of the law in the way the appellant did in this case, or permit a servant to make a valid election to allow the master to do so rather than subject himself to the ordinary process of the law. The process of the law is there not only to punish the guilty but for the protection of an accused person and he is not permitted to consent to the withdrawal of that protection even though he personally may prefer to be dealt with summarily by his master rather than face a possible prison sentence at the hands of the court. To hold otherwise could lead to the undermining of the whole fabric of criminal justice." [41]

7.2.1.1.3 **Legal Opinion**

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37 *Morrison v Anglo Deep Gold Mines Ltd* 1905 TS 775.

38 1973 (3) SA 764 (A) at (782).

39 *Santam Insurance Co Ltd v Vorster* 1973 (4) SA 764 (A).

40 1978 (3) SA 206 (R AD).

41 S v Collett 1978 (3) SA 206 (RAD).

(1) The doctrine of *volenti non fit iniuria* is recognised in South Africa, by both our legal writers as well as our courts. [42]

(2) The maxim *volenti non fit iniuria* is recognised as a ground of justification which excludes the wrongfulness of a defendant's conduct in circumstances in which the plaintiff's legally protected interests may be adversely affected through consent. [43]

(3) The rationale for the recognition of this defence is very much based on individualism or private autonomy in which the individual is left to work out his/her own destiny. [44]

(4) The effect of the maxim, as a ground of justification, lies in the fact that it excludes the unlawfulness or wrongfulness element of a crime or delict. [45]

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42 Strauss *Toestemming tot Benadeling* An unpublished doctoral thesis (1961) 3-6; McKerron *The Law of Delict* (1971) 67; Joubert et al *The Law of South Africa* (1995) Volume 8 Par 112; Van der Merwe and Olivier *Die Onregmatige Daad in die Suid-Afrikaanse Reg* (1989) 89; Van der Walt *Delict: Principles and Cases* (1979) 51; Van Oosten *The Doctrine of Informed Consent* An unpublished doctoral thesis (1989) 13ff; Burchell, Milton and Burchell *South African Criminal Law and Procedure* Volume 1 (1983) 369; Boberg *The Law of Delict* (1984) 724; De Wet *Strafreg* (1985) 94; Snyman *Strafreg* (1986) 131-132; Neethling et al *Deliktereg* (1989) 82-83; Strauss and Strydom *Die Suid-Afrikaanse Geneeskundige Reg* (1967) 317; Strauss *Doctor Patient and the Law* (1991) 323. Carstens and Pearmain *Foundational Principles of South African Medical Law* (2007) 875ff. For case law see *Steel v Pearman* 1877 NLR 22; *Spines v Scheepers* 1883 EDL 173; *Davids v Mendelson* 1898 15 SC 361; *Morrison v Anglo Deep Gold Mines Ltd* 1905 TS 775; *Waring & Gillon Ltd v Sherborne* 1904 TS 340; *Lampert v Hefer NO* 1955 (2) SA 507 (A); *Santam Insurance Co Ltd v Vorster* 1973 (4) SA (A); *S v Collett* 1978 (3) SA 206 (RAD).

43 Strauss *Toestemming tot Benadeling* An unpublished doctoral thesis (1961) 3-6; McKerron *The Law of Delict* (1971) 67; Joubert et al *The Law of South Africa* (1995) Volume 8 Par 112; Van der Merwe and Olivier *Die Onregmatige Daad in die Suid-Afrikaanse Reg* (1989) 89; Van der Walt *Delict: Principles and Cases* (1979) 51; Van Oosten *The Doctrine of Informed Consent* An unpublished doctoral thesis (1989) 13ff; Burchell, Milton and Burchell *South African Criminal Law and Procedures* Volume 1 (1983) 369; Boberg *The Law of Delict* (1984) 724; De Wet *Strafreg* (1985) 94; Snyman *Strafreg* (1986) 131-132; Neethling et al *Deliktereg* (1989) 82-83; Strauss and Strydom *Die Suid-Afrikaanse Geneeskundige Reg* (1967) 317; Strauss *Doctor Patient and The Law* (1991) 323. Carstens and Pearman *Foundational Principles of South African Medical Law* (2007) 875ff. For case law see *Steel v Pearman* 1877 NLR 22; *Spines v Scheepers* 1883 EDL 173; *Davids v Mendelson* 1898 15 SC 361; *Morrison v Anglo Deep Gold Mines Ltd* 1905 TS 775; *Waring & Gillon Ltd v Sherborne* 1904 TS 340; *Lampert v Hefer NO* 1955 (2) SA 507 (A); *Santam Insurance Co Ltd v Vorster* 1973 (4) SA (A); *S v Collett* 1978 (3) SA 206 (RAD).

44 McKerron *The Law of Delict* (1971) 67; Boberg *The Law of Delict* (1984) 724; Hutchinson et al Wille's *Principles of South African Law* (1991) 662; Van der Walt and Midgley *Delict: Principles and Cases* (1997) 112-113; Strauss and Strydom *Die Suid-Afikaanse Geneeskundige Reg* (1967) 182 as well as Gordon et al *Medical Jurisprudence* (1953) 188 whilst acknowledging that the maxim is founded in individualism, nevertheless, limitations and restrictions are placed in certain instances for example in the so-called `contracting of liability cases. The maxim is thus not unlimited. For case law see *Morrison v Anglo Deep Gold Mines Ltd* 1905 TS 775.

45 Van Oosten *The Doctrine of Informed Consent* An unpublished doctoral theses (1989) 15; McKerron *The Law of Delict* (1971) 73; Burchell Milton and Burchell *South African Criminal Law and Procedure* Volume 1 (1983) 369; Snyman *Strafreg* (1986) 131-132; Visser and Vorster *General Principles of Criminal Law* through the cases (1987) 186; Strauss *Toestemming tot Benadeling* An unpublished doctoral thesis (1961) 64ff; Van der Walt and Midgley *Delict: Principles and Cases* (1997) 95; Joubert *Lawsa* 1995 Vol 8 Par 69; Van der Walt *Delict: Principles and Cases* (1979) 51; Van der Merwe and Olivier *Die Onregmatige Daad in die Suid-Afrikaanse Reg* (1915) 101.

(5) Consent is a fundamental element of the maxim *volenti non fit iniuria*. For consent to operate successfully as a defence, certain requirements must first be satisfied, *inter alia*, the consenting party must have had knowledge and been aware of the nature and extent of the harm or risk; its use must be recognised by law, and not be regarded as *contra bonos mores*. [46]

(6) There is broad consensus amongst our legal writers that restrictions ought to be placed in certain circumstances on consent to or assumption of risk especially in the so-called `contracting out of liability cases'. [47]

7.2.1.2 **ENGLAND**

7.2.1.2.1 **Legal Writings**

One of the defences available in English law to a defendant which serves as a justification for a wrongful act resulting in damages, is that of *volenti non fit iniuria*. [48] The maxim *volenti non fit iniuria* was first recognized in the works of the classical Roman jurists and first recognized in English law A.D.1250-1258. [49]

A prerequisite for the success of the maxim *volenti non fit iniuria* is the plaintiff's consent. Consent as a defence takes two forms, namely, *volenti non fit iniuria,* in which the plaintiff

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46 Van Oosten *The Doctrine of Informed Consent* An unpublished doctoral theses (1989) 17ff; Strauss *Toestemming tot Benadeling* An unpublished doctoral thesis (1961) 8ff; Neethling et al *Deliktereg* (1989) 78; Van der Merwe and Olivier *Die Onregmatige Daad in die Suid-Afrikaanse Reg* (1989) 93ff; Van der Walt *Delict Principles and Cases* (1979) 51ff; Van der Walt and Midgley *Delict: Principles and Cases* (1997) 68ff; Joubert *The Law of South Africa* (1995) Vol 8 Par 89; Snyman *Strafreg* (1986) 133. Carstens and Pearman *Foundational Principles of South African Medical Law* (2007) 876ff. For case law see *Morrison v Anglo Deep Gold Mines Ltd* 1905 TS 775.

47 See Van der Walt *Delict: Principles and Cases* (1979) 53-54. The writers ascribe the restrictions placed on consent in certain instances due to the prevailing legal convictions of the community. See also Gordon et al *Medical Jurisprudence* (1953) 188-189 who is especially critical of the so-called `contracting out of liability cases.' According to the writers the inclusion of a clause in a contract releasing a practitioner from any legal obligation to show due skill and care would be grossly unprofessional. Courts should regard those contracts as void as against public policy. For a similar view see Van Oosten Encyclopaedia (1986) 88; Claassen and Verschoor *Medical Negligence* (1992) 102-103; Strauss and Strydom *Die Suid-Afrikaanse Geneeskundige Reg*; Van der Merwe and Olivier *Die Onregmatige Daad in die Suid-Afrikaanse Reg* (1989) 92-93; Van der Walt and Midgley *Delict: Principles and Cases* (1997) 69; Joubert *The Law of South Africa* Vol 8 (1995) 116-117; Boberg *The Law of Delict* (1984) 729. Carstens and Pearman *Foundational Principles of South African Medical Law* (2007) 468ff. For case law see the case of *Morrison v Anglo Deep Gold Mines Ltd* 1905 TS 775.

48 See Winfield and Jolowicz *Tort* (1989) 682. The writers recognizes the justification for the defence of *volenti non fit iniuria* in that a person who would otherwise have had a remedy in tort would now be deprived *" ..... because he consented, or at least assented, to the doing of the act which caused his harm."*

49 See Been *Journal of Comparative Legislation* (1907) 185; See also DIG. 47, 10, 1, 5; See, too DIG. 9.2.7.4: 50. 17,203; See further Bracton *De Legibus Anglia* 1250-1258 A.D.

consents to an invasion of his interest which would otherwise be a tort (conveniently called consent), and, assumption of risk, which signifies a willingness on the part of the plaintiff to run the risk of injury from a particular source of danger. [50]

In English law, consent may be given expressly, by words, or be inferred from conduct. [51] Before consent may be invoked successfully as a defence, it must be shown that consent was freely given, [52] that the plaintiff must have knowledge of the risk [53] and be warned thereof by the defendant. [54]

In consenting to the risk of injury, it has been made clear by the writers Winfield & Jolowicz, that, in so doing, the plaintiff does not necessarily consent to negligence [55] nor does he consent to an illegal act or agreement which is against public policy. [56]
It has been suggested before that, although certain English statutes, such as the Occupier's Liability Act 1957 and 1984, recognize the *volenti non fit iniuria* doctrine and provide that the defence of *volenti* may apply in appropriate circumstances, the Unfair Contract Terms Act 1977 outlaws clauses excluding or limiting liability for negligence or breach of an occupier's duty of care resulting in death or personal injuries, and those excluding or limiting liability for other types of harm, unless it is reasonable in all the circumstances to do so. [57]

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50 Winfield and Jolowicz (1989) 682-683; See also Street (1993) 80.

51 Winfield and Jolowicz (1989) 683 uses the examples of a fair blow in a boxing match, an inoculation or holding out one's arm for an injection to demonstrate consent in this regard. See also Street (1993) 80-81.

52 See Winfield and Jolowicz (1989) 691. According to the writers *"a man cannot be said to be truly willing unless he is in a position to choose freely."* The writers adds a caveat namely: *" .... freedom of choice predicates, not only full knowledge of the circumstances on which the exercise of choice is conditional, so that he may be able to choose wisely, but the absence of any feeling of constraint so that nothing shall interfere with the freedom of his will."*

53 Winfield and Jolowicz (1989) 690.

54 Winfield and Jolowicz (1989) 691.

55 Winfield and Jolowicz (1989) 691.

56 Winfield and Jolowicz (1989) 692-693. The writers hold the view that a contravention of a rule designed only to produce fair play for example should not automatically amount to negligence. For that reason the writers opine that in accepting certain risks it does not necessarily entail the elimination of all duty of care. A spectator does not therefore *".... consent to negligence on the part of the participants"* and *".... provided the competition or game is being performed within the rules and requirement of the sport and by a person of adequate skill or competence the spectator does not expect his safety to be regarded by the participant."*

57 See Winfield and Jolowicz (1989) 686-687 where for example two parties enter into a contract which entails an express exclusion of liability. The question according to the writers ought not to be whether the plaintiff did in fact agree to run the risk of negligence, but whether the defendant had given sufficient motive to make the excluding

7.2.1.2.2 **Case Law**

Although the requirements for the defence of *volenti non fit iniuria* in a negligence action have long been a subject which has raised some controversy, what has emerged from the earliest cases is that it must be shown that the plaintiff acted voluntarily, and that he exercised a general freedom of choice. One of the first decided cases on this point arose in the case of *Smith v Bake,* [58] in which the plaintiff was employed by the defendants on the construction of a railway. While he was working, a crane moved rocks over his head. Both he and his employers knew there was a risk of a stone falling on him and he had complained to them about this. A stone fell and injured the plaintiff and he sued his employers for negligence. The employers pleaded *volenti non fit iniuria* but this was rejected by the court.

The court subsequently held: *"Although the plaintiff knew of the risk and continued to work, there was no evidence that he had voluntarily undertaken to run the risk of injury. Merely continuing to work did not indicate volens."* [59]

The plaintiff's genuine freedom of choice, before the defence can be successfully raised against him, also formed the subject of a decision in *Bowater v Rowley Regis Corporation,* [60] in which Scott LJ stated that: *"A man cannot be said to be truly willing unless he is in a position to choose freely, and freedom of choice predicates, not only full knowledge of the*

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term part of the contract. The writers opine that in such event *"…. the plaintiff was bound even though he might not have troubled to read the terms and hence was unaware of the excluding one." Contra* the Unfair Contract Terms Act 1977 which provides: *"Where the defendant acts in the course of a business or occupies premises for business purposes he cannot, by reference to any contract term or notice, exclude or restrict his liability for death or personal injury resulting from negligence, and in the case of other loss or damage caused by negligence can only exclude or restrict his liability in so far as the term in the contract or notice is reasonable. See 55 2(1); 2(2); 2(3) of the Act. It is also provided "where a contract term or a notice purports to exclude or restrict.* The implication of the provisions of the Unfair Contract Terms Act according to Winfield and Jolowicz (1989) 687 *"is that the defence of violent non fit injuries is still available, but it remains to be seen what evidence of voluntary acceptance of the risk beyond the making of the agreement (which is not enough) will be required."* See Harpwood *Principles of Tort Law* (1998) 391. The writer recognizes that the influence of the legislation in preventing the use of exclusion clauses stem from the changing of attitudes of the courts and later of parliament towards the issue of consent. According to Harpwood (1998) 391: *"This picture first emerged in relation to contractual situations in which it was acknowledged that consumers and employees have little or no control over the terms of the agreements into which they enter. The courts developed the role, by convoluted means, frequently twisting and turning in order to circumvent unfair contractual provisions of protecting consumers. This approach spilled over into the law of tort and is part of a wider movement towards greater emphasis affording protection to the weaker party in many situations."*

58 (1891) AC 325.

59 *Smith v Baker* (1891) AC 325.

60 (1944) KB 476.

circumstances on which the exercise of choice is conditioned, so that he may be able to choose wisely, but the absence from his mind of any feeling of constraint so that nothing shall interfere with the freedom of his will ..... " [61]

A further requirement which must be complied with, before a defendant may succeed with a defence of *volenti non fit iniuria* in a negligent action, is for the defendant to show that at the time the plaintiff consented, the plaintiff had full knowledge of the nature and extent of the risk that he ran. This aspect received the attention of the court in the case of *Wooldridge v Summer*. [62] The facts can be stated briefly as follows:

The plaintiff was a professional photographer. During a horse show he positioned himself at the edge of the arena. He was knocked down and injured by a horse when the rider lost control while riding too fast. The plaintiff subsequently sued the defendant for damages. The defendant in return raised the defence of *volenti non fit iniuria*.

Diplock LJ laid down fundamental principles required before the defence of *volenti non fit iniuria* will succeed as a defence. In this regard the judge stated:

"A person attending a game or competition takes the risk of any damage caused to him by any act of a participant done in the course of and for the purposes of the game or competition, notwithstanding that such an act may involve an error of judgement or lapse of skill, unless the participants conduct is such as to evince a reckless disregard of the spectator's safety.

The spectator takes the risk because such an act involves no breach of his duty of care owed by the participant to him. He does not take the risk by virtue of the doctrine expressed or obscured by the maxim volenti non fit iniuria. The maxim states a principle of estoppel applicable originally to a Roman citizen who consented to being sold as a slave. Although pleaded and argued below, it was only faintly relied on by counsel for the first defendant in this court. In my view, the maxim, in the absence of express contract, has no application to negligence simpliciter where the duty of care is based solely on proximity or `neighbourship' in the Atkinian sense. The maxim in English law presupposes a tortuous act by the defendant. The consent that is relevant is not consent to the risk of injury, but consent to the lack of reasonable care that may produce that risk and requires on the part of the plaintiff at the time at which he gives his consent full knowledge of the nature and extent of the risk that he ran. In Dann v Hamilton, Asquith J expressed doubts whether the maxim ever could apply to license in advance a subsequent act of negligence, for if the consent precedes the act of negligence, the plaintiff cannot at the time have full knowledge of the extent as well as the nature of the risk which he will run." [63]

7.2.1.2.3 **Legal Opinion**

(1) The maxim *volenti non fit iniuria* is recognised in England, by both legal writers as

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61 *Bowater v Rowley Regis Corporation* (1944) KB 476.

62 (1963) 2 QB 43.

63 *Wooldridge v Summer* (1963) 2 QB 43.

well as the courts, as a fully fledged defence. [64]

(2) *Volenti non fit iniuria* as a defence serves as a justification for a wrongful act resulting in damages. [65]

(3) A prerequisite for the success of the maxim is the plaintiff's consent, provided, consent, *inter alia,* is given freely, the plaintiff has knowledge of the risk, and nevertheless, consents thereto and, provided further, the act consented to is not an illegal act nor is the agreement entered into against public policy. [66]

(4) In England, The Unfair Contract Terms Act 1977 prohibits clauses which are aimed at excluding or limiting liability for negligence or breach of a duty of care resulting in death or personal injuries. [67]

7.2.1.3 **UNITED STATES OF AMERICA**

7.2.1.3.1 **Legal Writings**

Volenti non fit iniuria is regarded as a fundamental principle of the American Common Law. [68] Its importance lies in the fact that the maxim *volenti non fit iniuria* has as its foundation consent to an act which is *prima facie* actionable and which deprives the plaintiff of the right afterwards to complain of it. [69] The rationale for the existence of the maxim, *volenti non fit iniuria*, is founded in the non-paternalistic view held by the American legal writers. Their attitude is generally, where no public interest is contravened, the individual is left to work out his own destiny, and they are not concerned with protecting him from his own folly in permitting others to do him harm. [70]

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64 See Winfield and Jolowicz *Tort* (1989) 682; Street *Torts* (1993) 80. For English case law see the early decision of *Smith v Baker* (1891) AC 325; *Bowater v Newley Regis Corporation* (1944) KB 476; *Wooldridge v Summer* (1963) 2 QB 43.

65 See Winfield and Jolowicz *Tort* (1989) 682; Street *Torts* (1993) 80. For English case law see the early decision of *Smith v Baker* (1891) AC 325; *Bowater v Newley Regis Corporation* (1944) KB 476; Wooldridge v Summer (1963) 2 QB 43.

66 Winfield and Jolowicz (1989) 690-693.

67 SB 2(1); 2(2); 2(3) of the Unfair Contract Terms of Act 1977.

68 See Page and Keeton *Prosser and Keeton on the Law of Torts* (1984) 112. The author translates the maxim as *" ..... to one who is willing, no wrong is done."*

69 Gordon et al (1953) 153.

70 See Page and Keeton *Prosser and Keeton on the Law of Torts* (1984) 112; See also Bohlen, "Consent as Affecting Civil Liability for Breaches of the Peace" (1924) 24 *COL.L.REV*. 819.

The maxim built around the *volenti* principle, is known in the American law, as is the position in English law, and received into South African law as "consent". [71] The effect of consent is thus, where a plaintiff's interests have been invaded, the fact that he consents, negates the wrongful event of the defendant's act, and prevents the existence of a tort. [72]

Consent may be manifested by words or conduct. In the former situation, the plaintiff expressly says, for example, *"it's all right with me",* in which event he will have difficulty in denying that he did consent. In the latter situation, he/she, for example, holds up his arm without objecting to be vaccinated.

Likewise, he will not be heard to deny that he has consented after the defendant has relied upon his action. In instances where the plaintiff attempts to deny that he consented through conduct, actual willingness may be established by competent evidence in which the test of how would the reasonable man interpret the conduct. [73]

Examples most generally used amongst American legal writers to depict the maxim, *volenti non fit iniuria*, can be found in those who enter into a sport, game or contest, may be taken to consent to physical contacts consistent with the understood rules of the game. [74] For consent to be effective, and in so doing, escape liability, certain requirements first have to be met. Where the requirements are not met, consent may be regarded as ineffective. According to Prosser and Keeton, consent of a person on whom an otherwise actionable invasion is inflicted is ineffective if:

"(1) Such person lacked capacity to consent to the conduct, (2) the consent was coerced, (3) the consenting person was mistaken about the nature and quality of the invasion intended by the conduct, or (4) the conduct was the kind of conduct to which no one can give a valid consent so as to avoid liability."

It is especially points (3) and (4) which needs a brief elucidation. The American writers are generally in agreement that, where a plaintiff assents to the conduct, while mistaken about the nature and quality of the invasion intended by the defendant, the plaintiff cannot ordinarily be regarded as actually consenting to the defendant's conduct, hence, the

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71 See Strauss *Toestemming tot Benadeling* (1961) 5-6; See also Bohlen *Consent as Affecting Civil Liability* (1924) 46.

72 See Page and Keeton *Prosser and Keeton on the Law of Torts* (1984) 112.

73 See Page and Keeton *Prosser and Keeton on the Law of Torts* (1984) 113.

74 See Page and Keeton *Prosser and Keeton on the Law of Torts* (1984) 114.

defendant will not succeed in his defence of *volenti non fit iniuria*. [75] Thus, a woman who consents to intercourse may still successfully sue for damages when she finds that she has been a victim of a mock marriage. Therefore, the fact that the consent was procured by a promise to marry, which the defendant did not intend to honour, would not vitiate the consent. [76]

Likewise, in cases involving medical or surgical treatment, where the defendant is aware that the patient does not understand the nature of the operation, or the risk of undesirable consequences involved therein, but, notwithstanding, continue with the medical or surgical treatment, the defendant's conduct will vitiate consent and the defendant may very well be liable to the plaintiff for damages founded on battery. [77]

The same prevails according to *Prosser and Keeton* [78] in instances where `active misrepresentation' occurs as well as in instances where there has been `a non-disclosure' of consequences which the surgeon knew to be certain to follow.

7.2.1.3.2 **Case Law**

In one of the very first American cases involving consent, in a vaccinating case in which the plaintiff sued the defendant, in tort, for an assault based on the fact that she did not consent, the Supreme Court of Massachusetts in *O'Brien v Cunard S.S. Co* [79] was confronted with two questions namely: First, whether there was any evidence to warrant the jury in finding that the defendant by way of its servants or agents, committed an assault on the plaintiff; Secondly, whether there was evidence on which the jury could have found that the defendant was guilty of negligence towards the plaintiff. The plaintiff relied on the fact that the surgeon who was employed by the defendant vaccinated her on board a ship, while she was on her passage from Queenstown to Boston. In determining whether she consented, the court was guided by her overt acts and manifestations of her feelings. The evidence in this regard was that at Boston, at the time, there were strict quarantine

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75 See Page and Keeton *Prosser and Keeton on the Law of Torts* (1984) 119. The writers holds the view that *"if the defendant knew, or probably ought to have known in the exercise of reasonable care, that the plaintiff was mistaken as to the nature and quality of the invasion intended, likewise an overt manifestation of assent or willingness would not be effective apparent consent."*

76 See Page and Keeton *Prosser and Keeton on the Law of Torts* (1984) 120.

77 See Page and Keeton *Prosser and Keeton on the Law of Torts* (1984) 120.

78 See Page and Keeton *Prosser and Keeton on the Law of Torts* (1984) 120.

79 1891 154 MASS. 272, 28 N.E. 266.

regulations in place. All immigrants were expected to be protected from small-pox by vaccination. Only those persons who held a certificate from the medical officer of the steamship were permitted to land. It appears that with the vaccination incident the plaintiff was one of the hundred women gathered on a deck. On her own version she understood from conversation that they were being vaccinated. She could also clearly see that the surgeon "examined" their arms, and then vaccinating them. Upon her turn, she showed him her arm and he examined her but besides saying "there is no mark and she needs to be vaccinated" he said nothing. After she held up her arm to be vaccinated, he vaccinated her and she took the ticket and left. According to the surgeon's evidence there was nothing to the contrary to show that she did not want to be vaccinated. The court subsequently confirmed that, having viewed her conduct in the light of the surrounding circumstances, there was nothing to indicate that the surgeon's conduct was not lawful; the court also answered the negligence question in the negative.

In the case of *De May v Roberts,* [80] the Supreme Court of Michigan dealt with an unusual set of facts involving consent in which the defendant, (in court a quo) a physician, was sued for breach of privacy. The evidence revealed that on a dark and stormy night, the physician was called out to medically attend to the plaintiff (in court a quo). The physician being sick and very fatigued from overwork, asked one Scatterwood, an unprofessional, to accompany him to the patient's home. Scatterwood was assigned to assist him in carrying a lantern, umbrella and certain articles deemed necessary on such occasions. Upon arrival, the defendant introduced Scatterwood to the husband as a friend who was accompanying him. Scatterwood accompanied the defendant to the room where they found the plaintiff. Scatterwood remained present throughout the examination and treatment. In fact, the defendant requested him to hold her hand during a paroxysm of pain. Neither the plaintiff nor her husband knew the true character of Scatterwood. The plaintiff claimed that the occasion was a most sacred one and no one had a right to intrude unless invited or because of some real and pressing necessity.

The court subsequently confirmed the court a quo's judgement against the defendant. The court found the plaintiff had a legal right to privacy of her apartment at such a time. The law required that others had to observe this and to abstain from its violation. The fact that, at the time she consented to the presence of Scatterwood, supposing him to be a physician does not preclude her from maintaining an action and incurring substantial damages, upon afterwards ascertaining his true character. The court also held that in obtaining admission at

[80] 1881 46 MICH 160, 9. N.W. 146.

such time, under such circumstances, without fully disclosing his true character, both parties were guilty of deceit.

In the case of *Hart v Geysel,* [81] which involves an action brought by the Administrator of the estate of the deceased, who died as the result of a blow received in a prize fight, the court had to decide whether the deceased's consent precluded a successful claim from the opponent prize-fighter. The court subsequently held that "there are no facts which show anger, malicious intent to injure, or excessive force." Therefore the court held: *"..... one who engages in prize fighting, even though prohibited by positive law, and sustains an injury, should not have a right to recover any damages that he may sustain as the result of the combat, which he expressly consented to and engaged in as a matter of business or sport."* [82]

In other medical cases, where consent is given tacitly, by the patient, for medical examinations or treatment and the defendant are sued afterwards see *Baxter v Snow*. [83]

"Where, as in this case, a patient who finds difficulty in hearing goes to a physician to ascertain the cause and voluntarily submits to treatment by that physician with full knowledge of what that physician is doing, and acquiesces and consents to all that the physician does, he clearly by implication authorises the physician to diagnose the case, to discover for himself the cause of his patient's disability, and to give such treatment as in the judgement of the physician is reasonably necessary. Although the patient may have believed that his disability was due to an accumulation of wax in his ear, that belief on his part did not relieve the physician of the obligation to discover the true cause of the disability that he was called on to remedy. Where one has voluntarily submitted himself to a physician for diagnosis and treatment, it will be presumed, in the absence of evidence to the contrary, that what the physician did was either expressly or by implication authorised."

The afore stated case should be contrasted with that of *McLeish v Cohen,* [84] where the court was confronted with a significant conflict of evidence as to whether the plaintiff had demanded that the defendant should extract certain teeth, or whether she had simply submitted herself to dental treatment. The Maryland Court of Appeals stated:

"If a patient goes to a dentist or a physician and submits herself for diagnosis, with the request, express of implied, that he do what is necessary to give her relief, then he is answerable only for the lack of proper knowledge, skill, and care in the treatment or operation. In this case it was a question of fact for the jury whether Mrs Cohen went to the dentist because she was suffering pain from her teeth generally, and submitted herself to his judgement, or whether she went to him to have two roots extracted from the upper jaw and he, in violation of her instructions and without her consent, pulled two lower teeth instead. If Mrs Cohen engaged the defendants to

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81 1930 159 WASH 632, 294 P.570.

82 *Hart v Geysel* 1930 159 WASH. 632, 294 P.570.

83 (UTAH) 2 PAL (2d) 257, 1931 - 35 M.L.C. 241.

84 (MD) 148 ATL. 124; 1926 - 30 M.L.C. 1190.

extract certain teeth indicated by her, her consent before extracting any others was necessary. The contradictory statements of dentist, and patient as to what was said and done made it proper for the trial Court to submit the case to the jury."

In the case of *Marsh v Colby,* [85] involving trespass for fishing on plaintiff's land, the common court of Michigan held that as; "it has always been customary, however, to permit the public to take fish in all the small lakes and ponds of the state, and in the absence of any notification to the contrary, we think anyone may understand that he is licensed to do so. No such notification appears in this case, and we therefore hold that the defendant was not trespassing upon plaintiff's land with the intent to take fish, having no knowledge that objection existed to his doing so."

7.2.1.3.2 **Legal Opinion**

(1) The United States of America has adopted a similar position as England and South Africa in recognising the maxim *volenti non fit iniuria* as a defence. [86]

(2) The maxim *volenti non fit iniuria* has as its foundation consent to an act which is *prima facie* actionable and which deprives the plaintiff of the right, afterwards, to complain of it. [87]

(3) The rationale for the existence of the maxim *volenti non fit iniuria* is founded in the philosophical view held by the legal writers. In this respect, individual freedom triumphs over paternalism. [88]

(4) The effect of consent, in this context, is that it negates the wrongful event of the defendant's act and deprives the plaintiff of a civil claim afterwards. [89]

(5) For consent to be effective certain requirements have to be met, inter *alia*, the

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85 1878 39 MICH. 626.

86 Page and Keeton *Prosser and Keeton The Law of Torts* (1984) 112. For the American case law, see *O'Brien v Cunard S.S. Co* (1891) 154 MASS. 272, 28 N.E. 266; De *May v Roberts* (1881) 46 MICH.160, 9 N.W. 146; *Hart v Geysel* (1930) 159 WASH.632, 294, 570; *McClees v Cohen* (MD) 148 at 124, 1926 30 MLC 1190; *Marsh v Colby* 1878 39 MICH. 626.

87 Page and Keeton *Prosser and Keeton The Law of Torts* (1984) 112. For the American case law, see *O'Brien v Cunard S.S. Co* (1891) 154 MASS. 272, 28 N.E. 266; De *May v Roberts* (1881) 46 MICH. 160, 9 N.W. 146; *Hart v Geysel* (1930) 159 WASH. 632, 294, 570; McClees *v Cohen* (MD) 148 at 124, 1926 30 MLC 1190; *Marsh v Colby* 1878 39 MICH. 626.

88 Page and Keeton *Prosser and Keeton The Law of Tort* (1984) 112; Bohlen "Consent as Affecting Civil Liability for Breaches of the Peace" (1924) 24 *Columbia Law Review* 819.

89 Page and Keeton *Prosser and Keeton The Law of Tort* (1984) 112.

consenting party must be made aware and be aware of the invasion intended by the conduct. In other words, the consenting party must be aware of the risk and of the consequences. [90]

7.2.2 Assumption of Risk in General Context

7.2.2.1 SOUTH AFRICA

7.2.2.1.1 Legal Writings

The term `voluntary assumption of risk' is a term widely used by our writers. [91] Some of the writers have expressed the view that the term `voluntary assumption of risk' is an extension of the doctrine `*volenti non fit iniuria*', in that it takes the wider form. [92] It is also clear from our legal writers, that whatever form the maxim *volenti non fit iniuria* takes and whether `voluntary assumption of risk' is regarded as an extension of the said maxim or regarded as a separate defence all together, they take two distinct forms. Whereas *volenti non fit iniuria* involves consent to a specific harmful act of the defendant, voluntary assumption of risk involves the assumption of the risk of harm connected with the activity of the defendant.

In order to succeed with a defence of voluntary assumption of risk, the defendant is required to show that the plaintiff had knowledge of the risk of harm, that the plaintiff appreciated the nature and extent of the risk involved and, notwithstanding, the plaintiff freely and voluntarily assumed the risk. [93]

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90 Page and Keeton *Prosser and Keeton The Law of Tort* (1984) 114 ff.

91 See Strauss *Toestemming tot Benadeling* (1961) 50. The writer expresses the view that this situation occurs in practice mainly in sport and medical operations. In sport for example when a player takes part in a rugby match he is well aware of the risk of injuries he may suffer arising from the contact with opponents. In a medical context it is general practice that the doctor brings to the patient's attention that there is a risk that side-effects may flow from an operation to be undertaken by the doctor or surgeon. This notwithstanding, the patient nevertheless consents to the operation. See also Van Oosten *The Doctrine of Informed Consent* (1989) 14; McKerron (1971) 70; Van der Walt (1979) 51ff; Van der Walt and Midgley (1997) 69; Joubert *The Law of South Africa* Volume 8 (1995) Par 89; Hutchison et al (1991) 662; Boberg (1984) 724ff; Neethling et al (1989) 83. The term `voluntary assumption of risk' is generally used by the writers referred to above. The writers Strauss *Toestemming tot Benadeling* (1961) 57ff 60ff 64ff; McKerron (1971) 70; Van der Merwe and Olivier (1989) 101; Van der Walt (1979) 55; Boberg (1984) 725ff 729 prefer the term `consent to the risk of harm' instead of `voluntary assumption of risk' on account of their reasoning that the latter denotes complacently whereas the former specifically denotes consent.

92 See Van Oosten (1989) 14; Van der Walt (1979) 51; McKerron (1971) 67; Van der Walt and Midgley (1997) 68; Joubert *LAWSA* Volume 8 (1995) Par 89; *Contra* Van der Merwe and Olivier (1989) 96.

93 See Joubert *LAWSA* Volume 8 (1995) Par 79; See also Van der Walt (1979) 57; See further McKerron (1971) 67. The writer uses the examples of consent to undergo a surgical operation on the one hand as opposed to consenting to take the risk where for example a spectator attends a cricket match. See further Van der Walt and Midgley (1997) 68ff; Hutchinson et al (1991) 662; Van der Merwe and Olivier (1984) 89 96-97; Strauss *Toestemming tot Benadeling* (1961) 49ff.

In a medical context, the defence of voluntary assumption of risk may successfully be pleaded, provided the defendant shows that the patient was informed of the seriousness or likely risks attendant upon treatment or the operation, that the patient fully appreciated the `seriousness' or likely risks involved and, notwithstanding, freely and voluntarily consented thereto. [94]

7.2.2.1.2 **Case Law**

The defence of voluntary assumption of risk received the attention of the South African courts as far back as 1904. In the case of *Waring & Gillon, Ltd v Sherborne*, [95] the court laid down clearly defined criteria in order to establish the defence of voluntary assumption of risk. The court stated that *"…. knowledge, appreciation, and consent - these are the essential elements ….."* The court continues:

"Now where a man voluntarily, deliberately, and with full knowledge continues in an employment to the very nature of which grave risks are incidental, it may be comparatively easy to come to a conclusion as to whether he consented to take the chance of these risks. But the difficulty of the inquiry is very much greater when the danger which affects him has been suddenly created or increased by the negligence of his employer, and is a danger not necessarily arising from the nature of his work. To quote the words of Lord Hershell (Smith v Baker & Sons (1891) AC 325 at 362): "Where there is a risk to the employed, which may or may not result in injury, has been created or enhanced by the negligence of the employer, does the mere continuance in service, with knowledge of the risk, preclude the employed, if he suffer from such negligence, from recovering in respect of his employer's breach of duty: I cannot assent to the proposition that the maxim volenti non fit iniuria to such a case, and that the employer can invoke its and to protect him from liability for his wrong." [96]

The criteria were confirmed in other non-medical cases as well. In the case of *Lampert v Hefer NO*, [97] the court indicated what evidence is to be considered in establishing whether the criteria have been met:

"Where the defence is that the plaintiff voluntarily became a passenger in a motor vehicle controlled by an intoxicated driver, the degree of intoxication may be of importance in considering whether the plaintiff either, in fact, appreciated, or was negligent in failing to appreciate, that the intoxication was such as to involve the risk of an accident." [98]

The leading South African decision on the scope of the defence of voluntary assumption of risk and, in particular the meaning of the consent element, is that of the Appellate Division

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94 See Van der Walt (1979) 51ff; Van der Merwe and Olivier (1989) 96ff; Van der Walt and Midgley (1997) 69ff; McKerron (1971) 67ff; Joubert *LAWSA* Vol 8 (1995) Par 89.

95 1904 TS 340 at 345.

96 *Waring and Gillow, Ltd v Sherborne* 1904 TS 340; See also *Union Government v Matthee* 1917 A.D. 688, 703

97 1955 (2) SA 507 (A).

98 *Lampert v Hefer NO* 1955 (2 SA 507 (A).

(as it was known then) in *Santam Insurance Co Ltd v Vorster*: [99]

"I am accordingly of the opinion that, if it be shown that, in addition to knowledge and appreciation of the danger, the claimant foresaw the risk of injury to himself, that will ordinarily suffice to establish the "consent" required to render him volens provided always that the particular risk which culminated in his injuries falls within the ambit of the thus foreseen risk. The inherent difficulty that the central factum probandum - viz. the consent to the particular risk which occasioned the supervening injuries - is basically a subjective enquiry can, I suggest, only be bridged by way of inference from the proved facts. In the nature of things, direct evidence will seldom, if ever, be available; and manifestly the negative ipso dixit of the claimant himself can by itself usually carry but little weight. The Court must, in my view, thus perforce resort first to an objective assessment of the relevant facts in order to determine what, in the premises, may fairly be said to have been the inherent risks of the particular hazardous activity under consideration. Thereafter the Court must proceed to make a factual finding upon the vital question as to whether or not the claimant must, despite his probable protestations as to the contrary, have foreseen the particular risk which later eventuated and caused his injuries, and is accordingly held to have consented thereto." [100]

The case of *Boshoff v Boshoff,* [101] illustrates the application of the test of knowledge appreciation and consent to a situation of sporting injuries. The facts of the matter can be briefly stated: The plaintiff who was playing squash, was hit by his opponent's racquet and injured. It was alleged that he knew that players could be hit by a racquet flying out of the hand of a player. It was also averred that the injured brother had appreciated this risk and consented to run the risk..... "

The court, in upholding the defence of voluntary assumption of risk, laid down the following criteria:

"In regard to consent to sporting injuries or voluntary assumption of the risk of such injuries, the sport must be a lawful one (not for instance, duelling or Russian roulette) and the injury must occur while the defendant is acting within the broad rules of the game." [102]

In a more recent judgement in the case of *Oosthuizen v Homegas (Pty) Ltd*: [103]

"It is clear that the three essential elements of this defence are knowledge, appreciation and consent. To my mind the defence fails for the reason that plaintiff has not been proved to have had knowledge of the full extent of the danger involved in the decanting of petroleum gas and that he accordingly could not have appreciated the full extent of the danger that threatened him. That being so, it has also not been shown that he consented." [104]

In a number of decisions, involving medical negligence cases, the South African courts have

99 1973 (4) SA 764 (A).

100 *Santam Insurance Co Ltd v Vorster* 1973 (9) SA 764 (A).

101 1987 (2) SA 694 (O).

102 *Boshoff v Boshoff* 1987 (2) SA 694 (O).

103 1992 (3) SA 463 (O) at 472 G-H.

104 *Oosthuizen v Homegas (Pty) Ltd* 1992 (3) SA 467 O at 472G-H.

laid down certain criteria which must be met before a doctor or surgeon may escape liability in using the defence of voluntary assumption of risk as a defence. Our courts have laid specific emphasis on the aspect of informed consent.

In a very early case of *Ex parte Dixie* [105] Millin J held with reference to a surgical operation, that, as a matter of law:

"Such an operation cannot lawfully be performed without the consent of the patient, or, if he is not competent to give it, that of some person in authority over his person. The fact that he is a patient in this hospital does not entitle those in charge of it to perform any surgical operation upon him which they may consider beneficial. They would only be justified in performing a major operation without consent where the operation is urgently necessary and cannot with due regard to the patient's interests be delayed." [106]

In the matter of *Rompel v Botha*: [107]

"There is no doubt that a surgeon who intends operating on a patient must obtain the consent of the patient. In such cases where it is frequently a matter of life and death, I do not intend to express any opinion as to whether it is the surgeon's duty to point out to the patient all the possible injuries which might result from the operation, but in a case of this nature, which may have serious results to which I have referred, in order to effect a possible cure for a neurotic condition. I have no doubt that a patient should be informed of the serious risks he does run. If such dangers are not pointed out to him then, in my opinion, the consent to the treatment is not in reality consent - it is consent without knowledge of the possible injuries. On the evidence defendant did not notify plaintiff of the possible dangers, and even if plaintiff did consent to shock treatment he consented without knowledge of injuries which might be caused to him. I find accordingly that plaintiff did not consent to the shock treatment." [108]

The knowledge of harm or risk also received the attention of the court in the case of *Esterhuizen v Administrator, Transvaal*. [109] The court laid down the following principle:

"Indeed if it is to be said that a person consented to bodily harm or to run the risk of such harm, then it presupposes, so it seems to me, knowledge of that harm or risk; accordingly mere consent to undergo X-ray treatment, in the belief that it is harmless or being unaware of the risks it carries, cannot in my view amount to effective consent to undergo the risk or the consequent harm." [110]

Although it has been held in several South African decisions that a patient must be informed of the serious or likely risks attended upon treatment or the operation, the courts

105 1950 (4) SA 748 (W) at 751.

106 *Ex Parte Dixie* 1950 (4) SA 748 at 751.

107 (An unreported judgement delivered in the TPD division on the 15th April 1953).

108 *Rompel v Botha* (An unreported judgement delivered in the TPD on the 15th April 1953).

109 1957 (3) SA 710 (T).

110 *Esterhuizen v Administrator, Transvaal* 1957 (3) SA 710 (T).

have held, however, that the medical practitioner does not have to inform the patient of the remote risks. This aspect received the courts attention in *Richter v Estate Hamman*. [111]

The following approach was adopted by Watermeyer J:

"A doctor whose advise is sought about an operation to which certain dangers are attached and there are dangers attached to most operations, is in a dilemma. If he fails to disclose the risks he may render himself liable to an action for assault, whereas if he discloses them he might well frighten the patient into not having the operation when the doctor knows full well that it would be in the patient's interests to have it." [112]

In a more recent case of *Castell v De Greef,* [113] the court balanced a patient's autonomy or right to self-determination, against the duty of the medical practitioner's right as to what disclosure is required in the circumstances. The court endorsed the approach of Scott J in the court a quo:

"A medical practitioner undoubtedly has a duty in certain circumstances to his patient of the risks involved in surgery or other medical treatment."

And relying on the dictum of *Esterhuizen v Administrator, Transvaal* 1957 (3) SA 710 (T) at 719 CD in which Bekker J stated the following:

"Generally speaking .... to establish the defence of volenti non fit iniuria the plaintiff must be shown not only to have perceived the danger, for this alone would not be sufficient, but also that he fully appreciated it and consented to incur it.....

Indeed if it is to be said that a person consented to bodily harm or to run the risk of such harm, then it presupposes, so it seems to me, knowledge of that harm or risk; accordingly mere consent to undergo X-ray treatment, in the belief that it is harmless or being unaware of the risks it carries, cannot in my view amount to effective consent to undergo the risk or the consequent harm."

Relying heavily on the patient-orientated approach, the court continues:

"I am of the view that there is not only a justification, but indeed a necessity, for introducing a patient-orientated approach in this connection."

Approving of the defence of *volenti non fit iniuria* the court continues:

"It is important, in my view, to bear in mind that in South African law (which would seem to differ in this regard from English law) consent by a patient to medical treatment is regarded as falling under the defence of volenti non fit iniuria which would justify an otherwise wrongful delictual act. (See, inter alia, Stoffberg v Elliott 1923 CPD 148 at 149-50; Lymbery v Jefferies 1925 AD 236 on 240; Lampert v Hefer NO 1955 (2) SA 507 (A) at 508;

111 1976 (3) SA 226 (C).

112 *Richter v Estate Hamman* 1976 (3) SA 226 (C).

113 1994 (4) SA 408 CPD.

Esterhuizen's case supra at 718-22; Richter's case supra at 232 and Verhoef v Meyer 1975 (TPD) and 1976 (A) (unreported), discussed in Strauss (op cit at 35-6)."

Relying then on the criteria enunciated by our writers and the courts in the past namely knowledge, appreciation of risk and especially voluntary and free consent the court stated:

"*It is clearly for the patient to decide whether he or she wishes to undergo the operation, in the exercise of the patient's fundamental right to self-determination. A woman may be informed by her physician that the only way of avoiding death by cancer is to undergo a radical mastectomy. This advice may reflect universal medical opinion and may be, in addition, factually correct. Yet, to the knowledge of her physician, the patient is, and has consistently been, implacably opposed to the mutilation of her body and would choose death before the mastectomy. I cannot conceive how the "best interests of the patient" (as seen through the eyes of her physician or the entire medical profession, for that matter) could justify a mastectomy or any other life-saving procedure which entailed a high risk of the patient losing her breast. Even if the risk of the breast-loss were insignificant, a life-saving operation which entailed such risk would be wrongful if the surgeon refrains from drawing the risk to his patient's attention, well knowing that she would refuse consent if informed of the risk."* [114]

Whether a deceased breadwinner's voluntary assumption of the risk that caused his death, can be raised as a defence to an action by his dependants has long sparked off fierce debate, often leading to controversies. On the one hand, there is the established notion that dependants have an independent, non-derivative right, so that defences which would have negated the breadwinner's claim for injuries had he lived (such as contributing negligence or waiver of action or voluntary assumption of risk) will not avail against the dependants. In this instance, it is suggested that, despite the deceased breadwinner's consent, the dependant's claim for loss of support is unaffected. [115]

On the other hand, there is another notion that the dependant's action, notwithstanding its

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114 *Castell v De Greef* 1994 (4) 59 408 at 420-421.

115 For those writers who supports the notion that the deceased person's voluntary assumption of risk of fatal injury does not deprive his/her dependants of their action for the loss of his support. See N.J. Van der Merwe Acta Juridica (1964) 82 at 83-93; See also Van der Merwe and Olivier (1989) 348-54; A.M. Conradie (1943) 7 THRHR 133 at 149; W.A. Joubert (1958) 21 THRHR 12 at 13. See also Boberg (1984) 734 who summarizes the thinking of the other writers as: *"This is because it is wrongfulness in volens to the deceased that the consent negatives, not wrongfulness in relation to his dependants. An act may be wrongful in relation to one person but not in relation to another. Thus if the deceased's consent (or assumption of risk) negatives the wrongfulness of causing his death, as far as he is concerned, it does not necessarily (though it may - see the next paragraph) also negative the wrongfulness of simultaneously depriving his dependants of his support, as far as they are concerned. Of course, the `traditional' view that the dependant's action rests upon a wrong (or breach of duty) to the deceased, not to the dependants, would defeat this argument."* See also the comment of W.E. Scott (1976) 9 De Jure 218 at 222 who aligns himself with especially Van der Merwe and Olivier (1989) who state: *" ..... though volenti negatives wrongfulness, the breadwinner's consent does not deprive his dependants of their action: only their own consent can do that."* See also Lee and Honoré Obligations (1950) 599 who agrees but comments as follows: *"Although it has been suggested that volenti negatives the duty of care, the better view however is that volenti is no defence (against dependants) because even though the deceased could not have claimed damages had he lived, the dependants can, as the duty owed to them is independent of that owed to the deceased."* For further approval of the notion see Van der Walt and Midgley (1997) 72; Joubert *LAWSA* (1995) Vol 8 Par 79 state that based on public policy *"a parent or guardian cannot contractually exclude possible delictual actions by dependants in the event of his death."* See also Van der Walt (1979) 55.

non-derivative character, is based on the breach of a duty owed, at the time of the wrongful act, to the injured or the deceased. The notion is based upon the belief that once it is shown that voluntary assumption of risk took place, there is a denial that there has been any negligence. In other words; no wrong was done to the deceased. Based on that premise, the dependant's claim for loss of support falls away. [116]

Bearing the above in mind, the question may be begged, can a parent or guardian contractually exclude possible delictual actions, by a minor, in circumstances where the parent or guardian, when consenting, foresees the risk of harm?

Though a parent or guardian, as seen above, may at times be called upon to consent on behalf of minors, his power to do so cannot be unlimited, for his basic duty is to act at all times in the minor's best interests. [117]

Whether a deceased person's voluntary assumption of the risk of fatal injury deprives his/her dependants of their action for the loss of his support, has remained unresolved in our case law for decades. The long lineage of the so-called "dependant's action", in South African case law, has it's origin in the well known case of *Jameson's Minors v CSAR*. [118] In that case, a passenger travelling under a free pass was killed in a railway accident. The pass was issued to him at his own request, on the terms that he accepted all risks of injury

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116 For the writers who supports this controversial view see McKerron 53 *SALJ* (1936) 413. See also McKerron 67 *SALJ* (1950) 62; See Walter Pollack 48 *SALJ* (1931) 191; See also Milner 72 *SALJ* (1955) 233; See also Schwietering 20 THRHR (1957) 138 at 144. The writer opines that with assumption of risk, as with all other defences, an action by the dependants based upon loss of support is denied as the wrongfulness is excluded. *Contra,* Price 66 *SALJ* (1949) 269. The writer holds the view that assumption of risk is "indistinguishable from the deceased's mere waiver of action, with the remedy of the dependant's is left unscathed". See also Boberg (1984) 728 who calls the afore stated notion a `jurisprudential monstrosity' in that the "argument contains a fallacy that is easily exposed" for "if the deceased's consent justifies the infliction of harm upon him, it does not follow that it also justifies the infliction of harm upon his dependants." Boberg also expresses the view that: *"If a person's consent negatives wrongfulness, it does so only in relation to him; he is not empowered thus summarily also to dispense with the rights of his dependants."*

117 Boberg (1984) 732. The writer opines that *"whilst it would no doubt be proper to consent on the minor's behalf to a reasonable risk involved in useful vocational training, or subject him to surgery for the sake of his health or (probably) appearance, it is submitted that consent to harm or its risk without corresponding benefit is an abuse of the guardian's authority and hence ineffective."* The above principles according to Boberg 732 740 is based on public policy and the principle of reasonableness. For that reason consent is regarded as ineffective. If it is *contra bonos mores* likewise consent can only be given to conduct reasonable under the circumstances to qualify in terms of the *volenti* doctrine. In this regard Boberg 732 gives the example that: *".... if the guardian's consent took the form of a pre-accident contractual waiver (e.g. tacit acceptance of a `patients ride at their own risk' clause), the minor could surely escape it. ..... cannot be prejudiced by an unreasonable consent given improperly on his behalf."* The above stated is, it is submitted, in line with Section 28(2) of the 1996 Constitution Act 108 of 1996 which provides: *"28(2) a child's best interest is of paramount importance in every matter concerning the child."*

118 1908 TS 575.

to himself, however caused. In a subsequent rail accident the said passenger was killed. Subsequently the plaintiff's sued, in their capacity as the guardians of the three minor daughters of the late Adam Jameson. Consequently, the court was asked to decide whether the agreement entered into between the deceased and the railway administration, in which the deceased voluntarily assumed the risk of injury and waived his right to claim damages from the railway administration, was, in law, also applicable to his dependants, who sued the railway administration for loss of support? The court in considering Roman law principles stated:

"But while on the one hand it resembles the ordinary action for personal injury in that it is based upon culpa, and while the breach of duty essential to its existence is the breach of a duty owed at the time of the wrongful act to the injured man; yet, on the other hand, the compensation claimable under it is due to third parties, who do not derive their rights through his estate, but on whom they are automatically conferred by the fact of his death. The action is one sui generis; probably its anomalous character may be accounted for by reference to its original sources; but, whatever the explanation, the fact remains that it exists quite independently, and is not in any way derived from the deceased or through his estate. (Voet, 9.2.11; Grotius, 3.32.2)" [119]

The dependant's potential claims (especially that of minors) for loss of support notwithstanding a defence being put up, is highlighted as follows in the case of *Victor NO v Constantia Insurance Co Ltd*: [120]

"*A child's claim against a third party who has wrongfully caused his father's death arises not from the fact that he has lost his claim for familial support, but because he has lost his right to claim support from the deceased. It has never been suggested that a child's claim for loss of support arising from the death of his father, should be reduced because he has a right to claim support from other members of his family."*

The court added:

"*Considerations of public policy do not favour the reduction of a child's claim. An adoption order is made only after careful consideration by a children's court of all the factors mentioned in s71 of the Act, one of which is that the proposed adoption will `serve the interests and conduce to the welfare of the child'. It would not be in the public interest to allow a wrongdoer to benefit from the care which others, namely the adoptive parents, through entirely altruistic and charitable motives, chose to devote to the child..... "* [121]

There are however decisions in which it was decided, although obiter, that the dependant's may have no action if the deceased voluntarily assumed the risk. In *Union Government (Minister of Railways & Harbours) v Matthee* [122] the question was raised whether the doctrine of *volenti non fit iniuria* can be invoked by a defendant, in an action brought, not

119 *Jameson's Minors v CSAR* 1908 TS 575 at 584-5.

120 1985 (1) SA 118 (C).

121 *Victor NO v Constantia Insurance Co Ltd* 1985 (1) SA 118 (6) at 125.

122 1917(AD) 688.

by the injured man himself, but by his dependants, in respect of damage sustained by them in consequence of his death?

Innes CJ in this regard stated:

"It remains shortly to consider a final defence pleaded at the trial, to which no reference has yet been made. It was that the deceased man knew and appreciated the risks involved in unloading the timber in question, and voluntarily consented to incur them. There is no need to decide the very interesting question whether a defence of this nature can be invoked by a defendant in an action brought not by the injured man himself by his family in respect of damage sustained by his death. Because I agree with the Provincial Division, that, even if the defence were available, it could not succeed." [123]

In the case of *Lampert v Hefer NO,* [124] the court *obiter* also remarked that the dependants may have no action in the following terms:

"Certainly if an arrangement is sought which will provide due protection for what are conceived to be just claims of dependants, while at the same time doing justice to defendants, it should be designed to rest rather on whether there really was a duty owed by the defendant to the deceased and not on what form of language is used in the plea. For present purposes, however, it does not seem to me that there is any advantage in departing from the customary usage which distinguishes consent from contributory negligence and treats the voluntary assumption of risk as a form of consent." [125]

In *Evans v Shield* [126] the court looked at the common law position regarding a dependant's action for damages for loss of the support of the breadwinner, its evolution and its nature as summarized by Holmes JA in *Legal Insurance Company Ltd v Botes* 1963 (1) SA 608 (A) at 614B-G as follows:

"The remedy was unknown to Roman law, in which no action arose out of the death of a freeman, and consequently the Aquilian action was not available. It had its origin in Germanic custom, in which the reparation of `maaggeld' was regarded as a conciliation to obviate revenge by the kinsmen of the deceased, and it was divided among the latter's children or parents or other blood relatives. The Roman-Dutch law modified the custom by regarding the payment as compensation to the dependants for loss of maintenance. The Roman-Dutch jurists felt that this could be accommodated within the extended framework of the Roman Aquilian action by means of an utilis actio. The remedy has continued its evolution in South Africa, particularly during the course of this century, through judicial pronouncements, including judgements of this Court, and it has kept abreast of the times in regard to such matters as benefits from insurance policies. The remedy relates to material loss `caused to the dependants of the deceased man by his death'. It aims at placing them in as good a position, as regards maintenance, as they would have been in if the deceased had not been killed. To this end, material losses as well as benefits and prospects must be considered. The remedy has been described as anomalous, peculiar, and sui generis, but it is effective."

The court then stated:

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123 *Union Government (Minister of Railway & Harbours) v Matthee* 1917 (AD) 688 at 703.

124 1955 (2) SA 507 (A) at 507.

125 *Lampert v Hefer NO* 1955 (2) SA 507 (A) at 508.

126 1980 (2) SA 814 (AD)

"An essential and unusual feature of the remedy is that, while the defendant incurs liability because he has acted wrongfully and negligently (or with dolus) towards the deceased and thereby caused the death of the deceased, the claimant (the dependant) derives his right of action not through the deceased or from his estate but from the fact that he has been injured by the death of the deceased and that the defendant is in law responsible therefore. Only a dependant to whom the deceased was under a legal duty to provide maintenance and support may sue and in such action the dependant must establish actual patrimonial loss, accrued and prospective, as a consequence of the death of the breadwinner." [127]

In a leading Appellate Division case of *Santam Insurance Co Ltd v Vorster,* [128] the court *obiter* also passed the following remarks regarding the exclusion of action of dependants where a defence of *volens* is raised successfully. In this regard the court stated:

"There exists a considerable weight of authority to the effect that, if established, the volens defence eliminates any duty of care, or, as some writers prefer to put it, negatives the commission of any actionable unlawful act, and, consequently, that it would operate entirely to exclude any claim by dependants (see e.g. McKerron op cit 70-3, Strauss `Aspekte' 60, Van der Merwe & Olivier op cit 95, 135, Schwietering op cit 144; and cf. also Salmond Torts 15 ed 665, and Walker The Law of Delict of Scotland 1966 ed vol. II 731). Contrary views are however not entirely lacking (see Macintosh & Scoble op cit 62ff, and Price (1949) 66 SALJ 269 at 271-3, and (1952) 15 THRHR 60 at 80). Bearing in mind the peculiar nature of the dependant's action in our law, I express no opinion on this controversy, and wish to record that nothing in this judgement should be regarded as leaving the position of a possible claim by dependants anything but open for future decision as and when it should arise." [129]

In a more recent case of *The Johannesburg Country Club v Stott and May NO,* [130] the Supreme Court of Appeal was confronted with a dependant's claim for the wife of the deceased breadwinner. The minor children were represented in so far as the deceased estate was concerned but were not involved in the current dispute. The facts of the case may be summarised as follows: The late Mr Stott was a member of the appellant, the Johannesburg Country Club. So was his wife, the respondent. While playing golf on the sixth fairway at the club, on 4 March 2000, he apparently sought shelter, under a cover of some sort, during a rainstorm. Lightning struck and he was severely injured and subsequently passed away on 24 March. Mrs Stott 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.

The Appellant, the Johannesburg Country Club, denied liability, relying on an exemption clause members have to sign when joining the club, in which the new member, upon signing the form, which contained the exemption clause, indemnified the club from any

127 *Evans v Shield* 1980 (2) SA 814(A).

128 1973 (4) SA 764 (A).

129 *Santam Insurance Co Ltd v Vorster* 1973 (4) SA 764 (A) at 777.

130 2004 (5) SA (SCA).

liability. After considering the doctrine of the exemption clause and the general rules pertaining to exemption clauses, the court was left with the question of whether the provision `plainly' absolves the club from a dependant's claim.

Harms JA although obiter relied upon the case of *Jameson's Minors v Central South African Railways* 1908 TS 575 in stating: *"..... That it was not possible for Mr Stott to exempt the club from such liability as one cannot forego the autonomous claims of dependants."*

Recognizing the defence of *volenti non fit iniuria* the court stated: *".... had Mr Stott survived the lightning strike, his claim for personal injuries would no doubt have been hit by this exclusion and Mrs Stott would also not have had a claim because a dependant's claim arises only upon the death of the breadwinner."*

The court concluded that as the exemption clause referred to "personal harm"; the wording "personal harm" did not ordinarily refer to a dependant's claim.

The court, in criticizing the radical nature of indemnity clauses which exclude liability for damages for the negligent causing of the death of another, concluded:

"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." [131]

7.2.2.1.3 **Legal Opinion**

(1) Voluntary assumption of risk as a defence is widely recognised by our legal writers. To some it is an extension of the maxim *volenti non fit iniuria* and to others it is regarded as a separate defence all together. [132]

(2) Before voluntary assumption of risk will succeed as a defence, certain requirements must first be met, inter alia, it is shown that the plaintiff had knowledge of the risk

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131 *The Johannesburg Country Club v Stott and May NO* (2004) (5) SA (SCA) at 516.

132 Strauss *Toestemming tot Benadeling* An unpublished doctoral thesis (1961) 50; Van Oosten *The Doctrine of Informed Consent* An unpublished Doctoral Thesis (1989) 14; McKerron *The Law of Delict* (1967) 70; Van der Walt *Delict: Principles and Cases* (1979) 51 ff; Van der Walt and Midgley *Delict: Principles and Cases* (1997) 68-69; Joubert *The Law of South Africa* Vol 8 (1995) Par 89; Hutchison et al *Wille's Principles in South African Law* (1991) 662; Boberg *The Law of Delict* (1984) 724 ff; Neethling et al *Deliktereg* (1989) 83. For case law recognizing voluntary assumption of risk see *Waring & Gillon Ltd v Sherborne* 1904 TS 340 at 345; *Lampert v Hefer NO* 1955 (2) SA 507 (A); *Union Government v Matthee* 1917 AD 688 703; *Santam Insurance Co Ltd v Vorster* 1973 (4) SA 764 (A); *Boshoff v Boshoff* 1987 (2) SA 694 (O); *Oosthuizen v Homegas (Pty) Ltd* 1992 (3) SA 463 (O) at 472 G-H; For the recognition of voluntary assumption of risk in a medical context see *Ex parte Dixie* 1950 (4) SA 748 (W) at 751; *Rompel v Botha* (Unreported decision in the TPA 15 April 1953); *Esterhuizen v Administrator Transvaal* 1957 (3) SA 710 (T); *Richter v Estate Hamman* 1976 (3) SA 226 (C); *Castell v De Greef* 1994 (4) SA 408 CPA at 420-421.

of harm; that the plaintiff appreciated the nature and extent of the risk involved and notwithstanding, the plaintiff freely and voluntarily assumed the risk. [133]

(3) In a medical context, the defence of voluntary assumption of risk may successfully be pleaded, provided, the defendant shows that the patient was informed of the seriousness or likely risks attended upon the treatment or the operation and the patient fully appreciated the seriousness or likely risks involved and freely consented thereto. [134]

(4) The effect of voluntary assumption of risk as a defence is that, like with consent, it negates wrongfulness. [135]

(5) Although voluntary assumption of risk appears to correspond with that of a waiver of action, the so-called *pactum de non petendo*, must be distinguished from the assumption of risk in that a *pactum de non petendo* merely bans the remedy for harm once entered into, without, affecting the wrongfulness of the act. Voluntary assumption of risk on the other hand negates wrongfulness. [136]

(6) Whether a deceased breadwinner's voluntary assumption of the risk that caused his death, can be raised as a defence to an action by his dependants, has long been a subject of controversy.

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133 Joubert *The Law of South Africa* Vol 8 (1995) Par 79; Van der Walt *Delict: Principles and Cases* (1979) 57; McKerron *The Law of Delict* (1971) 67; Van der Walt and Midgley *Delict: Principles and Cases* (1997) 68ff; Hutchinson et al *Wille's Principles of South African Law* (1991) 662; Van der Merwe and Olivier *Die Onregmatige Daad in die Suid-Afrikaanse Reg* (1984) 89 96-97; Strauss *Toestemming tot Benadeling* An unpublished doctoral thesis (1961) 49ff. For case law see *Waring & Gillon Ltd v Sherborne* 1904 TS 340 at 345; *Lampert v Hefer NO* 1955 (2) SA 507 (A); *Union Government v Matthee* 1917 AD 688, 703; *Santam Insurance Co Ltd v Vorster* 1973 (4) SA 764 (A); *Boshoff v Boshoff* 1987 (2) SA 694 (O); *Oosthuizen v Homecare (Pty) Ltd* 1992 (3) SA 463 (O) 472.

134 Van der Walt *Delict: Principles and Cases* (1979) 51ff; Van der Merwe and Olivier *Die Onregmatige Daad in die Suid-Afrikaanse Reg* (1989) 96ff; Van der Merwe and Midgley *Delict: Principles and Cases* (1997) 69ff; McKerron *The Law of Delict* (1971) 67ff; Joubert *The Law of South Africa* Vol 8 (1995) Par 89. For the relevant case law see *Ex parte Dixie* 1950 (4) SA 748; *Rompel v Botha* (Unreported judgement in the TPA Division 15 April 1953); *Esterhuizen v Administrator, Transvaal* 1958 (3) SA 710 (7); *Richter v Estate Hamman* 1976 (3) SA 226 (C); *Castell v De Greef* 1994 (4) SA 408 (CPA).

135 Van der Walt and Midgely *Delict: Principles and Cases* (1997) 69ff; Joubert *The Law of South Africa* Volume 8 (1995) Par 89; Van Oosten *Encyclopaedia* (1996) 67ff; Strauss and Strydom *Die Suid Afrikaanse Geneeskundige Reg* (1967) 216; Claassen and Verschoor *Medical Negligence* (1992) 62ff.

136 Boberg *The Law of Delict* (1984) 738ff; Van der Merwe and Olivier *Die Onregmatige Daad in die Suid-Afrikaanse Reg* (1989) 105-106; Van der Walt *Delict: Principles and Cases* (1979) 36.

(7) Two schools of thought have attempted to find answers to the discourse. One school of thought advanced the argument that dependants have an independent, non-derivative right, so that defences which would have negated the breadwinner's claim for injuries had he lived (such as waiver of action or voluntary assumption of risk) will not avail against the dependants. In this instance, despite the deceased breadwinner's consent, the dependants claim for loss of support is unaffected. [137] The other school of thought advance the counter argument that once it is shown that voluntary assumption of risk took place, the dependant's claim for loss of support falls away. [138]

(8) The legal position has now been settled, by the Supreme Court of Appeal, in the case of *Johannesburg Country Club v Stott and May N.O*. [139] In this case the court held that it was not possible for a deceased person to exempt a club from liability for the claim of dependants arising from the negligent act of a defendant. The rationale for this decision is based upon the notion that, to forego the autonomous claims of dependants 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.

7.2.2.2 **ENGLAND**

7.2.2.2.1 **Legal Writings**

In so far as assumption of risk as a defence is concerned, not much is written about this defence by the English writers. Nevertheless, it is used inter changeably with the *volenti* maxim by the legal writers. [140] It is however recognised as a separate defence to that of the maxim *volenti non fit iniuria*. Before assumption of risk may be invoked with a measure of

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137 See Van der Merwe *Acta Juridica* (1964) 82, at 83-93; Van der Merwe and Olivier *Die Onregmatige Daad in die Suid-Afrikaanse Reg* (1989) 348-354; Boberg *The Law of Delict* (1984) 734; Van der Walt and Midgley *Delict: Principles and Cases* (1997) 72; Joubert *The Law of South Africa* (1999) Vol 8 Par 79; Van der Walt *Delict: Principles and Cases* (1979) 55. For case law see *Jameson's Minors v CSAR* 1908 TS 575; *Victor N.O. v Constantia Co Ltd* 1985 (1) SA 118 (C).

138 For the writers who supports this controversial view see McKerron 53 *SALJ* (1936) 413; McKerron 67 *SALJ* (1950) 62; Walter Pollack 48 *SALJ* (1931) 191; Milner 72 *SALJ* (1955) 233; Schwietering 20 *THRHR* (1957) 138 at 144. For case law see *Union Government (Minister of Railways & Harbours v Matthee* 1917 AD 688; *Lampert v Hefer N.O.* 1955 (2) SA 507 (A) at 507; *Evans v Shield* 1980 (2) SA 814 AD; *Santam Insurance Co Ltd v Vorster* 1973 (4) SA 764 (A).

139 2004 (5) SA (SCA).

140 See Winfield and Jolowicz (1989) 688.

success against a plaintiff by a defendant, as with *volenti*, certain requirements first have to be met.

In this regard, it has been stated before that the defence may only be invoked once it is established that the defendant has committed a tort against the plaintiff. [141] Although actual knowledge of the risk, by the plaintiff, is necessary for the replication of the defence, it has been advocated that even where that knowledge is absent, the defendant may have discharged his duty by giving reasonable notice of the risk. [142]

There is a belief amongst certain legal writers that in the absence of an agreement express or implied there can be no defence of assumption of risk. [143] But caution the writers, knowledge of risk does not necessarily lead to a finding that the plaintiff assented to the risk. What is required is an acceptance of the risk of harm. [144]

A further requirement, as with consent in the defence of *volenti non fit iniuria*, is the plaintiff must have freely assumed the risk of harm, which is characterised by the absence of any feeling of constraint that may interfere with the plaintiff's freedom of will. [145]

But, despite the parties having reached an express agreement that the plaintiff will voluntarily assume the risk of harm and his agreement is made before the negligent act, the defence will not succeed in instances where the parties freedom to agree is subject to statutory restrictions, for example the Unfair Contract Terms Act 1977. [146] In terms of the Unfair Contract Terms Act 1977 it is not possible to exclude liability for death or personal injury at all.

The defendant will therefore not be allowed to get around the act by saying that the plaintiff accepted the risk of harm. [147]

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141 See Winfield and Jolowicz (1989) 688.

142 See Winfield and Jolowicz (1989) 688.

143 See Winfield and Jolowicz (1989) 688.

144 See Winfield and Jolowicz (1989) 690-691.

145 See Winfield and Jolowicz (1989) 691-692.

146 See Brazier *Street on Torts* (1993) 110.

147 See S.2 (1); S.2. (3) of the Unfair Contract Terms Act 1977.

The English position, with regard to the contractual exclusion or limitation of a dependant's claim, appears to be deeply governed by statutory provisions. In terms of the Congenital Disabilities (Civil Liability) Act [148] which, with regard to the civil liability to a child born disabled, provide:

"1(6) *Liability to the child under this section may be treated as having been excluded or limited by contract made with the parent affected to the same extent and subject to the same restrictions as liability in the parent's own case, and a contract term which could have been set up by the defendant in an action by the parent, so as to exclude or limit his liability to him or her, operates in the defendant's favour to the same, but no greater, extent in an action under this section by the child.* [149]

The effect thereof has been that the child is bound by a contractual exclusion or limitation clause that would have applied to the parent's action. [150]

However, with the promulgation of the Unfair Contract Terms Act [151] *the contractual exclusion clause which sought to exclude liability for death or personal injury caused by negligence would be ineffective.* [152] *Therefore the fact that the parents assumed the risk of harm or consents to the injury of harm does not include the autonomous claim of dependants."*

7.2.2.2.2 **Case Law**

The English courts have in a number of cases pronounced on the validity of the defence of *volenti non fit iniuria* which, in reality, display clear overtones of assumption of risk on the facts. The defence of *volenti* was thus interchangeably used.

In the case of *Dann v Hamilton* [153] the facts were: The defendant drove the plaintiff and her mother to London to see the Coronation lights. They visited several public houses and the defendant's ability to drive was clearly impaired. One passenger decided that the driver was drunk and got out of the car. The plaintiff said she would take the risk of an accident happening. A few minutes later there was an accident and the plaintiff was injured. It was held that *volenti* did not apply on these facts as the plaintiff had not consented to or absolved the defendant from subsequent negligence on his part. Asquith J stated that the defence of *volenti* was applicable where the plaintiff came to a situation where the danger

148 Congenital Disabilities Act 1976.

149 Sec 1 (6) of the Congenital Disabilities (Civil Liability) Act 1976.

150 Jones *Medical Negligence* (1996) 50.

151 Unfair Contract Terms Act 1977.

152 Jones *Medical Negligence* (1996) 50; S2 (1) of the Unfair Contract Terms Act 1977.

153 1939) 1 KD 509.

had already been created by the defendant's negligence. In the subsequent case of *Nettleship v Weston* [154] the plaintiff gave the defendant driving lessons. On the third lesson the defendant drove negligently and hit a lamp post. The plaintiff was injured and sued in negligence. The action was successful and the defence of *volenti* failed. The plaintiff had not consented to run the risk of injury as he had checked on whether the car was covered for passenger's insurance. Lord Denning in delivering the judgement stated: *"Nothing will suffice short of an agreement to waive any claim for negligence. The plaintiff must agree, expressly or impliedly, to waive any claim for any injury that may befall him due to the lack of reasonable care by the defendant."* [155]

The defence subsequently also received the attention of the court in *Owens v Brimmel,* [156] in which the plaintiff and defendant spent the evening on a pub crawl together. The plaintiff accepted a lift home with the defendant, although he knew the defendant was drunk. The defendant drove negligently and the plaintiff received serious injuries in a crash. The defence of *volenti* was held to be inappropriate but the plaintiff's damages were reduced for his contributory negligence in riding with a drunken driver and failing to wear a seat belt. The court held, in these cases, that the plaintiff's been aware of the risk, but did not consent to the acts of negligence that caused their injuries. The court stated it was pointed out in Dann v Hammilton, that the defence could apply in cases where: *`the drunkenness of the driver at the material time is so extreme and so glaring that to accept a lift from him is like engaging in an intrinsically and obviously dangerous occupation, intermeddling with an unexploded bomb or walking along on the edge of an unfenced cliff.'*

In the case of *Morris v Murray* [157] which also involved assuming the risk of harm involving a drunken person, the plaintiff went for a ride in a private plane piloted by the defendant, despite the fact that he knew the defendant was drunk. The plane crashed and the plaintiff was injured. It was held by the Court of Appeal that the pilot's drunkenness was so extreme and obvious that participating in the flight was like engaging in an intrinsically and obviously dangerous occupation. The defence of *volenti* succeeded. Accepting lifts with drunken pilots is more dangerous than with drunken drivers.

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154 (1971) 2 QB 691.

155 *Nettle ship v Weston* (1971) 2 QB 691.

156 (1977) 2 W.L.R. 943.

157 (1990) 3 ALL E.R. 801.

In a similar case involving the drunken driving of a motorbike the court in *Pitts v Hunt* [158] was confronted with the following facts: The plaintiff was a pillion passenger on a motor bike driven by the defendant. The defendant was drunk, had never passed a driving test, was uninsured and drove dangerously. The plaintiff encouraged him in this behaviour. The statutory provision of the Road Traffic Act 1988, S149 was held to prevent the defendant from relying on any form of the *volenti* defence. Had it not been for the section, the court was of the view that the claim would have been defeated by *volenti*.

I could find no case which deals with the effect of the parent(s) assuming the risk of harm or consenting to risk of injury or harm which affects the dependant's claim, in instances where the parent(s) contracts with a person or institution in terms of which, the parent(s) exempt the person or institution from such liability. It is respectfully submitted that should such a case arise in England, the dependants may successfully rely on the Unfair Contract Terms Act [159] to protect their interests. It is also submitted that the court will not deny the dependants their autonomous claim arising from the death or personal injury caused by the wrongdoer's negligence in terms of the said Act.

7.2.2.2.3 **Legal Opinion**

(1) Although some writers regard voluntary assumption of risk as an extension of the maxim *volenti non fit iniuria*, there are English writers who do regard voluntary assumption of risk as a totally separate defence. [160]

(2) Before voluntary assumption of risk may successfully be invoked as a defence, the defendant may give reasonable notice of the risk and the plaintiff must have knowledge of the risk of harm. [161]

3) A further requirement is that the plaintiff must have freely assumed the risk of harm. [162]

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158 (1990) 3 ALL E.R. 801.

159 Unfair Contract Terms 1977.

160 Winfield and Jolowicz *Tort* (1989) 688; Brazier *Street on Torts* (1993) 80ff. For case law see *Dann v Hamilton* (1939) 1 (U) 509; *Nettle ship v Weston* (1971) 2 QB 691; *Owens v Brimell* 1977 2 WLR 943; *Morris v Murray* 1990 (3) ALL ER 801.

161 Winfield and Jolowicz *Tort* (1989) 688-691.

162 Winfield and Jolowicz (1989) 691-692.

(4) The Unfair Contract Terms Act 1977 however, prohibits the exclusion of liability for death or personal injury despite parties having reached an express agreement that the plaintiff will voluntarily assume the risk of harm. [163]

(5) The Unfair Contract Terms Act 1977 protects dependants to claim successfully for loss of support, despite the fact that the parent(s) assumed the risk of harm or consented to the injury of harm, as dependants retain their autonomous and non-derivative claim.

(6) The Act prohibits any contractual exclusion which sought to exclude liability for death or personal injury caused by negligence.

7.2.2.3 UNITED STATES OF AMERICA

7.2.2.3.1 Legal Writings

Assumption of risk is known in American Law as a fully fledged defence. [164] It has, according to the American writers, been a subject of much controversy, in that, "assumption of risk" has been used in several different senses, but lumped together under the one name, often without realizing that differences exist in their usage. [165] The term "assumption of risk" has also been used inter-changeably with the doctrine of "*volenti non fit iniuria*", especially in instances where the parties stand in a relationship of master and servant or employee and employer or at vastly different bargaining positions in some other contractual relationship. [166]

Whatever form it takes, it appears that in its most basic usage, assumption of risk means that the plaintiff, in advance, gives his express consent to relieve the defendant of an obligation of conduct towards him/her, and to take his/her chances of injury from a known

163 SS2 (1); 2(3) of the Unfair Contract Terms Act 1977.

164 See Page and Keeton *Prosser and Keeton on the Law of Torts* (1984) 480; See also Louisell and Williams *Medical Malpractice* (2001) 9.

165 See Page and Keeton (1984) 480; See also Keeton *"Assumption of Risk in Products Liability Cases"* 1961, 22 *LA.L.REV*. 122 who classifies assumption of risk into no less than six different categories namely: express, subjectively consensual, objectively consensual, by consent to conduct or condition, associational, and imposed. See further Bohlen "Voluntary Assumption of Risk" 1966 20 *Harv.L.Rev* 14 91; Wade "The Place of Assumption of Risk in the Law of Negligence" 1961 22 *LA.L.REV*.5; Green "Assumed risk as a defence" 1961 *LA.L.REV*. 77.

166 See Page and Keeton (1984) 480; See further Louisell and Williams (2001) 9.

risk arising from what the defendant is to do. [167]

In the ordinary case, for example where the one party accepts a gratuitous pass on a railway train, or enters into a lease agreement or rents a house or employees an agent or enters into some other relationship involving free and open bargaining between the parties, that there shall be no obligation to take precaution, there is no public policy conviction which prevents the parties from contracting as they see fit. [168]

There is broad consensus amongst the writers that where one party is at such disadvantage in bargaining power, the effect of which, is to put the one party at the mercy of the other's negligence, such agreements should not be upheld but rather declared void as against public policy. [169]

There has been a movement afoot in America to extend the same rule to those who provide a service to the public, yet they are under no public duty because of their occupation. They include garage men and owners of parking lots etc. A second situation of assumption of risk is where the plaintiff voluntarily enters into some relationship with the defendant, with the knowledge that the defendant will not protect him against one or more future risks that may arise from the relationship. In this instance he may be regarded as having tacitly consented to negligence, and agreed to take his own chances. [170] Usually the implied assumption of risk is inferred from the conduct of the plaintiff, without there being an express agreement.

Nevertheless, he still knowingly and willingly encounters the risk. [171]

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167 See Page and Keeton (1984) 480-481 who state that in so doing the *"defendant is relieved of his/her legal duty, to the plaintiff, and being under no duty, he/she cannot be charged with negligence."* See also Louisell and Williams (2001) 9.2-9.3.

168 See Page and Keeton (1984) 482.

169 See Page and Keeton (1984) 482. The writers held the view that especially *"in instances where an employer is exempted from all liability for negligence towards his employees or efforts of public utilities to escape liability for negligence in the performance of their duty of public services should be held void as against public policy."* See also Louisell and Williams (2001) 9.03. In this regard the writers opine that the American courts are quite hostile in attempts by hospitals and doctors to enforce exculpatory clauses in admission and consent in treatment forms.

170 See Page and Keeton (1984) 483. The writers motivate for the extension of the rule on the ground that *"the indispensable need for their services deprives the customer of a real equal bargaining power."* Public interests thus demands for an extension of the rule. In this regard the writers mentions the leading case of *Tunkl v Regents of University of California* 1963, 60 Cal2d 92, 32 Cal.Rptr. 33, 383 P.2d 441; the same rule was applied to a charitable hospital accepting patients from the public, upon the ground that the "public interest" was involved. See also Louisell and Williams (2001) 9.02 who argue that hospitals perform activities thought suitable for public regulation. In hospital-patient contracts there is a disparity power in equal bargaining.

171 See Page and Keeton (1984) 481. The writers regard as examples of tacit consent to negligence instances where a person commences employment, knowing that he is expected to risk with a dangerous horse or ride in a car

A third situation of assumption of risk occurs where the plaintiff is aware of a risk that has already been created by the negligence of the defendant, yet chooses, voluntarily to proceed to encounter it. [172]

In order to succeed with a defence of assumption of risk the defendant must show or prove the following:

Firstly, the plaintiff must know that the risk is present and understand the nature of the risk. [173] *Secondly, the plaintiff's choice to incur the risk, must be freely and voluntary.* [174] *There are however instances in American law where despite the requirements of knowledge of risk and voluntariliness being present, nevertheless, because of a legal duty* [175] *owed by a defendant to the plaintiff or the existence of a statute which is clearly intended to protect the plaintiff, the defendant will not successfully invoke the defence of assumption of risk.* [176]

Despite its recognition, there is doubt whether the doctrine of "assumption of risk" as a defence, will ever be successfully invoked by a physician in practise. It is especially Holder who bespeaks the functionality of the doctrine when he states: [177]

"Since most patients' knowledge of medicine does not permit them to understand these risks, without clear proof of totally informed consent, the defence of assumption of risk is not successful."

It appears therefore that the defence will only be successful in exceptional cases.

7.2.2.3.2 **Case Law**

The defence of assumption of risk is widely recognized in the American case law. The

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where he knows the brakes are defective; See also Louisell and Williams (2001 9.02.

172 See Page and Keeton (1984) 481; See also Louisell and Williams (2001) 9.5-9.6.

173 See Page and Keeton (1984) 486. In this situation the writers uses as examples plaintiffs who enter business premises as invitees and discover dangerous conditions for example slippery floors or unsafe stairways. Though the invitees are aware of the risks, they nevertheless proceed freely and voluntarily to encounter them.

174 See Page and Keeton (1984) 487. This is often according to the writers referred to as "knowledge of risk". The writers express the view that actual knowledge of the required risk is a prerequisite.

175 See Page and Keeton (1984) 490. The writers state that *"the plaintiff is barred from recovery only if his choice is a free and voluntary one."*

176 See Page and Keeton (1984) 492. In instances where because of a legal duty the defendant is obliged to exercise reasonable care for the plaintiff's safety. In such cases the plaintiff does not assume the risk when he proceeds to engage the defendant's services or facilities where also there is a statute intended to protect the plaintiff against his own inability to resist pressures the plaintiff may not assume the risk of the violation. The statute is held to override the private agreement.

177 See Holder (1975) 306.

history underlying the development of the doctrine is set out in the case of *Tiller v Atlantic Coast Line R.Co.* [178] in which Mr Justice Black stated:

"Perhaps the nature of the present problem can best be seen against the background of one hundred years of master-servant tort doctrine. Assumption of risk is a judicially created rule which was developed in response to the general impulse of common law courts at the beginning of this period to insulate the employer as much as possible from bearing the "human overhead" which is an inevitable part of the cost to someone of the doing of industrialized business. The general purpose behind this development in the common law seems to have been to give maximum freedom to expanding industry." [179]

Certain principles in that case has been followed in a number of other cases *inter alia Siragusa v Swedish Hospital*, [180] a case decided by the Supreme Court of Washington which includes:

An action by a nurse's aid against her employer for injuries sustained while at work. As she was standing at the wash basin in a six-patient ward, a patient in a wheelchair pushed the door inward. On the door was a metal hook placed there to permit persons to open the door from the inside with a forearm. This hook struck the upper part of the plaintiff's back. Plaintiff asserted that defendant was negligent in failing to provide her a safe place to work. Defendant denied negligence and asserted contributory negligence and assumption of risk. On appeal following the remarks made by Frankfurter J in the Tiller case in which the Judge explained the application of the maxim as follows:

" ..... assumption of risk, has been used as a shorthand way of saying that although an employer may have violated the duty of care which he owed his employee, he could nevertheless escape liability for damages resulting from his negligence if the employee, by accepting or continuing in the employment with "notice" of such negligence, "assumed the risk". In such situations "assumption of risk" is a defence which enables a negligent employer to defeat recovery against him."

The court reasons that the defence is available *"only if the employer's duty is relegated to one of providing warning is it fair or just to allow a defence to the employee's action on the ground that the employee "received" warning from his self-acquired knowledge and appreciation of the risk involved."*

As to what is true and desirable the court held:

" ..... the employer has the positive duty to furnish a reasonably safe place to work, it is not just or fair to permit an employer to escape liability for a failure to perform this duty simply because the employee was aware of the danger when he reasonably elected to expose himself to it while in the course of his employment. To do so is to affirm and deny in the same breath, the employer's duty of care."

The court subsequently concluded:

"The time has now come, therefore, to state unqualifiedly that an employer has a duty to his employees to exercise, reasonable care to furnish them with a reasonable safe place to work. We now hold that if an employer

178 3 18 U.S. 54, 63 S.CT 444, 87 L.E.D. 619 (1943).

179 *Tiller v Atlantic Coast Line R.Co*. 3 18 U.S. 54, 63 S.CT 444, 86 L.E.D. 610 (1943).

180 60 WASH 2d 310, 373 P.2d. 767 (1962).

negligently fails in this duty, he may not assert, as a defence to an action based upon such a breach of duty, that the injured employee is barred from recovery merely because he was aware or should have known of the dangerous condition negligently created or maintained. However, if the employee's voluntary exposure to the risk is unreasonable under the circumstances, he will be barred from recovery because of his contributory negligence. Knowledge and appreciation of the risk of injury, on the part of the employee, are properly important factors which should be given weight in the determination of the issues of whether the employer is negligent in maintaining the dangerous condition and whether the employee is contributory negligent in exposing himself to it." [181]

The defence of assumption of risk has also frequently been raised in the so-called `motorist' cases in which a guest passenger sues the driver after a collision, and the driver, in order to escape liability, raises the defence of assumption of risk. This scenario formed the subject of appeal in the case of *Moconville v State Farm Mutual Automobile Insurance Co,* [182] in which the Supreme Court of Wisconsin, reviewing the legal position with regard to the doctrine of assumption of risk which previously provided that:

"..... an automobile host should not be held to as high a standard of responsibility for injury to his guest as for injury to one not in that relationship. The principle represents an evaluation of the relationship itself, including a concept that the guest is in the automobile as a matter of grace, not right, that he is free to ride or not ride and must protest or else be silent, at his own risk, and that the host as a benefactor of the guest merits protection from liability to one to whom the host has extended a favour."

Commenting on the previous dispensation the court held:

"This evaluation, this policy judgement, and these concepts do not appear sufficiently valid under present-day customs and community attitude toward the use of automobiles. We therefore adopt the following rules of law: (1) The driver of an automobile owes his guest the same duty of ordinary care that he owes to others; (2) A guest's assumption of risk, heretofore implied from his willingness to proceed in the face of a known hazard is no longer a defence separate from contributory negligence; (3) If a guest's exposure of himself to a particular hazard be unreasonable and a failure to exercise ordinary care for his own safety, such conduct is negligence, and is subject to the comparative negligence statute."

Consequently the court held that: *"..... The limitation on the duty of the automobile host under these, and other decisions, is no longer consistent with sound policy. A driver of an automobile should be held to the full standard of duty of ordinary care to his guests, as he is to other users of the highways."*

Protecting the interests of the passenger the court held:

"It has been suggested that the doctrine of assumption of risk is one of implied consent where the guest has acquiesced in a course of negligent driving. Consent seems not to be a satisfactory basis for retaining the doctrine of assumption of risk. The consequences of an automobile accident to a guest may be so disastrous that it would be contrary to public policy to hold that an individual who consents by implication to a dangerous situation will go uncompensated for his injuries. Conduct which has heretofore been denominated assumption of risk may constitute contributory negligence as well." [183]

The defence of assumption of risk was also recognised in the case of *Lyons v Redding*

181 *Siragusa v Swedish Hospital* 60 WASH. 2d 310, 373 P.ed. 767 (1962).

182 15 WIS. 2d 374, 113 N.W. 2d 14 (1962).

183 *Moconville v State Farm Mutual Automobile Insurance Co*. 15 WIS. 2d 374, 113 N.W. 2d 14 (1962).

Construction Co [184] but the court stated the defence should be limited to two situations namely:

"(a) When there is an express agreement to assume a risk and (b) when plaintiff has encountered a risk or danger with knowledge of "wilful, wanton, or reckless negligence of the defendant." [185]

7.2.2.3.3 **Legal Opinion**

(1) The doctrine of assumption of risk, though the subject of much controversy as to whether it exists independently or not, has found recognition amongst legal writers as a fully fledged defence. [186]

(2) The effect of the doctrine amounts to the plaintiff giving in advance his/her express consent to relieve the defendant of an obligation of conduct towards him/her, and to take his/her chances of injury from a known risk arising from what the defendant is to do. [187]

(3) For the defence to be invoked successfully by a defendant, it must be shown.

(3) (1) the plaintiff was made aware of the risk present and understood the nature of the risk. [188]

(3) (2) that the plaintiff's choice to incur the risk was free and voluntary. [189]

(4) But, notwithstanding the plaintiff being made aware of the risk, understanding the nature of the risk and freely and voluntarily choosing to incur the risk, there are instances in which the defendant will not escape liability. Factors which militate against the recognition of the defence assumption of risk under those

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184 83 WN. 2d 86, 515 P. 2d 821 (1973).

185 *Lyons v Redding Construction Co* 83 WN. 2d 86, 565 P. 2d 821 (1973).

186 Page and Keeton *Prosser and Keeton on the Law of Torts* (1984) 480; Louisell and Williams *Medical Malpractice* (2001) 0.02; Bohlen "Voluntary Assumption of Risk" 1966 20 *HARV.L.REV*. 14 91, Wade "The Place of Assumption of Risk in the Law of Negligence" 1961 22 *LA.LAW REV* 5; Green "Assumed risk as a defence" 1961 LA. *LAW REV* 77. For case law see *Tiller v Atlantic Coast Line R.Co.* 318 US 54, 63 S.CO 444, 87 L.Ed 610 (1943); *Strigusa v Swedish Hospital* 60 WASH. 2d 310, 373, P.2d 767 (1962); *Moconville v State Farm Mutual Automobile Insurance Co* 15 WIS 2d 374, 113 N.W. 2d 14 (1962); *Lyons v Redding Construction Co* 83 WN 2d 86, 515, P.2d 821 (1973).

187 Page and Keeton *Prosser and Keeton on the Law of Torts* (1984) 480-481; Louisell and Williams *Medical Malpractice* (2001) 9.2-9.3.

188 Page and Keeton *Prosser and Keeton on the Law of Torts* (1984) 480-481. For case law see *Siragusa v Swedish Hospital* 60 WASH 2d 310, 373 P2d (1962); *Tiller v Atlantic Coast Line R.Co*. 3 18 US 54, 63 SCT 444, 87 LED 610 (1943).

189 Page and Keeton *Prosser and Keeton on the Law of Torts* (1984) 487.

circumstances include:

(4) (1) where the defendant is under a public duty or legal duty in terms of a statute to furnish a reasonably safe environment alternatively to exercise a duty of care. [190]

(4) (2) where the one party is at such disadvantage in bargaining power, the effect of which is to put the one party at the mercy of the other's negligence. [191]

(4) (3) a contractant ought not to be allowed to contract out of his/her own negligence in breach of his/her duty of care in respect of the other contractant. [192]

7.3 Limiting or Excluding Liability in a Medical Context

7.3.1 *Volenti non fit iniuria*/Assumption of Risk in a Medical Context

7.3.1.1 SOUTH AFRICA

7.3.1.1.1 Legal Writings

The defence of *volenti non fit iniuria* as a ground of justification for medical interventions is recognised by legal writers. [193]

The recognition of the defence of *volenti non fit iniuria* stems from doctor/hospital/other healthcare providers contractual relationship with the patient, in which the consent of the patient plays a fundamental role. [194]

Save for emergency situations, statutory authority and authorization by the court, the general rule is that the patient's consent is a prerequisite for medical interventions. [195]

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190 Page and Keeton *Prosser and Keeton on the Law of Torts* (1984) 483, 490-492; *Tunkle v Regents of University of California* 1963 60 CAL 2d 92, 32 CAL.RPTR 33, 383 P. 2d 441; Siragusa *v Swedish Hospital* 60 WASH.2d 310, 373 P.2d 767 (1962).

191 Page and Keeton (1984)482; Louisell and Williams *Medical Malpractice* (2001) 9.02; *Tunkle v Regents of University of California* 1963, 60 CAL 2d 92, 32 CAL. RPTR. 33 383 P2d 441.

192 *Siragusa v Swedish Hospital* 60 WASH 2d 310, 373 P2d, 767 (1962).

193 Van Oosten *Encyclopaedia* (1996) 63; Strauss and Strydom (1967) 175; Strauss (1984) 3ff; Claassen and Verschoor (1992) 57ff; Strauss (1991) 3ff 91ff; McQuoid-Mason and Strauss (1983) Par 192; Gordon Turner and Price (1953) 153; Schwär Loubser and Olivier (1984) 8ff; Carstens and Pearman (2007) 591ff.

194 Van Oosten *Encyclopaedia* (1996) 63ff; Strauss and Strydom (1967) 175; Strauss (1991) 3ff; Claassen and Verschoor (1992) 57ff; Strauss (1991) 3ff 91ff; McQuoid-Mason and Strauss (1983) Par 192; Gordon Turner and Price (1953) 153; Schwär Loubser and Olivier (1984) 8ff; Carstens and Pearman (2007) 591ff.

195 Van Oosten *Encyclopaedia* (1996) 63ff; Strauss and Strydom (1967) 175; Strauss (1991) 3ff; Claassen and

The absence of consent from the patient himself/herself, or of someone acting on the patient's behalf, has the effect that the medical intervention is wrongful or unlawful unless justified in law or excused in law. [196] The legal consequences that flow there-from are that the doctor/hospital/other health care provider may be criminally prosecuted for assault and/or face civil action for damages. [197]

The presence of consent has the effect that an act which is *prima facie* actionable deprives the plaintiff of the right afterwards to complain of it. The maxim applicable in such a case is known as *volenti non fit iniuria*. [198]

Before the defence of *volenti non fit iniuria* may be said to be legally operative, certain requirements must first be met, inter alia: The patient must have knowledge of the procedures to be followed, the patient appreciates their consequences and nevertheless consents to them, the patient must have the legal capacity to consent, the consent given must be recognised by law: That is, it must conform with the dictates of society, the so-called *boni mores*. [199] The requirements are now also legislatively controlled. [200]

It is particularly the latter requirement which is of great importance to the core of this thesis, namely whether a doctor/hospital/other healthcare provider may validly include in a written agreement with a patient a term, releasing him from any legal obligation to show due skill and care, for such conduct?

Put differently, whether a patient's consent releasing a doctor/hospital/other healthcare provider from a legal obligation to show due skill and care would be valid, alternatively void as against public policy? The writers Gordon, Turner and Price [201] persuasively argue that in

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Verschoor (1992) 57ff; Strauss (1991) 3ff 91ff; McQuoid-Mason and Strauss (1983) Par 191; Carstens and Pearman (2007) 875ff. Legislative intervention in the form of the National Health Act 61 of 2003 today also provides for the healthcare user's consent for medical intervention save for certain circumstances.

196 Claassen and Verschoor (1992) 57ff; Strauss (1991) 3ff; McQuoid-Mason and Strauss (1983) Par 191; Van Oosten *Encyclopaedia* (1996) 63; Strauss and Strydom (1967) 182ff; Carstens and Pearman (2007) 890ff.

197 McQuoid-Mason and Strauss (1983) Para 191; Van Oosten Encyclopaedia (1996) 63; Strauss and Strydom (1967) 185ff; Strauss (1984) 3; Claassen and Verschoor (1992) 57ff; Strauss (1991) 91ff; Gordon Turner and Price (1953) 153ff; Carstens and Pearman (2007) 890ff.

198 Gordon Turner and Price (1953) 153ff, 188ff; McQuoid-Mason and Strauss (1983) Par 192; Strauss and Strydom (1967) 182ff 317; Carstens and Pearmain (2007) 591ff.

199 McQuoid-Mason and Strauss (1983) Par 192; Van Oosten Encyclopaedia (1996) 64ff; Strauss and Strydom (1967) 182ff; Claassen and Verschoor (1992) 59ff; Strauss (1984) 4ff; Strauss (1991) 4ff; Gordon Turner and Price (1953) 153ff, 188ff; Carstens and Pearman (2007) 883.

200 Sections 6-9 of the National Health Act 61 of 2003.

201 (1953) 188-189.

the so-called "contracting out" of liability cases involving medical practitioners, although consent may be clearly established, it may be of only very limited effect, that is, *"consent can only protect the surgeon against a claim for assault*" and further *"any attempt by a practitioner to contract out of liability for malpractice may be considered by the courts to be void as against public policy, leaving the patient's right to sue for damages unimpaired."*

The writers continue to argue that *"society cannot allow a medical practitioner to take such an advantage of his patient in regard to whom he stands in a position of such power."* [202]

More recently the South African Supreme Court of Appeal in the case of *Afrox Healthcare Bpk v Strydom* [203] took the view that although a contractual clause that offends public policy is unenforceable, it nevertheless, decided that a contractual clause in a hospital contract which indemnifies a hospital against liability for negligence is valid, but left open the question where gross negligence is shown. This dictum has subsequently, deservedly, undergone severe criticism. It is especially the writers Carstens and Kok [204] who persuasively criticise this judgement. For their insightful reasoning see the discourse *supra*. [205]

In so far as assumption of risk as a defence in a medical context is concerned, very little attention has been given by our legal writers to this subject matter. Our legal writers do however, in general terms, recognise a voluntary acceptance of risk which in broad terms amounts to this, the aggrieved person with full knowledge and intent, subjected him/her to a risk of harm which another person created. Should the aggrieved person then afterwards suffer harm, he/she cannot afterwards claim damages from the perpetrator. Our positive law has, however, placed limitations on the recognition of this defence, in that an aggrieved party, notwithstanding his/her consent to the assumption of risk, still retains his/her right to recovery in instances where the perpetrator's conduct is contrary to public policy or where the granting of the action is not contrary to public policy. [206]

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202 Gordon Turner and Price (1953) 153ff 188ff; *Contra,* Van Oosten (1996) 88. See also Strauss (1991) 305; Claassen and Verschoor (1992) 102-103; Burchell and Schaffer (February 1977) 109-115. *Contra,* Cronje-Retief (2000) 440-41; Carstens and Pearmain (2007) 458.

203 2002 (6) SA 21 SCA.

204 "An assessment of the use of disclaimers by South African hospitals in view of Constitutional demands, Foreign Law and medico-legal considerations" (2007) 78 *SAPR/PL* 430 18.

205 Chapter 14 Page 1177.

206 Strauss and Strydom (1967) 317ff.

To the question of whether a medical practitioner, who through his/her negligence causes physical harm to a patient or jeopardises the patient's health, can escape liability by invoking the defence of voluntary assumption of risk, Strauss & Strydom [207] in particular have come out strongly against the surgeon escaping liability.

7.3.1.1.2 **Case Law**

The defence of consent to intended harm in the performance of surgical operations received the attention of our courts as far back as 1923. In the case of *Stoffberg v Elliot* [208] Watermeyer J put the position as follows:

"Any bodily interference with or restraint of a man's person which is not justified in law, or excused in law, or consented to, is a wrong, and for that wrong the person whose body has been interfered with has a right to claim such damages as he can prove he has suffered owing to that interference. I said `not justified, or not excused, or not consented to'; now, by `justified' I mean this: there are certain interferences with the body of another which are justified and perfectly lawful, for instance, when a police constable arrests another under a warrant, or when an executioner hangs a man ..... If the interference is consented to, then it is not a wrong..... "

Watermeyer J continues:

" ..... unless his consent to an operation is expressly obtained, any operation performed upon him without his consent is an unlawful interference with his right of security and control of his own body, and is a wrong entitling him to damages if he suffers any." [209]

In a subsequent medical malpractice case of *Esterhuizen v Administrator, Transvaal* [210] the court unequivocally recognised the maxim *volenti non fit iniuria* when Bekker J, referring with approval to the dictum of Schreiner JA, in Lampert v Hefer NO stated:

"It is usual to include in the defence volenti non fit iniuria, or as I call it for convenience, consent, cases of voluntary acceptance of risk as well as cases of permission to inflict intentional assaults upon oneself, as in the case of surgical operations."

Bekker J continues:

"Generally speaking, all the numerous authorities without exception indicate that, to establish the defence of volenti non fit iniuria the plaintiff must be shown not only to have perceived the danger, for this alone would not be sufficient, but also that he fully appreciated it and consented to incur it. Furthermore, in the matter of Rompel v Botha (TPD 15 April 1953, unreported), Neser J held:

There is no doubt that a surgeon who intends operating on a patient must obtain the consent of the patient. In

207 (1967) 320-321.

208 1923 CPD 148.

209 *Stoffberg v Elliot* 1923 CPD 148.

210 1957 (3) SA 710 (T).

such cases where it is frequently a matter of life and death I do not intend to express an opinion as to whether it is the surgeon's duty to point out to the patient all the possible injuries which might result from the operation but in a case of this nature, which may have serious results to which I have referred, in order to effect a possible cure for a neurotic condition, I have no doubt that a patient should be informed of the serious risk he does run. If such dangers are not pointed out to him then, in my opinion, the consent to the treatment is not in reality consent, it is consent without knowledge of the possible injuries."

Endorsing the stated principle Bekker J concludes:

"Indeed if it is to be said that a person consented to bodily harm or to run the risk of such harm, then it presupposes, so it seems to me, knowledge of that harm or risk, accordingly mere consent to undergo X-ray treatment, in the belief that it is harmless or being unaware of the risks it carries, cannot in my view amount to effective consent to undergo the risk or the consequent harm." [211]

In a more recent judgement concerning the recognition of the maxim *volenti non fit iniuria*, which in South African Law can take the form of informed consent Ackermann J in *Castell v De Greef* [212] held:

"It is important, in my view, to bear in mind that in South African Law (which would seem to differ in this regard from English law) consent by a patient to medical treatment is regarded as falling under the defence of volenti non fit iniuria, which would justify an otherwise wrongful delictual act. (See, inter alia, Stoffberg v Elliot 1923 CPD 148 at 149-50; Lymbery v Jefferies 1925 AD 236 at 240; Lampert v Hefer NO 1955 (2) SA 507 (A) at 508; Esterhuizen's case supra at 718-22; Richter's case supra at 232 and Verhoef v Meyer 1975 (TPD) and 1976 (A) (unreported), discussed by Strauss (op cit at 35-6)."

Ackermann J continues:

"South African law generally classifies volenti non fit iniuria, irrespective of whether it takes the narrower form of consent to a specific harm or the wider form of assumption of risk of harm, as a ground of justification (regverdigingsgrond) excludes the unlawfulness or wrongfulness element of a crime or delict."

Ackermann J then lays down certain criteria which must be satisfied before the defence of *volenti non fit iniuria* may successfully be relied upon:

(a) The consenting party `must have had knowledge and been aware of the nature and extent of the harm or risk';
(b) The consenting party `must have appreciated and understood the nature and extent of the harm or risk';
(c) The consenting party `must have consented to the harm or assumed harm or risk';
(d) The consent `must be comprehensive that is extending to the entire transaction, inclusive of its consequences'. [213]

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211 *Esterhuizen v Administrator, Transvaal* 1957 (3) SA 710 (T).

212 1994 (4) SA 408 (C).

213 See *Castell v De Greef* 1994 (4) SA 408 (C). Owing to constraints and focus being placed on the focal point of this thesis, it is impossible to go into an in-depth discussion regarding the general principles of informed consent

7.3.1.1.3 **Legal Opinion**

(1) What emanates from the doctor/hospital/other healthcare provider's contractual relationship with the patient wherein the consent of the patient plays a fundamental roll is the recognised defence of *volenti non fit iniuria* which serves as a ground of justification. [214]

(2) As consent is a prerequisite for medical interventions, [215] consent is present, an act which is *prima facie* actionable may, provided the requirements are met, be denounced as actionable, deprive the plaintiff of the right to complain afterwards, as the maxim *volenti non fit iniuria* may successfully be invoked.

(3) Before the maxim *volenti non fit iniuria* may successfully be raised as a defence it must be shown inter alia: the patient did have sufficient knowledge of the procedure to be followed; the patient appreciated the consequences and nevertheless, consented thereto. The consent given must be recognised by law, that is, it must conform to the dictates of society, the so-called *boni mores*. [216]

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and their application in the South African law. The idea here was basically to give an overview in very broad terms of informed consent as a defence and how it can be utilized in negating wrongfulness in cases concerning medical treatment or intervention. For further reference on the South African case law see: *Allott v Paterson & Jackson* 1936 (SR) 221; *Buls v Tsatsarolakis* (1976) (2) SA (T) 891; *Castell v De Greef* (1993) (3) SA 5-1 (C); *Castell v De Greef* 1994 (4) SA 408 (C) 426; *Esterhuizen v Administrator, Transvaal* 1953 (3) SA 710 (T); *Ex parte Dixie* (1950 (4) SA 748 (W); *Lampert v Hefer* 1955 (2) SA 507 (A); *Lymbery v Jefferies* 1965 (AD) 236; *Philips v De Klerk* 1983 (T) Unreported case; *Richter v Estate Hammann* 1976 (3) SA 226; *Rompel v Botha* (1953) (T) unreported; *Stoffberg v Elliott* 1923 (C) 148; *Verhoef v Meyer* 1975 (T); 1976 (A) unreported discussed by Strauss *Doctor Patient and The Law* (1989) 32.

214 Van Oosten *Encyclopaedia* (1996) 63; Strauss and Strydom *Die Suid-Afrikaanse Geneeskundige Reg* (1967) 175; Claassen and Verschoor *Medical Negligence* (1992) 57ff; Strauss *Doctor Patient and The Law* (1991) 3ff 91ff; McQuoid-Mason and Strauss *Law of South Africa* Vol 17 (1987) Par 192; Gordon Turner and Price *Medical Jurisprudence* (1955) 153; Schwär Loubser and Olivier *Die ABC van Geregtelike Geneeskunde* (1984) 8ff; See also Carstens and Pearman *Foundational Principles of South African Medical Law* (2007) 875ff. In so far as case law is concerned, one of the first cases in which the defence of consent to intended harm in the performance of surgical operations arose was that of *Stoffberg v Elliot* 1923 CPD. The court however, did not refer to *volenti non fit iniuria* as a defence. Our courts did however sometime later in the case of *Esterhuizen v Administrator, Transvaal* 1957 (3) SA 710 (T) recognises the maxim. In a more recent judgement in the case of *Castell v De Greef* 1994 (4) 408 (C) the Cape Provincial Division continued to recognize the defence of *volenti non fit iniuria*. For other cases see *Lymbery v Jefferies* 1925 AD 236 at 240, *Lampert v Hefer NO* 1955 (2) SA 507 (A) at 508; *Verhoef v Meyer* 1975 (TPD) and 1976 (A) (Unreported), discussed by Strauss (1991) 35-6.

215 Gordon Turner and Price *Medical Jurisprudence* (1953) 153ff 188ff; McQuoid-Mason *The Law of South Africa* Volume 17 (1983) Par 192; Strauss and Strydom *Die Suid-Afrikaanse Geneeskundige Reg* (1967) 182ff, 317; Carstens and Pearmain *Foundational Principles of South African Medical Law* (2007) 878ff.

216 McQuoid-Mason *The Law of South Africa* Vol 17 (1983) Par 192; Van Oosten *Encyclopaedia* (1996) 64ff; Strauss and Strydom *Die Suid-Afrikaanse Geneeskundige Reg* 182ff; Claassen and Verschoor *Medical Negligence* (1992) 59ff; Strauss *Doctor Patient and the Law* (1991) 4ff; Gordon Turner and Price *Medical Jurisprudence* (1953)

(4) In the so-called "contracting out" of liability cases involving medical practitioners, nonetheless, our legal writers opine that in those circumstances consent can only protect the medical practitioner against a claim of assault. It is persuasively argued by some writers that any attempt, by a practitioner, to contract out of liability for malpractice ought to be declared void as against public policy, leaving the patient's right to sue for damages unimpaired. This view I respectfully associate myself with. [217] For a more fully detailed motivation therefore see *infra*.

(5) Assumption of risk as a defence in a medical context has received scant attention from our legal writers and the courts alike. Although our legal writers do, in general terms, recognise voluntary assumption of risk as a defence, nonetheless, limitations are placed on the defence in, for example, instances where the perpetrator's conduct is contrary to public policy or where the granting of the action is not contrary to public policy. [218] In a medical context, it is especially Strauss and Strydom [219] who persuasively argue that societal dictates demand that, in executing his/her profession, the medical practitioner ought not to be allowed to compromise the degree of care and skill expected of the medical practitioner. A relaxation thereof, cautions the writer, would lead to a distortion of recognised medical norms and ethics. [220]

7.3.1.2 **ENGLAND**

7.3.1.2.1 **Legal Writings**

Consent to medical treatment and/or surgery in English law, is an integral part of medical

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153ff, 188ff; Carstens and Pearmain *Foundational Principles of South African Medical Law* (2007) 937.

217 See Gordon Turner and Price *Medical Jurisprudence* (1953) 153ff 188ff; 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" (2002) 18 *SAPR.PL* 430 18. The latter writer includes the position of hospitals when making use of indemnity clauses or exculpatory clauses in hospital contracts. Support for this view can also be found in Cronje-Retief *The Legal Liability of Hospitals* (2000) 440-441. Carstens and Pearmain *Foundational Principles of South African Medical Law* (2007) 458ff *Contra* however, Van Oosten *Encyclopaedia* (1996) 88; Burchell and Schaffer "Liability of Hospital for Negligence" February 1997 *Businessman's Law* 109-111, Claassen and Verschoor *Medical Negligence* (1992) 102-103; Strauss *Doctor, Patient and The Law* (1991) 102-103. See also the controversial decision by the Supreme Court of Appeal in *Afrox Healthcare Bpk v Strydom* 2002 (6) SA 21 SCA.

218 Strauss and Strydom *Die Suid-Afrikaanse Geneeskundige Reg* (1967) 317ff. For case law see *Castell v De Greef* 1994 (4) SA 408 (C) in which the court recognised assumption of risk of harm as a wider form of *volenti non fit iniuria*.

219 Strauss and Strydom *Die Suid-Afrikaanse Geneeskundige Reg* (1967) 320-321.

220 Strauss and Strydom *Die Suid-Afrikaanse Geneeskundige Reg* (1967) 320-321.

treatment, the failure whereof, *prima facie,* constitutes battery [221] or trespass. [222]

For that reason it is generally accepted that consent to medical treatment by a patient, in certain instances, may be invoked successfully, by a physician, in a medical negligence suit as a valid defence. In this regard the doctrine of *volenti non fit iniuria* in a medical context also plays a significant role in English law. [223]

When applying the concept consent in a medical context, the question arises, to what extent should the patient be informed by the physician in order to constitute real consent? The answer lies in the following of the American law, in receiving certain principles pertaining to "informed consent" into the English law. It is particularly the nature and scope of the physician's duty of disclosure to the patient and the question whether the absence of "informed consent", by the patient, constitute negligence that received a tremendous amount of attention amongst the legal writers. [224]

Where a physician carries out treatment of a patient and/or performs an operation on a patient without the necessary consent, the patient may sue the physician for damages which claim may be founded in the so-called battery [225] or trespass [226] otherwise known

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221 See Street *The Law of Torts* (1993) 82; See also Scott (1995) 85.

222 See Winfield and Jolowicz *Tort* (1989) 682-683.

223 See Milner *Negligence in Modern Law* (1967) 99 who describes the rationale of the defence of *volenti non fit iniuria* as follows: *"The negation of negligent conduct may be presented in the form of as contention that no duty is owed to one who consents to the defendant's act, either to a specific act of a harmful nature, or to an activity which involves the risk of harm. Volenti non fit iniuria - no wrong is done to a willing party ... the philosophical premise of this rule is the freedom of the will, that is, the freedom to choose between alternatives, coupled to the social outlook that each man is master of his fate and the best judge of his own wellbeing."* See also Jackson and Powell (1997) 317; Kennedy and Grubb (1998) 171 ff; Mason and McCall-Smith (1987) 120; Skegg (1984) 88; See further Winfield and Jolowicz (1989) 691; Street (1993) 82-83; Scott (1995) 91.

224 With regard to the nature and scope of the physician's duty to provide information to his/her patient see Skegg (1984) 88 who states: *"Generally speaking, the greater the patient's capacity to comprehend the issues involved and come to a decision about them, the greater will be the extent of the duty to disclose relevant information. Conversely the more restricted his capacity - whether by reason of his current medical condition, limited intelligence or education, or the complexity of the issues involved - the less may be the extent of any duty to inform."* Factors which influence the physician's duty of disclosure include the capability of the patient to understand the nature and scope of the medical treatment; to what extent the patient desires information regarding the proposed treatment; the nature and scope of the proposed treatment and/or surgical procedure and the effect of the said information on the patient. For a comprehensive discussion see Skegg (1984) 88-92; See also the discussion by Mason and McCall-Smith (1987) 120; Winfield and Jolowicz (1989) 685 suggest that *".... So long as the patient understands the broad nature of what is to be done, his consent is not vitiated by failure to explain the risks inherent in the procedure.... "See* further Street (1993) 82; Scott (1995) 88-89; Kennedy and Grubb (1998) 215ff. There are however situations which may arise where the patient is not in a position to consent for example the patient may be unconscious, the patient is a minor or the absence of consent is predicated by an emergency situation. For a full discussion see Kennedy and Grubb (1998) 180ff; Mason and McCall-Smith (1987) 112-117; Winfield and Jolowicz (1989) 684-685; Street (1993) 82-84. The foretasted topic however falls outside the scope of this discussion.

225 See Street (1993) 83; Brazier (1992). Battery is defined by Flemming *The Law of Torts* (1977) 27 as: *"the*

simply as negligence, in not securing the necessary consent.

Consent to one medical procedure does not justify another. Where a condition is discovered during the authorised treatment of another condition or during an operation, the physician first has to obtain consent to treat the newly discovered condition. [227]

At common law, in the absence of duress or some other vitiating factor, entry into a contract exempting the defendant from liability for negligence was, prior to the promulgation of the Unfair Contract Terms Act in 1977, a complete defence. The effect of the common law position was that the freedom to contract was overriding, in that, once the contracting party signed the agreement, even though the agreement included an exclusion of liabilities term, the parties were bound by the agreement. This was the position, notwithstanding one of the parties not having read the agreement prior to signing. [228]

The position changed dramatically, however, with the promulgation of the Unfair Contract Terms Act of 1977, which resulted in a limitation being placed on contractual freedom in that, parties to the contract were no longer by reference to any contract term, free to exclude or restrict their liability for death or personal injury resulting from negligence. [229] The same principle is advocated when a physician and patient have reached an express agreement that the plaintiff will voluntarily assume the risk of harm. [230]

7.3.1.2.2 **Case Law**

Consent as an integral part of medical treatment is recognised in English case law. In the *locus classicus* of *F v West Berkshire Health Authority* [231] the court looked at the

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intentional application of force to the person of another, the force being harmful or offensive, and being without the consent of that other and without lawful excuse." The doctrine of *volenti non fit iniuria* is firmly entrenched in the definition in that where a patient consents and provided all the requirements are met the physician is lawfully excused.

226 See Winfield and Jolowicz (1989) 683-685. The writers opine that where the physician failed to perform the duty to warn the patient of risks, the plaintiff may nevertheless succeed with his/her claim even though the operation has been carried out with all due care and skill, provided the patient can show he/she would not have consented; See also Street (1993) 83; Jackson and Powell (1997) 317; Kennedy and Grubb (1998) 215; Mason and McCall-Smith 117; Skegg (1984) 79.

227 Winfield and Jolowicz (1989) 685.

228 Harpwood *Principles of Tort Law* (1997) 110.

229 S 2(1) of the Unfair Contract Terms Act 1977.

230 Harpwood *Principles of Tort Law* (1997) 140.

231 (1989) 2 ALL ER 545 (1990) 2 AC 1 (1989) 2 WLR 938.

consequences of treatment without consent. Lord Brandon summed up the position as follows:

"At common law a doctor cannot lawfully operate on adult patients of sound mind, or give them any other treatment involving the application of physical force however small (which I shall refer to as `other treatment'), without their consent. If a doctor were to operate on such patients, or give them other treatment, without their consent, he would commit the actionable tort of trespass to the person."

Lord Brandon identifies instances when consent is not required and motivates his reasons as follows:

"There are, however, cases where adult patients cannot give or refuse their consent to an operation or other treatment. One case is where, as a result of an accident or otherwise, an adult patient is unconscious and an operation or other treatment cannot be safely delayed until he or she recovers consciousness. Another case is where a patient, though adult, cannot by reason of mental disability understand the nature or purpose of an operation or other treatment. The common law would be seriously defective if it failed to provide a solution to the problem created with such inability to consent. In my opinion, the common law does provide a solution to the problem. With the common law principles a doctor can lawfully operate on, or give other treatment to, adult patients who are incapable, for one reason or another, of consenting to his doing so, provided that the operation or other treatment concerned is in the best interests of such patients. The operation or other treatment will be in their best interests if, but only if, it is carried out in order either to save their lives or to ensure improvement or prevent deterioration in their physical or mental health." [232]

Lord Goff in the same case endorsed the famous principle enunciated by an American Judge Cardozo J in *Schloendorff v Society of New York Hospital* 211 NY 125 (1914) 12:

"Every human being of adult years and sound mind has a right to determine what shall be done with his own body."

The patient's right to autonomy was also recognised in a later decision namely:
In *Potts v North West Regional Health Authority* [233] the plaintiff was injected with `Depo-Provera', a long-lasting and slow-acting contraceptive drug, without her prior consent at the same time as she was given a rubella vaccination, shortly after the birth of a baby. She was awarded $3,000 damages for assault and battery because she had never been given the opportunity to accept or refuse the treatment. The judge said: `*To deprive her of the right to choose is to deprive her of the basic human right to do with her body as she wishes.*' For the defendant to be successful with the defence of *volenti non fit iniuria* the defendant must show that the plaintiff consented to the medical treatment and/or surgery. To be successful however, it must be shown that the patient's consent was valid consent, often referred to as real consent. This was the position enunciated in *Chatterton v Gerson*: [234]

232 *F v West Berkshire Health Authority* (1989) 2 ALL ER 545, (1990) 2 AC 1, (1989) 2 WLR 938.

233 (1983) as discussed by Harpwood (1987) 388.

234 (1981) QB 432.

"In my judgement what the court has to do in each case is to look at all the circumstances and say: "Was there a real consent?" I think justice requires that in order to vitiate the reality of consent there must be a greater failure of communication between doctor and patient than that involved in a breach of duty if the claim is based on negligence."

The court goes on to state:

" ..... once the patient is informed in broad terms of the nature of the procedure which is intended, and gives her consent, that consent is real, and the cause of the action on which to base a claim for failure to go into risks and implications is negligence, not trespass." [235]

As to how much detail the physician is to impart to his or her patient, in English law, patients are not entitled to the fullest possible information about the treatment they receive. Instead it is up to the doctor to decide how much information to give, and the test to be applied in deciding whether a doctor has acted reasonably in the amount of information given, is that in *Bolam v Friern Hospital Management Committee* [236] in which the court see the following criteria:

"If a doctor is able to demonstrate that he acted in accordance with a responsible body of medical opinion he will not be negligent." [237]

The dilemma of how much the doctor should, or should not, tells his patient reached trial in *Sidaway v Board of Governors of Bethlem Royal Hospital and Maudsley Hospital*. [238] The patient averred *inter alia* that she had not been told of the possibility of cord damage. She argued that if she had been told, she would not have consented to the operation and the damage would not have occurred. This raised the question of whether it was negligent to fail to warn her of the risk.

When the case reached the trial the medical witnesses for the defence said that they too would not have disclosed the risk. They justified this on the basis the risk was very slight and to mention it would probably have frightened the patient into refusing the operation. Even though the experts for the plaintiff may well have asserted that they would have told her, the defence experts represented a responsible body of medical opinion that would have withheld the information.

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235 *Chatterton v Gerson* (1981) QB 432 at 443.

236 (1957) 2 ALL ER 118, (1957) 1 WLR 582.

237 *Bolam v Friern Hospital Management Committee* (1957) 2 ALL ER 118 (1957) 1 W.L.R. 582.

238 (1985) 2 WLR 480.

The House of Lords held that a doctor is not negligent in obtaining a patient's consent if he only discloses the risks which would have been mentioned by a responsible body of medical opinion when it followed the Bolam decision in which it was stated:

"A medical man is not guilty of negligence if he has acted in accordance with a practice accepted as proper by a responsible body of medical men skilled in that particular act ... merely because there is a body of opinion that takes a contrary view."

But the court held:

" ..... A doctor [is] under a duty to provide the patient with the information necessary to enable the patient to make a balanced judgement in deciding whether to submit to that treatment." [239]

The obligation to disclose information to the patient, in non-therapeutic cases, in England also received the court's attention.

In *Gold v Haringey Health Authority* [240] the plaintiff alleged *inter alia* that the consultant had been negligent in failing to discuss the treatment policy in that he had failed to explain the risk of failure and that he had not discussed any alternative method by which steps could be taken to avoid becoming pregnant. All the medical witnesses said that they would have warned the patient of the risk of failure, but that a sizeable proportion of doctors (estimated at up to 50 percent) would not have done so at the time when she had the operation.

The court followed the *Sidaway decision* although the latter cases were applicable to therapeutic procedures. Lloyd L.J. stated:

"The principle does not depend on the context in which any act is performed, or any advice given. It depends on a man professing skill or competence in a field beyond that possessed by the man on the Clapham omnibus. If the giving of contraceptive advice required no special skill, then I could see an argument that the Bolam test should not apply. But that was not, and could not have been, suggested. The fact (if it be the fact) that giving contraceptive advice involves a different sort of skill and competence from carrying out a surgical operation, does not mean that the Bolam test ceases to be applicable. It is clear from Lord Diplock's speech in Sidaway that a doctor's duty of care in relation to diagnosis, treatment and advice, whether the doctor is a specialist or general practitioner, is not to be dissected into its component parts. To dissect a doctor's advice into that given in a therapeutic context and that given in a contraceptive context would be to go against the whole thrust of the decision of the majority of the House of Lords in that case. So I would reject the argument of counsel for the plaintiff under this head, and hold that the judge was not free, as he thought, to form his own view of what warning and information ought to have been given, irrespective of any body or responsible medical opinion to the contrary." [241]

Where the patient asks questions, although there is an obligation on the doctors to disclose

239 *Sidaway v Board of Governors of Bethlem Royal Hospital and Maudsley Hospital* (1985) 2 WLR 480.

240 (1987) 2 ALL ER 888, (1988) 1 QB 481, (1987) 3 WLR 649, (1988) 1 FLR 55.

241 *Gold v Haringey Health Authority* (1987) 2 ALL ER 888, (1988) 1 QB 481; (1987) 3 WLR.

information, their duty of disclosure is not unlimited. In this regard Kerr L.J. in *Blyth v Bloomsbury Health Authority* [242] the court of appeal criticising the comments of the Judge in the court a quo stated:

"In the light of these comments I conclude that the judge was in error in holding that there was any obligation to pass on to the plaintiff all the information available to the hospital; that is to say in this case the information contained in Dr Law's files. That conclusion could not properly be based upon the evidence. As regards the judge's repeated reference to the need to give a full picture in answer to a specific enquiry, it must be borne in mind, apart from the other matters already mentioned in that regard, that no specific enquiry was found to have been made in this case.

Secondly, I think the judge's conclusions equally cannot properly be based on the remarks of Lord Diplock and Lord Bridge in Sidaway. The question of what a plaintiff should be told in answer to a general enquiry cannot be divorced from the Bolam test, any more than when no such enquiry is made. In both cases the answer must depend upon the circumstances, the nature of the enquiry, the nature of the information which is available, its reliability, relevance, the condition of the patient, and so forth. Any medical evidence directed to what would be the proper answer in the light of responsible medical opinion and practice - that is to say, the Bolam test - must in my view equally be placed on the balance in cases where the patient makes some enquiry, in order to decide whether the response was negligent or not." [243]

More recent decisions have however started questioning the conservatism display by the court in the decisions of *Sidaway and Blyth*. In *Smith v Tunbridge Wells Health Authority* [244] referring to the Bolam judgement Morland J concluded:

"In my judgement by 1988, although some surgeons may still not have been warning patients similar in situation to the plaintiff of the risk of impotence, that omission was neither reasonable nor responsible.

In my judgement Mr Cook, in stating that he considered that he owed a duty to warn, was reflecting not only the generally accepted standard practice, but also the only reasonable and responsible standard of care to be expected from a consultant in Mr Cook's position faced with the plaintiff's situation." [245]

7.3.1.2.3 **Legal Opinion**

(1) The doctrine of *volenti non fit iniuria* is a recognised defence in England in a general, as well as in a medical context and plays a significant role in the English Law of Tort. [246]

(2) The rationale for the existence of the doctrine of *volenti non fit iniuria,* in a general

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242 (1993) 4 Med. L.R. 151.

243 *Blyth v Bloomsbury Health Authority* (1993) 4 Med. L.R. 151.

244 (1994) 5 Med. L.R. 334.

245 *Smith v Tunbridge Wells Health Authority* (1994) 5 Med. L.R. 334.

246 Milner *Negligence in Modern Law* (1967) 99; Rogers Winfield and Jolowicz on *Tort* (1989) 691; Street *The Law of Torts* (1993) 82-83; Jackson and Powell *Professional Negligence* (1997) 317; Kennedy and Grubb *Principles of Medical Law* (1998) 171; Mason and McCall-Smith *Law and Medical Ethics* (1987) 120; Skegg *Law, Ethics and Medicine* (1984) 88; Scott *The General Practitioner and The Law of Negligence* (1995) 91.

sense, stems from a philosophical premise, namely; the freedom to choose between alternatives coupled with the social outlook that each man is master of his fate and the best judge of his own wellbeing. Hence, where consent is given involving the risk of harm, the party consenting cannot be heard to say afterwards that he has been wronged as no wrong is done to a willing party. [247]

(3) Consent is an integral part, therefore, of the doctrine of *volenti non fit iniuria*. Especially in a medical context, in that, where a physician carries out treatment of a patient and/or performs an operation on a patient without the necessary consent, the patient may sue the physician for damages. [248]

(4) Before however, consent may successfully be invoked; certain requirements must first be met before one can talk of real consent inter alia:

(4)(1) The physician has a duty to provide the patient with sufficient information regarding the risks of medical procedure including treatment and/or operations. [249]

(4)(2) As to what constitutes sufficient information, the English writers, have identified various factors which influence how much information is expected to be given by the physician to the patient, which include, the patient's capability to understand the nature and scope of the medical treatment, the patient's desire for information, the nature and scope of the proposed treatment and/or surgical procedure and the effect of the information on the patient. [250]

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247 Milner *Negligence in Modern Law* (1967) 99; Rogers Winfield and Jolowicz on *Tort* (1989) 691; Street *The Law of Torts* (1993) 82-83; Jackson and Powell *Professional Negligence* (1997) 317; Kennedy and Grubb *Principles of Medical Law* (1998) 171; Mason and McCall-Smith *Law and Medical Ethics* (1987) 120; Skegg *Law, Ethics and Medicine* (1984) 88; Scott *The General Practitioner and The Law of Negligence* (1995) 91.

248 Street *The Law of Torts* (1993) 82; Rogers Winfield and Jolowicz on *Torts* (1989) 682-683; Skegg *Law, Ethics and Medicine* (1984) 88; Mason and McCall-Smith *Law and Medical Ethics* (1987) 120; Scott *The General Practitioner and The Law of Negligence* (1995) 88-89; Kennedy and Grubb *Principles of Medical Law* (1998) 215ff. For case law see *F v West Berkshire Health Authority* (1989) 2 ALL ER 545 (1990) 2 AC 1 (1989) 2 WLR 938; *Potts v North West Regional Health Authority* (1983) as discussed by Harpwood *Principles of Tort Law* (1997) 388.

249 Skegg *Law, Ethics and Medicine* (1984) 88; Mason and McCall-Smith *Law and Medical Ethics* (1987) 120; Rogers Winfield and Jolowicz on *Tort* (1989) 685; Street *the Law of Torts* (1993) 82; Scott *The General Practitioner and the Law of Negligence* (1995) 88-89; Kennedy and Grubb *Principles of Medical Law* (1998) 171. For case law see *Chatterson v Gerson* (1981) QB 432.

250 Skegg *Law, Ethics and Medicine* (1984) 88-92; Mason and McCall-Smith *Law and Medical Ethics* (1987) 120; Rogers Winfield and Jolowicz on *Tort* (1989) 685; Street *The Law of Torts* (1993) 82; Scott *The General Practitioner and The Law of Negligence* (1995) 88-89; Kennedy and Grubb *Principles of Medical Law* (1998) 171. For case law see *Bolam v Friern Hospital Management Committee* (1957) 2 ALL ER 118 (1957) 1 WLR 582; *Sidaway v Board of Governors of Bethlem Royal Hospital* 1985 2 WLR 480; *Gold v Haringly Health Authority*

(4)(3) But England, unlike America, does not recognise "Informed Consent". As long as the patient understands the broad nature of what is to be done, his consent is not vitiated by failure to explain in detail the risks inherent in the procedure. [251]

(5) Although at Common Law in England, in the absence of duress or some other vitiating factor, entry into a contract exempting the defendant from liability for negligence was a complete defence, notwithstanding the plaintiff not having troubled to read the terms. Once the contracting party signed the agreement with the excluding term forming part of the contract, he/she was bound by the agreement. However, with the promulgation of the Unfair Contract Terms Act of 1977, limitations have been placed on contractual freedom in that contracting parties are no longer, by reference to any contract, free to exclude or restrict their liability for death or personal injury resulting from negligence. [252]

(6) In so far as voluntary assumption of risk as defence in a medical context is concerned, although I did not come across case law on the point *in casu*, nevertheless, the same statutory restriction which is placed on the parties freedom to agree in instances in which the maxim of *volenti non fit iniuria* may not successfully be involved, are also applicable in instances where the physician and the patient have reached an express agreement that the plaintiff will voluntarily assume the risk of harm. [253]

7.3.1.3 **UNITED STATES OF AMERICA**

7.3.1.3.1 **Legal Writings**

Although some of the legal writers have recognised the doctrine of *volenti non fit iniuria* as a fundamental principle of the common law, [254] most writers, with reference to the

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(1987) 2 ALL ER 888, (1988) 1 QB 481, 1987 3 WLR. 649; *Blyth v Bloomsberg Health Authority* (1992) 4 MED L.R. 151; *Smith v Tunbridge Wells Health Authority* (1994) 4 MED L.R. 334.

251 Rogers Winfield and Jolowicz on *Tort* (1989) 685; Robertson "Informed Consent to Medical Treatment" (1981) 97 *L.Q.R.* 102. For case law see *Chatterton v Gerson* (1981) QB 436; *Hills v Potter* (1984) 1 WLR 641; *Sidaway v Bethlem Royal Hospital* (1985) AC 871.

252 S.2 (1) of the Unfair Contract Terms Act 1977.

253 The restriction is placed by S2 (1) S2 (3) of The Unfair Contract Terms Act 1977. See Harpwood Principles of Tort Law (1997) 110.

254 Prosser and Keeton *The Law of Torts* (1971) 112; Bohlen "Consent as Affecting Civil Liability for Breaches of the Peace" 1924 24 *Col.L. Nev.* 819.

recognition of a defence against medical negligence involving consent, have preferred the defence of assumption of risk, which may, in certain circumstances, be invoked by the physician. [255]

The doctrine of assumption of risk is said to blend into the issue of informed consent and waivers of liability. [256] Assumption of risk entails that the patient, notwithstanding, his/her knowledge and understanding of possible harmful consequences which certain treatment and/or surgery may hold for him/her, nevertheless, consents to the treatment and/or surgery. [257]

The doctrine of assumption of risk is said to be founded upon the general law which recognises that an individual is free from unwarranted and unwanted intrusion, since it extends the patient's decision-making power, even to choose unconventional therapies. [258]
For the doctrine to be successfully invoked, it has often been said that the principles applicable to informed consent must first be complied with, *inter alia* the physician must first carry out his duty towards the patient, namely, to disclose certain information about risks collateral to the proposed therapy and secondly, the physicians must not proceed, without consent, to the risks that have been, or should have been, disclosed. [259]
The concept "consent" therefore involves knowledge and understanding, as well as a duty on the physician to carefully explain to the patient the proposed treatment and/or surgery and the risks attached thereto. For that reason it has often been stated that the doctrine of "Assumption of Risk" is related to informed consent. [260]

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255 Furrow et al *Health Law* (1995) 256; Bianco and Hirsh "Consent to and Refusal of Medical Treatment" A chapter in *American College of Legal Medicine Legal Medicine* (1991) 286; Holder *Medical Malpractice Law* (1975) 306; Southwick *The Law of Hospital and Healthcare Administration* (1988) 72.

256 Furrow et al (1995) 256; Holder (1975) 225.

257 Holder (1975) 310; Sharter and Plant *The Law of Medical Malpractice* (1959) 154; Bianco and Hirsch (1991) 286; Southwick and Slee (1988) 72.

258 Furrow et al (1995) 256; Flamm "Healthcare Provider as a Defendant" A chapter in American College of Legal Medicine *Legal Medicine* (1991) 120; Prosser and Keeton (1971) 112.

259 Waltz and Inbau (1971) 156; Bisbing McMenami Granville "Competency, Capability and Immunity" A chapter in *American College of Legal Medicine* (1991) 121; Flamm "Healthcare Provider as a Defendant" A chapter in *American College of Legal Medicine* (1991) 120; Holder (1975) 227; Peters (1981) 163-164; Moore and Kramer *Medical Malpractice: Discovery and Trial* (1990) 35-36; Southwick and Slee (1988) 361ff; Pozgar and Pozgar (1996) 395-396.

260 See Holder (1975) 306; See also Bianco and Hirsh (1991) 286; Furrow et al (1995) 256; See further Southwick and Slee (1988) 72.

The effect of the closeness of the inter-relationship between the two doctrines amounts to this, where the physician fails to fully inform the patient of the intended treatment and/or operation to the extent that the patient is apprised of all the risks which he or she may encounter, so much so, that the patient understands the risks, it cannot be said that the patient properly exercised informed consent.

This may result in the physician being held liable for negligence, in that, without clear proof of totally informed consent; the defence of assumption of risk will be unsuccessful. [261]

The defence of assumption of risk will also be unsuccessful where the physician's diagnosis or treatment fall below the expected standard of due care. Put differently, it has been stated before, that the defence of assumption of risk does not apply to cases of negligence. If, therefore, the physician advises the patient of the risks of proper care and then provides improper care, he/she cannot successfully invoke the defence on the ground that the patient has assumed the risk. [262]

Waivers of liability and other attempts at exculpating healthcare providers from liability have, as with assumption of risk and negligence, been treated with disdain by the American legal writers. [263] It appears, therefore, that the general consensus amongst the writers is that physicians and hospitals ought not to contract out of negligence.

For a more in-depth discussion see Chapter 4 *infra*.

7.3.1.3.2 **Case Law**

The American courts have in the past recognized the express assumption of risk as a defence.

The case of *Shorter v Drury* [264] involved such a case which stemmed *inter alia* from the refusal of a Jehovah's Witness to accept a blood transfusion. In this case the decedent became pregnant and consulted the defendant physician who determined the foetus had died. The physician recommended removal of the foetus by dilation and curettage which

261 Holder (1975) 226-227, Waltz and Inbau (1971) 164ff; Flamm (1991) 121; Moore and Kramer (1990) 35-36; Pozgar and Pozgar (1996) 395-396; Southwick and Slee (1988) 361ff.

262 Holder (1975) 307-308; Southwick and Slee (1988) 72.

263 Furrow et al (1995) 257. Holder (1975) 716.

264 103 WASH 2d 645, 695 P.2d 116 (1985).

involved a risk of bleeding. He described this procedure to Mr and Mrs Shorter, advising them of the possibility of bleeding, but no other methods were discussed with them. Immediately prior to the procedure, Mrs Shorter signed a consent which expressly released the hospital for any injuries resulting from her refusal to accept a blood transfusion. During the operation she began to bleed due to lacerations caused by Dr Drury. Although she continued to bleed profusely, while still coherent she refused to authorize a transfusion despite warnings that she would die. Mrs Shorter ultimately bled to death, and expert witnesses for both parties agreed a blood transfusion would have saved her life.

The Washington Supreme Court upheld the validity of the release signed by Mrs Shorter. It further held that the release precluded the cause of action arising from Dr Drury's negligence where the injury resulted from Mrs Shorter's refusal to accept blood.

In *Schneider v Revici* [265] the court also recognized the viability of the defence of express assumption of risk. This case arose from the treatment of breast cancer with an unconventional form of treatment. Dr Revici operated a clinic which specialized in experimental therapies. After Mrs Schneider signed a lengthy consent form, Dr Revici diagnosed her cancer and began treating it with selenium and a special diet. After 14 months of treatment, when the tumour had increased in size and spread to the other breast and lymph nodes, Mrs Schneider finally underwent a bilateral mastectomy.

In its decision the court focused on an alleged covenant not to sue executed by Mrs Schneider. It noted that New York federal law recognises the efficacy of a covenant not to sue in the context of experimental and inherently dangerous medical procedures. New York law also required that the covenant to sue be strictly construed against the drafting party, and that its wording be clear and unequivocal. But the court concluded the form signed by Mrs Schneider lacked the precision required by New York law.

In the case of *Mainfort v Giannestras* [266] a diabetic patient was warned, in advance of surgery, that his condition might result in an unavoidable infection. He told the physician that he wished to proceed. His leg had to be amputated as a result of post-operative infection. It was held that he had assumed the risk.
In the following cases the courts also upheld the defence of express voluntary of risk. In

265 817 F.2d 987 (2d CIR. 1987).

266 111 NE 2d 692, OHIO 1951.

the first case, of *Gramm v Boesner,* [267] decided as far back as 1877, the facts were as follows: a man fractured his arm and the defendant set it. Some weeks later it was apparent that the bones were slightly out of alignment. There was no clear indication whether the original setting of the fracture had been negligent or whether the bones had been displaced through no fault of the surgeon. The patient asked the defendant to operate on the arm, break it, and reset it. The defendant opposed the suggestion because he thought this would be bad medical practice, but he eventually agreed. The outcome of the second operation was far worse than the original misalignment.

The court held in favour of the surgeon and said that if a physician tells a patient that an operation is improper and advises against it and the patient still insists upon it, the patient assumes the risk because he relies upon his own judgement and not that of the surgeon.

The facts in the second case of *Brockman v Harpole* [268] were as follows:
An adult patient had had his ears washed out on several occasions because they became plugged with wax. He came to the office of his physician without an appointment and told a nurse that he wanted his ears washed out. He was told that both physicians who practised in the office were at the hospital and that his ears could not be treated until one of the physicians could examine him and order such a procedure. He insisted that the nurse do it without requiring him to wait for the physician's return and she finally agreed to do so. During the washing process, both his eardrums were ruptured.

The court held that the fact that the patient came to the office without an appointment and persuaded the nurse, against her better judgement, to perform the procedure without waiting for an examination by a physician was sufficient to support a finding that he had assumed the risk.

In another case of *Karp v Cooley,* [269] the surgeon was not held liable for the patient's death after a heart transplant because he had fully informed the patient and obtained consent to the operation.

In so far as an implied assumption of risk is concerned, the American courts, in a number of cases, recognised the doctrine as a defence, despite the plaintiff not agreeing expressly to

267 56 TOND 497, 1877.

268 444 P2d 25, ORE 1968.

269 349 F.Supp. 827 (S.D.TEX.1972) Aff.1 493 F.2d 408.

assume the risk. In this regard, in the case of *Charrin v Methodist Hospital,* [270] the plaintiff assumed the risk of injury when she tripped over a television antenna cord in her hospital room. She knew of the cord's existence, as she had earlier pointed out its dangers.

In *Causey v Dean* [271] a patient who voluntarily submits to treatment, depending entirely on the surgeon to decide what shall be done, gives a general consent by implication for such operation as may, in the surgeon's professional judgement, be reasonably necessary.

In a number of cases the American courts refused to uphold the defence of assumption of risk and relied especially on two overriding factors, namely; the hospital performing activities thought suitable for public regulation, as well as the unequal bargaining power of the hospital in the negotiation of hospital-patient contracts. The leading case in this regard is that of *Tunkle v Regents of University of California,* [272] in which the court held invalid a release from liability for future negligence which was imposed as a condition of admission to a charitable hospital. The court noted the decisive advantage in bargaining power on the part of the hospital, and characterized the release as an adhesion contract. It also noted that the hospital was providing an essential and crucial public service.

Likewise, in *Abramowitz v New York University Dental Centre, College of Dentistry* [273] the court struck down a poorly drafted release which had been buried in a lengthy registration form.

The American courts have also rejected the defence of implied assumption of risk where it was not proved that the plaintiff possessed the necessary knowledge and appreciation of the risk involved. In the case of *Reyes v Wyeth Labs* [274] the court held that the mother of

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270 432 S.W.2d 572 (TEX. APP.1968).

271 280 So.2d. 251 (LA.1973).

272 60 CAL.2d 92, 383 P.2d 441, 82 CAL.RPTR.33 (1963).

273 110 A.D. 2d 343; 494 N.Y.S.2d 721 (1985); See also *Porubiansky v Emory Univ*. 156 Gs.App.602, 275 S.E. 2d 163 (1980). In an action against a dentist and a dental school, the court voided an exculpatory clause in the patient's consent form. The practice of dentistry was suitable for public regulation and already was regulated by statute. Moreover, the relative positions of the dentist and patient were unequal. See also *Olson v Molzen* 558 S.W.2d 429 (Tenn.1977). An exculpatory agreement between a doctor and a patient signed as a condition to receiving to abortion was contrary to public policy. The doctor occupied a superior bargaining position in relation to the patient. See further *Smith v Hosp. Auth. of Walker* 160 Gs.App.387, 287 S.E. 2d 89 (1981). The court held that a release by a prospective blood donor prior to extraction of blood, absolving all medical personnel from liability for negligence, was void against public policy.

274 498 F.2d 1264 5th Cir. 1974, Apply in Texan law.

an infant who was given a polio vaccine that was "unavoidably unsafe" did not assume the risk of injury if she was unaware of the danger inherent in the vaccine.

In the case of *Los Alamos Med. Center v Coe* [275] the court rejected both the "assumption of risk" and "contributory negligence" defences. In this case, the plaintiff received repeated injections of morphine during home treatment for relatively minor complaints. Although the defendant became aware that she took the drug more out of desire and dependency than from a genuine need for relief from pain, this awareness did not constitute the kind of voluntary participation required for assumption of risk or contributory negligence.

7.3.1.3.3 **Legal Opinion**

(1) Although the doctrine of *volenti non fit iniuria* is recognised as a fundamental principle of the common law, [276] the defence mostly preferred by the American legal writers and the courts alike, involving medical negligence, in which consent plays a dominant role, is that of assumption of risk. [277]

(2) The doctrine of assumption of risk is said to blend into the issue of informed consent and waivers of liability. [278]

(3) The doctrine entails that the patient, notwithstanding his/her knowledge and understanding of the possible harmful consequences which certain treatment and/or surgery may hold for him, nevertheless, consent to the treatment and/or surgery. The effect of such consent is that the physician, if sued for damages arising from his/her negligence, may invoke the defence of "assumption of risk" and avert liability based upon the fact that the patient relied upon his/her own judgement. [279]

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275 58 N.M.686 275 P.2d 175 (1954).

276 Prosser and Keeton *The Law of Torts* (1971) 112; Bohlen "Consent as affecting civil liability for breaches of the Peace" 1924 24 *COL.L New* 819.

277 Furrow et al *Health Law* (1995) 256; Bianco and Hirsh "Consent to and refusal of medical treatment" A chapter in *American College of Legal Medicine* (1991) 288; Holder *Medical Malpractice Law* (1975) 306; Southwick *The Law of Hospital and Healthcare Administration* (1988) 72.

278 Furrow et al Health *Care* (1995) 256; Holder *Medical Malpractice Law* (1975) 225. For case law see *Shorter v Drury* 103 ASH 2d 645, 695 P 2d 116 (1985); *Schneider v Revici* 817 F. 2d 987 (2d CIR 1987); *Mainfort v Giannestras* 111 NE 2d 692 OHIO 1951; *Cramm v Boesner* 56 TOND.497 1877; *Brochman v Harpole* 444 P 2d 25, ORE 1968; *Karp v Cooley* 349 F. Supp. 827 (S.D. TEX 1972) AFF 1 493 F. 2d 408.

279 Holder *Medical Malpractice Law* (1975) 310; Sharter and Plant *The Law of Medical Malpractice* (1959) 154; Bianco and Hirsh "Consent as affecting civil liability for breaches of the Peace" (1991) 286; Southwick and Slee *The Law of Hospital and Healthcare Administration* (1988) 72 *Gramm v Boesner* 56 TOND. 497 1877; *Shorter v Drury* 103 WASH 2d 645, 699 P.2d 114 (1985); *Schneider v Revici* 817 F. 2d 987 (2d CIR. 1987); *Mainfort v Giannestras* 111 NE 2d 692, OHIO 1951; *Karp v Cooley* 349 Supp 827 (S.A.je x 1972) Aff. 1 473 f 2D 408.

(4) For the defence to be successful however, the following requirements must first be met *inter alia*:

(4) (1) The principles applicable to informed consent, namely; the disclosure of certain information about risks collateral to the proposed therapy, must first be impacted by the physician, to the patient, in order for the patient to make an informed decision and secondly, the patient's consent, to the risks explained, must be forthcoming. [280]

(4) (2) The physician's diagnosis or treatment, notwithstanding the patient's consent, must not fall below the expected standard of due care. In other words, the physician cannot contract out of negligence. [281]

(5) Waivers of liability and other attempts at exculpating healthcare providers from liability, as with assumption of risk and negligence, have received a negative response from both the American legal writers and the courts. Various factors militate against their validity when incorporated in agreements, which include the vulnerability of the patients, the anxious state patients find themselves in upon admission, the unequal bargaining position of the parties, the effect of his/her own negligence. [282]

7.4 Summary and Conclusions

It is evident from the discourse in this Chapter, that the different jurisdictions, selected for the research undertaken in this thesis, do recognize certain defences which serve as grounds of justification and which limit, or exclude, the liability of a person/persons/or institutions arising from their conduct which caused damages, which, in the absence of such defences, would otherwise have been regarded as tortuous or delictual conduct.

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280 Waltz and Inbau *Medical Jurisprudence* (1971) 156; Bisber, McMenamin, Granville "Competency, capability, and immunity" A chapter in *American College of Legal Medicine* (1991) 121; Flamm "Healthcare provider as a Defendant "A chapter in *American College of Legal Medicine* (1991) 121.

281 Holder *Medical Malpractice Law* (1975) 307-308; Southwick and Slee *The Law of Hospital and Healthcare Administration* (1988) 72.

282 Furrow et al *Health Law* (1975) 257; Flamm "Healthcare provider as a Defendant" A chapter in *American College of Legal Medicine Legal Medicine* (1991) 121; Holder *Medical Malpractice Law* (1975) 316. For case law see *Tunkle v Regents of University of California* 60 CAL 2d 92, 383 P 2d 441, 82 CAL RPTR 33 (1963); *Abramowitz v New York University Dental Centre, College of Dentistry* 110 A.D. 2d 343; 494 NYS 2d 721 (1985); *Porubiansky v Emory University* 156 69 APP 602 275 SE 2d 163 (1980); *Olsen v Molzen* 558 S.W. 2d 429 (TENN 1977); *Smith v Hospital Authority of Walker* 160 69 APP 387 287 S.E. 2d 89 (1981).

One of the defences is that of *volenti non fit iniuria,* which means that no harm is done to someone who consents thereto. Consent in the doctor/hospital/other healthcare provider contractual relationship plays a foundational role, which has the effect that the presence of consent indicates that an act which is *prima facie* actionable, assures the plaintiff of the right afterwards to complain of it. But, before it can be said that the defence of *volenti non fit iniuria* is legally operative, certain requirements must first be met, *inter alia,* that the consent given must be recognised by law i.e., it must conform with the dictates of society, the so-called *boni mores*. This requirement is of great importance to the core of this thesis, as well whether a doctor/hospital/other healthcare provider may validly include in a written agreement with a patient, a term releasing him/her/it from any legal obligation to show due skill and care, for such conduct? Put in the alternative, whether a patient's consent releasing a doctor/hospital/other healthcare provider from a legal obligation to show due skill and care, would not be used against public policy?

Two of the mainstream defences, recognised by the different jurisdictions in South Africa, England and the United States of America, include the doctrine of *volenti non fit iniuria* and the assumption of risk. The main purpose for the existence of the defences in the general law sphere is said to lie in the fact that no man can complain of an act which he/she has expressly or impliedly consented to. The effect thereof is that the defendant finds himself/herself exonerated from liability, or put differently, relieved of a legal duty to the plaintiff. The rationale underlying the defences is based on the jurisprudential principle of individualism, in that the individual is left to work out his/her own destiny. To this end, a person who willingly consents to the defendant's act, in the form of either a specific harmful act or an activity involving a risk of harm, cannot complain that a wrong has been committed against him or her.

The discourse in this Chapter reveals that the application of these defences, in the general sphere, is not without any restriction or limitations. For the maxim *volenti non fit iniuria* to succeed certain requirements, *inter alia* consent, must be present and which must be real consent. For consent to be real it is required that the consenting party must have had knowledge and been aware of the nature and extent of the harm or risk. Furthermore, its use must be recognised by law and not regarded as *contra bonos mores*. As to when or under what circumstances consent would be regarded as *contra bonos mores*, regard must be had to the prevailing convictions of the community. It is also clear from the discussion in this Chapter that the following factors sway the legal convictions of the community, namely, the nature and extent of the interest involved the motives of the parties and the social purpose of the consent or assumption of risk. Another factor, which has also

influenced societal conviction, is the so-called `contracting out of liability' cases in which some courts and legal writers alike have viewed such conduct to be grossly unprofessional, void as against public policy.

In the South African and United States of America jurisdictions, the restrictions or limitations to the said defences are regulated by the common law. In England however, the English Unfair Contract Terms Act 1977 impacts on these defences.

From the discourse in this chapter it is also clear that the bargaining position of the parties to an agreement may also influence the restriction or limitation placed on consent, which results in such conduct to be against public interest or public policy. As far as the question of the general application of the defence of "voluntary assumption of risk" in dependants' claims is concerned; this seems to be fairly settled in the different jurisdictions. Today the position seems to be that as the dependants have an independent, non-derivative right, defences such as waiver of action or voluntary assumption of risk, which would have negated the breadwinner's claim for injuries had he/she lived, will not avail against the dependants. Besides the common law protection, constitutionally, the South African Constitution, Act 108 of 1996 also bestows a duty on parents, guardians or wards to act in the best interests of minors. Signing a waiver or consenting to the voluntary assumption of risk cannot be said to be acting in the best interest of the child.

This chapter also focused on the edictal position with regard to the validity of the defence of *violent non fit injuries* as a ground of justification for medical interventions. It is clear from this chapter that, whereas the South African and English jurisdictions recognise the defence of *violent non fit injuries* as a ground of justification for medical interventions, the United States of America prefer the doctrine of assumption of risk as a defence.

But it is clear from the discourse in the chapter that the application of the maxim, *violent non fit injuries,* may only be raised successfully as a defence provided it is shown that certain requirements had been met. The requirements include that the patient had sufficient knowledge of the procedure to be followed and he/she appreciated the consequences; and nevertheless consented thereto. Similarly, as with the application of the defence in the general sphere, the consent given must be recognized by law. Once again the dictates of society play a fundamental role in determining whether consent has been validly given.

It is especially, in the so-called `contracting out of liability' cases, in which a patient consents not to sue a doctor/hospital/other healthcare providers, that many South African writers have persuasively argued that notwithstanding the fact that consent was given, it

does not conform with the dictates of society, the so-called *boni mores*. This school of thought argues that no medical practitioner/hospital should be released from his/her/its obligation to show due skill and care, for such conduct would be grossly unprofessional and void as against public policy. Other factors influencing their thinking include the unequal bargaining position the patient occupies in relation to, especially, the medical practitioner/hospital who stand in a superior bargaining position; the position of trust the doctor/hospital occupies in relation to the patient; the fiduciary relationship between the medical practitioner/hospital and the patient; the influence of normative ethics and other ethical codes, medico-legal considerations and constitutional demands. Another school of thought that holds an opposing view is greatly influenced by the doctrine of freedom of contract. They argue that once the contracting parties consent, they should not afterwards be heard to complain against their own folly and rely heavily on the *caveat subscriptor* rule. This view seems to have found favour with the South African courts, more particularly, the Supreme Court of Appeal, who in the case of Afrox Healthcare Bpk v Strydom decided, contrary to popular opinion, that exclusionary clauses in hospital contracts are not against public policy. This controversial issue forms the subject matter of the central theme of this thesis and will be the subject of a comprehensive discussion in Chapter 14.

It is also clear from the discussion in this chapter that in the English jurisdiction the doctrine of *volenti non fit iniuria* is recognized as a defence, in a medical context, provided certain requirements are first met. But, the defence is not unlimited as legislative restrictions are placed which limit contractual freedom. In terms of the Unfair Contract Terms Act 1977, a medical practitioner/hospital is not free to exclude or restrict his/her/its liability for death or personal injury from negligence. The same principle applies when a medical practitioner/hospital and the patient have reached an express agreement that the plaintiff will voluntarily assume the risk of harm.

In this chapter it is also seen that the doctrine of assumption of risk is preferred to *volenti non fit iniuria* as a defence in a medical context. But, as in the other jurisdictions where the doctrine of *volenti non fit iniuria* is preferred, certain requirements first have to be met before the defence of assumption of risk will succeed. But, the defence does not operate without limits or restrictions in that despite consent, the defence will be unsuccessful where the medical practitioner's/hospital's conduct falls below the expected standard of due care and skill. It follows therefore, that should the medical practitioner/hospital advise the patient of the risks and then provide improper care, he/she/it will not successfully be able to invoke the defence on the ground that the patient has assumed the risk.

Likewise, the courts in America view waivers of liability and other attempts to exculpate

medical practitioners/hospitals from liability, as with assumption of risk and negligence, with disdain. Contracting out of negligence is treated as void, against public interest or *contra bonos mores* in the United States of America.

The discussions in the preceding chapters have covered the nature of the doctor-patient relationship commencing with the history of the relationship and extending to the modern day context. Having regard to the nature of the relationship, it is clear that the relationship comprises both a contractual relationship and general relationship flowing from both the contractual, as well as the general relationship, of the doctor/hospital-patient relationship as a duty of care, which set a standard of care which the doctor/patient must comply with. What was also looked at, in particular, in Chapter 7 is whether the doctor's/hospital's duty of care may be limited or excluded in a medical context. From what is discussed in Chapter 7 it follows that the doctrine of *volenti non fit iniuria* and the assumption of risk play a significant role in their application. What is also significant is the restrictions or limits placed on their applications, especially, where the convictions of the community so dictate. This discourse, albeit to a limited degree, will be foundational to the focal point of this thesis in determining whether exclusionary or exculpatory clauses in hospital contracts, exonerating medical practitioners or hospitals from liability for their negligence, may validly be included in contract.

The subsequent chapters will consider, in detail, the role of the law of contract in general and how principles including freedom of contract, the *caveat subscriptor* rule, fairness, unconscionableness and public policy influencing the law of contracts in general, impact on medical contracts. What will also be considered will be the role of exclusionary clauses in the commercial sphere and how they impact on contractual relationships? In Chapter 13 Constitutional values and principles will be considered as means to determine how they impact on contract law in South Africa. The considerations referred to hereinbefore are foundational to the ultimate chapter when the legitimacy of exclusionary clauses in medical contracts will be investigated. Consequently, a contractual law, as they relate to exclusionary clauses, is the subject of the next chapter and succeeding chapters.

Chapter 8

General Law of Contract: Selective Principles influencing the Law of Contract and impacting on Medical Contracts

8.1 Introduction

Freedom of contract is a concept which, ever since it was first recognized in Greek philosophy and Roman law, has shaped the law of contract. Freedom of contract, has contributed in different ways in forming the law of contract.

The writings of the Greek philosophers and Roman jurists concentrated, especially, on the value of promise-keeping [1] and consent. [2] The influence of their thinking is today seen universally when regard is had to the relationship of contract and the law of obligations. [3] During the sixteenth and seventeenth centuries naturalists of the likes of Hobbes and

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1 This is evident from a number of different sources. Gordley *The Philosophers Origins of Modern Contract Doctrine* (1991) 10-11 highlights in particular, the writings of the Greek philosopher, Aristotle, who first wrote *"let us discuss the truthful ..... Who seeks faith in his agreements? For he is true both in word and in life because his character is such"* and the writings of Thomas Aquinas who wrote *"One who promises something does not lie if he has the intention to do what he promises because he does not speak contrary to what he has in mind. If, however, he does not do what he promises, then he appears to act unfaithfully because his intention changes."*

2 Gordley (1991) 10-11 highlights the emphasis placed by Gaius on promises and the role consent plays in keeping to a promise made. The writer also highlights the work of *Accursius* D. 46.1.172 who wrote of consent as giving *"..... effect or form or clothing to the natural root so that it can produce an obligation."*

3 Much has been written about the relationship but it is especially, Atiyah *An Introduction to the Law of Contract* (1995) 7-10 who emphasizes that the law of contract is part of the law of obligations ..... *"It is governed with obligations which people incur to others as a result of the relations and transactions in which they become involved."*

Locke, relying on social, economic and political philosophies, promoted their natural law ideas in promoting the concept of freedom of contract. The freedom of contract was viewed by them as a fundamental human freedom, in which man was free to regulate his own conduct. In the market place, to enter into market relations, free from any interference. [4]

In the eighteenth and nineteenth centuries in a market driven universe, economic liberalism through the concept *laissez-faire*, relied heavily on the doctrine of freedom of contract in which the freedom of the individual was valued highly. [5]

The dominance of the doctrine of freedom of contract continued its influence so much so, that in the United States of America, it found its way into the American Constitution. [6] The dominance of contractual freedom also found its way into the courts in the United States of America, England and South Africa etc. Influenced by the natural law theory, which provided, man had an inalienable right to make their own contracts for themselves, the courts started adopting the attitude that the courts should interfere with people, on the

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4 The national laws ideas by Hobbes and Locke is encapsulated in the following passages quoted by Atiyah *The Rise and Fall of Freedom of Contract* (1985) 69ff; Aronstam *Consumer Protection Freedom of Contract and The Law* (1979) namely:

"(1) Human beings are free from control by others; what men do, they do freely.

(2) Relationships with other human beings are voluntarily entered into out of motives of self-interest.

(3) The individual is essentially the proprietor of his own person and capacities; he can alienate his own labour by a contract which is perceived as a disposal of something belonging to the individual in much the same way as alienation of his land or his goods.

(4) Human society consists of a series of market relations."

and as far as rights issues are concerned:

"The right of nature, which writers commonly call the jus naturale, is the liberty each man hath, to use his own power, as he will himself, for the presentation of his own nature, that is to say, of doing anything, which in his own judgement, and reason, he shall conceive to be the aptest means thereunto."

Aronstam believes the right to contract freely, in modern day, still remains one of the basic human rights and the cornerstone of the modern theory of the law of contract.

5 Friedman *The Law of Contract in Canada* (1999) at v refers to Maine *Ancient Law: Its Connection with the Early History of Society and its Relation to Modern Ideas* (Oxford University Press, London 1861) at 140. Maine writes: *"Not, is it difficult, to see what is the tie between man and man, which, replaces by degrees those forms of reciprocity in rights and duties, which, have their origin in the Family. It is Contract. Starting, as from one terminus of history, from a condition of society in which all the relations of Persons are summed up in the relations of Family, we seem to have steadily moved towards a phase of social order in which all these relations arise from the free agreement of Individuals ..... (We may say that the movement of the progressive societies has hitherto been a movement from Status to Contract."* (His emphasis). It was especially the philosopher Adam Smith, relying on the value of promise-keeping quoted in Atiyah who advocated *"A man who makes a promise is trusted by the promisee and it is in his interest that he should be so trusted; the double meaning of the phrase `to be given credit' clearly shows why it is in a man's interest that he should be trusted."*

6 Article 1 of Section 10(1) of the American Constitution provides: *"No state shall pass any bill of attainder, ex post facto law, or law impairing the obligation of contracts."* See Aronstam (1979) 6ff.

economical terrain, as little as possible. During the classic law period, the courts developed a judicial doctrine of freedom of contract. [7]

The legal writers also expressed strong views in favour of the pure doctrine of freedom of contract, *inter alia; contracting parties* should be free to negotiate the terms of their contracts without legislative interference, where contracting parties have entered into an agreement, full legal effect should be given thereto etc. It has also been stated that agreements should be held sacred and should be enforced by the courts if the agreement, or terms of the agreement, are broken. [8]

But, in time, the argument of the protagonists of the pure doctrine of freedom of contract came under severe criticism by the legal writers, the courts, as well as consumer organizations. It is especially with the advent and influence of standardized contracts that the ethos of pure freedom of contract was questioned and criticized. The main arguments

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7 Atiyah (1979) 69ff sets out the approach of the courts at the time when he states: *"The law was not concerned to limit the power of contracting or to interfere between the contracting parties in the interests of justice, but merely to assist one of them when the other broke the rules of the game and defaulted in the performance of his contractual obligations."* See also Aronstam (1979) 6. The ingredients of the doctrine of freedom of contract comprising unlimited freedom to contract and sanctity of contract were highlighted by the courts quite frequently none better than, the much better abbreviated English decision of *Printing and Numerical Registering Company v Sampson* (1875) L.R. 19 Eq. 562 in which Sir George Jessel MR stated: *"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. Therefore you have this paramount public policy to consider, that you are not lightly to interfere with this freedom of contract."* The American courts were particularly alive to individualism, private rights free from restrictions and a minimum of legal interference with private rights. This was expressed in very clear and precise terms in the case of *Lochner v State of New York* (1898) 45 US 198 in which Mr Justice Peckham stated: *"There is no reasonable ground for interfering with the liberty of person or right of free contract, by determining the hours of labour, in the occupation of a baker. There is no contention that bakers as a class are not equal in intelligence and capacity to match other trades or manual occupations, not that they are not able to assert their rights and care for themselves without the protecting arm of the State, interfering with their independence of contract and of action."* The judicial ethos of freedom of contract also made its way into the South African courts so much so, that Kotze JP in the case of *Osry v Hirsch, Loubser and Co Ltd* 1922 CPD 531, remarked: *"The spirit of modern jurisprudence is in favour of the liberty of contract, and there is practical wisdom in the observations of De Villiers CJ, in Henderson v Hamilton, 1903 2D SC 513 at 519."*
And further remarking: *"All modern commercial dealings proceed upon the assumption that binding contracts will be enforced by law."*

8 Aronstam (1979) 13-14; Atiyah (1979) 9-10; The South African legal position is best illustrated by Hahlo "Unfair Contract Terms in Civil Law Systems" Vol. 98 *SALJ* Law Journals (1981) 70: *"Provided a man is not a minor or a lunatic and his consent is not vitiated by fraud, mistake or duress his contractual undertakings will be enforced to the letter. If though inexperience, carelessness or weakness of character, he has allowed himself to be overreached it is just too bad for him, and it can only be hoped that he will learn from his experience. The courts will not release him from the contract or make a better bargain for him. Darwinian survival of the fittest, the law of nature, is also the law of the market place."*

advanced included, firstly, the argument that both parties to a contract are bargaining from positions of equal strength is incorrect, especially when dealing with standardized contracts. In reality, so it is argued by the legal writers and the courts alike, equality in the relationship between two contracting parties rarely exists. Often the weaker contracting party is exploited by the stronger party. [9]

The promotion of consumerism impacted heavily in curbing the unlimited freedom of contract enjoyed during the classical period. A factor influencing a change in mindset is said to be morality. [10]

Various doctrines were founded and developed throughout the years which served to play a role in the protection of the weaker party in the law of contract. These include paternalism, [11] good faith, [12] public policy, inequality [13] and unconscionable-ness. [14]

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9 The writers Aronstam (1979) 14 and Hawthorne "The Principle of Equality in the Law of Contract" (1999) *THRHR* 157, 163 identify social and economical inequalities as factors influencing the domination and exploitation; With regards to the courts approach during the classical period Atiyah (1979) 8-9 presents the position as follows: *" ..... during the classical period the courts when considering the principle of freedom of contract took no account of social and economic pressures which in many circumstances might virtually force a person to enter into a contract."* The writer also expresses the view that *"classical law of contract paid little attention to inequalities between the contracting parties."* Insofar as case law is concerned the American courts as early as 1873 in the case of *New York Central Railway Company v Lockwood* 84 US 357 (1873) at 379 expresses reservations about equality in the bargaining position of contracting parties when Justice Bradley states: *"The carrier and his customer do not stand of a footing of equality. The latter is only one individual of a million. He cannot afford to haggle or stand out and seek redress in the courts. He prefers, rather, to sign any paper the carrier presents. In most cases, he has no alternative but to do this, or abandon his business."*

10 The effect of the change is described by Atiyah (1979) 28ff as *"The moral principle that one should abide by one's agreements and fulfil one's promises is being increasingly met by another moral principle, namely that one should not take advantage of an unfair contract which one has persuaded another party to make under economic or social pressure."*

11 The restraint placed in this form on contractual freedom to protect the weaker party comprises legislative control and judicial control. Throughout the years since the classic period the courts developed canons of constriction *inter alia* the *contra proferentem* rule in order to protect the weak against exploitation. Because of the inconsistency by the courts in applying the rules and so protect the weak; the legislature stepped in countries such as England and the United States of America. In the former instance the *Unfair Contract Terms Act* 1977 was passed and in the latter instance the *Uniform Commercial Code* was passed. See Atiyah (1979) 28. Other countries to have introduced legislative and judicial interventions to redress the perceived evils and injustices include the Netherlands, France and Germany. See Hawthorne (1995) 167.

12 Good faith is a doctrine which plays a significant role in the United States of America and has been absorbed in their legislative interventions. Section 1-203 of the *Uniform Commercial Code* provides *inter alia "Every contract or duty within this Act imposes an obligation of good faith in its performance or enforcement."* On the other hand, similarly, Sec 205 of the *Second Restatement of Contracts* provides: *"Every contract imposes upon each party a duty of good faith and fair dealing in its performance and its enforcement."* For a comprehensive discussion on the role of good faith in the United States legislation see Dimatteo *Equitable Law of Contracts: Standards and Principles* (2001) 113ff. In Britain, although English law decline to adopt a general principle of good faith, it nevertheless play a role as it is used as another tool for control by the courts especially, where unfairness arises.

Having given a brief introduction to the history of the doctrines of freedom of contract and the sanctity of contract, it is important to outline to what degree they have impacted on the law of contract in the countries selected for researching this thesis, namely, South Africa, England and the United States of America. For that reason, the remainder of this Chapter will comprise of a discussion on the influence of freedom of contract in South Africa, England and the United States of America. This is important, given the topic of the research

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See Beatson and Friedman *Good Faith and Fault in Contractual Law* (1995) 14. In South Africa, good faith is not used as a general principle to curb unfairness although the South African courts do recognize contracts are acts which involve good faith. The cases include *Meshkin v Anglo-American Corporation of SA Ltd* 1968 4 SA 793 (W) 802; *Tuckers Land and Development Corporation (Pty) Ltd v Hovis supra* 852; *Mutual and Federal Insurance Co Ltd v Oudtshoorn Municipality* 1985 (1) SA 419 (A) 433. There are legal writers in South Africa who have promoted the idea of including good faith as a fully fledged defence in the South African Law of Contract. See Fletcher "The Role of Good Faith in the South African Law of Contract" *Responsa Meridiana* (1997) 1-14 See also Hawthorne (1995) 172.

13 Public policy is universally accepted as a fully fledged defence in the law of contract and provides a counter to the doctrine of unlimited freedom of contract. It is a term which provides a somewhat dichotomy in the sense that on the one hand public policy dictates the freedom of contract, on the other hand, where contracts or provisions of contracts are incompatible with general social customs, the principles of freedom to contract and contracts ought to be enforced, should succumb to policy considerations which promotes fairness and justice. See Hawthorne (1995) 173. See also Atiyah (1979) 25-26; Pollock *Principles of Contract* (1902) 313; See further Christie *The Law of Contract in South Africa* (1991) 419ff; Wessels *The Law of Contract in South Africa* 2ed by Roberts (1951) par 463 480ff; Joubert *General Principles of the Law of Contract* (1987) 132-151; Van der Merwe et al (2003) 440ff; Kerr (1998) 171-189.

14 Unconscionable-ness, is a doctrine widely recognised in countries such as England and the United States of America. In England, legal writers such as Cheshire et al *Law of Contract* (1986) 20-21, Nyuk-Yin *Excluding liability in Contracts* (1985) 132, Atiyah (1995) 300 recognizes the justification for pronouncing on the invalidity of agreements, where one of the contracting parties , who is viewed as the stronger party, takes unfair advantage of his position in exploiting the weaker contracting party . The English courts have also since as early as 1751 in the case of *Chesterfield v Jansen* (1751) 2 Ves. Sen. 125, 28 E.R. 82 remarked: *"..... an unconscionable bargain made with him shall not only be looked upon as oppressive in the particular instance, and therefore avoided but as pernicious in principle, and therefore repressed."* More recently in the cases of *Lloyds Bank v Bundy* (1975) QB 326 and *Schroeder Music Publishing Co Ltd v McCall* (1974) 3 ALL E.R. 616 the English courts also recognize the principle of affording protection of *"those whose bargaining power is weak against being forced by those whose bargaining power is stronger to enter into bargains that are unconscionable".* The American position is described by Peden *The Law of Unjust Contracts* (1982) 300 and Deutsch *Unfair Contracts* (1977) 11 in very similar terms as that of England. The dominance of standardized contracts also necessitated the American legislature to step in and promulgate legislation to counter substantive unfairness. The *Uniform Commercial Code* - Sec 2-302 recognize the need for relief from unconscionable contracts. It provides *"if the court as a matter of law finds the contract or any clause ..... to have been unconscionable ..... the court may refuse to enforce the contract"* UC.C. Sec 2-302(1) (1990). See the discussion Dematteo (2001) 100. The American courts have also on a number of occasions stepped in and assisted the weaker party against exploitation by the stronger contracting party, especially, in standard form contracts. One of the cases in which this doctrine featured very prominently is that of *Williams v Walker-Thomas Furniture Co* 121 U.S. App D.C. 315, 350 F.2d 445, 18 A.L.R. 3d 1297. This doctrine has not made its mark in South Africa as is the case in the United States of America and England. Although the concept unconscionable-ness is known to the legal writers and the courts in South Africa, it has never been accepted as a free floating defence. It has however been used mainly to assess unfair terms and unfairness in attempting to enforce a contract. See Van der Merwe et al Contract*: General Principles* (2003) 117, Lubbe and Murray (1988) 340. The South African Law Commission (1998) 17 has however, suggested that perhaps the time is ripe to revisit this defence.

undertaken, and will very clearly contribute to the final assessment on whether a hospital or doctor or other health care provider may validly exclude their liability.

Consequently, the influence of freedom of contract in the aforementioned countries will be discussed individually, where-after, a brief summary and the conclusions reached will be drafted.

Given the influence of western democracy and capitalism in South Africa, there can be no denial that the contract doctrine in South Africa is based on the paradigm of a free market, where voluntarily participation, by individuals, is perceived to be one of equal footing in a bargaining process.

The aforementioned ideology has caused legal writers and the courts to accept that an individual is free to decide whether, with whom, and on what terms, to contract and once a contract has been concluded, the wishes of the contracting parties must be adhered to by the exact enforcement of the contractual obligations. [15]
But, especially, some of the legal writers share the view that unlike the classic period, the notion of autonomy and the principles derived from it are not applied absolutely. Factors identified which are said to inhibit private autonomy include the changing values of society, [16] the recognition of the inequality of bargaining power, [17] public policy, [18] as well as,

15 It is especially, the writer Kahn *Contract and Mercantile Law* (1988) 70 who fully embraces the sanctity of contract with reference to the famous dictum of Jessel in *Printing and Numerical Registering Co v Sampson* (1875) LR 19 EQ 462 at 445 in which he stated: *" ..... 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 Hahlo "Unfair contract terms in civil law systems" *SALJ* 70 following the English law advocates: *"Provided a man is not a minor or a lunatic and his consent are not vitiated by fraud, mistake or duress, his contractual undertakings will be enforced to the letter. If, through inexperience, carelessness or weakness of character, he has allowed himself to be overreached, it is just too bad for him, and it can only be hoped that he will learn from his experience. The courts will not release him from the contract or make a better bargain for him. Darwinian survival of the fittest, the law of nature, is also the law of the market-place."* Christie (2001) 17 also defend the so-called hands-off approach in stating: *"the whole basis of the law of contract is that the law will enforce their agreement. Intervention by the courts appears to be unreasonable; a form of paternalism inconsistent with the parties' freedom of contract."* The South African courts have also over a century supported the idea of contractual freedom and the sanctity of the enforcement of contracts. This commenced as far back as 1902 in the case of *Eastwood v Shepstone* 1902 TS 294 at 302, continuing with the case of *Wells v South African Alumenite Company* 1927 AD 69 who adopted the principle enunciated in *Printing and Numerical Registering Company v Sampson* (1875) LR 19 EQ 462; and more recently *Olsen v Standaloft* 1982 (2) SA 668 ZS; *Oatorian Properties (Pty) Ltd v Maroun* 1973 (3) SA 779 (AD); *Tamarillo (Pty) Ltd v B.N. Aitken (Pty) Ltd* 1982 (1) SA 398 (AD); *Sasfin (Pty) Ltd v Beukes* 1989 (1) SA 1 (AD) and most recently in the cases of *Brisley v Drotsky* 2002 (4) SA 1 (SCA) and *Afrox Healthcare Bpk v Strydom* 2002 (6) SA 21 SCA.

16 Van der Merwe et al (2003) 11 emphasize the changing values of society as a cardinal factor affecting individual autonomy.

constitutional protection. [19]

Influenced by its historical background, the principle of freedom of contract and the binding force of contract still remains one of the pillars of the English law of contract today, despite the influence of positive law and legislative intervention. [20]

The effect of the English ethos of contractual freedom, similarly to the position in South Africa, is this, a contracting party is free to contract with whom and on what terms (save for legislative prohibition or any other common law prohibitions such as fraud, public policy, misrepresentation etc) and courts are obliged under these circumstances to enforce such contracts and contractual provisions. [21]

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17 Hawthorne (1994) 167-169 expresses the view that the inequality between the contracting parties has caused a gradual erosion of the freedom of contract which does need legislative and judicial intervention. He is particularly keen on legislative intervention as the judiciary in the past has ignored the socio-economic reality between contracting parties and has `hidden their moral vision behind technical rules and legal doctrines'.

18 Public policy is perhaps the most used factor in invalidating contracts or contractual provisions. It is Christie *The Law of Contract and the Bill of Rights Compendium* (1997) 3H-9 who opines: *"Although public policy generally favours the utmost freedom of contract, a contract or a term in a contract may be declared contrary to public policy which is clearly inimical to the interests of the community, or is contrary to law or morality, or runs counter to lack of economic experience, or is plainly improper and unconscionable, or unduly harsh or oppressive."* Support for this view can be found in Beauchamp and Childress (2001) 65 in which the writer remark: *Respect for autonomy has only prima facie standing and can sometimes be overridden by competing moral considerations."*

19 Carstens and Pearmain (2007)322. The new constitutional era in South Africa has had an influence on the application of the pure doctrine of freedom of contract. See in this regard the discussion of Carstens and Pearmain (2007) 322ff who exclaim that since constitutional values and principles now infuse and inform public policy, the principle of freedom of contract must similarly acknowledge and be shaped in accordance with constitutional values and principles. The Constitutional Court in the case of *Barkhuizen v Napier* 2007 (5) SA 323 (CC) Para 15 sums up the position as follows:
"All law, including the common law of contract, is now subject to constitutional control. The validity of all law depends on their consistency with the provisions of the Constitution and the values that underlie our Constitution. The application of the principle pacta sunt servande is, therefore, subject to constitutional control."

20 It is the writings of Chitty *Chitty on Contracts* Volume 1 General Principles (1999) Par 1-011; Tillotson *Contract Law in Perspective* (1995) 6-7; Stone *The Modern Law of Contract* (2003) 2-3; McKendrick *Contract Law Text, Cases and Materials* (2003) 4, 7-8; Atiyah (1995) 27-36; Furmston, Cheshire and Fitfoot *Furmston's Law of Contract* (1986) 17-18 which have continuously emphasized the importance of the doctrines of freedom of contract and the sacred enforcements of contracts. The legislature intervention referred to it as the *Unfair Contract Terms Act* 1977 and the *Unfair Terms in Consumer Contracts Regulations* 1994.

21 The position is most forcefully described by Sir George Jessel MR in the case of *Printing and Numerical Registering Company v Sampson* (1875) L.R. 19 EQ 562 in which he stated: *"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, that you are not lightly to interfere with this freedom of contracts."* This dictum has been favoured in many judgements in the English courts, since.

With the empowerment of consumer organisations in England, who showed great concern at the exploitation of the weaker contracting parties by the stronger, especially, in standardized contracts, protective measures were put in place, albeit legislative interventions which impacted severely on the notions of freedom of contract and the sanctity of contracts. [22]

It was especially the case in exemption clauses, where consumer organisations focused their attention a great deal. This then, eventually lead to legislative interference by the State, with freedom of contract in circumstances which Atiyah [23] described as, "often justified on moral and economic grounds." The writer however, suggests that with the increase in the educational and sophistication levels of British people over the last century and a half, the pendulum is swinging more in favour of freedom of contract again, in which paternalism is less favoured.

American contract law has as its basis the philosophical grounding that every force in society should be permitted to act freely and exert itself without constraint, limited only by the constraint that it should not cause friction in society. [24]
America being a capitalist state, in the business world, values the pious spirit of individualism and of *laisezz-faire*. Moreover, this is reflected in their ethos of freedom of contract and the sanctity of the exchange between the contracting parties, so much so, that, contractants are expected to keep to their promises in an exchange. [25]

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22 The legislative interventions included statutory changes in the law of contract by adopting legislation for the protection of the consumers *inter alia* the Rent Act, the Purchase Act, the Money Lenders Act and the Unfair Contract Terms Act 1977, just to mention a few.

23 Atiyah (1995) 3. The rationale for the change in emphasis is explained by Atiyah (1985) at 731-732 as follows: *"The problem is all the greater because ..... in the high noon of classical theory the Courts gave a new meaning to the requirements of the Statute of Frauds. The written note or memorandum required by the Stature, they insisted, was merely evidence of an agreement: the actual binding contract rested not in the writing itself, but in the will of the parties. But when, later in the nineteenth century, the Courts were faced with the new problems of printed clauses, or tickets containing references to terms contained elsewhere, there was an increasing tendency to treat the written terms, subject to certain conditions, as themselves the actual words of the contract."*

24 This philosophy was expounded by the philosopher Pound. See Peden *The Law of Unjust Contracts* (1982) at 457.

25 This has been firmly endorsed by the American legal writers. In this regard Kessler *Contracts of adhesion - some thoughts about freedom of contracts* (1943) Columbia LR 629-631 quotes with authority the English dictum of Jessel N, Printing and Numerical Registering Co v Sampson 19 EQ CAS 462: *" ..... courts are extremely hesitant to declare contracts void as against public policy because 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 and voluntarily shall be held sacred and shall be enforced by the Courts of Justice."* This principle has been vigorously defended by the American courts in the past. In the case of *Diamond Match Co v Roeber* 106 N.Y. 473, 13 N.E. 419 (1887) the court in following Jessel's much quoted dictum held: *"It is clear that public policy and the interests of society favour the utmost freedom of contract, within the law, and require that business transactions should*

The only exception recognized by legal writers and the courts alike, is when there could be a justifiable interference with the freedom of contract and the sanctity of contract, where contracts contaminated by fraud, undue influence, where the contract or provisions of the contract threatens health, the moral welfare or the safety of the public, as well as contracts that are illegal or against public policy. [26]

Some of the American courts have, in the past, shown their reluctance to police the content of a contract or the process of the formation, so much so, that they invoked the constitutional guarantees to freedom of contract. [27]
The effect thereof was that the courts ignored those contracting parties who stood in an unequal bargaining position with the stronger party and, consequently, the weaker was exploited by the stronger.

In time however, as was the case in English law, pressure groups and legal writers re-aligned the issues with the changes in community values, which included striving for fairness and justice in contracts. This eventually led to the American contract law being codified, thus putting a stop to unlimited freedom of contract.

The Restatement of Contracts made a tremendous impact on the general jurisprudential

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not be trammelled by unnecessary restrictions."

26 Although the courts retained the power to declare a contract void for being in contravention of sound public policy, the American courts have expressed caution before doing so. This was a clear message rendered by the court in *Equitable Loans and Security CC v Waring* 117 Ga. 599 (1) 2 44 S.E.: *"The power of the courts to declare a contract void for being in contravention of a sound public policy is very delicate and undefined power, and, like the power to declare a statute unconstitutional, should be exercised only in cases free from doubt. The authority of the law making power to interfere with the private right of contract has its limits and the courts should be extremely cautious in exercising the power to supervise private contracts which the law making power has not declared unlawful."* A similar view was expressed by the Appeal Court of Florida in the case of *Banfield v Louis Cats Sports Inc* et al 589 So, 2d 441, 16 Flo (1991) in stating: *"It is a matter of great public concern that freedom of contract be not lightly interfered with. Bituminous Casualty Corp Williams. When a particular contract, transaction, or course of dealing is not prohibited under any constitutional provision, statutory provision, or prior judicial decision, it should not be struck down on public policy grounds unless it is `clearly injurious to the public good' or `contravene(s)' some established interest of society."*

27 The constitutional guarantee was vigorously invoked by the court in the case of *Josie E Smith v Edward Simson JR and FL Cappaert* 224 So. 2d 565 (1969) wherein it was stated: *"The right to contract and have contracts enforced is a basic one guaranteed by the Constitutions. The function of the courts is to enforce contracts rather than enable parties to escape their obligation upon the pretext of public policy. The court has adjudged contracts void only when the illegality is clearly shown."* The court continues: *"Contracts voluntarily made between competent persons are not to be set aside lightly. As the right of private contract is no small part of the liberty of the citizen. The usual and most important function of courts is to enforce and maintain contracts rather than to enable parties to escape their obligations on the pretext of public policy or illegality."*

premise of freedom of contract. [28] Besides the Restatement of Contracts, the American legislature also introduced the Uniform Commercial Code in 1990, which grants American judges discretion to impose equitable corrections in the interest of justice, where contracts, or provisions of contracts, would lead to unfair results. [29]

8.2 Freedom of Contract

8.2.1 Historical Background

The concept of freedom of contract in more modern times first gained recognition, by the courts and some jurists alike, during the eighteenth and nineteenth centuries. It does appear, however, that its first traces date back to the sixteenth century. In this regard, both Greek Philosophy and Roman law contributed in different ways, in establishing general principles which advocated largely the keeping to agreements.

In this regard, both Aristotle and Thomas Aquinas made major contributions. It is Aristotle who, with the introduction of his promise-keeping theory, first wrote:

"Let us discuss the truthful man. ..... Who seeks faith in his, agreements? For he is true both in word and in life because his character is such." [30]

Similarly, Thomas Aquinas expounded the theory that promises are binding as a matter of fidelity and honesty. Relying on the principles of `natural law', Aquinas, advocated that promise-keeping is in like lying, although, with a distinction:

"One who promises something does not lie if he has the intention to do what he promises because he does not speak contrary to what he has in mind. If, however, he does not do what he promises, then he appears to act unfaithfully because his intention changes." [31]

It was especially the Roman jurist, Gaius, who wrote about the effects of consent when

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28 In this regard S179 (b) (1981) of the *Restatement (Second) of Contracts* directs that courts void a contract or contractual provisions which are against "some aspect of public welfare". S195 (1) of the *Restatement (Second) of Contracts* directs that "a term exempting a contracting party from tort liability is unenforceable on grounds of public policy."

29 Section 2-702 of the *Uniform Commercial Code* (1990) provides that: *"If the court as a matter of law finds the contract or any clause to have been unconscionable, the court may refuse to enforce the contract."* The statutory limitations according to the legal writers have curbed the individual's freedom to contract and have lead to just and reasonable results. Aronstam (1979) 13ff. See also Dimatteo (2001) 99ff; Burton *Contract Law Selected Source Materials* (1995) 4ff.

30 Gordley (1991) 10-11 quoting from the writings of Aristotle.

31 Gordley (1991) 10-11 quoting from the writings of Aquinas.

concluding contracts. According to Gaius, obligations arise by contract (ex contractu), especially, sale, lease, partnership and mandatum, which contracts, Gaius, called contracts *consensu* or consensual contracts.

Although Gaius did not rely on the theories of `promise-keeping' or `fidelity and honesty', nevertheless, he regarded promises as binding and thought that consent was essential to a promise.

It was the jurist Accursius who wrote of consent as giving *".....efficacy or form or clothing to the natural root so that it can produce an obligation."* [32]

But it was during the sixteenth and seventeenth centuries that the concept freedom of contract was theoretically developed. It was especially the writings of Hobbes and Locke, who relied on social, economic and political philosophies, which made major contributions in promoting the concept freedom of contract. Their natural law ideas included:

"(1) Human beings are free from control by others; what men do, they do freely.

(2) Relationships with other human beings are voluntarily entered into out of motives of self-interest.

(3) The individual is essentially the proprietor of his own person and capacities; he can alienate his own labour by a contract which is perceived as a disposal of something belonging to the individual in much the same way as alienation of his land or his goods.

(4) Human society consists of a series of market relations." [33]

Thomas Hobbes, espousing the natural law approach to freedom of contract as a fundamental human freedom, explained this right in the following general terms:

"The right of nature, which writers commonly call the jus naturale, is the liberty each man hath, to use his own power, as he will himself, for the preservation of his own nature, that is to say, of doing anything, which in his own judgement, and reason, he shall conceive to be the aptest means thereunto." [34]

The doctrine of freedom of contract continued to be adopted during the eighteenth and nineteenth century. It was, especially, the proponents of the *laissez-faire* economy who

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32 Gordley (1991) 10-11 quoting from the writings of Accursius D.46.1.172.

33 See Atiyah (1979) 69ff. See also Aronstam (1979) 1-4. The writer states that during this period a strong feeling existed that man, because of his unique ability to reason, could by means of rational argument, create and develop a universal body of rules to regulate relations within the prevailing economic, political and social conditions. It is the ability of man to argue rationally which propagated the idea that man possessed certain fundamental rights including the right to contract. The right to contract was seen as a voluntary act of a man whereby he promised something to another. See Grotius Inleidinge 3.1.10-12. According to Aronstam (1978) 1-6 it was the recognition of the basic right to contract which lead to the formulation of the concept of freedom of contract which in modern day, still remains one of the basic human rights and the cornerstone of the theory of the law of contract. See further Hawthorne (1999) 157 *THRHR* 596ff.

34 See Aronstam (1979) 3.

attached a lot of value to the doctrine of freedom of contract. [35] Most notably amongst them, was the philosopher Adam Smith, who paved the way for economic liberalism with his popularised version of *laissez-faire*. Smith advocated a free political economy, free of state interference and the enhancement of freedom of contract, which he perceived to be necessary for the successful expansion of trade and industry. He also attached great value to the freedom of the individual. [36]

Other writers included *Henry Maine* and *Henry Sidgewick* who viewed contractual freedom as a means to social development. In his famous phrase `*from status to contract*', *Maine* , argued that society grew from a situation in which obligations and functions were determined by a person's status (the static society) into one in which all obligations were created by the contract (The progressive society). [37]

The doctrine of freedom of contract was also advocated by the writer, *Henry Sidgewick,* who illustrated societal progression, when he wrote:

"Suppose contracts freely made and effectively sanctioned, and the most elaborate social organisation becomes possible, at least in a society of such human beings as the individualistic theory contemplates, gifted with mature reason and governed by enlightened self-interest." [38]

So strong was this movement to promote the doctrine of the freedom of contract in a social, political and economic climate, that countries such as the United States of America incorporated this into their Constitution. [39]

The purpose, aims and objectives of the doctrine of freedom of contract have been articulated in more modern times by *Hawthorne* [40] as follows:

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35 See Aronstam (1979) 4; See also Hawthorne (1999) 162-163; See further Atiyah (1995) 3.

36 See Hawthorne (1999) 163; Aronstam (1979) 4-5; See further Atiyah (1979) 81. The author holds the view that it was especially Smith who had a deep seated belief in `man's moral obligation to observe promises'. It was Smith who then advocated: *"A man who makes a promise is trusted by the promisee and it is in his interest that he should be so trusted; the double meaning of the phrase `to be given credit' clearly shows why it is in a man's interest that he should be so trusted."*

37 See Sir Henry Maine *Ancient Law* 180-2 discussed by Aronstam (1979) 6.

38 Henry Sidgewick *Elements of Politics* (1879) 82ff.

39 Article 1 of Section 10(1) of the *American Constitution* provides: *"No state shall pass any bill of attainder, ex post facto law, or law impairing the obligation of contracts."* See Aronstam (1979) 6.

40 "The Principle of Equality in the Law of Contract" (1999) *THRHR* 157, 163.

"First of all, it is used to mean that persons should be free to negotiate the terms of their contracts without legislative interference. Secondly, the meaning attached is that where parties have concluded a contract, the terms of the contract should not be interfered with and should be given full effect. Thirdly, it has been interpreted to mean that a person should be free to select the parties he contracts with, and fourthly, that a person should be free to decide not to contract." [41]

It was during the eighteenth and nineteenth centuries and during the heyday of the theories of natural law and the philosophy of *laissez-faire*, that the judges (who were largely responsible for the creation of the law) were faced with the creation of the law of contract.

Influenced by natural law, wherein, it was believed that men had an inalienable right to make their own contracts for themselves and the philosophy of *laissez-faire*, wherein, it was believed that the law should interfere with people on economical terrain as little as possible, judges attempted to formulate a judicial doctrine of freedom of contract. [42]

The pure doctrine of freedom of contract according to *Aronstam* [43] embodied four distinct characteristics namely: Firstly, it was used to mean that persons should be free to negotiate the terms of their contracts without legislative interference. Secondly, it was used to mean that where persons have entered into a contract, the provisions of that contract should not be interfered with and should be given full legal effect. Thirdly, the doctrine was used to mean that a person should be free to select the person with whom he contracts, and fourthly, it was used to mean that a person should be free not to contract.

The effect of the classical law of contract embodied the following: Besides the freedom of contract that you could choose with whom you wanted to contract and arrive at the terms you wanted by mutual agreement, once a contract was freely and voluntarily entered into, it should be held sacred, and should be enforced by the courts if the agreement or terms of the agreement were broken. [44]
In so far as judicial thinking is concerned, what did emerge during this period was an ethos

41 See Hawthorne (1999) 163; Von Hippel "The Control of Exemption Clauses" *International and Comparative Law Quarterly* (1967) 592; See also Atiyah (1979) 83.

42 Atiyah (1995) 3. The author states that the judicial doctrine at the time embraced the following approach namely: *"The law was not concerned to limit the power of contracting or to interfere between the contracting parties in the interests of justice, but merely to assist one of them when the other broke the rules of the game and defaulted in the performance of his contractual obligations."* See also Aronstam (1979) 6.

43 *Consumer Protection, Freedom of Contract and the Law* (1979) 13-14.

44 Atiyah (1995) 9-10. The writer puts the ratio behind the sanctity of contracts down to the fact that *the parties entered into them of their own choice and volition, and settled the terms by mutual agreement."*

of unlimited freedom of contracting. The ingredients of `freedom of contract' and `sanctity of contract', became the foundation on which the whole of the law of contract, in the different jurisdictions, was built. This was echoed by Sir George Jessel MR, in one of the most celebrated English dictum at the time, namely, in the case of *Printing and Numerical Registering Company v Sampson* [45] he stated:

"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. Therefore you have this paramount public policy to consider, that you are not lightly to interfere with this freedom of contract." [46]

In a succeeding judgement of the *Manchester, Sheffield and Lincolnshire Railway Company v H.W. Brown* [47] Lord Bramwell in similar terms stressed the importance of freedom of contract when he stated:

"I am prepared to hold that unless some evidence is given to show that a contract voluntarily entered into by two parties is unjust and unreasonable, it ought to be taken that that contract is a just and reasonable one, the burden of proof being upon the man who says that it is unjust and unreasonable." [48]

The pronouncements on the ethos of the doctrine of freedom were not restricted to the English Courts. There is also a long line of *dicta* handed down by the American Courts in which the doctrine has been formulated and applied. The American Courts were particularly alive to individualism, private rights free from undue restrictions and a minimum of legal interference with private rights. During this period, the American Courts exaggerated private rights at the expense of public interests. Their decisions were based on the belief that the public good is best served by the protection of the rights of every individual. The only limitation placed on the right to contract freely, was that it yield before the health, moral welfare or the safety of the public. [49]

One of the first cases in which the American Courts refused to interfere with the freedom of contract and found that a statute constituted an unwarranted interference with freedom

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45 (1875) L.R. 19 EQ 562.

46 *Printing and Numerical Registering Company v Sampson* (1875) L.R. 19 EQ 462.

47 (1883) 8 AC 703 (HL).

48 *The Manchester, Sheffield and Lincolnshire Railway Company v H.W. Brown* (1883) AC 703 (HL).

49 Aronstam (1979) 7; See also Atiyah (1979) 6. The writer also recognizes that in instances, concerning public policy, the courts retained the power to declare contracts to be ineffective.

of contract, was that of *Godcharles v Wigeman*. [50] In this case the court found that a statute, requiring labourers to be paid their wages in money and not in goods, was degrading and insulting to the labourers in that it prevented them, as persons, having full legal capacity, from making their own contracts for the payment of wages.

In a subsequent case of *State v Hauen*, [51] the Supreme Court of Kansas, when dealing with a similar statute which prescribed payment of wages in money, went so far as to accuse the State legislature of placing the labourer under guardianship, thereby classifying him, in right of freedom of contract, alongside the idiot, the lunatic or the felon in the penitentiary.

The doctrine of freedom of contract was also emphasized in the well known case of *Lochner v State of New York*. [52] In this case, the American Supreme Court, decided that Art 8 Sec 110 of New York Laws 1897, which limited employment in bakeries to 60 hours a week and to 10 hours a day, constituted an arbitrary interference with the freedom to contract guaranteed by the 14th amendment to the Constitution of the United States of America. In this regard Mr Justice Peckham stated the following:

"There is no reasonable ground for interfering with the liberty of person or right of free contract, by determining the hours of labour, in the occupation of a baker. There is no contention that bakers as a class are not equal in intelligence and capacity to match other trades or manual occupations, or that they are not able to assert their rights and care for themselves without the protecting arm of the State, interfering with their independence of judgement and of action. They are in no sense wards of the State. Viewed in the light of a purely labour law, with no reference whatever to the question of health, we think that a law like [this] one involves neither the safety, the morals not the welfare of the public, and that the interest of the public is not in the slightest degree affected by such an act." [53]

Although the courts retained the power to declare a contract void for being in contravention of sound public policy, the American Courts have expressed caution before doing so. The court adopted the following approach in *Equitable Loan and Security Co v Waring*: [54]

"The power of the courts to declare a contract void for being in contravention of a sound public policy is very delicate and undefined power, and, like the power to declare a statute unconstitutional, should be exercised only in cases free from doubt. The authority of the law making power to interfere with the private right of contract has its limits and the courts should be extremely cautious in exercising the power to supervise private contracts which the

50 (1886) 113 PA at 427.

51 (1892) 61 KANS 146.

52 (1898) 45 US 198.

53 *Lochner v State of New York* (1898) 45 US 198.

54 117 GA. 599(1) (2; 44 S.E. 320 (1903).

law making power has not declared unlawful." [55]

A flaw, however, existed in the argument of the protagonists of the pure doctrine of freedom of contract, in that, the doctrine is based upon the premise that both parties to a contract are bargaining from positions of equal strength and that each is quite free to adopt, or reject, any term that the other might wish to impose on the contract. [56]

But it fails, however, to take into consideration the fact that, in reality, equality rarely exits, nor does it consider that many contracts entered into arise from necessity, for example, the standardized agreements. [57]

It was especially the standardized contracts which came in for criticism by the legal writers, [58] the courts, [59] and the consumer organizations.
Since the beginning of the nineteenth century, with the advent of the consumer organisations, pressure was brought to bear on businesses to respect the rights of consumers and to curb all forms of exploitation. This led to changes in political thought, as well as, social and economic conditions. [60]

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55 *Equitable Loan and Security Co v Warring* 17 GA 599(1) (2); 44 SE 320 (1903).

56 See Aronstam (1979) 14; Hawthorne (1999) 163; See also Atiyah (1995) 6.

57 Aronstam (1979) 14; See also Hawthorne (1999) 163. The writer identifies social inequalities as a factor which contributed towards the domination and exploitation of one contracting party by another. See further Atiyah (1979) 8-9 who states that *"..... During the classical period the court of freedom of contract took no account of social and economic pressures which in many circumstances might virtually force a person to enter into a contract."* The writer also states that *"classical law of contract paid little attention to inequalities between the contracting parties."*

58 Kessler (1943) 43 *Col LR* 629 opines: *"The customer is usually not able to shop around for better terms, either because the author of the standard of contracts has a monopoly (natural or artificial) or because all competitors use the same clauses. His contractual intention is but subjection more or less voluntary to terms dictated by the stronger party."* See also Aronstam (1979) 15; See further the comments by Jacobson "The Standard Contracts Law of Israel" (1968) 12 *Journal of Business Law* 325 when the writer states: *"On the other side there stands the person who requires services or purchases the goods that he can either accept the contract as it is without any changes, or refuse to become a party thereto. In fact very often, or almost always, the supplier as the only one, or one of few, who is in a position to supply the required services or the necessary goods, and the suggested option of the customer is merely theoretical for in fact it does not exist."* See further Aronstam (1979) 15; Hawthorne (1999) 166.

59 The American Courts as early as 1873 in the case of *New York Central Railway Company v Lockwood* 84 US 357 (1873) at 379 recognised that the pure doctrine of freedom of contract rarely, if ever, exists. Justice Bradley in this regard stated: *"The carrier and his customer do not stand of a footing of equality. The latter is only one individual of a million. He cannot afford to haggle or stand out and seek redress in the courts. He prefers, rather, to sign any paper the carrier presents. In most cases, he has no alternative but to do this, or abandon his business."*

60 Atiyah (1995) 11. The author states that the emergence of the consumer as a contracting party brought about

It was especially the promotion of consumerism which brought about the virtual eclipse of the doctrine of *laissez-faire* as a political force which impacted on the law of contract. [61]

But, notwithstanding the pressure brought by the consumer movements, standard-form contracts continued to develop and to be introduced in different spheres of industry, insurance, transport and commerce. [62]

During this period, ardent critics of freedom of contract began to home in on the societal ills of unlimited freedom of contract. [63] It was, especially, countries such as the Netherlands, [64] the United States, [65] France [66] and England, [67] who introduced legislative and judicial interventions to redress the perceived evils and injustices resulting from a free market. [68]

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significant changes in that the law of contract was seen as a positive instrument. This replaces the negative position the law of contract held sway before the influence of consumerism.

61 Atiyah (1995) 11. The author opines that law viewed as a positive instrument for the achievement of justice. This according to the author resulted in the change of mindset in that: *"The moral principle that one should abide by one's agreements and fulfil one's promises is being increasingly met by another moral principle, namely that one should not take advantage of an unfair contract which one has persuaded another party to make under economic or social pressure."* See also Atiyah The Rise and Fall of Freedom of Contract (1979) 544-545.

62 Atiyah (1995) 12. The writer is of the view that right from the outset *"the terms in these standard-form contracts were far more favourable to the organization supplying the goods or services in question than to the individual receiving them."* The author also identifies what he terms a *"common and troublesome feature of standard-form contracts namely the presence of an `exemption clause' which often provides that the organization is not to be liable in virtually any circumstances whatsoever."*

63 Hawthorne (1995) 166.

64 Hawthorne (1995) 167. The author states that the publication of the Niew Burgerlijk Wetboek heralded in an era in which the consequences of contracts as well as the application of any legal risks had to be both reasonable and equitable. See also Niew Burgerlijk Wetboek Arts 6.5.3.1.2 and 6.5.3.1.2.

65 Hawthorne (1995) 167. The author expresses the view that similarly with the promulgation of the Uniforms Commercial Code unconscionable contracts were also marginalized. See also the Uniform Commercial Code Par 2. 302.

66 Hawthorne (1995) 167. In France the justification for state intervention lay in the concept of protecting the weaker parties and restoring the inequality of bargaining power.

67 Hawthorne (1995) 167. In England the doctrine of equity influenced the modification of the English common law on contract which also provided relief for unconscionable bargains. England, also introduced the Unfair Contract Terms Act 1977 which is seen as the most important consumer protection Act dealing with contractual rights. See also Atiyah (1995) 25.

68 Hawthorne (1995) 167.

In this regard, it was especially the development of various doctrines; inter *alia,* paternalism, [69] good faith, [70] public policy, [71] inequality and unconscionable ness [72] which played a major

69 Hawthorne (1999) 168. The author defines paternalism as *"the principle or system of controlling or governing in a parental manner an action which is contrary to the actor's welfare"*. Restraints placed on contractual freedom to protect the weaker party, be it in the form of legislative control, and be it judicial control, serves as a form of paternalism. See also Atiyah (1995) 28.

70 Hawthorne (1999) 171. According to the writer the duty to contract in good faith is a principle introduced which governs the creation, consequences and performance of contracts and addresses the inequality between contracting parties as means to redress the situation. See also further Fletcher *Responsa Meridiana* (1997) 1-17 who sees the role of good faith as *"if good faith is entrenched legislation, powerful bargaining will be less able to rely on their access to legal resources as an advantage over consumers."* Hitherto, the South African legal system has not adopted a general principle of good faith, although, the South African courts accepts that contracts are acts which involve good faith. See Van der Merwe et al (1994) 232; See also Hawthorne (1999) 172; See further the South African cases of *Meshkin v Anglo-American Corporation of SA Ltd* 1968 4 SA 793 (W) 802; *Tuckers Land and Development Corporation (Pty) Ltd v Hovis supra* 652; *Mutual and Federal Insurance Co Ltd v Oudtshoorn Municipality* 1985 1 SA 419 (A) 433.

For the English Law position see Bratson and Daniel Friedman Good Faith and Fault in Contractual Law (1995) 14. The authors state that although hitherto, English law, declines to adopt a general principle of good faith, nevertheless, the doctrine of good faith provides another tool for control of contractual terms and their applications, especially, with regard to unfairness. In the United States of America, it is especially in the *Uniform Commercial Code* that the doctrine of good faith plays a significant role. See 1-203 of the *Uniform Commercial Code* which provides: *"Every contract or duty within this act imposes an obligation of good faith in its performance or enforcement."* See also Sec 205 of the *Restatement (2d) of Contracts* which states: *"Every contract imposes upon each party a duty of good faith and fair dealing in its performance and its enforcement."*

71 Hawthorne (1995) 173. This principle entails that in the case of contracts perceived as incompatible with general social customs, the values of the principle of freedom of contract and the rule that contracts freely concluded, should be enforced (*pacta sunt servanda*) succumb to other policy considerations. See also Atiyah (1995) 25-26; Atiyah (1979) 386; Pollock (1902) 313; See further Christie (1991) 419 ff; Wessels (1951) par 463 480 ff; Joubert (1987) 132-151; Van der Merwe et al (1994) 440 ff; Kerr (1998) 171-189.

72 For the English position see Cheshire et al (1986) 20-21. The authors recognize the principle namely that the English Courts, are justified in pronouncing on the invalidity of agreements, where one of the contracting parties , who is viewed as the stronger party, takes unfair advantage of his position in exploiting the weaker party to the contract . See also Nyuk-Yin (1985) 132. The author supports the doctrine of unconscionability when he states: *"Unconscionability enables courts to review unfair contracts not otherwise open to review on the ground that they are procured by the abuse of unequal bargaining power."* But cautions the author that unlike in American Law in which the American *Uniform Commercial Code* holds that unconscionability lies at the heart of the code, the English notion of unconscionability is still skeletal, although, it can be said that unconscionability is now very much a part of English Law. The author continues to state that, it is especially with the introduction of the *Unfair Contract Terms Act* 1977, which superseded the common law notion that now empowered the courts to *inter alia* police the reasonableness of contractual terms. See also Wheeler and Shaw *Contract Law cases, materials and commentary* (1994) 474-475. The authors find justification for the interference in contracts entered into between two parties in the fact that *"by nature it is equitable that no-one should be made richer by another's loss or injury especially when use is made of exclusionary clauses in which liability for negligently inflicted personal injury is excluded."* See further Atiyah (1995) 300. According to the author *"it is unconscionable that one party has extracted an extortionate and grossly unfair bargain, by taking advantage of the other in some unfair or tricky way."* It is especially the principle of equity which has moved the English Courts to set aside express contractual provisions on the grounds of unconscionability. See Atiyah (1995) 300. For the earlier decisions see *Chesterfield v Janssen* (1751) 2 Ves. Sen. 125; 28 ER. 82 in which it was held:*"…. an unconscionable bargain made with him shall not only be looked upon as oppressive in the particular instance, and therefore avoided but as pernicious in principle, and therefore repressed."* See further *Wynne v Heaton* (1778) 1 Bro CC 1 at 9, 28 ER 949. See also

role in the protection of the weaker party in the law of contract.

But, notwithstanding the introduction and development of the various doctrines as means

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Evans v Llewellyn (1787) 29 ER 1191 in which the court held: *"..... If the party is in a situation in which he is not a free agent and is not equal to protecting himself, this Court will protect him."*
A century later in *Frey v Lane* (1888) 40 Chancery Div 312 the court came to the protection of a contracting over which advantage was taken when it stated: *" .... 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 void the contract."* More recently, the court was also prepared to protect the weaker party against exploitation by the stronger party. In *Lloyds Bank v Bundy* (1975) QB 326 at 339 when the court held: *"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 or 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."*
In 1974 the House of Lords was also impaired to recognize the principle of: *" ... protection of those whose bargaining power is weak against being forced by those whose bargaining power is stronger to enter into bargains that are unconscionable"* when in the case of *Schroeder Music Publishing Co Ltd v McCall* (1974 3 All ER 616 the principle was accepted. For the American position see Peden (1982) 300. The author states that although attempts were made in the American Common Law to adopt the doctrine of unconscionability as exposed in the English decision of *Chesterfield v Janssen* (1751) 2 Ves. Sen. 125, 28 ER 82, most of the cases were however, decided on the more traditional grounds of mistake, misrepresentation, duress or fraud as the common law courts generally refused to recognize a doctrine of unconscionability as such. See also Deutsch (1977) 11. But, with the enactment of the *Uniform Commercials Code* in 1957, litigants were encouraged to seek relief, and courts were more susceptible, to recognize the need for relief from unconscionable contracts. Most of these cases according to Peden involved standard forms of contract. See also Deutsch (1977) 3. The author is of the view that it was especially adhesion contracts as a type of standard contract in which one party has ultimate superiority of bargaining power and the other party has virtually no choice but to adhere to the terms of the stipulator (on the basis of a take-it-or-leave-it translation) which eventually lead to the enactment of the American *Uniform Commercial Code*. The defence against unfair standardized contracts is embodied in Section 2-302 of the *Uniform Commercial Code*. Although the text of the code does not reveal the rational behind the doctrine, Deutsch (1977) 16 express the opinion that it was founded on the principle namely: *"the prevention of oppression and unfair surprises."* In this regard the American Courts especially in a leading case of *Williams v Walker-Thomas Furniture Co* 121 U.S. App D.C. 315; 350 F2d 445, 18 A.L.R. 3d 1297 (Dis Coll 1965) defined the test for deciding on unconscionability as: *" .... an absence of meaningful choice on the part of one of the parties together with contract terms which are unreasonably favourable to the other party."* The court further detailed the elements of absence of meaningful choice namely: *"Did each party to the contract, considering his obvious education or lack of it, have a reasonable opportunity to understand the terms of the contract, or were the important terms hidden in a maze of fine print and minimized by deceptive sales practices? [W]Then a party of little bargaining power, and hence little real choice, signs a commercial unreasonable contract with little or no knowledge of its terms, it is hardly likely that his consent, or even an objective manifestation of his consent, was ever given to all the terms."*
The effect of superiority of bargaining power according to Deutsch (1977) 128-129, therefore, plays an important role in deciding unconscionability. In this regard the economic disparity, together with other relevant factors, induces the courts to invalidate the harsh and unfair contract terms in certain cases. See also Nyuk-Yin (1989) 146-149.

to protect the weaker party and the modifications in social and economic conditions, the freedom of contract and the sanctity law of contract, itself, remains an integral part of the modern law of contract. [73]

In so far as the South African Law of Contract is concerned, the doctrine of the freedom of contract has long since also been recognised by several of the South African writers as one of the foundations of the law of contract in South Africa. It is especially *Kahn* [74] quoting from *Grotius* [75] who once stated: *"In civil law the very essence of a contract is the full meeting of the minds of the parties wishing to make a contract."* [76]

Hahlo [77] best illustrated our common law approach with regard to contractual freedom when he writes:

"Provided a man is not a minor or a lunatic and his consent is not vitiated by fraud, mistake or duress his contractual undertakings will be enforced to the letter. If through inexperience, carelessness or weakness of character, he has allowed himself to be overreached it is just too bad for him, and it can only be hoped that he will learn from his experience. The courts will not release him from the contract or make a better bargain for him. Darwinian survival of the fittest, the law of nature, is also the law of the market-place." [78]

The South African courts have also long since adopted the ethos of contractual freedom. In this regard, the South African judges, in a number of cases, spanning over a period of time, also contributed towards bolstering the doctrine of freedom of contract.

In one of the earliest cases concerning the doctrine of contractual freedom, Kotze JP in *Osry v Hirsch, Loubser and Co Ltd* [79] commented as follows:

"The spirit of modern Jurisprudence is in favour of the liberty of contract, and there is practical wisdom in the

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73 Atiyah (1995) 9-10, 21-22; See also Deutsch (1977) 19; See further The South African Law Commission *Report on Unreasonable stipulations in contracts and the rectification of contracts* (1998) 17 who suggest: *"In modern contract law, a balance has to be struck between the principle of freedom of contract, on the one hand, and the counter-principle of social control over private volition in the interest of public policy, on the other."*

74 *Contract and Mercantile Law* (1988) 31.

75 *Inleidinge* 3.1.10.4.

76 Kahn *Contract and Mercantile Law* (1988) 31 quoting from Inleidinge 3.1.10.4.

77 "Unfair Contract Terms in Civil Law Systems" Vol. 98 *SA Law Journal* (1981) 70.

78 Hahlo "Unfair Contract Terms in Civil Law Systems" Vol. 98 *SA Law Journal* (1981) 70.

79 1922 CPD 531.

observations of De Villiers CJ, in Henderson v Hamilton. 1903 20 SC 513 at 519

Kotze JP proceeds:

"All modern commercial dealings proceed upon the assumption that binding contracts will be enforced by Law." [80]

In a succeeding Appellate division case of *Wells v South African Alumenite Co,* [81] Innes CJ, dealing with the sanctity of contractual bargains and the court's obligation to uphold and enforce such bargains stated:

"No doubt the conditions 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." [82]

In a later dictum, in the case of *Shifren and Others v SA Sentrale Ko-op Graan Maatskappy Beperk,* [83] Potgieter J stated the position as follows:

"It is a general principle of our law that parties shall not be fettered in their contractual freedom unless their agreement is against public policy or prohibited by law." See Wells v SA Alumenite Co *supra* at p 73.

Commenting on an agreement that parties should never again contract with each other, Potgieter J held that *".... it is certainly contrary to public policy since it amounts to a substantial limitation of contractual freedom and on that ground it would not be binding."* [84] The Supreme Court of Appeals in a more recent judgement echoed the sentiments expressed by the South African Courts throughout the years when the court per Cameron

80 *Osry v Hirsch, Loubser and Co Ltd* 1922 (CPD) 531 at 546.

81 1927 (AD) 69.

82 *Wells v South African Alumenite Co* 1927 (AD) 69.

83 1964 (2) SA 343 (0).

84 *Shifren and Others v SA Sentrale Ko-op Graan Maatskappy Beperk* 1964 (2) SA 343 (0) at 346; the abovementioned dictum was followed in the Appellate Division (as it then was) case of *SA Sentrale Ko-op Graan Maatskappy Beperk v Shifren en Andere* 1964 (4) SA 760 (AD). See also the number of dicta in which the South African Court judges have commended the freedom and sanctity of contract and refused to interfere with contractual terms, however harsh they are. In 1973 in the case of *Oatorian Properties (Pty) Ltd v Maroun* 1973 (3) SA 779 (A) at 785 the Appellate Division stated that `*the court will not enquire into the conscionability or unconscionability* of the exercise of a right to involve a forfeiture clause in a lease. In 1982 in the case of *Tamrillo (Pty) Ltd v B.N. Aitken (Pty) Ltd* 1982 (1) SA 398 (A) at 436 the Appellate Division stated that the courts have no power to modify contractual terms as to afford some `equitable relief'. There are also innumerable decisions upholding the maxim `*caveat subscriptor*' in which the judges have been reluctant to interfere with the provisions of the market place and in so doing to protect the improvident, foolish or ill informed. See *George v Fairmead* 1958 (2) SA 465 (A).

AJ expressed himself as follows in the case of *Napier v Barkhuizen* [85] with regard to the principles and autonomy which *"find expression in the liberty to requlate one's life by freely engaging (in) contractual arrangements."* [86]

8.2.2 The Influence of Freedom of Contract in South Africa

8.2.2.1 Legal Writings

The concept of freedom of contract and the maxim *pacta sunt servanda* have withstood the test of time and still very much form the cornerstone of the South African Law of Contract. [87]

Both freedom of contract and *pacta sunt servanda* have been received via the South African common law, namely Roman law, as well as, the English Law. [88]

Although *pacta sunt servanda* and freedom of contract are different concepts, nevertheless, the latter is regarded as a corollary of the former and they are seldom distinguished from each other. [89]

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85 2006 (4) SA 1 Para 12 (SCA), 2006 (9) BCLR 1011 (SCA).

86 *Napier v Barkhuizen* 2006 (4) SA 1 Para12 (SCA), 2006 (9) BCLR 1011 (SCA).

87 Hefer "Billikheid in die Kontraktereg volgens die Suid-Afrikaanse Regskommissie 2000 *TSAR* No 1 142 at 153; Pretorius "The Basis of Contractual Liability in South African Law" (1) 2004 (67) *THRHR*. 179; Van der Walt "Kontrakte en Beheer oor Kontrakteervryheid in 'n nuwe Suid-Afrika" 1991 *THRHR* 367 at 368; Van Aswegen "The Future of South African Contract Law" 1994 (57) *THRHR* 448 at 456; Grove "Die Kontraktereg, Altruïsme, Keusevryheid en Die Grondwet" 2003 *De Jure* 134; Lubbe and Murray (1988) 20-21; Van der Merwe et al (1994) 10; Christie *Bill of Rights Compendium* 2002 311-6; Wessels *The Law of Contract in South Africa* 1951 Volume 1 572; Hutchinson van Heerden Visser Van der Merwe *Wille's Principles of South African Law* (1991) 431; Joubert *The Law of South Africa* Volume 5 Part 1 (1994) 215; Hahlo *SALJ* (1981) 70 at 71.

88 Hawthorne "Closing of the Open Norms in the Law of Contract" 2004 67 (2) *THRHR* 294 295; Hopkins "Standard-form Contracts and the Evolving Idea of Private Law Justice: A case of Democratic Capitalist Justice versus Natural Justice" 2003 (1) *TSAR* 150 155; Van der Walt *THRHR* (1991) 367 375; Pretorius (2004) *THRHR* 179 at 181, 183; See also Kahn (1981) 70 who with regard to the English law influence to the subject of freedom and sanctity of contract cites the time-worn dictum of Sir George Jesse in *Printing and Numerical Registering Co v Sampson* (1875) LR 19 EQ 462 at 445 in which he states: *" ..... 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."*
The author Hahlo (1981) 70 following the English Law advocates: *"Provided a man is not a minor or a lunatic and his consent are not vitiated by fraud, mistake or duress, his contractual undertakings will be enforced to the letter. If, through inexperience, carelessness or weakness of character, he has allowed himself to be overreached, it is just too bad for him, and it can only be hoped that he will learn from his experience. The courts will not release him from the contract or make a better bargain for him. Darwinian survival of the fittest, the law of nature, is also the law of the market-place."* See also Hefer (2000) *TSAR* 142 regarding the English Law influence on South African Law with reference to the Jessel dictum.

89 Christie *Bill of Rights Compendium* (2002) 3H-5.

Freedom of contract means that an individual is free to decide whether, with whom, and on what terms, to contract. [90]

The principle of *pacta sunt servanda,* on the other hand, requires exact enforcement of contractual obligations created in circumstances which are consistent with freedom of contract and consensuality. [91]

The concept freedom of contract, in South Africa today, is founded on the principle of liberty, a natural law right, [92] blended with the principles of human rights and dignity. [93] Although the notion of autonomy entails that the contracting parties have, as previously stated, the liberty to contract, the notion of autonomy and the principles derived from it,

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90 Van der Merwe et al (1994) 10; Kahn (1988) 36-33; See also De Wet and van Wyk Kontraktereg en Handelsreg (1992) 6 130; Jordaan "The Constitution's impact on the law of contract in perspective" 2004 37 (1) De Jure 58 at 59; Grove *De Jure* (2003) 134; Hopkins *TSAR* 2003 (1) 150 at 152; Hawthorne 1995 (58) *THRHR* 163.

91 Van der Merwe et al (1994) 10; See also Christie (2001) 17. The author defends the so-called hands off approach in that: *"the whole basis of the law of contract is that the law will enforce their agreement. Intervention by the courts appears to be unreasonable; a form of paternalism inconsistent with the parties' freedom of contract."*

92 Kahn (1988) 31, views the very essence of a contract as *"the free meeting of the minds of the parties wishing to make a contract."* See also Van der Walt 1991 *THRHR* 367 at 376. The author opines that one of the fundamental principles of natural law is that the individual is autonomous and as such clothed with certain fundamental rights *inter alia* a competency to freely engage in trade and to conclude contracts as they see fit; Jordaan 2004 *De Jure* 58 at 59 describes the contractual autonomy as *"the freedom to determine whether, with whom and on which terms to contract, and create, if at all, legally enforceable relationships in terms of which performance must take place."* The author quotes from Kant's basic writings (Kant 2001) who believed that *"every person is therefore perceived as a moral agent with moral autonomy which relate to contracting."* Kötz "Controlled Unfair Contract Terms: Options for legislative reform" 1986 *SALJ* 405 describes the autonomous competency of individuals as: *"Contract involves free choice of the individuals concerns and is therefore based on the idea of private autonomy."* Hopkins *TSAR* 2003.1.150 at 152 acknowledges contractual autonomy when emphasizing our court's approach namely: *"..... The parties to a contract must be free to choose the terms and the manner of their agreement for themselves."*

93 Van der Merwe et al (2003) 1-14. The author states that since the introduction of the Constitution of the Republic of South Africa, Act 108 of 1996, it has had implications for the notion of autonomy, in that, Chapter 2 of the Constitution dealing with basic rights, recognizes and protects some particular rights on a `horizontal' level, including, the principles of the common law governing the law of contract. See also Grove (2003) *De Jure* 134 138. See further Christie *Bill of Rights Compendium* (2002) 3H-20. The writer, with reference to Section 9 of the Constitution Act 108 of 1996, argues that in instances where on the facts of the case, the adoption of the pure principles of freedom of contract and the sanctity of contract, would lead to an infringement of a right resultant from the inequality of bargaining power in those instances, when the necessity of the prevention outweighs the necessity of enforcing the contract, the *caveat subscriptor* rule will be relaxed. The author suggests that this technique can be applied to limitations on the enforcement of exemption clauses and to the constriction of contracts *contra proferentem*. *Contra* Grove (2003) *De Jure* 134 at 138-139. The author expresses the view that notwithstanding the introduction of Schedule 2 of the Constitution Act 108 of 1996, there is nothing in the provisions dealing with basic human rights which provides that the freedom of contract is *per se* in conflict with the provisions of the constitution.

unlike during the classical period, are not applied absolutely. [94]

One of the most recognised characteristics of the law of contract in South Africa which has shown great prominence in recent years is the principle that, despite the acceptance of the principle of the freedom of contract, a contract will not be enforced if its application would be against public policy. [95]

8.2.2.2 Case Law

Given the fact that South Africa as a state is moulded in the Western democratic capitalist style, in which the current contract doctrine is based on the paradigm of a free market, where voluntary participation by individuals is perceived to be one of equal footing in a

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94 Grove 2003 *De Jure* 134. The author is of the view that limitations are placed on the freedom to contract by numerous *ad hoc* common law and statutory rules and norms, which externally, influence the relationship between contracting parties. The author cites good faith and public interests as the prime example of the common law rules and norms as well as statutory rules and norms limiting the freedom of contract. See the *Credit Agreement Act* 75 of 1980 and the *Usury Act* 73 of 1968. Useful guidelines thereon are provided by Strydom "The Private domain and the Bill of Rights" 1995 *SAPL/SAPR* 52 63 wherein he holds: *"Let's take the example of freedom of contract. No matter how highly we value such freedom, it cannot serve as a justification for enforcing private agreements the purpose of which is the exclusion of persons of a certain race of sexual orientation. If such agreements affect a person's human dignity, undoubtedly a situation which calls for redress arises."* See further Gordley (1991); Jordan 2004 41ff *De Jure* 58 at 60; See also Kerr (1998) 8-9; See also Van der Merwe et al (2003) 11 who cites the changing values of society as a factor which inhibits private autonomy. Hawthorne 1999 (58) *THRHR* 157 at 167-169 claims that freedom of contract and the principle of *pacta servanda sunt* are not absolute values in that, despite its recognition in especially, the classical period, the inequality between the contracting parties has caused a gradual erosion of freedom of contract as the legislative and judiciary, have sought intervention to redress an imbalance of power, engendered, by freedom of contract. In this regard Hawthorne opines that: *"..... The present principle of pacta sunt servanda should be interpreted to conflict as little as possible with fundamental rights such as equality or freedom from servitude or forced labour. These implications do not, however, in my opinion mean that where the effect of an application of a rule or principle amounts to a limitation of fundamental rights as between private individuals, the protection of fundamental right will necessarily take precedence over subjective rights of performance validly acquired."* The writer also cites the *Credit Agreement Act* 75 of 1980, the *Usury Act* 73 of 1968 and the *Rent Control Act* 80 of 1976 as forms of legal paternalism employed by the legislature, to govern the contracts of consumers, borrowers and tenants for social interests in which the weaker parties are protected against exploitation. Hawthorne in promoting legislating influence is critical of the judiciary in its efforts to control immoral and unconscionable agreements. He argues that most judges despite appearing to be neutral in their strict adherence to the principle of equality before the law `ignore the discrepancy between the formal requirements of freedom and equality and socio-economic reality' as they prefer to hide their moral vision behind technical rules and legal doctrines'. *Contra* Van Aswegen 1994 (57) *THRHR* 448-451. The author appears to be a protagonist for judicial reform in the law of contract provided it is met with judicial activism in which factors such as *bona fides*, equity and substantive justice, play a vital role. Support for the foretasted view is found in Van Aswegen's 1994 (5) *THRHR* 455 argument that *"legislative reform can never be the only means of reform."*

95 Christie *Bill of Rights Compendium* (2002) 3H-9. The author sets out the legal position as follows namely: *"Although public policy generally favours the utmost freedom of contract, a contract or a term in a contract may be declared contrary to public policy if it is clearly inimical to the interests of the community, or is contrary to law or morality, or runs counter to social or economic experience, or is plainly improper and unconscionable, or unduly harsh or oppressive."* Support for this view can be found in Beauchamp and Childress (2001) 65 in which the writers remark: *"Respect for autonomy has only prima facie standing and can sometimes be overridden by competing moral considerations."*

bargaining process, without State intervention, it is not a surprise that this influence is mirrored in the judicial *dicta*, ranging from the more recent judgements of *Afrox Health Care Bpk v Strydom* 2002 6 SA 21 (SCA), and *Brisley v Drotskey* 2002 (4) SA 1 (SCA) to the earlier decisions of *Eastwood v Shepstone* 1902 TS 294, and more especially in *Osry v Hirsch Loubser and Co Ltd* 1922 CPD 531.

In order to have a greater understanding of the judicial thinking, it is advisable to commence with an investigation into the older cases first. This will create a platform for establishing to what degree their reasoning still influences judicial thinking today.

In the case of *Eastwood v Shepstone supra* the court refused to recognise a contract of forced labour. The court based its decision on the liberty of contract but subsequently concluded:

" ..... Because the people of the tribe in regard to all such transactions would not be free agents, and would have no liberty of contract." [96]

The principle of freedom to contract and, in particular, the terms upon which a contract may be founded, formed the basis of the decision of *Morrison v Anglo Deep Gold Mines Ltd*. [97] This case concerned a so-called `contracting out' clause in which an employer limited his liability for injury caused to a servant by the negligence of fellow-workman. Recognising the principle of freedom to contract, the court held:

"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." [98]

The Appellate Division in 1919 also recognised the sanctity of contract when in the case of *Conradie v Rossouw*, [99] Solomon ACJ stated:

"That rule may be simply stated as follows: An agreement between two or more persons entered into seriously and deliberately is enforceable by action."

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96 *Eastwood v Shepstone* 1902 (TS) 294 at 302.

97 1905 (TS) 775.

98 *Morrison v Anglo Deep Gold Mines Ltd* 1905 (TS) 775 at 779. See also *South African Railways and Harbours v Conradie* 1921 (AD) 132 at 147-148.

99 1919 (AD) 279.

In the same case De Villiers A.J.A. also stated the legal position to be the following:

"According to our law if two or more persons, of sound mind and capable of contracting, enter into a lawful agreement, a valid contract arises between them enforceable by action." [100]

Thereafter followed a number of cases, in South Africa, in which the consensuality basis of contract and the autonomy of the wills of the contracting parties, as well as, the doctrine of the sanctity of contract, were upheld.

In a Cape decision of *Osry v Hirsch* [101] Kotze JA strongly pronounced his preference for the doctrine of freedom of contract when he stated: *"The spirit of modern jurisprudence is in favour of the liberty of contract."* [102]

In another Appellate division dictum of *Paiges v Van Ryn Gold Mines Estates Ltd* [103] the court recognised the principle of freedom to contract when De Villiers JA held that, for a stipulation in a contract to be invalid, a reason must first be found, in a principle, restricting the freedom of contract.

But it was Innes CJ who, in the *Wells v South African Alumenite Company,* [104] took the strongest stance until then, in recognising the sanctity of contract. Adopting the principle enunciated in the English decision of *Printing and Numerical Registering Company v Sampson* (1875) LR 19 EQ 462 at 465 Innes CJ stated:

"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. "[I]f 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 and Numerical Registering Company v Sampson (1875) LR Eq. 462 at 465)" [105]

The sanctity of contract was further entrenched by the Appellate Division in the case of

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100 *Conradie v Rossouw* 1919 (AD) 279 at 288 and 320 respectively.

101 1922 (CPD) 531.

102 *Osry v Hirsch* 1922 (CPD) 531 at 546.

103 1920 (AD) 600.

104 1927 (AD) 69.

105 *Wells v South African Alumenite Company* 1927 (AD) 69 at 73.

George v Fairhead (Pty) Ltd. [106] When the court was asked, in this case, to decide whether a hotel guest was bound by a clause in a hotel register he had signed, exempting the proprietor from liability for loss caused by theft or from the wrongful conduct of employees. Fagan CJ, in deciding in favour of the hotel, held:

"When a man is asked to put his signature to a document he cannot fail to realise that he is called upon to signify, by doing so, his assent to whatever words appear above his signature."

Fagan CJ continues:

"If he chose not to read what that additional something was, with his open eyes, taking the risk of being bound by it, he cannot then be heard to say that his ignorance of what was in it was a justus error ..... " [107]

The principles of freedom of contract and the sanctity of contract was also recognised in the case of *SA Sentrale Ko-op Graan Maatskappy Bpk v Shifren* [108] in upholding a `no variation exception writing' clause in a contract. Steyn CJ relying on the *Wells v South African Alumenite Company* 1927 AD 69 case spoke of *"Die elementêre en grondliggende algemene beginsel dat kontrakte wat vryelik en in alle erns deur bevoegde partye aangegaan is [word] in die openbare belang afgedwing."* [109]

Emphasis is also placed on the principle of freedom of contract and sanctity of contract in the case of *Filmer and Another v Van Straaten*,[110] in which Claassen J remarked:

"As to `A' the general rule is that:
(a) Any contract interfering with individual liberty of action in trading and all restraints of trade are contrary to public policy and therefore void, but..... "

And further:

"As to "B" it is the general tendency of the Court not to interfere between parties contracting on equal terms, provided the public interests are not affected detrimentally. The parties are considered the best judges of what is a reasonable contract between them. The doctrine pacta sunt servanda is applicable, and the Courts look with disfavour on a party attempting to escape from a contract into which he has entered with his eyes open, and then alleging afterwards that it was unreasonable. See New United Yeast Distributors (Pty) Limited v Brooks 1935

106 1958 (2) SA 465 (A).

107 *George v Fairmead (Pty) Ltd* 1958 (2) SA 465 (A) at 472 and 473 respectively.

108 1964 (4) SA 760 (A).

109 *SA Sentrale Ko-op Graan Maatskappy Bpk v Shifren* 1964 (2) SA 343 (0) at 346.

110 1965 (2) SA 575 (W).

W.L.D. 75 at p83." [111]

In the *Magna Alloys and Research (SA) Pty Ltd v Ellis* [112] Rabie CJ, whilst recognising the general doctrine of freedom of contract, acknowledges that there are circumstances that may arise when courts are entitled to deviate from the general rule. He sets out the position as follows:

"Dit sou dus volgens die beginsels van ons reg moontlik wees om te sê dat 'n ooreenkoms wat omstandighede van die betrokke geval sodanig is dat die hof daarvan oortuig is dat die afdwing van die betrokke ooreenkoms die openbare belang sou skaad."

But cautions the court: *"Die tweede hoof oorweging is dat daar al oor 'n baie lang tyd in beslissings van ons howe aanvaar is dat dit in die belang van die gemeenskap is dat iedereen vir sover moontlik toegelaat moet word om hom vryelik in die handelswêreld of in sy beroep te laat geld - of, om dieselfde punt op 'n ander wyse te stel: Daar is al vir baie jare aanvaar dat dit die gemeenskap skaad as daar 'n onredelike beperking op iemand se handels of beroepsvryheid geplaas word."* [113]

The principle of sanctity of contract was reinforced in a Zimbabwean decision of *Olsen v Standaloft*. [114] Relying heavily on the Roman Dutch Law, Fieldsen CJ stated:

" ..... Roman-Dutch Law..... even more than the English Law tends as a matter of policy to attach importance to the need to uphold the sanctity of contracts made freely by competing parties." [115]

Our judges have also, in a number of cases, not only commended the freedom and sanctity of contract, but, outright refused to interfere with contractual terms, however, harsh this may be. In *Oatorian Properties (Pty) Ltd v Maroun* [116] the Appellate Division declared that *"the court will not enquire into the conscionable ness or unconscionable nesses of the*

111 *Filmer and another v Van Straaten* 1965 (2) SA 575 (W) at 578.

112 1984 (4) SA 874 (A).

113 *Magna Alloys and Research (SA) Pty Ltd v Ellis* 1984 (4) SA 874 (A) 892-893.

114 1983 (2) SA 668 (ZS).

115 *Olsen v Standaloft* 1983 SA 668 (Z) at 673.

116 1973 (3) SA 779 A.

exercise of a right to involve a forfeiture clause in a lease." [117]

In *Tamarillo (Pty) Ltd v B.N. Aitken (Pty) Ltd* [118] Miller JA quoting the English decision of Esso Petroleum Co Ltd v Harpere Garage (Stanport) Ltd (1968) AC 269 at 294 A-B in which it was held: *"If one who seeks to take a lease of land knows that the only lease which is available to him is a lease with a restriction, then he must either take what is offered (on the appropriate legal terms), or he must seek a lease elsewhere. No feature of public policy requires that, if he freely contracted, he should be excused from honouring his contract. In no national sense could it be said that, he took a lease with restriction as to trading, he was entering into a contract that interfered with the free exercise of his trade or his business or with his "individual liberty of action in trading"*. Consequently, the Appellate Division held: *"To hold otherwise would be to enlarge wholly unjustifiably, the scope of the so-called `doctrine' relating reasonableness as a covenant in restraint of trade (assuming such doctrine to be part of our law) and would represent unwarranted interference with ordinary `liberty of contracting'."* [119]

But, our common law has, to a certain extent, encroached upon the freedom and sanctity of contract by its condemnation of contracts against public policy. [120]

In the *locus classicus Sasfin (Pty) Ltd v Beukes* [121] the Appellate Division declared that a contractual provision which is unfair and against public interest is unenforceable and void. In cautioning against the deviation of the general rule concerning freedom and sanctity of contract, Smalberger JA, stated the legal position as follows:

"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. 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..... "

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117 *Oatoriam Properties (Pty) Ltd v Maroun* 1973 (3) SA 779 (AD) at 785.

118 1982 (1) SA 398 (AD).

119 *Tamarillo (Pty) Ltd v B.N. Aitken (Pty) Ltd* 1982 (1) SA 398 (AD) at 439.

120 *Magna Alloys and Research (SA) (Pty) Ltd v Ellis* 1984 (4) SA 874 (AD) 874 at 891.

121 1989 (1) SA 1 (AD).

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." [122]

This dictum has in the most recent times been quoted and reinforced in a number of cases before the Supreme Court of Appeal. [123]

In the case of *Brisley v Drotsky*, [124] Cameron JA stresses the constitutional value which the freedom to contract embraces when he states:

"The constitutional values of dignity and equality and freedom require that the Courts approach their task of striking down contracts or declining to enforce them with perceptive restraint, contactual autonomy is part of freedom. Shorn of its obscene excesses, contractual autonomy informs also the constitutional value of dignity." [125]

The constitutional value of freedom of contract was also highlighted, as follows, in the matter of *Afrox Healthcare Bpk v Strydom* [126] in which Brand JA, remarked:

"[23] Die grondwetlike waarde van kontrakteersvryheid omvat, op sy beurt, weer die beginsel wat in die stelreël pacta sunt servanda uitdrukking vind. Hierdie beginsel word deur Steyn HR in SA Sentrale Ko-op Graanmaatskappy Bpk v Shifren en Andere 1964 (4) SA 760 (A) op 767A saamgevat as synde:

> *"die elementêre en grondliggende algemene beginsel dat kontrakte wat vryelik en in alle erns deur bevoegde partye aangegaan is, in die openbare belang afgeding word."* [127]

More recently as stated earlier, the Supreme Court of Appeals, per Cameron AJ, in the case of Napier v Barkhuizen, [128] stressed the importance of the principle of freedom of contract and the sanctity of contract when the learned judge stated:

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122 *Sasfin (Pty) Ltd v Beukes* 1989 (1) SA 1(AD) at 9B-f.

123 *Brummer v Gorfil Brothers Investments (Pty) Ltd en andere* 1999 (3) SA 389 (SCA) at 420 F; See also *De Beer v Keyser van Others* 2002 (1) SA 827 (SCA) at 837 C-E; *Brisley v Drotsky* 2002 (4) SA 1 SCA; *Afrox v Healthcare Bpk v Strydom* 2002 (6) SA 21 (SCA) at 33 I-J, 34 A-B.

124 2002 (4) SA 1 SCA.

125 *Brisley v Drotsky* 2002 (4) SA 1 SCA at 36.

126 2002 (6) SA 21 SCA.

127 *Afrox v Healthcare Bpk v Strydom* 2002 (6) SA 21 SCA at 38.

128 2006 (4) SA 1 (SCA); 2006 (9) BCLR 1011 (SCA).

"That intruding on apparently voluntarily concluded arrangements are a step that Judges should countenance with care, particularly when it requires them to impose their individual conceptions of fairness and justice on parties' individual arrangements." [129]

The court, in the *Napier* case, also attaches great value to the age old doctrine *pacta sunt servanda*. In this regard, the court held that the law of general application is the common law rule, namely, that agreements are binding and must be enforced as far as possible.
So strong is the Supreme Court of Appeal's belief in upholding the doctrine, that it cautions that, the fact that a term in a contract is unfair or may operate harshly does not, by itself, lead to the conclusion that it offends the values of the Constitution. Here, the court emphasizes the principles of dignity and autonomy which *"find expression in the liberty to regulate one's life by freely engage[ing] [in] contractual armaments."* The Supreme Court of Appeal further explained that *" ..... intruding on apparently voluntarily concluded arrangements is a step that judges should countenance with care, particularly when it requires them to impose their individual conceptions of fairness and justice on parties' individual arrangements."* [130]

Since then this case found itself in the Constitutional Court when, very recently, in the case of *Barkhuizen v Napier*, [131] the majority of the court (majority judgement written by Ngcobo J) again emphasized the importance of the previously mentioned principle. But, cautions the Constitutional Court, the Supreme Court of Appeal never suggested that the contract *pacta sunt servanda* was a sacred cow that should trump all other considerations. The Constitutional Court found in this regard that *"all law, including the common law of contract, is now subject to constitutional control."* The court then goes on to add *"the application of the principle pacta sunt servanda is, therefore, subject to constitutional control."* [132]
Sachs J, in a minority judgement in the same Constitutional Court case, comes out critically against what he terms *" ..... judicial and text-book repetition ..... which appear axiomatic, indeed mesmeric, to many in the legal world when regard is had to the doctrine of sanctity of contract and the maxim pacta sunt servanda."* Sachs J emphasizes the aspect that in open and democratic societies, through the influence of consumer protection struggles, scholarly critiques, legislative interventions and creative judicial reasoning, the

129 *Napier v Barkhuizen* 2006 (4) SA 1 (SCA); 2006 (9) BCLR 101 (SCA).

130 *Napier v Barkhuizen* 2006 (4) SA 1 SCA Para 13.

131 *Napier v Barkhuizen* 2006 (4) SA 1 SCA Para 13.

132 *Barkhuizen v Napier* 2007 (5) SA 323 (CC).

influence of the said principles have been dethroned from their jurisprudential pedestal, once occupied. They have now been *"singularly narrowed in the great majority of democratic societies"* according to Sachs J. Their application in South Africa has, according to Sachs J, been further influenced by the new constitutional order.

It appears therefore, that the South African judiciary heavily favours contractual freedom and the sanctity of enforcing contracts, notwithstanding attempts made by Sachs J in *Barkhuizen v Napier*.

8.2.2.3 Legal opinion

Both the Roman law and English Law influences are profoundly observed in the South African Law of Contract. Both the freedom of contract and the enforcement of contractual obligations are perhaps the most recognized characteristics of the law of contract and have their roots firmly embodied in the Roman law as well as the English Law. [133]

It is especially the time-worn dictum of Sir George Jessel, in *Printing and Numerical Registering Co v Sampson,* [134] in which it was stated:

" ..... 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." [135]

This influenced *Hahlo* [136] to advocate:

"Provided a man is not a minor or a lunatic and his consent are not vitiated by fraud, mistake or duress, his contractual undertakings will be enforced to the letter. If, through inexperience, carelessness or weakness of character, he has allowed himself to be overreached, it is just too bad for him, and it can only be hoped that he will learn from his experience. The courts will not release him from the contract or make a better bargain for him. Darwinian survival of the fittest, the law of nature, is also the law of the market-place." [137]

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133 Hawthorne "Closing of the Open Norms in the Law of Contract" 2004 67 (2) *THRHR* 294 295; Hopkins "Standard form Contracts and the Evolving Idea of Private Law Justice: A case of Democratic Capitalist Justice versus Natural Justice" 2003 (1) *TSAR* 150 155; Van der Walt "Kontrakte en Beheer oor Kontrakteervryheid in 'n nuwe Suid-Afrika" *THRHR* (1991) 367 375; Pretorius "The Basis of Contractual Liability in South African Law" (1) (2004) *THRHR* 179 at 181, 183; Kahn *Contract and Mercantile Law* (1981) 70. For case law see *Olsen v Standlift* 1983 (2) SA 668 (29); *Tamarillo (Pty) Ltd v B.N. Aitken (Pty) Ltd* 1982 (1) SA 398 (AD).

134 (1875) LR 19 Eq. 462 at 465.

135 *Printing and Numerical Registering Co v Sampson* (1875) LR 19 EQ 462 at 465.

136 "Unfair Contract Terms in Civil Law Systems" *SALJ* (1981) 70 at 71.

137 Hahlo "Unfair Contract Terms in Civil Law Systems" *SALJ* (1981) 70 at 71.

And Innes CJ in *Wells v South African Alumenite Company* [138] to remark:

"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. "(I)f 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 and Numerical Registering Company v Sampson (1875) LR EQ 462 at 465)" [139]

The effect of the adoption of the doctrine of freedom to contract is; the individual is free to decide whether he/she wants to contract; with which he/she wishes to contract and on what terms he/she wants to contract. [140]

On the other hand, the *pacta sunt servanda* requires the enforcement of the contractual obligations, created in the circumstances consistent with freedom of contract and consensuality. [141]

But, the notion of autonomy is not applied absolutely, as there are contracts or contractual terms which will not be enforced if their application would be against public policy or one of the contracting parties contracted with duress, undue influence or fraud. [142]

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138 1927 (AD) 69.

139 *Wells v South African Alumenite Company* 1927 (AD) 69.

140 Van der Merwe et al *Contracts - General Principles* (1994) 10; Kahn *Contract and Mercantile Law* (1988) 33-36; See also De Wet and Van Wyk *Kontraktereg en Handelsreg* (1978) 6 130; Jordaan "The Constitution's impact on the law of contract in perspective" 2004 37 (1) *De Jure* 58 at 59; Grove "Die Kontraktereg, Altruisme, Keusevryheid en die Grondwet *De Jure* (2003) 134; Hopkins "Standard form contracts and the evolving idea of private law justice: A case of democratic capitalist justice versus natural justice" *TSAR* 2003 (1) 150 at 152; Hawthorne "The Principle of Equality in the Law of Contract" 1999 (58) *THRHR* 163. For case law see *Morrison v Anglo American Deep Gold Mines Ltd* 1905 TS 775; *Conradie v Rossouw* 1919 (AD) 279; *Osry v Hirsch* 1927 (CP) 81; *Paiges v Van Ryn Gold Mine Estates Ltd* 1920 (AD) 600; *Wells v South African Alumenite Company* 1927 (AD) 69; *George v Fairmead (Pty) Ltd* 1958 (2) SA 465 (A); *SA Sentrale Ko-op Graan Maatskappy v Shifren* 1964 (4) SA 760 (A); *Filmer and Another v Van Straaten* 1965 (2) SA 575 (W); *Magwa Alloys and Research (SA) (Pty) Ltd v Ellis* 1984 (4) SA 874 (A); *Napier v Barkhuizen* 2006 (4) SA 1 (SCA); 2006 (9) BCLR 1011 (SCA).

141 Van der Merwe et al *Contracts - General Principles* (1994) 10; See also Christie *The Law of Contract in South Africa* (2001) 17. The author defends the so-called hands off approach in that: *"the whole basis of the law of contract is that the law will enforce their agreement. Intervention by the courts appears to be unreasonable; a form of paternalism inconsistent with the parties' freedom of contract."*
For case law see *Conradie v Rossouw* 1919 (AD) 279 at 288; *George v Fairmead (Pty) Ltd* 1958 (2) SA 465 (A); *SA Sentrale Ko-op Graan Maatskappy v Shifren* 1964 (4) SA 760 (A); *Filmer and Another v Van Straaten* 1965 (2) SA 575 (W); *Olsen v Standaloft* 1983 (2) SA 668 (S); *Oatorian Properties (Pty) Ltd v Maroun* 1973 (3) SA 779 (A); *Napier v Barkhuizen* 2006 (4) SA 1 (SCA); 2006 (9) BCLR 1011 (SCA).

142 Christie *The Law of Contract and the Bill of Rights Bill of Rights Compendium* (2002) 3H-9. For case law see *Sasfin (Pty) Ltd v Beukes* 1989 (1) SA 1 (AD); *Brummer v Gorfil Brothers Investments (Pty) Ltd en Andere* 1999 (3) SA 389 (SCA) at 420 F; *De Beer v Keyser and Others* 2002 (1) SA 827 (SCA) at 837 C-E; *Brisley v Drotsky*

Most recently the Constitutional Court, in a majority judgement per Ngcobo J, in the case of *Barkhuizen v Napier*, [143] endorsed the views of especially, the Supreme Court of Appeals in Napier v Barkhuizen, [144] in which the principles of freedom of contract and the sanctity of contract were highlighted. The Constitutional Court, per Ngcobo J, stressed the fact that it was not the court's understanding that the Supreme Court of Appeals suggested that the principle of contract *pacta sunt servanda* is a sacred one that should trump all other considerations. The court endorses the view of the Supreme Court of Appeals namely *"the application of the principle pacta sunt servanda is, therefor, subject to constitutional control."* [145]

It is respectively submitted that the views expressed by Sachs J need to be welcomed as they usher in new jurisprudential thinking in contract law in South Africa. Whereas judicial thinking appeared to be stagnant in the marshland of resistance to change, Sachs J clearly identifies the need to bring about legal reform when he states: *"..... legal tradition, if unmodified, will frequently lag well behind social and commercial reality."* [146] I respectfully associate myself with this thinking. It is submitted that when the principles of freedom of contract and the sanctity of contract were founded, it was during an era when social and commercial reality dictated that individually negotiated agreements should be honoured and enforced. But, since the founding of standard form contracts, where contracts are drafted in advance by the supplier of goods or services and presented to the consumer on a "*take it or leave it*" basis, often leading to harsh, unjust and injurious results, consumer organizations, especially, have rightfully questioned their legal status. Besides, some of the South African courts have also called into question the validity of clauses in standard form contracts that are unreasonable, oppressive or unconscionable. The Constitutional Court, in *Barkhuizen v Napier,* [147] quotes with approval the persuasive argument presented by Davis

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2002 (4) SA 1 SCA; *Afrox v Healthcare Bpk v Strydom* 2002 (6) SA 21 (SCA) at 33 I-J, 34 A-B; *Napier v Barkhuizen* 2006 (4) SA 1 (SCA); 2006 (9) BCLR 1011 (SCA).

143 2007 (5) SA 323 (CC).

144 2006 (4) SA 1 (SCA); 2006 (9) BCLR 1011 (SCA).

145 *Barkhuizen v Napier* 2007 (5) SA 323 (CC) Para 15. See however, the dissenting views expressed by Sachs J in the minority judgement in which he expresses strong views against the axiomatic and mesmeric influence of the principles of freedom of contract and the sanctity of contract and the direction courts should take in the light of the new constitutional order in South Africa.

146 *Barkhuizen v Napier* 2007 (5) SA 323 (CC) Para 145 of the Judgement.

147 2007 (5) SA 323 (CC) Para 140.

J in the case of *Mort NO v Henry Shields-Chiat* [148] that the legal convictions of the community or as he terms it "our constitutional community" dictates that *"clauses in a standard form contract that are unreasonable, oppressive or unconscionable are in general inconsistent with the values of an open and democratic society that promotes human dignity, equality and freedom".*(Quote from Constitutional Court). [149] It is submitted that the social and commercial reality in the modern day dictates that preventative measures ought to be taken to prevent the abuse of contracting parties, who stand in an unequal bargaining position, often the ignorant and poor, and who enter into written agreements, the terms of which wholly favour the party that had drafted the contract, or terms of the aforementioned contract that lie buried in the form of small print. The movement, internationally, is also clearly, to regard these types of clauses or contracts offensive to public policy.

Other factors influencing the principles of freedom of contract and the *pacta sunt servanda* as will be observed from the writings that follow include the principle of fairness, the doctrine of unconscionability, certain exclusionary clauses, the status and bargaining of the contracting parties.

8.2.3 The Influence of Freedom of Contract in England

8.2.3.1 Legal Writings

The principle of freedom of contract and the binding force of contract has remained one of the pillars of the English Law of Contract, despite losing some of its intellectual attraction through the influence of positive law and legislative intervention. [150]

The influence of the principles of freedom of contract and the binding force of contract is an extension, in part, of the nineteenth century position. The philosophical justification for the said principle during this period is said to be, *inter alia,* in the "will theory" of contract. The "will theory" on the other hand, entails that parties were to be the best judges of their interests. If, therefore, they freely and voluntarily entered into a contract, the only function

148 2001(1) SA 464 (C) at 474J-475F. This passage was cited by Olivier JA in *Brisley v Drotsky* 2002 (4) SA 1 (SCA); 2002 (12) BCLR 1229 (SCA) at Para 69.

149 *Barkhuizen v Napier* 2007 (5) SA 323 (CC) Para 140.

150 Chitty Chitty on Contracts Volume 1 General Principles (1999) Par 1-011; Tillotson Contract Law in Perspective (1995) 6-7; Stone The Modern Law of Contract (2002) 2-3; McKendrick Contract Law Text, Cases and Materials (2003) 4, 7-8; Atiyah An Introduction to the Law of Contract (1995) 27-36; Furmston Cheshire Fitfoot and Furmston's Law of Contract (1986) 17-18.

of the law was to enforce it. Moreover, the validity of a contract should not be challenged on the ground that its effect was unfair or socially undesirable, save for instances where the contract was illegal or immoral. It was also immaterial that one party was economically in a stronger bargaining position than the other. [151]

During the nineteenth century, the freedom of contract and the binding force of contract were best illustrated in contracts intending to regulate the damages payable on breach of contract, as well as, contracts limiting or excluding liability in damages for breach of contract and also in tort. During this period, reluctance was also shown to declare penalty clauses ineffective, however harsh or unfair their effect to one of the contracting parties may have been. [152]

The influencing factor behind this philosophy was grounded upon the moral principle that a person should fulfil his promises and abide by his agreements. Other influencing factors included the theories of natural law, which meant that men had an inalienable right to make their own contracts, for themselves. The philosophy of *laissez-faire*, similarly, meant that the law should interfere with people as little as possible. [153] It was especially, during the nineteenth century, that industrial and commercial competition was encouraged. This further promoted the ideas of freedom of choice and freedom of contract. [154] The only restriction placed on the principle of freedom of contract during this period, was the overriding public interest - `public policy', in which the courts retained the power to declare contracts to be ineffective because they were contrary to public policy. [155]

In so far as the sanctity of contract is concerned, it was generally accepted that once a contract was freely and voluntarily entered into, it should be held sacred, and should be enforced by the courts if it was broken. [156] The only limitations placed upon the courts in enforcing the sanctity of contracts were, contracts entered into under the influence of fraud, or duress or contracts designed to violate the criminal law. Such contracts could not

151 Chitty (1999) Par 1-010; McKendrick (2003) 4; Stone (2002) 2-3; Tillotson (1995) 6-7; Atiyah An Introduction to the Law of Contract (1995) 3-5; Furmston et al (1986) 13, 17-18.

152 Chitty (1999) Par 1-010; McKendrick (2003) 7-8; Tillotson (1995) 6-7; Stone (2002) 2-3.

153 Atiyah (1995) 3.

154 Atiyah (1995) 6.

155 Atiyah (1995) 6.

156 Atiyah (1995) 10.

be enforced due to public policy. [157] The general principle of freedom to contract continued to impact on the law of contract in English law during the twentieth century and continues to do so today. [158] Nevertheless, moral, political and economical forces had already commenced exerting their influence on the nature and content of contract during the nineteenth century. But, it was during the twentieth century that real development in the law of contract began to take place. [159]

The emergence of consumerism heralded in a new era, in which the consumer became a contracting party, which led to major changes.

Whereas previously, little attention was paid to inequalities between contracting parties, with the advent of consumerism, a moral principle was established, namely, that one should not take advantage of an unfair contract which one has persuaded another party to make, under economic or social pressure. Regard was had to the inequality of bargaining power between the contracting parties. [160]

The emergence and widespread use of the standard-form contracts also influenced the development of contract law in English Law. One of the key concerns about the standard-form contracts generally is this, whereas the actual creation normally requires the agreement of the parties, with standard-form contracts, the contracts ceased to consist of individually negotiated or custom-made terms. The individually negotiated contracts have been replaced by standard printed terms, offered by large organizations, often, on a `*take it or leave it'* basis. Although the consumer remained `free' in theory, his choice was often restricted to `*taking it or leaving it'*. If a consumer, for example, wanted to travel by rail, although nobody could compel the consumer to travel by train, should he decide to travel by rail, he had to do so on the terms and conditions imposed by the Railway companies. He could, therefore, not negotiate his own terms. [161]

By the mid-twentieth century, these standard-form contracts had become one of the major problems of the law of contract in England. It was felt that the fact that the terms were

157 Atiyah (1995) 10.

158 Chitty (1999) Par 1-011; McKendrik (2003) 4-5.

159 Tillotson (1995) 7; Atiyah (1995) 11.

160 Atiyah (1995) 11; Tillotson (1995) 6-7; Chitty (1999) Par 1-010; 1-011; McKendrik (2003) 4.

161 Atiyah (1995) 16.

imposed by one party and the other had no choice but to accept them or go without, they made serious inroads into contractual freedom, in that, one of the contractants had no real freedom to negotiate his own terms. The terms were also perceived to be more favourable to the bigger organizations or monopolies, leaving the weaker contracting party in a disadvantageous position. [162]

One of the most troublesome features of standard-form contracts was the presence of an `*exemption clause,* ' which often provided that the organization would be exonerated from liability `*in virtually any circumstances whatsoever.*' They were incorporated into most commercial agreements, ranging from the sale of goods, carriage of goods by sea, insurance contracts and travelling by rail etc. [163]

It was, however, recognized that standard-form contracts had advantages as well. The advantages included, saving time, trouble and expense in bargaining over terms. Also a legal decision in one case would, through the principle of precedent, provide a guide to disputed problems in other cases. [164]

But, it was the growth of monopolies and restrictive practices of all kinds, which gave rise to intellectual debate. Part of the debate included the decision to provide f protective measures to deal with the abuse by the monopolies and to deal with restrictive practices. Problems surrounding the inequality of bargaining power also stimulated the debate. Further, what was prominently advocated was the need for the protection by the law, of the vulnerable, against exploitative practices. [165]

Calls went out for the prohibition of some kinds of contracts or some kinds of contractual terms. For that reason state intervention was felt to be necessary. Many statutory changes in the English law of contract were introduced, as a consequence, during the twentieth century. The statutory changes in the law of contract were designed with the express purpose of redressing the balance between the weak and the strong. Legislation for the protection of the consumer was introduced, for example, the *Rent Act*, the *Purchase Act* 1965, the *Money Lenders Act*, the *Trade Descriptions Act* 1968, the *Unfair Contract Terms*

162 Atiyah (1995) 16.

163 Atiyah (1995) 16-17.

164 Atiyah (1995) 18.

165 Atiyah (1995) 18.

Act 1977, to illustrate just a few.

The, afore mentioned, legislative intervention demonstrates a method used for interfering with freedom of contract, in order to protect the public from exploitation, in circumstances warranting interference. This included the prohibition of `exemption clauses' in certain circumstances. It was thus widely accepted and acknowledged that legislative interference, by the state, with freedom of contract, is often justified on moral and economic grounds. [166] But, notwithstanding the legislative intervention, there are suggestions that the doctrine of the freedom of contract has not been halted, and the pendulum is again swinging in favour of freedom of contract. [167]

The main reasons advanced for the decline are said to be inter alia political, in that renewed faith is shown in the underlying principles behind freedom of contract. Great belief is shown in the individual making his own free choice instead of being governed by collective and bureaucratic decision-making. It is also felt that paternalism is less necessary in the modern day than, say, a hundred or hundred and fifty years ago, in that, the British people are today better educated and more sophisticated, requiring less paternalist protection. They are, thus, seen to be in a better position to make their own contracts and to judge their own interests without paternalist protection. [168]

8.2.3.2 Case Law

The judicial influence of the well known dictum of Sir George Jessel MR, in the case of *Printing and Numerical Registering Company v Sampson,* [169] in which he stated:

> *"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. Therefore you have this paramount public policy to consider, that you are not lightly to interfere with this freedom of contracts."* [170]

has been enormous in the English law of contract.

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166 Atiyah (1995) 18-20.

167 Atiyah (1995) 27-34.

168 Atiyah (1995) 28.

169 (1875) L.R. 19 Eq. 562.

170 *Printing and Numerical Registering Company v Sampson* (1875) L.R. 19 Eq. 462.

This judgement has been immense in that it cast its shadow very prominently over the English Law of Contract. Moreover, the classical theory of contract and its model of the typical contract, encapsulated in the dictum, have been expressed in similar terms, commencing with the case of *Manchester, Sheffield and Lincolnshire Railway Company v W Brown* [171] in which Lord Bramwell stressed the importance of freedom of contract when he stated:

> *"I am prepared to hold that unless some evidence is given to show that a contract voluntarily entered into by two parties is unjust and unreasonable, it ought to be taken that that contract is a just and reasonable one, the burden of proof being upon the man who says that it is unjust and unreasonable. First of all, its justice and reasonableness are prima facie proved against him by his being a party to it, and if he means to say that what he agreed to is unjust and unreasonable, he must show that it is so. I am prepared to hold that..... However, so it is, and I repeat that I am for my own part prepared to hold, not that an agreement between two people which has been voluntarily entered into by them cannot be unreasonable, but that the fact that it has been voluntarily entered into by them is the strongest possible proof that it is a reasonable agreement, and that I should enquire the strongest possible evidence, or something more even than a possibility, to show me that that was an unreasonable agreement."* [172]

During the nineteenth century the parties were regarded as the best judges of their own interests, and if they freely and voluntarily entered into a contract, the only function of the law was to enforce it. In particular, the validity of a contract, or the terms of a contract, should not be challenged on the ground that its effect was unfair or socially undesirable (as long as it was not actually illegal or fraudulent) and it was immaterial that one party was economically in a stronger bargaining position than the other. The attitude of the court to clauses which attempted to regulate the damages payable, on breach of contract, was also one of neutrality, for the courts held that parties to a contract were able to limit or exclude liability, in damages, not merely for breach of contract, but also in tort. [173]

More recently the English Courts have also, in a number of cases, held that a person who signs a contractual document is bound by its terms however harsh they may be. [174] These are clear signs that, as a general principle, freedom of contract has considerable support in the modern judiciary. So strong was the belief in the doctrine of freedom of contract that

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171 (1883) 8 AC 703 (HL).

172 *The Manchester, Sheffield and Lincolnshire Railway Company v H.W. Brown* (1883) 8 AC 703 (HL); See also the judgements of Lord Bramwell *Salt v Marquis of Northampton* (1892) A.C. 1.

173 *Nicholson v Willan* (1804) 5 507.

174 *L'Estrange v F Graucob Ltd* (1934) 2 K.B. 394; *Levison v Patent Steam Cleaning Co Ltd* (1978) QB 69; *Singer (U.K.) v Tees and Hartepool Port Authority* (1988) 2 Lloyd's Rep 164 166; *Swisse Atlantique Societe d'Armenent Maritime SA v N.V. Rotterdamsche Kolen Centrale* (1967) 1 A.C. 361 at 399.

Lord Reid in 1966, in the case of *Swisse Atlantique Societe d'Armenent Maritime SA v N.V. Rotterdamsche Kolen Centrale,* [175] rejected the idea that the doctrine of fundamental breach was a substantial rule of law, on the ground that this would restrict the general principle of English Law that "*parties are free to contract as they may think fit*." [176]

Lord Diplock, in 1980, in the case of *Photo Production Ltd v Securicor Transport Ltd* [177] in the same context observed:

"(A) basic principle of the common law of contract ..... is that parties to a contract are free to determine for themselves what primary obligations they will accept. Moreover, the courts have proved unwilling to strike down contracts on the ground simply that none of the parties suffered from an `inequality of bargaining power'." [178]

The House of Lords, in the case of *Liverpool City Council v Irwin,* [179] also made it clear that the courts ought not to add to the agreement which the parties have made by implying a term merely because it would be reasonable to do so. This can be done only where it is necessary.

The court also emphasized the judicial approach to the interpretation to contracts, namely, courts will not put a meaning on the words of a contract different from that which the parties clearly express. [180]

The judicial attitude in England with regard to the doctrine of the freedom of contract was once expressed by Lord Denning, in the case of *George Mitchell (Chesterhall) Ltd v Finney Lock Seeds Ltd,* [181] as follows, despite the courts at times invalidating the terms of agreements which were regarded as unfair or unreasonable, namely:

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175 (1967) 1 AC 361 at 399.

176 *Swisse Atlantique Societe d'Armement Maritime SAVN v Rotterdamsche Kolen Centrale* (1967) 1 A.L. 361 at 399.

177 (1980) AC 827, 848.

178 *Photo Production Ltd v Securicor Transport Ltd* (1980) A.C. 827, 848; See also *National Westminister Bank p/c v Morgan* (1985) A.C. 686, 708 disapproving the dictum of Lord Denning M.R. in *Lloyds Bank Ltd v Bundy* (1975) Q.B. 326, 339.

179 (1977) AL 239, 254.

180 *Liverpool City Council v Irwin* (1977) A.C. 239, 254; See also *Tai Hing Cottin Mill Ltd v Lin Chong Hing Bank Ltd* (1986) A.C. 80 at 104-105.

181 (1983) QB 284 (CA) at 297, (1983) 1 ALL E.R. 108 at 113-114.

"(Judges) ..... still had before them the idol, "freedom of contracts". They still knelt down and worshipped it, but they concealed under their cloaks a secret weapon. They used it to stab the idol in the back. This weapon was called "the true construction of the contract"." [182]

In a more recent judgement by the Court of Appeals in *Williams Roffey Bros and Nicholls (Contractors) Ltd,* [183] the court continued to pay lip service to the classical formulation of the doctrine of freedom of contract, but, departed significantly from it in this case; the court remarked:

"Because justice requires that men, who have negotiated at arm's length, be held to their bargains unless it can be shown that their consent was vitiated by fraud, mistake or duress. If a promise is induced by coercion of a man's will, the doctrine of duress suffices to do justice. The party coerced, if he chooses and acts in time, can avoid the contract. If there is no coercion, there can be no reason for avoiding the contract when there is shown to be a real consideration which is otherwise legal ....."

But, despite the firm stance taken by the courts to entrench the doctrine of freedom of contract, the English Courts, as will be seen, placed certain limitations on contractual freedom. Factors such as duress, undue influence, fraud, mistake, misrepresentation, inequality of bargaining power, unconscionability and the like, began and continue to play a significant roll.

8.2.3.3 Legal Opinion

Despite the influence of the positive law and legislative intervention, the principle of freedom of contract and the binding force of contract still remain the pillars of the English Law of Contract. [184] What has emerged however, during the twentieth century in England, is that the emergence of consumerism has impacted upon the almost unlimited application of freedom of contract and the sanctity of contract once entered into (save for instances which involved public interest or public policy). With the emergence of consumerism, the legal writers and the courts alike, started to give more and more attention to the inequality between the contracting parties and the hardship which the inequality of bargaining power

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182 *George Mitchell (Chester hall) Ltd v Finney Lock Seed Ltd* (1983) QB 284 (CA) at 297, (1983) 1 ALL E.R. 108 at 113-114.

183 (1991) 1 QB 1 (1990) 1 ALL E.R.512.

184 Chitty *Chitty on Contracts Volume 1 General Principles* (1999) Par 1-011; Tillotson *Contract Law in Perspective* (1995) 6-7; Stone *The Modern Law of Contract* (2002) 2-3; McKendrick *Contract Law Text, Cases and Materials* (2003) 4, 7-8; Atiyah *An Introduction to the Law of Contract* (1995) 27-36; Furmston Cheshire Fitfoot *Furmston's Law of Contract* (1986) 17-18. For the influential case see *Printing and Numerical Registering Company v Sampson* (1979) L.R. 19 EQ 462; *Manchester Sheffield and Lincolnshire Railway Co v H.N. Brown* (1883) A.L. 703.

brought with it. [185]

It was especially the advent of standard form contracts and the widespread use of these types of contracts which influenced the development of contract law in England. One of the most profound criticisms lodged against the use of standard form contracts is that the weaker contracting party was often at the mercy of the stronger contracting party and the choice of the form is often restricted to `*taking it*' or `*leaving it*'. He/she could therefore, not negotiate his/her own terms. It was especially the bigger organisations or monopolies who took advantage of the weaker contracting parties, who often found themselves in disadvantageous positions. [186]

This was so, particularly with the presence of exemption clauses in these types of contracts, often exonerating from liability in virtually any circumstances whatsoever, the bigger organisations. Consumer movements and academic writers, in identifying the various problems that these types of contracts brought with them, sought protective measures to deal with the restrictive practices. As a consequence, the legislature stepped in to address the imbalances between the weak and the strong. Various forms of legislation, as a protective measure for the consumer, were introduced in England, *inter alia*, the *Rent Act*, the *Purchase Act*, the *Money Lenders Act* and the *Unfair Contract Terms Act*. These legislative interventions made significant inroads into the freedom of contract, including the prohibition of exemption clauses in certain circumstances. [187]

But, there is a strong movement, in England today, to revert back to the autonomous position once held by the contracting parties. This move is said to be brought about by the increased educational levels and rise in sophistication of the average citizen, which calls for less paternalistic protection. [188]

8.2.4 The Influence of Freedom of Contract in the United States of America

8.2.4.1 Legal Writings

American contract law is founded on the philosophical grounding that every force in society should be permitted to act freely and exert itself without constraint, limited only by the

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185 Atiyah *An Introduction to the Law of Contract* (1995) 11, 16-18; Tillotson *Contract Law in Perspective* (1995) 6-7; Chitty *Chitty on Contracts Vol. 1 General Principles* (1999) Par 1-010, 1-011; Eccentric *Contract Law Text, Cases and Materials* (2003) 4.

186 Atiyah *An Introduction to the Law of Contract* (1995) 16-18.

187 Atiyah *An Introduction to the Law of Contract* (1995) 18-20.

188 Atiyah *An Introduction to the Law of Contract* (1995) 27-28.

constraint that it should not cause friction in society. [189]

In the business world the sanctity of the exchange between contracting parties and freedom of contract is reflected in the fact that the business system, along with its legal support structure, highly values the pious spirit of individualism and of *laissez-faire,* in which contracting parties are expected to keep to their promises in an exchange. [190]

With the development and recognition of the "*will*" theory, in the nineteenth century, by American jurists, contracts were defined in terms of the will of the contracting parties. [191] *Kessler,* [192] in this regard states that, since a contract is the result of the free bargaining of parties who are brought together by the play of the market and who meet each other on a footing of social and approximate economic equality, there is no danger that freedom of contract will be a threat to the social order as a whole.

The "*will*" theory is enthusiastically recognized by *Gilmore* [193] when he states:

"[One] of the finest flowers of nineteenth century subjectivism (was) an attitude which modulates smoothly into a theory of untrammelled autonomy of the individual will and thence into the idea of unrestricted freedom of contract which was surely one of the master concepts of nineteenth century thought." [194]

The individual's free will, as expressed by mutual assent, has become the core requirement for the foundation of a contract in American contractual jurisprudence in the 20th century. [195] The effect thereof, so it was felt, was that private parties should be left to their own free will, to use their own talents and devices to negotiate and conclude agreements

189 Pound "Liberty of Contract" (1908-9) 18 *Yale Law Journal* 454 at 457.

190 Kessler "Contract of Adhesion - Some thoughts about Freedom of Contracts" 43 *Columbia Law Review* 629, 629-631 (1943); Dimatteo *Equitable Law of Contracts: Standards and Principles* (2001) 85; Summers and Hillman *Contract and Related Obligation - Theory, Doctrine and Practice* (1987) 507; Graswell and Swartz *Foundations of Contract Law* (1994) 13; Hunter 5-3; Macauly, Kidwell and Whitford *Contracts: Law in Action* (1995) 7.

191 Schreiber *The State and Freedom of Contract* (1998) 67.

192 "Contract of Adhesion - Some thoughts about Freedom of Contracts" 43 *Colum.L.Rev*. 629, 629-631 (1943).

193 Gilmore *The Death of Contract* (1974) 40.

194 Braucher "Freedom of Contract and the Second Restatement" *Yale Law Journal* 78 (1969) 598 endorsed by Dimatteo *Equitable Law of Contracts: Standards and Principles* (2001) 85.

195 Dimatteo *Equitable Law of Contracts: Standards and Principles* (2001) 85-86.

without the court's interventions. [196]

In this regard *Kessler* [197] wrote *"..... courts are extremely hesitant to declare contracts void as against public policy because there is one thing which more than another public policy requires it is that man of full age and competent understanding shall have the utmost liberty and voluntarily shall be held sacred and shall be enforced by the Courts of Justice."* [198]

The promotion and enforcement of contractual freedom have been so fierce that critics have found certain statutes to constitute an unwarranted interference with freedom of contract, even though the statutes were designed to protect certain contracting parties from being exploited by those holding superior bargaining power over them. [199]

The American courts, according to *Aronstam,* [200] have, until at least before the First World War, exaggerated private rights, at the expense of the public interest, by basing their decisions on the belief that the public good is best served by the protection of the rights of every individual. This freedom was subject only to the limitation that the right of contract, freely entered into, has to yield to the health, the moral welfare or the safety of the public.

Various states in the United States of America, under the common law, were also not prepared to police the content of a contract or the process of formation of a bargain. Save for instances where the contract formation was contaminated by fraud, undue influence or where the contract was illegal or against public policy, [201] or where the bargain is unconscionable, illegal or based on unequal bargaining power between the parties concerned, the legal consequences of the agreement would not be interfered with. Very often though, the consumer, because of his/her poor or middle class background, is placed

196 Kessler "Contract of Adhesion - Some thoughts about Freedom of Contracts" 43 *Colum.L.Rev.* 629, 629-631 (1943).

197 "Contract of Adhesion - Some thoughts about Freedom of Contracts" 43 *Colum.L.Rev.* 629, 629-631 (1943).

198 Kessler "Contract of Adhesion - Some thoughts about Freedom of Contracts" 43 *Colum.L.Rev.* 629, 629-631 (1943).

199 Aronstam *Consumer Protection, Freedom of Contract and the Law* (1979) 7.

200 *Consumer Protection, Freedom of Contract and the Law* 1979) 7.

201 Calamari and Perillo *Contracts* (1987) 429; Scheiber *The State and Freedom of Contract* (1998) 75; American College of Legal Medicine *Legal Medicine* (1991) 50-51; West Group *Corpus Juris Secundum* (1999) 67.

in an unequal bargaining position. Often, because of their position, they are compelled to accept the terms of an agreement without a possible alternative. Very often the terms were not even understood or read. [202] *Pound*, [203] in this regard, remarked some hundred years ago:

"The bigness of things in the economy today, which precludes the equality of the parties that the regime of free contract presupposed and throws upon the service state to ensure the fulfilment of reasonable expectations which are increasingly beyond the reach of the ordinary man." [204]

In time greater interest was shown in rescuing many contracting parties from the harm of bad bargains. In so doing pressure groups and legal writers re-aligned themselves with the changes in community values, inclusive of striving for fairness and justice in contract. [205]

A significant event in the long history of the American law of contract occurred when the American common law was codified, virtually putting a stop to the unlimited freedom of contract. Under the auspices of the American Law Institute, membership of which included Justices of the United States Supreme Court, Senior Judges of other divisions of the American courts, leading academics, the American Bar Association and the Association of American Law Schools, the common law was restated. One of the chief aims of the restatement of the common law was said to include to:

"*Clarify and simplify the law and to render it more of certain ...*"

The function of the courts was stated to include: *"to decide the controversies brought before them."* The function of the Institute was said to include: *"to state clearly and precisely, in the light of the decisions, the principles and rules of the common law."* [206]
There were two restatements, the first being 1932 and the second in 1981. Section 179 of the second restatement in particular, made a significant impact into the general jurisprudential premise of freedom of contract. It lays down the foundation for the non-enforceability of a contract, or of contractual terms, on the grounds of public policy. In

202 Calamari and Perillo *Contracts* (1987) 429.

203 "The Decadence of Equity" *Columbia Law Review* 5 (1905) 163.

204 Dimatteo *Equitable Law of Contracts: Standards and Principles* (2001) 86-87.

205 Burton *Contract Law: Selected Source Materials* (1995) 1-2.

206 Burton *Contract Law: Selected Source Materials* (1995) 1-2.

terms of Section 179, the courts are directed to intervene to void a negotiated contractual term if it conflicts with a public policy as expressed or implied in legislation or if it is against *"some aspect of public welfare."* [207]

The restatement also provides examples of the policies against *inter alia* restraint of trade and limitations on contractual duties or exculpatory clauses. S195 (1) expressly sanctions voiding of overly broad exculpatory clauses on the grounds of public policy. It provides that *"a term exempting a contracting party from tort liability is unenforceable on grounds of public policy."* [208]

Besides the restatements, the legislature also stepped into the American Law of Contract, bringing about fundamental changes to the American Law of Contract in the twentieth century. [209] In this regard, Article 2 of the Uniform Commercial Code (1990) is said to have supplemented much of the common law of contracts, in the area of sales. It is also said to grant judges a discretion to impose equitable corrections in the interests of justice, when, by applying the rules, it would lead to unfair results. [210]

The Uniform Commercial Code (1990) also addressed unconscionable clauses or agreements. Section 2-302 in this regard provides that:

"*If the court as a matter of law finds the contract or any clause to have been unconscionable, the court may refuse to enforce the contract."* [211]

The code has also introduced the adoption of the principles of equity and the notion of good faith in the enforcement of the code provisions. [212]
The American writers hold the view that legislative inroads into contract law have resulted in the replacement of the broad interpretive discretion delegated to the courts. The said

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207 *Restatement (Second) of Contracts* S179 (b) (1981).

208 *Restatement (Second) of Contracts* S195 (1) (1981).

209 Dimatteo *Equitable Law of Contracts: Standards and Principles* (2001) 99.

210 Dimatteo *Equitable Law of Contracts: Standards and Principles* (2001) 100.

211 *Uniform Commercial Code* S2-302(1) (1990) See also Summers and Hillman *Contract and Related obligation theory Doctrine and Practice* (1987) 506.

212 Dimatteo *Equitable Law of Contracts: Standards and Principles* (2001) 100-101; See also the *Uniform Commercial Code* 551-103, 1-203 (1990).

discretion has been substituted with the adoption of the principles of equity and good faith, ensuring maximally just legal outcomes. [213]

The American courts, according to *Aronstam,* [214] gradually recognized that statutory limitations to the individual's freedom to contract have just and reasonable results.

8.2.4.2 Case Law

The American courts have for centuries upheld the principle of freedom of contract. The effect thereof was that once a contract had been entered into, the task of the courts was to ensure that the principle of sanctity of exchange and the accompanying values pertaining to the keeping of one's promises, in an exchange, were fulfilled.

The rationale for acknowledging and enforcing the afore stated principles was stated, as follows, by Artherburn CJ in the case of *Weaver v American Oil Co.* [215]

"The traditional contract is the result of free bargaining of parties who are brought together by the play of the market, and who meet each other on a footing of approximate economic equality. In such a society there is no danger that freedom of contract will be a threat to the social order as a whole ....." [216]

For that reason the American Courts have strongly resisted interference with contractual freedom and the sanctity of contract, so much so, that the courts used public policy as a reason for their resistance to interfere with contractual freedom. In this regard, the American courts have relentlessly followed the principles, laid down by Sir George Jessel, in the much quoted dictum of *Printing and Numerical Registering Co v Sampson* [217] in which it was stated:

"It must not be forgotten that you are not to extend arbitrarily those rules which say that a given contract is void

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213 Dimatteo *Equitable Law of Contracts: Standards and Principles* (2001) 100-101; See also the *Uniform Commercial Code* SS1-103, 1-203 (1990); See also Atiyah *The Rise and Fall of Freedom of Contract* (1979) 617; See also Burton *Contract Law: Selected Source Materials* (1995) 6 on the uniformity the code has brought with it.

214 *Consumer Protection, Freedom of Contract and the Law* (1979) 7. See also Dimatteo *Equitable Law of Contracts: Standards and Principles* (2001) 102; The *Uniform Commercial Code* SS1-103, 1-203 (1990); Atiyah *The Rise and Fall of Freedom of Contract* (1979) 617; Burton *Contract Law: Selected Source Materials* (1995) 6 on the uniformity the code has brought with it.

215 257 Ind. 458, 276 N.E. 2d 144 (Supreme Court of Indiana 1971).

216 *Weaver v American Oil Co* 257 Ind. 458, 276 N.E. 2d 144 (Supreme Court of Indiana 1971); *Henningsen v Bloomfield Motors Inc* 32 N.J. 358, 161 A 2d 69 (Supreme Court of New Jersey, 1960)

217 19 EQ. CAS. 462.

as being against public policy, because 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. Therefore, you have this paramount public policy to consider that you are not lightly to interfere with this freedom of contract." [218]

The general rule is therefore that competent persons shall have the utmost liberty of contracting and that these agreements, voluntarily and fairly made, shall be held valid and enforced by the courts. [219]

In the case of *Diamond Match Co v Roeber* [220] Andrews J, as far back as 1887, followed the case of *Printing and Numerical Registering Co v Sampson* 19 EQ CAS. 462 held:

"It is clear that public policy and the interests of society favour the utmost freedom of contract, within the law, and require that business transactions should not be trammelled by unnecessary restrictions." [221]

One of the first cases in which the American Courts refused to interfere with the freedom of contract and found that a statute constituted an unwarranted interference with freedom of contract, was that of *Godcharles v Wigeman*. [222] In this case the court found that a statute, requiring labourers to be paid their wages in money and not in goods, was degrading and insulting to the labourers in that it prevented them, as persons, having full legal capacity, from making their own contracts for the payment of wages.

In a subsequent case of *State v Hauen,* [223] the Supreme Court of Kansas, when dealing with a similar statute which prescribed payment of wages in money, went so far as to accuse the State legislature of placing the labourer under guardianship, thereby classifying

218 *Printing and Numerical Registering Co v Sampson* 19 EQ CAS. 462 followed in an unlimited number of American cases including but not restricted to *North Cutt et al v Highfill* 225 Ky. 456, 9 S.W. ed 209 (1928); *Anderson et al v Blair* 202 Ald 209, 80 So 31 (1918); *Twin City Pipe Line Co et al v Harding Glass Co* 282 U.S. 353, 51, S.Ct 476 (1931); *Diamond Match Co v Roeber* 106 N.Y. 433, 13 N.E. 419 (1887).

219 *Twin City Pipe Line Co et al v Harding Glass Co* 283 U.S. 253, 51 S. Ct 476 (1931); *Henningsen v Bloomfield Motors Inc* 32 N.J. 358, 161 A 2d 63 (1960); *Home Beneficial Ass'n v White* 180 Tenn. 585, 177 S.W. 2d 545 (1942); *Chicago Great Western Freeway Company v Farmers Produce Company* 164 F. Supp 532 (1958); *Smith v Seaboard Coast Line Railroad Company* 639 F. 2d 1235 (1981).

220 106 NY 473, 13 NE 419 (1887).

221 *Diamond Match Co v Roeber* 106 NY 473, 13 NE 419 (1887).

222 (1886) 113 PA at 427.

223 (1892) 61 KANS 146.

him, in right of freedom of contract, alongside the idiot, the lunatic or the felon in the penitentiary.

The doctrine of freedom of contract was emphasized in the well known case of *Lochner v State of New York*. [224] In this case the American Supreme Court decided that Art 8 Sec 110 of New York Laws 1897, which limited employment in bakeries to 60 hours a week and to 10 hours a day, constituted an arbitrary interference with the freedom to contract guaranteed by the 14th amendment to the Constitution of the United States of America. In this regard Mr Justice Peckham stated the following:

"There is no reasonable ground for interfering with the liberty of person or right of free contract, by determining the hours of labour, in the occupation of a baker. There is no contention that bakers as a class are not equal in intelligence and capacity to match other trades or manual occupations, or that they are not able to assert their rights and care for themselves without the protecting arm of the State, interfering with their independence of judgement and of action. They are in no sense wards of the State. Viewed in the light of a purely labour law, with no reference whatever to the question of health, we think that a law like [this] one involves neither the safety, the morals not the welfare of the public, and that the interest of the public is not in the slightest degree affected by such an act." [225]

Although the courts retained the power to declare a contract void for being in contravention of sound public policy, the American Courts have expressed caution before doing so. The court adopted the following approach in *Equitable Loan and Security Co v Waring*: [226]

"The power of the courts to declare a contract void for being in contravention of a sound public policy is very delicate and undefined power, and, like the power to declare a statute unconstitutional, should be exercised only in cases free from doubt. The authority of the law making power to interfere with the private right of contract has its limits and the courts should be extremely cautious in exercising the power to supervise private contracts which the law making power has not declared unlawful." [227]

Some of the American courts have enforced this general rule very vigorously and have invoked constitutional guarantees in the past. In the case of *Josie E Smith v Edward Simson JR and FL Cappaert* [228] it was stated:

"The right to contract and have contracts enforced is a basic one guaranteed by the Constitutions. The function of

224 (1898) 45 US 198.

225 *Lochner v State of New York* (1898) 45 US 198.

226 117 GA. 599(1) (2; 44 SE 320 (1903).

227 *Equitable Loan and Security Co v Waring* 17 GA 599(1) (2); 44 SE 320 (1903).

228 224 So. 2d 565 (1969).

the courts is to enforce contracts rather than enable parties to escape their obligation upon the pretext of public policy. This Court has adjudged contracts void only when the illegality is clearly shown."

And further:

"Contracts voluntarily made between competent persons are not to be set aside lightly. As the right of private contract is no small part of the liberty of the citizen. The usual and most important function of courts is to enforce and maintain contracts rather than to enable parties to escape their obligations on the pretext of public policy or illegality." [229]

In *Banfield v Louis Cat Sports Inc et al,* [230] the Appeal Court of Florida also endorsed the principle of freedom of contract when referring to constitutional provisions, when it stated:

"It is a matter of great public concern that freedom of contract be not lightly interfered with. Bituminous Casualty Corp v Williams. When a particular contract, transaction, or course of dealing is not prohibited under any constitutional provision, statutory provision, or prior judicial decision, it should not be struck down on public policy grounds unless it is `clearly injurious to the public good' or `contravene(s) some established interest of society." [231]

Traditionally however, only in limited instances, have the American courts been prepared to come to the rescue of one of the contracting parties.

The courts showed a willingness to depart from the principles of freedom of contract and the sanctity to enforce contracts in the following instances.

Firstly, courts have the power to invalidate agreements of parties on the grounds of public policy, but, only in those instances where the impropriety of a transaction is clear, in order to justify the exercise of the power. [232] For a full discussion on the requirements see Chapter 10.
Secondly, a contract may be set aside due to illegality, although a bare suspicion of illegality is not sufficient. [233] For a more in-depth discussion see Chapter 9.

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229 *Josie E Smith v Edward Simson JR and FL Cappaert* 224 So 2d 565 (1969); *Walker v American Family Mutual Insurance Co* 340 N.W. 2d 599 (1983).

230 589 So. 2d 441, 16 Fla. (1991).

231 *Banfield v Louis Cat Sport Inc* et al 589 So. 2d 441, 16 Fla. (1991).

232 *Banfield v Louis Cat Sport Inc* et al 589 So. 2d 441, 16 Fla. (1991).

233 *Ingalis v Perkins* 33 N.M. 269, 263 P. 761 (1928); *Styles v Lyon* 87 Conn. 23, 86 A. 564 (1913); *Anderson et al v Blair* 202 Ala. 209, 80 So. 31 (1918); *Twin City Pipe Line Co et al v Harding Glass Co* 283 U.S. 353, 51 S6 476 (1921); *Smith v Simon and Cappaert* 224 So 2d 585 (1969); *Ryan v Griffin* 199 V.A. 891, 103 S.E. 2d 240

Thirdly, acts which are injurious to public interests will also be declared invalid, but only in those instances where the conduct is clear and free from doubt. [234] For a more in-depth discussion see Chapter 10.

Other factors impacting on contractual freedom include the principle of fairness, inequality of bargaining power between the contracting parties, the effect of exclusionary clauses in contracts etc.

8.2.4.3 Legal Opinion

Because American contract law is founded on the philosophical grounding that every force in society ought to be permitted to act freely and no unnecessary constraints be placed, in the business world, contracting parties were expected to honour, *inter alia,* freedom to contract and to keep to their promises once contracts have been executed. It was especially during the nineteenth century that the spirit of individualism and of *laissez-faire* was promoted. [235]

Courts were extremely hesitant, during this period, to declare contracts void as against public policy due to the principle of sanctity of contracts. Private rights were exaggerated almost at the expense of public interests. [236] The only limitation placed on freedom to contract during this period was due to health, moral welfare or the safety of the public. [237]

(1958); *Henningsen v Bloomfield Motors Inc* 32 N.J. 358 161 A. 2d 69 (1960); *Banfield v Louis Cat Sports Inc* 589 So. 2d 441; 16 Fla. (1991); *Stack and Stack v State Farm Mutual Automobile Insurance Company* 507 So. 2d 617 12 Fla. (1987); *Martin v Allianz Life Insurance Company of North America* 573 N.W. 2d 823 (1958).

234 *Ingalls v Perkins* 33 N.M. 269, 263 P 761 (1928); Anderson *v Blair* 202 Ala 209, 80 So. 31 (1918); *Smith v Simon and Cappaert* 224 So 2d 585 (1969); *Zeitz and Foley* 264 S.W. 2d 267 (1954); *Diamond Match Co v Roeber* 106 N.Y. 473 13 N.E. 419 (1887).

235 Pound "Liberty of Contract" (1908-9) 8 *Yale Law Journal* 424 at 457; Kessler "Contract of Adhesion - Some thoughts about Freedom of Contracts" 43 *Columbia Law Review* 629-63 (1943); Dimatteo *Equitable Law of Contracts: Standards and Principles* (2000) 85; Summers and Hillman *Contract and Related Obligation - Theory, Doctrine and Practice* (1987) 507; Graswell and Swartz *Foundations of Contract Law* (994) 3; Hunter *Modern Law of Contracts* 5-3; Macauly, Kidwell and Whitford *Contracts: Law in Action* (1995) 7.

236 Kessler "Contract of Adhesion - Some thoughts about Freedom of Contracts" 43 *Colum.L.Rev.* 629, 629-631 (1943); Aronstam *Consumer Protection, Freedom of Contract and The Law* (1979) 7; *Henningsen v Bloomfield Motors Inc* 32 N.J. 351, 161 A 2d 69 (1960); *Twin City Pipe Line Co et al v Harding Glass Co* 283 U.S. 253, 51 S. Ct 476 (1931); *Home Beneficial Ass'n. V White* 180 Tenn. 585, 177 S.W. 2d 545 (1949); *Chicago Great Western Freeway Company v Farmers Produce Company* 164 F. Supp 532 (1958); *Smit v Seaboard Coast Line Railroad Company* 639 F. 2d 1235 (1981); *Lochner v State of New York* (1898) 45 U.S. 198.

237 Kessler "Contract of Adhesion - Some thoughts about Freedom of Contracts" 43 *Colum.L.Rev.* 629, 629-631 (1943); Aronstam *Consumer Protection, Freedom of Contract and The Law* (1979); For case law see *Weaver v American Oil Co* 257 Ind. 458, 276 N.E. 2d 144 (1971) 7; *Henningsen v Bloomfield Motors Inc* 32 N.J. 354, 161 A 2d 69 (1960).

This was later broadened to include contracts contaminated by fraud, undue influence, illegal contracts and contracts against public policy. [238]

In time, many organizations began to show great interest in consumer affairs. During this period it was identified that the fallacy which once existed, namely, contracting parties remain on equal footing, was not true. Especially with the advent of standard terms contracts, critics realised that it was the poor or middle class which were usually placed in an unequal bargaining position when contracting. They were compelled to accept the terms without a possible alternative, often resulting in great harm being suffered due to bad bargains. [239]

For that reason pressure groups and legal writers alike started advocating fairness and justice in contract. [240]

The pressure applied by the said courts eventually led to the American common law being codified in terms of the Restatement of the common law, under the auspices of the American Law Institute. [241] The Restatement provided for the intervention of the courts where contracts or contractual terms conflicted with some aspects of public welfare. [242]

Besides the Restatement, the legislature also stepped in, promulgating the Uniform Commercial Code (1990), which must also be seen as an attempt to curb contractual freedom. In this regard, the Code always empowers the American courts to refuse to enforce a contract or terms of the contract where the contract or clause is unconscionable. [243]

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238 Calamari and Perillo *Contracts* (1987) 429; Schreiber *The State and Freedom of Contract* (1998) 75; American College of Legal Medicine *Legal Medicine* (1991) 50-51; West Group *Corpus Juris Secundum* (1999) 67
For case law see *Josie E Smith v Edward Simson JR and FL Cappaert* 224 So. 2d 565 (1969); *Walker v American Family Mutual Insurance Co* 340 N.W. 2d 599 (1983); *Banfield v Louis Cat Sports Inc* et al 589 So. 2d 441, 16 Fla. (1981).

239 Calamari and Perillo *Contracts* (1987) 429; Burton *Contract Law: Selected Source Materials* (1995) 1-2.

240 Burton *Contract Law: Selected Source Materials* (1999) 1-7.

241 *Restatement (Second) of Contracts* Sec 179(b) (1981).

242 *Restatement (Second) of Contracts* S195 (b) (1981).

243 *Uniform Commercial Code* S2-302(1) (1990) See also Summers and Hillman *Contract and Related obligation theory Doctrine and Practice* (1987) 506.

It is today recognised, in the United States of America, that curbing freedom of contract through statutory interventions has just and reasonable results. [244]

8.2.5 Summary and Conclusions

It is evident from the contents and scope of this Chapter that the impact of freedom of contract is universally far reaching and profound. The history, including the origin and development, the nature and scope and the influence of freedom of contract in countries such as South Africa, England and America, was looked at in great depth. While it is clear that during the classical period the pure doctrine of freedom of contract applied, including an unlimited freedom to contract, certain limitations were however, in time, placed on freedom of contract. The nature of the pure doctrine of freedom of contract, as was seen during the discussion in this Chapter, entailed *inter alia,* that contracting parties should be free to negotiate the terms of their contracts without legislative or judicial interference. Further, where contracting parties have entered into an agreement, full legal effect should be given thereto. This could be achieved by holding agreements sacred and enforcing the obligations that flowed from such agreements.

It also emerged during the discourse in this Chapter that, in time, protagonists of the pure doctrine of freedom of contract were severely criticised by legal writers, the courts and consumer organisations. The ethos of pure freedom of contract became a target, especially, during the advent, and consequent influence, of standardised contracts. A factor most extensively debated is the general unequal bargaining position of contracting parties to standardized contracts. Often the weaker contracting parties find themselves at the mercy of the stronger contracting parties, which consequently lead to unfair and harsh results. The resistance to the application of the doctrine of pure freedom of contract shepherded in a new ethos, namely, a duty of good faith and fair dealing in the concluding of agreements and the enforcement of contracts.

From the discussion it also emerged that various doctrines were founded and developed, which played a role in the protection of the weaker party in the law of contract. They include paternalism, good faith, public policy, inequality and unconscionable ness.

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244 Aronstam *Consumer Protection, Freedom of Contract and the Law* (1979) 7. See also Dematteo *Equitable Law of Contracts: Standards and Principles* (2001) 192; *The Uniform Commercial Code* SS1-103, 1-203 (1990; Atiyah *The Rise and Fall of Freedom of Contract* (1979) 617; Burton *Contract Law: Selected Source Materials* (1995) 6 on the uniformity the code has brought with it.

Having acquired a greater understanding of freedom of contract from an historical perspective, the remaining part of the Chapter was dedicated to the investigation of the influence which freedom of contract has had and continues to have in countries, *inter alia,* South Africa, England and the United States of America.

What flows from the discussion in this chapter is that western democracy and capitalism is deeply embedded in the respective political systems, as well as the business and commercial spheres of the countries selected for the research undertaken. Contract law in all three the said countries is based on the paradigm of a free market, where voluntary participation by individuals is perceived to occur on equal footing in a bargaining process.

From the afore stated perception a jurisprudence developed which caused legal writers and the courts to accept that an individual is free to decide whether, with whom, and on what terms to contract and once a contract has been concluded, the wishes of the contracting parties must be adhered to by the exact enforcement of the contractual obligations.

But, it is especially in countries such as England and the United States of America that voices have gone up, through legal writings and consumerism as well as, judicial pronouncements that the notion of autonomy and the principles derived from it, are not absolute. The most prominent factors influencing the paradigm shift included the changing values of society, the recognition of the inequality of bargaining power, public policy, as well as constitutional, judicial and legislative protection. From the application and workings of the aforementioned factors it is clear that they have had a profound effect in inhibiting private autonomy of contracting parties.

The significance and the effect of adopting the mentioned factors were especially seen after the emergence of the domination of standardized contracts. The factors served to counter the inequality of bargaining power which often led to harsh, unfair and unreasonable results. They contributed to a paradigm shift in thinking in countries, *inter alia,* England and the United States of America. More particularly, legislative interventions in both England and America have impacted severely on the notions of freedom of contract and the sanctity of contract. England introduced the Unfair Contract Terms Act 1977 and other forms of legislation, whereas, the United States of America introduced the Restatement of Contracts (First and Second) in 1936 and 1981, respectively. The United States of America also introduced the Uniform Commercial Code. The effect of the legislative intervention is that in terms of legislative prohibitions, certain contracts or contractual provisions are void *ab initio* and if challenged, the courts will make pronouncements upon legislative lines. Alternatively,

as is the case with the application of the American Uniform Commercial Code, American judges are given discretion to impose equitable corrections, in the interest of justice, where contracts or provisions of contracts would lead to unfair results. Sadly to say, South Africa still lags far behind in bringing transformation to contract law and all its facets, including, the influence of the freedom of contract and the sanctity of contract.

But, all in all, despite the interventions introduced in countries such as England and the United States of America, freedom of contract and the sanctity of contract still remains the pillar of contract law, especially in western, democratic countries.

The discussions in this Chapter have focused on the influence of freedom of contract in countries such as South Africa, England and the United States of America. The subsequent Chapters will consider, in more detail, factors impacting on contractual freedom alluded to in this Chapter, the legal effect of contracts containing exclusionary clauses and the factors impacting on the validity of exclusionary clauses.

Consequently, factors impacting on contractual freedom are the subject of the next Chapter.

Chapter 9

General Law of Contract: Selective principles influencing the law of contract and medical contracts. The influence of the *caveat subscriptor* rule

9.1 Introduction

From the discourse in the previous Chapter, it is undoubtedly so that the doctrine of freedom of contract and the sanctity of contract, have made serious inroads and impacted heavily on the law of contract, universally.

One of the consequences which flow from the doctrine of freedom of contract is the rule that once a contracting party concludes a written contract by signing the agreement, the contracting party is bound by the agreement notwithstanding the subsequent cause and effect, alternatively, that the terms of the contract are not to his/her liking. It is generally accepted the contracting party cannot complain as he/she has no-one to blame but him/herself. The rule is generally known as the *caveat subscriptor* rule which crudely translated, means `*let the signer beware*'. The *caveat subscriptor* rule has found recognition and is applied in the law of contract in all the jurisdictions chosen for the research undertaken in writing this thesis. The rationale for the continued recognition and implementation of the rule in the different jurisdictions is to give stability to written agreements or to enshrine an element of sacrosanct to writing. Besides the traditional defences recognized in the law of contract, including misrepresentation, mistake, undue influence, duress, illegality and fraud, which all serve as exceptions to the *caveat subscriptor* rule, the introduction and domination of standard contracts has also brought about the questioning, at times, of whether true assent has taken place between the contracting parties. This is especially relevant where the terms of agreement contained in the standard contract are oppressive, unfair, indecent or unconscionable.

In those instances, where a contracting party has not been afforded a genuine opportunity to read the clause containing the terms in question, true asset could not have taken place. The consequence thereof is said to influence the obviation of the required consensus between the contracting parties. Besides the afore stated traditional exceptions to the *caveat subscriptor* rule, it is especially the American Law which imposes certain duties on those contracting parties who occupy a stronger bargaining position, to bring certain terms and conditions to the attention of the weaker contracting party. This results, then, in a further exception to the *caveat subscriptor* rule if not complied with. But, the effect of the *caveat subscriptor* rule, otherwise, is far-reaching, in that, contracting parties, regardless of their literacy level or ignorance or the fact that they read the terms of the contract or not, are chargeable in law with knowledge of the terms of the contract which they choose to sign. A failure to seek advice or the negligence in not reading, whether a party signs in haste or not, will have the effect that he/she will suffer the consequence of their negligence, by being held to the terms of the agreement notwithstanding the terms being oppressive or unfair.

But, despite the influence and effects of the *caveat subscriptor* rule from what appeared in this Chapter, there are exceptions to the *caveat subscriptor* rule. The primary exceptions to the *caveat subscriptor* rule, which also serve as total defences in contract law in the jurisdictions selected for the research undertaken in this thesis, include, misrepresentation, mistake, also known as *Justus error*, illegality, duress, undue influences and fraud. For the purpose of introducing the various defences individually, a discourse of the rationale for their recognition in the various jurisdictions will be undertaken.

In so far as misrepresentations are concerned, it is generally recognised that as dissensus between the parties exist resultant from a misstatement of fact, there is no *animus contractus*. The legal consequence, generally, is that the contracting party to whom the misstatement is made and who acted thereupon may resile from the agreement.

Where a party relies on mistake as a defence, the contracting party who wishes to recile from the agreement may, depending on the circumstances, argue that to enforce the agreement would be contrary to the intention of the parties. To hold otherwise would, in certain cases, lead to unjust results. The consequence thereof is that the party relying upon mistake will have the remedy available to recile from the contract and seek cancellation.

Illegality has long been a defence to the *caveat subscriptor* rule. The rationale for the existence of illegality as an exception to the *caveat subscriptor* rule is founded on general

terms, namely, to allow an agreement founded in contravention of a statute or the common law would be contrary to public policy or *contra bones mores*. The courts would be wanting in their duty if they hesitated to declare such arrangements void. The underlying reason for the law's intervention in this way is also said to lie in the fact that it serves as a deterrence, in that, the law does not allow a person to benefit in any way from illegal behaviour. Also the courts should never be seen, by law-abiding members of the community, to be lending their assistance to claimants who have defied the law. The legal consequences, where these types of contracts are found to be illegal, are that these types of contracts are void.

In both duress and undue influence, the rationale for the recognition of both defences, lies in the fact that consent was not freely given and properly given when the transaction was entered into. It has also often been suggested, and quite rightfully so, that such an agreement, induced by duress or undue influence, such purported agreement lacks consensus or full intent between the contracting parties. The effect of duress is that such an agreement is voidable, at the instance of the party who wishes to recile from the agreement.

The final exception and defence to the *caveat subscriptor* rule is that of fraud. In this regard the law will not recognise an undertaking by which one of the contracting parties binds himself to condone and be subject to the fraudulent conduct of the other. This will be contrary to public policy. The presence of fraud is generally said to vitiate any contract, as such agreements are generally regarded as odious and fatal in a court of law. The consequences of such agreements are they are void *ab initio*. The remedies available to the aggrieved party are cancellation and claiming restitution, or to keep the agreement in abeyance but claim damages.

9.2.1 SOUTH AFRICA

9.2.1.1 Legal Writings

The term `*caveat subscriptor*" is a term received in the South African Law of Contract from Roman law. Crudely translated it means `*let the signer beware*'. As a general rule it has been accepted, by the South African legal writers, that a person who signs a contractual document thereby signifies his assent to the contents of the document. Once a person has signed a contractual document, but it subsequently it turns out that the terms of the contract are not to his/her liking, he/she cannot complain, as he/she has no one to blame but him/herself. [1] The legal effect thereof is that once a contracting party to the document,

[1] Farlam and Hathaway *The Case Book on the South African Law of Contract* (1979) 65; Christie (2001) 199ff.

unaware that it contains a contract, or, in the mistaken belief that the document contains terms of a contract other than those he intended, he will, in general, not be permitted to rely on his mistake to escape liability. [2]

The underlying reason therefore is that a reasonable man generally takes care that the documents he signs correctly reflect his intentions. [3]

But, signing a document without reading it does not in every instance mean that the signatory will be bound by it. There are instances where one's signature can be voided, for example, through mistake, misrepresentation, duress, undue influence etc. [4] The rationale is founded upon the reliance theory in that, in circumstances in which there has been no true agreement between the parties and if a contractant had not created a reasonable impression that he/she intended to be bound, that party cannot be bound by that agreement. The importance thereof is that the person who relies on a signature must have a reasonable belief that the signatory intends to be bound by the terms of the agreement. But, this belief will not be reasonable if he/she is aware that a mistake has been made, or where he/she ought reasonably to have known that the terms do not reflect the signatory's true intentions, or where he/she was in some way responsible for the fact that the signatory was not aware of the contents of the contract. [5]

Therefore, the legal writers have stated that; in instances where the signatory has not read the document before signing it, in circumstances where, from his/her attitude, expressed or implied, it is easily conveyed through his/her attitude that he/she is bound by the terms, notwithstanding, the choice exercised not to read the contents of the agreement, he/she is bound to the terms. [6]

But the legal writers do recognise that there are circumstances when a contracting party despite his/her signing the document, will not be bound to the terms. In those instances,

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2 Christie (2001) 199-200; Joubert *The General Principles of the Law of Contract* (1987) 85; Farlam and Hathaway (1979) 65; Walker "*Caveat Subscriptor: How careful are we expected to be?*" (2003) 15 *SA Merc. LJ* 109 at 110.

3 Christie (2001) 199-200; Joubert (1987) 85; Farlam and Hathaway (1979) 65; Walker "*Caveat Subscriptor: How careful are we expected to be?*" (2003) 15 *SA Merc. LJ* 109 at 110.

4 Farlam and Hathaway (1979) 65; Joubert (1987) 85; Walker "*Caveat Subscriptor: How careful are we expected to be*?" (2003) 15 *SA Merc LJ* 109 at 110.

5 Walker (2003) 15 *SA Merc. LJ* 110 - 111; Christie (2001) 199-200; Farlam and Hathaway (1979) 65-66.

6 Christie (2001) 199-200; Joubert (1987) 85.

special defences, including the ignorance and handicap of the signatory to whom the contents of the document has been inadequately and inaccurately explained; where a trap has been set for the signatory; where despite the signatory appending his/her signature to the document without reading the document, the document contained a term or terms which the reasonable man would not expect to find therein, may be raised. [7]

The other defences to the *caveat subscriptor* rule, recognised by the legal writers, include misrepresentation, mistake, illegality, duress and undue influence. Consequently, each defence will be discussed individually hereinafter.

Misrepresentation

Misrepresentation, itself, may take the form of fraudulent, (intentional), negligent or innocent misrepresentation. [8]

Fraudulent misrepresentation includes the following elements, namely, a wrongful, pre-contractual false statement of fact, fraudulently (intentionally) made, with the intention to induce the person to whom it is made to conclude the contract or to agree to its terms, to which the person to whom the misrepresentation is made, would not otherwise have agreed. [9]

Negligent and innocent misrepresentation, on the other hand, includes the following elements, namely, a wrongful, pre-contractual false statement of fact, which is made either negligently or innocently, by one party to a contract and which induces the other party to enter into the contract or to agree to terms to which he/she/it would not have agreed had the truth been known. [10]

Misrepresentation is recognised as one of the defences to the *caveat subscriptor* maxim. [11] Although South African legal writers recognise that remedies for non-fraudulent misrepresentation can be excluded, by prior agreement between the parties, provided there

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7 Christie (2003) 201-203; See also Lubbe and Murray Farlam and Hathaway *Contract, Cases, Materials, Commentary* (1988) 132ff.

8 Joubert *LAWSA* Volume 5 Part 1 (1994) Par 146; O'Brien *TSAR* 2001-3 597 at 599-600.

9 Joubert *LAWSA* Volume 5 Part 1 (1994) Par 147.

10 Joubert *LAWSA* Volume 5 Part 1 (1994) Par 149.

11 Christie (1996) 182; Kahn "Imposed Terms in Tickets and Notices" *Businessman's Law* (1974) 159.

is consensus between the parties, [12] the same cannot be said for fraudulent misrepresentation as the remedies for fraudulent misrepresentation cannot be excluded by a prior agreement between the parties. [13]

The harshness which is said to befall the operation of exemption clauses involving non-fraudulent misrepresentation may be mitigated in a number of ways, inter alia, the contract as a whole, including the exemption clause, is void where the misrepresentation has resulted in a dissensus between the parties. [14] Proof of fraud on the part of the representor is also said to be extremely difficult to prove in practise. For that reason our legal writers suggest that exemption clauses are ineffective on the grounds of public policy. [15]

Mistake (Justus error)

Justus error, or operative mistake, refers to a factual situation involving mistake of which the law will take notice. It is a mistake which is otherwise described as one "*which is reasonable and justifiable*", and which the law takes notice of. [16] The law takes notice of it, for as Pothier [17] states, "*error is the greatest defect that can occur in a contract, for agreements can only be formed by the consent of the parties, and there can be no consent when the parties are in error respecting the object of their agreement .....*" [18]

Therefore, according to the Roman law classification, there is no contract if there is a mistake as to the nature of the agreement (*error in negotia*); or as to the identity of the party, provided this is material (*error in persona*); or as to the identity of the subject-matter (*error in corpore*); or as to some essential quality (*error in substantia*). [19]

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12 Joubert *LAWSA* Volume 5 Part 1 (1994) Par 150; Farlam and Hathaway (1988) 340.

13 Joubert *LAWSA* Volume 5 Part 1 (1994) Par 148; Kerr (1998) 404-405; Christie (1996) 205.

14 Farlam and Hathaway (1988) 340; Ramsden "The Meaning of Mutual Mistake and Exemption Clauses" *SALJ* (1975) 139 at 141.

15 Farlam and Hathaway (1988) 340.

16 Christie (2003) 303; Kerr *The Principles of the Law of Contract* (2002) 242; Lubbe and Murray (1988) 132ff.

17 Pothier, *Traite Des Obligations translated by Evans* (1802) and quoted by Kahn *Contract and Mercantile Law through the cases* (1971) 85.

18 Pothier, Traite *Des Obligations translated by Evans* (1802) and quoted by Kahn *Contract and Mercantile Law through the cases* (1971) 85.

19 Farlam and Hathaway (1979) 65; Kerr (2002) 246ff; Joubert (1987) 73-74.

In modern times a distinction is drawn between a unilateral mistake i.e., when one party to the contract is mistaken but the other is not; so the existence of the mistake may not be known to the other party; there is a mutual mistake when each party is mistaken about the other party's state of mind - they are at cross purposes; there is a common mistake when both parties are of one mind and share the same mistake about anything other than the state of each other's mind. [20] *Christie* [21] holds the view that a person who makes a unilateral mistake ought not to be given relief, for the whole concept that a contract is a binding and enforceable agreement would be so destroyed. But, the author does recognise that when at the time of contracting he, personally, was labouring under some misapprehension; he has a better claim to the law's attention. The test, however, remains an objective test. Where the mistaken party has so conducted himself as to give the other party reasonably to believe that he was contracting with him on certain terms, he is nevertheless bound by the contract, whatever his subjective state of mind. Where however, the mistaken party can prove that the other party knew of his mistake, or that, as a reasonable person he ought to have known of it, or that he caused it, the onus of showing that the mistake was a reasonable, one justifying release from the contracting bond rest on him. But, cautions the writer, the possibility of a *justus error* being shown is limited. Where the mistake is caused by the other party, the mistaken party may seek recision of the contract, provided the mistake is sufficiently material and the mistaken party shows that he would not have entered into the contract if he had known the truth. An example hereof may occur with fraudulent conduct or the party is brought under the impression he signs for this type of transaction but, as it turns out, that, in fact, it is another transaction or it may take the form of mistakenly thinking that a written contract contains terms other than those it actually does contain. [22]

Mutual mistake occurs where the contracting parties are at cross purpose and not *ad idem*. Here the reasonableness of the understanding of both parties is compared. It is only where the mistake is regarded as reasonable that the mistake could be regarded as *justus*. The effect thereof is that a mutual mistake resulting from a misrepresentation, if substantiated, would render the contract void *ab initio*. [23]

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20 Christie (2003) 363-382; Kerr (2002) 255ff; Lubbe and Murray (1988) 132ff.

21 *The Law of Contract* (2003) 365; Kerr (2002) 251.

22 Christie (2003) 371.

23 Christie (2003) 378.

Parties who are commonly mistaken are, by definition, ad *idem* and the contract is not necessarily void. But, the matter is different where the common mistake is caused by one of the parties only. In such an instance relief may be sought by the party who was not responsible for the mistake. Where the mistake is due to him, he being the author of his own loss, he may not find relief. Common mistake will result in the contract being declared void *ab initio,* but only if impossible performance is present. [24]

Illegality

In so far as illegality as a defence to the *caveat subscriptor* rule is concerned, it has long been a principle in the South African Law of Contract that, if a contract is illegal it is void. [25] In general terms, a contract is said to be illegal if the making of it or the performance agreed upon, or the ultimate purpose of both parties in contracting is prohibited by statutory law or common law i.e., is contrary to public policy or is *contra bones mores*. [26]

The South African legal writers are, generally, *ad idem* that exemption clauses may also be struck down where they are contrary to public policy. [27] The trend is to interpret public policy, in terms of the interest of society, to general, as well as, the interest of individual contractants. [28]

Individual contracts affecting public interests may take many forms. There are no numerous clauses. A few notable examples may be mentioned which include: contracts which undermine the safety of the state and public order; contracts concerning or affecting the maintenance of the sexual morality of the community and the sanctity of marriage and the family; contracts which promote forced labour etc. [29]

It is also well established that exemption clauses purporting to exclude liability for wilful acts, whether of a delictual or constituting a breach of contract, are regarded as ineffective for the want of legality on the grounds of public policy. [30]

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24 Christie (2003) 378ff; Kerr (2002) 255ff.

25 Joubert *LAWSA* Part 1 (1994) Par 167; Christie (1987) 115ff; Lubbe and Murray (1988) 238-241.

26 Christie (1987) 129ff; Kerr (2002) 181ff; Joubert *LAWSA* (1994) Par 167; Joubert (1987) 129ff.

27 Van der Merwe et al (2003) 215; Kerr (2002) 404-405; Christie (2003) 204-205.

28 Van der Merwe et al (2003) 215; Kerr (2002) 401; Christie (2003) 341ff; Lubbe and Murray (1988) 238; Joubert *LAWSA* First Review 5 Part 1 (1994) Par 164-165.

29 Lubbe and Murray (1988) 238-340; Joubert *LAWSA* (1994) Par 163-165.

30 Lubbe and Murray (1988) 425; Van der Merwe et al (2003) 215; Kerr (2002) 405-406; Christie (2003) 205-206.

Although it is generally accepted that exemption clauses excluding liability for ordinary negligence and gross negligence (*culpa lata*) escape the effect of illegality, and are regarded as effective and not against public policy, [31] there are voices who hold the view that, notwithstanding the generally accepted principle as enunciated hereinbefore, there are rights which are inalienable and may never be waived, forfeited, or transformed in a contract. In this regard, *Hopkins* [32] persuasively argues that contracts, whose enforcement would entail the violation of a right in the Bill of Rights, are unenforceable, because they are contrary to public policy. The writer also persuasively argues that the right to human dignity is the core right in the South African Constitution. This core right can be applied in public policy considerations, regarding contracts, where there is a great disparity of bargaining power between the parties. Although the writer does not believe that every instance of unequal bargaining power calls for the intervention of the courts, where however, *"the inequality is such that the `stronger' party is able to abuse the power imbalance to such a degree that the `weaker' party's right to human dignity is impaired during the contracting process, then intervention by the courts may be appropriate."* [33]

With regard to the legality of waivers, *Hopkins* [34] further persuasively argues that the limitation of a contractant's constitutional right can only be done provided two requirements are met, namely, `reasonableness' and `*proportionality*'. The latter requirement represents a balance between *"the benefit obtained (it must be a social benefit and not merely a private one) and the harm done."* [35]

The afore stated argument, it is submitted, may contribute very richly in considering the central theme of this thesis, especially, in assessing whether an exclusionary clause in a hospital contract, in which the hospital's (including its staff) liability may be waived, regardless of the hospital, through it's staff, acting negligently in treating the patient.

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31 Lubbe and Murray (1988) 425; 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* 2001-3 597 at 599; Hopkins "Constitutional rights and the question of waiver: How fundamental are fundamental rights?" (2001) 16 *SAPR/SAPL* 122.

32 Hopkins (2001) *SAPR/SAPL* 122 at 137.

33 Hopkins (2001) *SAPR/SAPL* 122 at 133.

34 Hopkins (2001) *SAPR/SAPL* 122 at 133.

35 Hopkins (2001) *SAPR/SAPL* 122 at 133.

Duress and Undue Influence

Duress (*metus*) and undue influence are defences which may be raised successfully where, for example, an exemption clause, included in a contract, was so included, through the abusive conduct of one party to the contract over another. This may take the form of pressure which, in itself, is manifested through duress and undue influence. [36]

In order to set aside a contract on the ground of violence or fear or duress the South African legal writers require the following elements to be present, namely:

"(1) Actual violence or reasonable fear;
(2) The fear must be caused by the threat of some considerable evil to the party or his family;
(3) It must be the threat of an imminent or inevitable evil;
(4) The moral pressure used must have caused damage." [37]

The rationale for the recognition of the defence of duress lies in the fact that consent was not freely and properly given when the transaction was entered into. Furthermore, where a threat induces a contracting party to contract with another, the law would not stand back and allow someone to suffer to his/her prejudice especially where the pressure is exercised unlawfully or *contra bonos mores*. [38]

For that reason, if a person's consent to a contract is obtained by some form of pressure which may be regarded as improper conduct in terms of the law, the agreement is voidable at the instance of the contractant who is adversely affected by the improper conduct. [39]

Further, the rationale for the limitation placed on the *caveat subscriptor* rule in this form, is said to be based on the fact that the exemption clause, or even the entire contract of which it is a part, may fail for lack of consensus between the contracting parties. But, even where consensus has been reached, nonetheless, an exemption clause may be voided where the abuse of the one party to the contract over the other contracting party in the prevailing circumstances, is such that it can be said that consensus reached, was so obtained, in an

36 Joubert *LAWSA* Volume 5 Part 1 (1994) Par 151; Van der Merwe et al (2003) 214-215.

37 Christie (2003) 349ff; Lubbe and Murray (1988) 355ff; Kerr (2002) 318ff; Farlam and Hathaway (1979) 215.

38 Kerr (2002) 318ff; Lubbe and Murray (1988) 362; Christie (2003) 355-396.

39 Joubert *LAWSA* (1994) Par 151; Christie (2003) 349, 358; Lubbe and Murray (1988) 367ff; Kerr (2002) 319.

improper manner.

The South African legal writers opine that before the defence of undue influence may be raised successfully and a contract can be set aside by the aggrieved party, it must first be shown:

(1) One person acquired an influence over another which weakened the other's powers of resistance and which rendered the will of the weaker party pliable;
(2) Such a party exercised his/her influence in an unconscionable manner to persuade the other to agree to a prejudicial transaction which he would not have entered into with normal freedom of will. [40]

Undue influence may, according to the South African legal writers, exist in a variety of circumstances, inter alia, between doctor and patient thought to be dying, priest and woman on her death bed etc. [41]

According to *Lubbe and Murray,* [42] the operation of the doctrine pre-supposes a victim who is psychologically dependant on the other party to the transaction to such an extent that his/her capacity to make decisions independently is impaired and his will is rendered pliable. Factors which have been identified as influencing the weaker party unduly include; extreme youth or age, illness, emotional immaturity, retarded intellectual development, naiveté exacerbated by a lack of education, the disintegration of personality resulting from the abuse of alcohol or other drugs, anxiety. [43]

The effect of influence, as with fraud, is to make the contract void *ab initio,* only if the influence induced the party seeking relief, to act by way of a fundamental mistake, but, which apparent assent to the contract is, in truth, not asset at all. [44]

Fraud

According to the South African legal writers one of the defences to the *caveat subscriptor*

40 Van der Merwe et al (2003) 214-215.

41 Farlam and Hathaway (1979) 215; Christie (2003) 359; Kerr (2002) 327.

42 Christie (2003) 360; Lubbe and Murray (1988) 374.

43 Lubbe and Murray (1988) 374; Christie (2003) 360; Kerr (2002) 328.

44 Christie (2003) 361; Lubbe and Murray (1988) 395; Kerr (2002) 327-328.

rule is that of fraud. [45]

The rationale for allowing the signatory to resile from the contract is based on the pre-contractual representation of a false fact, in which the signatory is induced to act upon, to his prejudice. The proviso is that the signatory must, of course, be ignorant of the falsity of the representation. [46] Furthermore, public policy dictates that an undertaking, by which one of the contracting parties bind himself to condone and submit to fraudulent conduct of the other, should not be recognized. [47]

9.2.1.2 Case Law

It is submitted that the *caveat subscriptor* rule has its roots firmly embedded in the case of *Burger v Central South African Railways*. [48] The facts briefly stated included:

This was an appeal from a decision of the First Civil Magistrate in Johannesburg. Burger, through his duly authorized agent, delivered a box of law books to the Railways, at Johannesburg, for carriage by rail to Grahamstown. The agent signed a consignment note, which was also signed by an official of the Railways, and which stated on the face of it that it was issued subject to the goods traffic regulations in force on the railway. Under s 147 of those regulations, the liability of the department was very materially limited in the case of loss or damage to goods entrusted to it, unless the value had been declared and the goods had been specially insured by the consignor. Burger read the note before the goods left Johannesburg, but did not make himself acquainted with the regulations. The goods were lost in transit, and Burger sued for their full value. The magistrate gave judgement for the amount tendered by the Railways in terms of the regulations, and Burger appealed.
Ultimately the question that came up for decision was as follows: *"..... can a man who has signed a document in the form of the one now before the court claim that he is not bound by it, simply because he did not read what he signed, and did not know what the document referred to?"*

The court per Innes CJ held:

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45 Christie (2003) 201; Kerr (2002) 104-105, 330-331.

46 Lubbe and Murray (1988) 330.

47 Christie (2003) 210; Kerr (2002) 188.

48 1903 TS 571.

"It is a 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." [49]

The court did, however, find that there are grounds upon which a contractant may repudiate a document to which he has put his signature. Although nothing was proved in this case, the court recognised misrepresentation as a ground.

This dictum has been followed and applied on numerous occasions in our courts, most notably for the purposes of this research, in *George v Fairmead (Pty) Ltd*. [50] The facts the court, on appeal, was confronted with were:

On 18 January 1955, George hired a room in the respondent company's hotel, for a fixed amount per month, by means of a verbal agreement with Miss Gurek, the hotel receptionist. He moved in on 1 February and at Miss Gurek's request, signed the hotel register. At the top of his form he filled in his name, date of arrival, tariff and nationality. Between this and his signature at the bottom, was a passage, in both English and Afrikaans, reading as follows:

`I hereby agree that it is a condition of my/our occupation or visit to these premises that notwithstanding the provisions of sec. 112 of the Liquor Act, 30 of 1928, a copy of which is exhibited in the hotel premises and to which my attention has been directed, the proprietor shall not be responsible for loss or damage to my/our property brought upon the premises, whether arising from fire, theft, or otherwise by whomsoever caused, or arising from the negligence or wrongful act of any person in the employ of the proprietor. Money or valuables may be handed to the proprietor for custody, when a special receipt will be issued accordingly. All visitors, whether or not they occupy rooms are deemed to contract with the proprietor on this basis.'

A month later certain clothing and personal effects were stolen from George's room in the hotel and he sued the company in the Magistrate's Court, Wynberg, Cape, for damages in the sum of 125 pounds. The magistrate granted absolution from the instance, and the Cape Provincial Division upheld his judgement. George appealed, his case being based on *justus error* i.e. he submitted that he was under a reasonable misapprehension that he was not signing a contract but merely a register, in that the receptionist had asked him to sign the hotel register without indicating that what he was asked to sign was really a contract, and without drawing his attention to the important new condition, which had been no part of his oral contract.

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49 *Burger v Central* SAR 1903 TS 571 at 578.

50 1958 (2) 465 (A).

As a general rule the court held the signatory is bound because, as Fagan CJ stated: *"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 assent to whatever words appear above his signature."* [51]

The court recognized *justus error* as a ground to repudiate a contracting party's assent to a written contract.

In the case of *Glenburn Hotels PVT Ltd v England,* [52] the court followed the dictum *Burger v Central South African Railways* [53] when Lewis JA stated the position with regard to a contracting party signing an agreement, with or without reading an agreement, before signing the written contract:

" ..... as he has not said so in his reply, it must be taken that they were in fact visible although he may not have bothered to look at them or to read them."

The authorities establish that in such circumstances the plaintiff cannot avoid the limitation of liability expressly set out in the contract unless he can set up some special reason for doing so, such as fraud or misrepresentation on the part of the defendant. This is made quite clear in the leading case of Burger v Central South African Railways 1903 TS 571, a decision of the Full Bench of the Transvaal Supreme Court, in which the facts were somewhat similar to those of the present case." [54]

The learned judge continues to restate the position set out in the *Burger case* which provides:

"It is a 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. There are, of course, grounds upon which he may repudiate a document to which he has put his hand. But no such grounds have been shown to exist in the present case. Consider the circumstances under which his note was signed. Neither fraud nor misrepresentation have been alleged, nothing was said by any railway official who misled the signatory; the language of the document was one which the consignor understood; no pressure of any kind was exercised. All that can be said is that the consignor did not choose to read what he was signing, and after he signed did not know the particulars of the regulations by which he had agreed to abide. For the Court to hold upon these facts that the appellant is legally justified in repudiating his signature would be a decision involving far-reaching consequences, and it would be a decision unsupported by any principle of our law. The mistake or error of the signatory in the present case was not such justus error as would entitle him to claim a restitution in integrum, or as could be successfully pleased as a defence to an action founded upon the written contract, and therefore it cannot be used for the purposes of attacking that

51 *George v Fairmead (Pty) Ltd* 1958 (2) SA 465 (AD) at 472 A.

52 1972 (2) SA 660 (RA).

53 1903 TS 571.

54 *Glenburg Hotels (PVT) Ltd v England* 1972 (2) SA 660 (RA) at 662.

contract when the railway seeks to rely upon it." [55]

The legal position with regard to the *caveat subscriptor* was also stated as follows in the case of *Micor Shipping (Pty) Ltd v Tregor Golf and Sports (Pty) Ltd and Another*: [56] *"If a person receiving a document knows that there is writing on it and that it contains conditions relative to the contract, he is bound whether he reads them or not, if he knows that there is writing but does not know that it contains conditions relative to the contract, he is not bound, unless the other party has done what is reasonably necessary to bring the conditions to his notice."* [57]

The afore discussed principle was also applied in the dictum of *Diners Club SA (Pty) Ltd v Thorburn,* [58] in which an employee of a company applied for a credit card on behalf of the company, but was sued with the company for payment of the debt. The employee sought to avoid liability on the ground of mistake.

Burger AJ stated the legal position to be as follows:

"It is again trite law that a party who puts his signature to a document containing contractual terms has a very limited scope for escaping liability by saying that he did not know or understand the terms of the document (George v Fairmead (Pty) Ltd 1958 (2) SA 465 (A) at 472). The courts have allowed such a defence only in cases where the other party was in some way to blame for his mistake." [59]

The afore state dictum accords with the position found in *Burger v Central South African Railways* [60] in which Innes CJ stated:

"All that can be said is that the consignor did not choose to read what he was signing, and after he had signed did not know the particulars of the regulations by which he had agreed to abide. For the court to hold upon these facts that the appellant is legally justified in repudiating his signature would be a decision involving far-reaching

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55 *Burger v Central South African Railways* 1903 TS 571 at 577-579 quoted in the case of *Glenburg Hotels (PVT) Ltd v England* 1972 (2) SA 660 (RA) at 662.

56 1977 (2) SA 709 (W).

57 *Micor Shipping (Pty) Ltd v Trecor Gold and Sports (Pty) Ltd and Another* 1977 (2) SA 709 (W) at 713. See also *Central South African Railways v McLaren* 1903 TS 727; *Frocks Ltd v Dent and Goodwin (Pty) Ltd* 1950 (2) SA 717 (C); *Hughes N.O. v SA Fumigation Co (Pty) Ltd* 1961 (4) SA 799 (C) at pp 803-804; *King's Car Hire (Pty) Ltd v Wakeling* 1970 (4) SA 640 (N) at pp 642-644; *Kemsley v Car Spray Centre (Pty) Ltd* 1976 (1) SA 121 (SE) at pp 123-124.

58 1990 (2) SA 870 (C).

59 *Diners Club SA (Pty) Ltd v Thorburn* 1990 (2) SA 870 (C).

60 1903 TS 571.

consequences and it would be a principle unsupported by any principle of our law." [61]

and stated in different wording in *George v Fairmead (Pty) Ltd*: [62]

"But she knew that she was assenting to something, and indeed to something in addition to the terms she had herself filled in. If she chose not to read what that additional something was, she was, with her open eyes, taking the risk of being bound by it. She cannot then be heard to say that her ignorance of what was in it was a justus error." [63]

The position with reference to the duty of a contracting party, where notices are prominently displayed, was also set out, as follows, in the Supreme Court of Appeals judgement of *Durban's Water Wonderland (Pty) Ltd v Botha and Another*. [64] In this case an exemption clause was displayed in notices at an amusement park. The respondent purchased a ticket for herself and her daughter. During one of the rides she and her daughter were injured.

Consequently the respondent sued the amusement park for damages. The appellant, in turn, relied upon the *caveat subscriptor* rule and the fact that the sale of the tickets was subject to a disclaimer absolving the amusement park from liability.

Scott JA's reasoned, handing down the judgement, that had the customer read the terms of the notices in question, there would be actual consensus. Further, had the customer seen one of the notices and realised that it contained terms relating to the use of the amenities, but did not bother to read them, there would similarly have been actual consensus on the basis that she would have agreed to be bound by these terms, whatever they may have been. It was held that, as Botha had not seen any of the notices, Durban's Water Wonderland was obliged to establish that she was bound by the terms of the disclaimer on the basis of quasi-mutual assent.

Scott JA explained this involves an inquiry into whether Durban's Water Wonderland was reasonably entitled to assume from the customer's conduct in going ahead and purchasing

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61 *Burger v Central South African Railways* 1903 TS 571 at 578.

62 1998 (2) 465 (AD).

George v Fairmead (Pty) Ltd 1958 (2) SA 465 (AD) at 472 H; See also *Booysen v Sun International (Bophuthatswana) Ltd* Case no 96/3261 Delivered 23 March 1988 (WLD) (Unreported).

64 1999 (1) SA 982 (SCA).

a ticket that she had assented to the terms of the disclaimer, or was prepared to be bound by them without reading them. The answer depends upon whether, in all the circumstances, Durban's Water Wonderland did what was `*reasonably sufficient*' to give customers notice of the terms of the disclaimer. That is, an objective test is applied, based on the reasonableness of the steps taken by the proferens, to bring the terms in question to the attention of the customer.

The court goes on to state:

"Had she seen one of the notices, realised that it contained conditions relating to the use of the amenities but not bothered to read it, there would similarly have been actual consensus on the basis that she would have agreed to be bound by those items, whatever they may have been (Central South African Railways v James 1908 TS 221 at 226)."

As to when it can reasonably be assumed that the contractant had assented to the terms of the disclaimer or was prepared to be bound by them without reading them, the court held:

"The answer depends upon whether in all the circumstances the appellant did what was reasonably sufficient to give patrons notice of the terms of the disclaimer."

The test according to the court is *"an objective test based on the reasonableness of the steps taken by the proferens to bring the terms in question to the attention of the customer or patron."* [65]

In two more recent decisions, the Witwatersrand Local Division and the Supreme Court of Appeals were faced with the question of whether a contracting party may repudiate a contract, in circumstances where contracts were concluded, via facsimile but only the front pages of the contracts were transmitted. Certain terms were contained on the reverse side of the documents, but were never sent through to the signing parties. Consequently they were unaware of these terms. Later disputes arose and attempts were made, by the relevant parties, to rely on these undisclosed terms.

The first case was that of *Home Fires Transvaal CC v Van Wyk and Another* [66] in which the respondents wanted to acquire a freestanding furnace, for their home, from the appellant, a dealer in such furnaces. The pre-typed, standardized contract was sent to the respondents

65 *Durban's Water Wonderland (Pty) Ltd v Botha and Another* 1999 (1) SA 982 (SCA).

66 2002 (2) SA 375 (W).

for signature. One of the terms was an exclusion clause that had the effect of freeing the appellant from liability. After the installation of the furnace, a fire broke out and the respondent's home was badly damaged. When putting the appellants on terms, the appellants refused to pay, relying on the exemption clause. Much was made in argument that, as one of the respondents admitted he was aware that there should have been terms on the back of the document; his failure to call for them signified his willingness to sign. The court set out the general legal position as follows, namely; that if someone is aware that there is writing in a document and he/she chooses not to read it, he/she may be bound by the writing, even where the other party is aware that he/she has chosen not to read the document. In its discussion of this issue, the Full Bench referred to *RH Christie The Law of Contract in South Africa* 4 ed (2001) 20, who states *"on the basis of quasi-mutual assent the cases in which it is clear (sometimes even to the other party) that the signatory has not read the document before signing are easily understood." "I haven't read the document but I'm signing it because I'm prepared to be bound by it without reading it" is an attitude whether expressed or implied, that entitles the other party to regard the document as binding."*

Despite the rule, neither the trial court nor the Full Bench, were prepared to extend this to cover the situation where the terms were never transmitted.

The Full Bench (Barber AJ, Goldstein J and Boruchowitz J) confirmed the decision of the trial court. It stated that by omitting to send the reverse side of the order to the respondents, the appellant must be held not to have intended to conclude the contract on the basis of the terms and conditions therein set forth. (At 382A-B). The Full Bench held further that the words appended at the foot of the `order', that referred to conditions on the reverse side were meaningless and had to be considered as *pro non scripto* (at 382B).

The facts of *Solar (Pty) Ltd v Divwatt (Pty) Ltd* [67] are similar to those of Home Fires. The appellant was the manufacturer of certain panels that were used to convert solar energy into electricity. The respondent wanted to purchase these to use them to operate water pumps, for its customers, in areas where conventional electricity was not available or too expensive. The agreement between the parties arose in the following circumstances. During 1993, a meeting between representatives of the two parties took place. At this meeting it was agreed that Africa Solar would provide five panels, free of charge, to Divwatt, so that it could test them. Shortly before delivery of these free panels, one Ms Gerber, from Africa

67 2002 (4) SA 681 (SCA).

Solar, contacted Divwatt's financial director, Mr Pichulik. She asked him to supply certain information regarding Divwatt, as it was a new company and Africa Solar wanted to check it out before supplying it with the expensive panels. She faxed a form for him to complete. Puchulik received a single page that was headed `Application for Credit Facilities'. At first he did not complete the form, because he was not applying for credit. But, after again being requested for the information, he completed it, signed it, and returned it to her. The free panels were then supplied. They were tested and found to be acceptable. Divwatt did not apply for credit and no further terms on which the panels were to be supplied were discussed. Divwatt ordered panels to the value of R600 000.00. Some of them were installed. After a period of time Divwatt started receiving complaints about the performance of the pumps. It was established that the panels did not meet the quoted specifications.

Divwatt withheld payment of the balance due to Africa Solar because of the ongoing dispute that ensued between the parties. Africa Solar sued Divwatt for the outstanding amount.

The question to be decided by the Full Bench was whether the respondents were entitled to repudiate the agreement and to withhold payment to the appellant company.

The Full Bench dismissed the appeal. This court (Van der Walt and Roos JJ) stated:

"Where a document specifically states "conditions on the reverse hereof" you have the opportunity to read the conditions. If you choose not to read them or if the conditions appear above in the document, in the contract, you are able to read them, then you are bound. That is logical. But if the document specifically states as annexure A does "as printed on the reverse hereof" and there is no printing on the reverse, no matter how lame the excuse of the secretary as to why he signed or why he did not read the clause the factual position is there is no printing to which he has subscribed. And lacking such printing he may be criticized for not inquiring after the printing, but he cannot be held to be bound by something which he has not seen, and that is the simple issue as far as I am concerned (quoted at 695D-F)"

The appellant subsequently appealed to the Supreme Court of Appeals who upheld the decision of the Full Bench, but took a different approach, similar to that of the trial court. The Supreme Court of Appeal, like the trial court, focused on Pichulik's state of mind when he completed the form. It accepted that Pichulik believed that the form was for information purposes only and that he was not on his guard when he signed it. At that stage he was not committing himself to a future contractual relationship with Africa Solar (at 697F2D-G). Gerber, too, knew that she required the form for information purposes only. Although her superiors were unaware of the circumstances in which the document was completed, her knowledge was imputed her principal, as it was acquired during the course and scope of her

employment (at 697H).

The court reiterated the principle that the burden of proof was on the person who sought to rely on a contract to prove its terms. Here, proof of those terms included proof that the parties had the requisite intention to contract (at 698C). The court went on to state that the production of the signed document was a telling indication that Divwatt intended to be bound. But the court found that this was counterbalanced by Pichulik's evidence that the document had been sent to him for a limited purpose only. Although the majority referred to the fact that only one page had been transmitted, its decision rested on the finding that Pichulik had misunderstood the purpose for which this document was going to be used, or could be used. He completed the document for information purposes only. He was not applying for credit. Gerber was responsible for this misunderstanding. She was aware of the specific limited purpose for which the document was transmitted. So, at that stage of the negotiations, there was no *animus contrahendi*.

In a dissenting judgement, Streicher JA reasoned that, as the document was clear and unambiguous, Pichulik should have called for the reverse side. He did not accept Pichulik's version that he misunderstood why the document was required. As a result, the judge was of the view that the Full Bench had erred in holding that a person `*cannot be held to be bound by something which he has not seen*' and that if `*a person is prepared to contract subject to standard conditions which he has not seen, there is nothing preventing him from doing so*.' (At 706A).

More recently, the Supreme Court of Appeal, in the case of *Hartley v Pyramid Freight (Pty) Ltd t/a Sun Couriers* [68] was confronted with the question whether the respondent, a courier service, who was tasked to convey certain travellers' cheques from South Africa to the Jersey Islands, and lost, in the process, the cheques, could escape liability by relying on standard terms and conditions, including an exclusionary clause exempting the courier company from liability.
The court, in coming to a conclusion, relied on the *caveat subscriptor* rule in rejecting the appellant's version that he made a mistake. The court also found that the exclusionary clause was part of the contract between the parties and consequently clause 8.7 was fatal to the appellants claim. The court concluded *"to hold otherwise would be to introduce a degree of paternalism in one law of contract at odds with the caveat subscriptor rule."* [69]

68 2007 (2) SA 599.

69 *Hartley v Pyramid Freight (Pty) Ltd t/a Sun Couriers* 2007 (2) SA 599 (SCA) 603.

But, the *caveat subscriptor* doctrine, according to the South African courts, does not operate unconditionally. The following factors have vitiated its effectiveness, especially in exemption clauses. Firstly, our courts have held, ever since the dictum of *Morrison v Anglo Deep Gold Mines Ltd,* [70] those contracts will be valid only in instances where a man contracts without duress, without fraud and understanding what he does.

The South African courts, as with the legal writers, do recognise exceptions to the *caveat subscriptor* rule including misrepresentation, mistake, illegality, duress and undue influence, fraud, consequently, a discussion on each exception follows.

Misrepresentations

The South African courts have acknowledged before that relief, on the basis of misrepresentation, may be excluded by means of contractual stipulation. [71]

The South African courts have at the same time, played a protective role towards contractants, especially, as a result of the harshness which exemption clauses, in their operation, often bring. Consequently, the courts do not allow these practises to operate unchecked and the courts have protected the public from the worst abuses of exemption clauses. Recent cases have concluded that the contract as a whole, including the exemption clause, is void where the misrepresentation has resulted in a *dissensus* between the parties. [72] Whether or not an exemption clause has been incorporated, in some form of disguise, into a contract has been highlighted in the case of *Du Toit v Atkinson's Motors Bpk*: [73]

"If certain characteristics were attributed in an advertisement to a res which was offered for sale and an unsuspecting purchaser later, on request, signed a document in which the seller's liability for representations concerning the res is excluded, the seller's silence in respect of the provision in question can obviously also constitute a misrepresentation."

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70 1905 TS 775.

71 *Maritz v Pratley* (1894) 11 SC 345; *National and Overseas Distributory Corporation (Pty) Ltd v Potato Board* 1958 (2) SA 473 (A); *Trollip v Jordaan* 1961 (1) SA 238 (A); *Janowski v Fourie* 1978 (3) SA 16 (O); *Goldberg and Another v Carstens* 1997 (2) SA 854 at 858-859.

72 *Allen v Sixteen Sterling Investments (Pty) Ltd* 1974 (4) SA 164 (D); *Goldberg and Another v Carstens* 1997 (2) SA 854 at 859.

73 1985 (2) SA 873.

The court consequently held:

" ..... that, by saying nothing to the appellant concerning the effect of Para 6 of the document, the respondent's employees instilled in the appellant the trust that the document was not in conflict with the advertisement and therefore did not exclude liability in respect of representations contained in the advertisement." [74]

Fraudulent misrepresentation, when proved, is handled differently by South African courts than that of non-fraudulent misrepresentations. In the former instance, the Appellate division (as it was known then) as long ago as 1927, in the case of *Wells v SA Alumenite Co* [75] decided:

"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." [76]

This also appears to be the position in respect of a clause which excludes liability for an intentional breach of contract, although it may not have resulted from fraudulent misrepresentation. In the dictum of *Hughes v SA Fumigation Co (Pty) Ltd*, [77] Herbstein J remarked:

"If the contractor `deliberately caused the fire no exclusionary clause would serve to relieve it from liability". [78]

The courts are more tolerant when confronted with a question of non-fraudulent misrepresentation. The leading case in this regard is that of *Essa v Divaris,* [79] in which the garage keeper contracted to garage a lorry "*at owner's risk*". The Appellate Division held that a parking garage keeper is not subject to the strict liability applied to *stabularri* by the praetor's edict, so the clause could not have been intended to apply to such non-existent liability. *"The minimum degree of blameworthiness for which he would be liable was negligence, so the clause was interpreted as exempting him from liability based on*

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74 *Du Toit v Atkinson's Motors Bpk* 1985 (2) SA 893 at 896.

75 1927 AD 69.

76 *Wells v SA Alumenite Co* 1927 AD 69 at 72; See also *Sissons v Lloyd* (1) SA 367; *Claassens v Pretorius* 1950 (1) SA 738 (0); *Trollip v Jordaan* 1961 (1) SA 238 (A).

77 1961 (4) SA 799 (C) at 805 G.

78 *Hughes v SA Fumigation Co (Pty) Ltd* 1961 (4) 799C at 805C.

79 1947 (1) SA 753 (A).

negligence." [80]

Following the principle enunciated in *Essa v Divaris* the court in *South African Railways and Harbours v Lyle Shipping Co Ltd* [81] held:

"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." [82]

In order to ascertain the common intention of the parties from the language used in the contract, the South African courts, have often utilized the various canons of construction, the first of which is the `*golden rule*' of interpretation which provides, that the language in the document is to be *"given it grammatical and ordinary meaning, unless this would result in some absurdity or some repugnancy or inconsistency with the rest of the instrument."*

More recently, in the case of *Van der Westhuizen v Arnold*, [83] applying the mode of construction enunciated in the case of *Coopers and Lybrand and Others v Bryant,* [84] cautioned that exclusionary clauses *"should be construed bearing in mind that they seek to limit or oust a party's common-law rights."* With regard to the construction of exclusion clauses, Lewis AJA stated:

"There does not, therefore, appear to be any clear authority for a general principle that exemption clauses should be construed differently from other provisions in a contract. But that does not mean that courts are not, or should not be, wary of contractual exclusions, since they do deprive parties of rights that they would otherwise have had at common law. In the absence of legislation regulating unfair contract terms, and where a provision does not offend public policy or considerations of good faith, a careful construction of the contract itself should ensure the protection of the party whose rights have been limited, but also give effect to the principle that the other party should be able to protect himself or herself against liability insofar as it is legally permissible. The very fact, however, that an exclusion clause limits or ousts common law rights should make a court consider with great care the meaning of the clause, especially if it is very general in its application. This requires a consideration of the background circumstances, as described in Coopers and Lybrand v Bryant (above) and a resort to surrounding circumstances if there by any doubt as to the application of the exclusion."

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80 *Essa v Divaris* 1947 (1) SA 753 (A) at 767.

81 1958 (3) SA 416 (A).

82 *South African Railways and Harbours v Lyle Shipping Co Ltd* 1958 (3) SA 416 (A).

83 2002 (6) SA 453 (SCA).

84 *Coopers and Lybrand and Others v Bryant* 1995 (3) SA 761 (A) 768.

Marais JA consequently considered language as a factor which may influence the effect of exemption clauses when he remarked:

"It appellant wished to exclude liability for a breach of the warranty against eviction which warranty arose ex lege and existed whether or not the parties turned their minds to it, it behoved him to say so plainly and unambiguously. Having initially thought otherwise, mature reflection has led me to conclude that the language he chose failed to achieve that purpose (if that was indeed his purpose)."

Marais JA then held:

"In my judgement, plainer language than that which appellant chose would have been necessary to exclude effectively such a warranty." [85]

Mistake (Justus error)

Case Law

A factor which has also weighed against, especially, the validity of exemption clauses is that of a *justus error*. Although it is trite law that a party who puts his/her/its signature to a document, containing terms, has a very limited scope for escaping liability by saying that he/she/it did not know or understand the terms of the document, [86] the courts nevertheless, have allowed a defence of *justus error* only in cases where the other party was in some way to blame for the mistake. [87] Moreover, such blame would more commonly exist where the other party has himself/herself/itself created or fostered the mistake, by previously advertising, or describing the transaction, in terms of variance with those contained in the document, also now containing the clause in question. [88] In a later decision, the court in the case of *Du Toit v Atkinson's Motors Bpk* [89] recognised the defence of *justus error,* to

85 *Van der Westhuizen v Arnold* 2002 (6) SA 453 (SCA) at 469-470.

86 *Burger v Central SAR* (1903)(TS) 571; *SAR and H v Conradie* 1922 AD 137; *Goedhals v Massey-Harris and Co* 1939 EDL 314; *Bhikhagie v Southern Aviation (Pty) Ltd* 1949 4 SA 105 (E); *Mothle v Mothle* 1951 (1) SA 256 (T); *George v Fairmead (Pty) Ltd* 1958 116 (2) SA 465 (A); *Glenburg Hotels (PVT) Ltd v England* 1972 (2) SA 660 (RA); *National and Grindays Bank Ltd v Yelverton* 1972 (4) SA 114 (R); *Hartley v Pyramid Freight (Pty) Ltd t/a Sun Couriers* 2007 (2) SA 599.

87 Blame could come in the form of fraud as a result of which the signatory signs in error, which will then be accepted as a justus error. See *Musgrove and Watson (Rhodesia) (PVT) Ltd v Retra* 1978 (4) SA 656 (R) *contra Standard Credit Corporation Ltd v Naicher* 1987 (2) SA 49 (N) in which the court held that where the signatory was negligent in signing the error would not be justus; See also *Hartley v Pyramid Freight (Pty) Ltd t/a Sun Couriers* 2007 (2) SA 599 in which it was held that where a party does not bother to read the contract the party's unilateral mistake as to the terms of the contract is not excusable and reliance cannot be placed on a *justus error*.

88 *Shepherd v Farelo's Estate Agency* 1921 TPD 62.

89 1985 (2) SA 893 (A).

the maxim *caveat subscriptor*, in a case involving an advertisement concerning the sale of a motor vehicle, in which there was a misrepresentation regarding the model year of the motor vehicle. The court found that the seller's silence, in not saying anything to the purchaser concerning the effect of the provision, constituted a trust instilled in the purchaser that the document was not in conflict with the advertisement. The purchaser's mistake concerning the liability of the seller under the document was, accordingly, found to be a *justus error*.

In a subsequent dictum of *Spin Drifter (Pty) Ltd v Lester Donovan (Pty) Ltd,* [90] the court followed the judgement of *Du Toit v Atkinson's Motors Bpk* when the court ruled that a standard form contract concerning trade exhibitions, duly signed by the Appellant and the Respondent's agent, in which the Respondent's agent had earlier implanted a certain belief with the Appellant, which, due to the Respondent's subsequent silence, turned out to be a misrepresentation, to be a *justus error*.

Hoexter JA, considering when can an error be said to be *justus* for the purpose of entitling a man to repudiate his/her apparent assent to a contractual term, after referring to a number of decisions by the South African courts (vide *Logan v Beit* 7 SC B 197; *Pieters and Co v Salomon* 1911 AD 121 esp. at 130, 137; *Van Ryn Wine and Spirit Co v Chandos Bar* 1928 TPD 417, esp. at 422, 423, 424; *Hodgson Bros v South African Railways* 1928 CPD 257 at 261) laid down the following test: The first question to be asked is: *"Has the first party - the one who is trying to recile - been to blame in the sense that by his conduct he had lead the other party, as a reasonable man, to believe that he was binding himself?"* If the said contractant relies on a mistake, the next question to be asked is *"whether the mistake is due to a misrepresentation, whether innocent or fraudulent, by the other party, then of course, it is the second party who is to blame and the first party is not bound."* Consequently, the court held that *"the Respondent's agent's failure to disabuse the mind of the Appellant when getting the Appellant to append his signature to the contract that the reverse side of the contract contained a clause in terms whereof the Respondent might with impunity alter the dates of the exhibition and nevertheless exact from the Appellant payment in full"*, [91] constituted a *justus error*.

In a more recent case of *Dole South Africa (Pty) Ltd v Pieter Beukes (Pty) Ltd,* [92] a case

90 1986 (1) SA 303.

91 *Spindrifter (Pty) Ltd v Lester Donovan (Pty) Ltd* 1986 (1) SA 303 at 318-319.

92 2007 (4) SA 577 (CPD).

involving the export of grapes to Europe, in which the defendant had not read the agreement before signing it, and stating that he would not have entered into the agreement if he had been aware of this clause, the court held that for the defendant to avoid the written agreement on the basis of the mistake as to the content of the agreement, he needed to convince the court that he had been misled as to the purport of the words to which he had signified assent by appending his signature. The court held that he needed to prove that the nature and tenor of the written agreement had not been explained to him before he had signed the agreement. But, adds the court, the conduct and statements of the contracting parties should be judged in accordance with the practise in the industry as the background. The court continues to hold that it would be reasonable to believe that someone participating in the industry had a basic understanding and grounding as to the norms of the industry. A similar approach was adopted in the case of *Hartley v Pyramid Freight (Pty) Ltd t/a Sun Couriers,* [93] in which the court attached significant weight to the fact that the appellant was a senior attorney, with 44 years experience, who practised commercial law in Zimbabwe and who did a fair amount of contract work and a fairly substantial amount of litigation. The court consequently found the attorney's conduct inexcusable.

Our courts have also previously held that such blame can also attach to the other party if he/she has drafted and presented the document in such a way as to set a trap for the unwary signatory. This issue formed the basis of a decision in the dictum *Keens Group Co (Pty) Ltd v Lötter*. [94] In this case, the defendant, a senior director of a company which subsequently entered liquidation, signed a document purporting to be an application for credit facilities on behalf of the company. After supplying all the information required in respect of the company, the defendant signed without further reading the conditions, which contained two clauses in which was stated that the signatory bound himself as surety. From what was stated both at the beginning and immediately above his signature, it appeared that it was purely an application by the Applicant Company, binding the Applicant to its terms. The Defendant, after being sued as a surety, attempted to recile from the agreement, averring that he did not know he signed as a surety.

The court acknowledged that:

"It has long been a principle of our law embodied in the caveat subscriptor rule that a man, when he signs a

93 2007 (2) SA 599.

94 1989 (1) SA 585 (C).

contract, is taken to be bound by the ordinary C meaning and effect of the words that appear above his signature. (See, for example, Burger v Central South African Railways 1903 TS 571 at 578 and George v Fairmead (Pty) Ltd 1958 (2) SA 465 (A) at 472A) As Fagan CJ put it in the last mentioned case:

`When a man is asked to put his signature to a document he cannot fail to realise that he is called upon to signify, by doing so, his D assent to whatever words appear above his signature'."

The court, notwithstanding, recognized *justus error* as a defence and subsequently found that, the fact that the defendant *"had been misled as to what he thought he was signing,"* [95] and he was not bound by his signature to the document in question.

The courts also recognize that trapping may result in a *justus error*. The prohibition against trapping was restated in *Diners Club SA (Pty) Ltd v Thorburn* [96] when Burger AJ stated:

"I consider it sound in principle that the party who drafts a contractual document would be blameworthy if he did so in such a way as to turn it into a trap containing onerous clauses which would not reasonably be expected by the other party. A signatory can be misled by the form and appearance of the document itself just as must as by a c prior advertisement or representation. Obviously, however, each case must be decided on its own facts." [97]

Other instances in which the South African courts have held an error to be *justus* include:

(1) Where an ignorant and handicapped signatory, to whom the contents of the document were inadequately and inaccurately explained; [98]

(2) Representations are being made during negotiations which are inconsistent with the terms of the contract to be signed; [99]

(3) Where the signatory is misled by the format of the written document, for example, by tucking away an important clause in very fine small print; [100]

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95 *Keens Group Co (Pty) Ltd v Lötter* 1989 (1) SA 585 (C) at 590-592.

96 1980 (2) SA 870 (C).

97 *Diners Club SA (Pty) Ltd v Thorburn* 1990 (2) SA 870 (C) at 875; See also *Goldberg and Another v Carstens* 1997 (2) SA 854 (CPD) at 858.

98 *Hatzen v Mguno* 1954 (1) SA 277 (T).

99 *Spindrifter (Pty) Ltd v Lester Dononvon (Pty) Ltd* 1986 1 SA 303 (A); *Kempstone Hire (Pty) Ltd v Snyman* 1988 (4) SA 465 (T); *Dlovo v Braam Porter Motors Ltd* 1994 (2) SA 518 (C) 526; *Diners Club SA (Pty) Ltd v Livingstone* 1995 (4) SA 493 (W) 495; *Fourie v Hansen* (2000) 1 ALL SA 510 (W) 517.

100 *Keens Group Co (Pty) Ltd v Lötter* 1989 (1) SA 585 (C) 590; *Dlovo v Brian Porter Motors Ltd v Livingstone* 1995 (4) SA 495; It is especially, Sachs J in the Constitutional court dictum of *Barkhuizen v Napier* 2007 (5) SA 323 (CC) who looked at the effect of the one-sided clauses, the existence or import of which, the consumer, is likely to be largely or totally unaware. In this category Sachs J not only places the owner of the jalopy close to the scrap-yard, who signs with a thumbprint, but also the computer literate owner of a relatively new BMW who buys on-line. In both instances the impact is the same. He goes on to state *"it is not only the indigent and the illiterate who in practise remain ignorant of everything the document contains; the fact that consumer protection is specially*

(4) Where a document is signed without reading it, but the document contained a term or terms which the reasonable man would not expect to find therein. [101]

Illegality

Illegality is recognised by our courts as a valid defence to the *caveat subscriptor* rule. Despite the signatory signing the written agreement, the law does not hold the signatory to the contract, as a valid contract cannot come into existence if the agreement is illegal.

Our courts, however, draw a distinction between common law illegality and statutory illegality.

In so far as common law illegality is concerned, the South African courts have relied heavily upon public policy in deciding whether a contract or transaction is illegal and unenforceable or not. As far back as 1902, in the case of *Eastwood v Shepstone,* [102] Innes CJ makes an authoritarian statement of the court's power to condemn a contract. In this case, A sold B two farms, together with all rights under an agreement, with a Bantu chief and his council of indunas, to supply Bantu labour, which was void as against public policy, intending to produce a system of forced labour. One of the contracting parties challenged the validity of the contract to supply labour. Innes CJ in consequence 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 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 at is the tendency of the proposed transaction, not its actually proved result." [103]

In another of the early cases involving a lease and tenancy in violation of regulations dealing with the occupation of stands in the so-called white areas, the court, in the case of *Jajbhay v Cassim,* [104] was asked to look at, *inter alia,* the following facts namely: Jajbhay was the registered holder of a licence entitling him to occupy a stand in the Malay location at

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important for the poor does not imply that it is irrelevant for the rich. The rich too have rights. They have the same entitlement as everybody else to fair treatment in their capacity as consumers."

101 *Dlovo v Brian Porter Motors Ltd* 1994 (2) 518 (C) 525; *Fouche and Hansen* (2000) 1 ALL SA 510 (W) 516.

102 1902 (TS) 294.

103 *Eastwood v Shepstone* 1902 TS 294 at 302.

104 1939 (AD) 537.

Johannesburg. He sub-let the stand to Cassim on a monthly tenancy and Cassim carried our all the terms of the sub-lease. During the currency of the sub-lease, Jajbhay applied to the Transvaal Provincial Division for an order ejecting Cassim on the grounds that in terms of the regulations dealing with the occupation of stands in the location, Cassim's occupation was unlawful, the sub-lease was illegal and that Jajbhay was therefore entitled to reclaim possession.

The court, per Stratford CJ, looked at the Roman Dutch authority and identified the two maxims, namely *ex turpi causa non oritur actre* and the *ex parte delicto potion conditio defendentis,* which, *inter alia,* prohibits the enforcement of immoral contracts and curtails the right of the delinquents to avoid the consequences of their performance or part performance. The import of the said maxims is stated as follows by Stratford CJ:

"..... It is to discourage illegality and immorality and advance public policy. So much is trite and certain, and our pronouncement of law on the matter before us must be in conformity with that principle." [105]

But, the court decided, this was not a case in which any of the parties advanced issues of public policy, hence no interference by the court.

In a subsequent judgement the Transvaal Provincial Division in the case of *Padayachey v Lebese,* [106] the facts, briefly stated, were: The respondent, agent of one Suliman, was to deliver 25 cases of condensed milk to the appellant. All three parties knew that the condensed milk was stolen property. The appellant paid the agreed purchase price of $24 on delivery, but discovered a day later that bricks had been substituted for the condensed milk. The court was satisfied that neither Suliman nor the respondent was responsible for the substitution. Subsequently the respondent signed a promissory note for $24 in favour of the appellant. The appellant claimed on this note.

Murray J, delivering the judgement, recognized the principles enunciated in *Jajbhay v Cassim* 1939 AD 540. Relying upon public policy to decide this matter, Murray J held:

" ..... I think that it is against ordinary justice that persons in the position of the respondent and Ismail Suliman should be enriched by permitting them to retain, as against the appellant, moneys for which they have in fact given no value; and in fact it would be in accordance with public policy, as I see it, to hold them to any specific subsequent agreement made by them to refund such moneys I therefore consider the first ground of defence

105 *Jajbhay v Cassim* 1939 (AD) 540.

106 1942 (TPD) 10.

fails." [107]

In another matter concerning the Group Areas Act, decided in the Cape High Court, in the case of *Osman v Reis,* [108] the court, in the following facts, had to decide whether to uphold an illegal contract. The plaintiff purchased a half share in a business known as "Eddies Take Aways" from the defendant. The agreement contravened s17 of the Group Areas Act 36 of 1966 and was, therefore, illegal and invalid. The partnership was dissolved and the plaintiff reclaimed a sum paid towards the purchase price.

Watermeyer J, delivering the judgement, recognized the general rule in that a plaintiff who is *in pari delicto* cannot recover what he has parted with pursuant to the illegal contract. But, the rule can be relaxed, but only to prevent injustice or to satisfy the requirements of the public policy.

The court accordingly found the plaintiff had made out a case for the return of his money as the contract was illegal. Other cases wherein the South African courts decided the cases on common law illegality include the cases of *Magna Alloys and Research (SA) (Pty) Ltd v Ellis*. [109] The facts briefly stated included:

Ellis initiated litigation by claiming outstanding commission from his former employer; Magna Alloys and Research (SA) (Pty) Ltd. Magna Alloys counterclaimed for damages in terms of clause 6 of its agreement with Ellis and requested an interdict restraining him from continuing to act in breach of the cause.

In terms of clause 6(b) and (c) of the agreement, Ellis, *inter alia*, undertook that, for a period of two years following the termination of the agreement for any cause, and within a radius of 10 kilometres of the perimeter of a defined area, he would not seek employment.

Clause 6 also included:
In the event of breach of the terms of the provisions of the agreement by the plaintiff, the defendant would suffer damages at the rate of R250 per week for the period during which the plaintiff was in violation of the provisions of clauses 6(b) and 6(c) and that such sum

107 *Padayachey v Lebese* 1942 (TPD) 10.

108 1976 (3) SA 710 (C).

109 1984 (4) SA 874 (A).

would constitute a genuine pre-estimate of the damages which would be suffered by the defendant as a result of plaintiff's breach of the foregoing provisions (883).

On the termination of his employment with Magna Alloys, Ellis took up employment with a company called Welding Advisory Services (Pty) Ltd. This was in breach of clause 6 of his agreement with Magna Alloys. At a pre-trial conference it was agreed that Magna Alloys owed Ellis outstanding commission of R35.18 and the parties proceeded to trial on the counterclaim. The trial court rejected the counterclaim on the basis that clause 6 constituted an unenforceable agreement in restraint of trade and ordered that Magna Alloys should pay costs, including the costs of two counsel and attorney/client costs. Magna Alloys appealed successfully against this decision.

In this landmark judgement, Rabie CJ laid down the following principles with regard to restraint of trade clauses, namely, as a general rule; covenants in restraint of trade are valid. But the court states they are unenforceable when, and to the extent that, their enforcement would be contrary to public policy. It is against public policy to enforce a contract which is unreasonable, one which unreasonably restricts the covenants freedom to trade or to work. The court sums up the position as follows:

"Dit is in beginsel van ons reg dat ooreenkomste wat teen die openbare belang is, nie afgedwing word nie, en 'n mens sou dus kon sê dat 'n ooreenkoms wat iemand se handelsvryheid inkort teen die openbare belang, en dus onafdwingbaar is, indien die omstandighede van die betrokke geval sodanig is dat die Hof van oordeel is dat die afdwing van die ooreenkoms die openbare belang sou skaad." [110]

In a subsequent decision of *Sasfin (Pty) v Beukes,* [111] in the Appellate Division (as it was known then), Smalberger JA adopted a very cautious approach in deciding a contract contrary to public policy and thus illegal and unenforceable. In this regard His Lordship 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 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 at is the tendency of the proposed transaction, not its actually proved result." [112]

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110 *Magna Alloys and Research (SA) (Pty) Ltd v Ellis* 1984 (4) SA 874 (A) at 897I; See also the dictum of Didcott J in *J Louw and Co (Pty) Ltd v Richter* 1987 (2) SA 237 (N) at 243 B-D in which his Lordship stated: *"Whether it is indeed unreasonable must be determined with reference to the circumstances of the case. Such circumstances are not limited to those that existed when the parties entered into the covenant. Account must also be taken of what has happened since then and, in particular, of the situation prevailing at the time enforcement is sought."*

111 1989 (1) SA 1 (A).

112 *Sasfin (Pty) v Beukes* 1989 (1) SA 1 (A).

A few months later, the Appellate Division (as it was known then), was again faced with the difficult decision in the case of *Botha (now Griesel) v Finanscredit (Pty) Ltd* ,[113] to decide the question when a contract is regarded as illegal and unenforceable. Hoexter JA adopted and restated the principles enunciated in Sasfin when he stated:

"I proceed to consider whether the provisions of clause 7 are, in the language of the majority judgement in the Sasfin case (at 8C-D).
Contracts clearly inimical to the interests of the community, whether they are contrary to law or morality, or run counter to social or economic expedience ..... and accordingly, unenforceable on the ground of public policy. In such an investigation (see the remarks of Smalberger JA at 9A-G of the Sasfin case) there must be borne in mind: (a) that, while public policy generally favours the utmost freedom of contract it nevertheless properly takes into account the necessity for doing simple justice between man and man' and (b) that a court's power to declare contracts contrary to public policy should be exercised sparingly and only in cases in which the propriety of the transaction and the element of public harm are manifest.

So approaching the inquiry in the instant matter I am not persuaded that the provisions of clause 7 of the suretyships are plainly improper and unconscionable. While at first establish the provisions of clause 7 may seem somewhat rigorous they cannot, I think, having regard to the particular circumstances of the present case, fittingly be described as unduly harsh or oppressive. The enquiry is directed to ` ..... The tendency proposed transaction, not its actually proved result.' (Per Innes CJ in Eastwood v Shepstone 1902 TS 294 at 302, the Sasfin case supra at 8I-9A; 14F)" [114]

In so far as statutory illegality is concerned, the South African courts, for decades, have had to pronounce upon the illegality and unenforceability of contracts. Commencing with *Schierhout v Minister of Justice*: [115]

"It is a fundamental principle of our law that a thing done contrary to the direct prohibition of the law is void and of no effect. The rule is thus stated: Ea quse lege fieri prohibentur, si feurint facta, non solum inutilia, sed pro infectis habeantur, licent legislator fieri prohibuerit tantum, nec specialiser diserit inutile esse debere guod factum est' (Code 1.1.4.5) So that what is done contrary to the prohibition of the law is not only of no effect, but must be regarded as never having been done - and that whether the lawgiver has expressly so decreed or not; the mere prohibition operates to nullify the act ....." [116]

In a succeeding case of *Standard Bank v Estate van Rhyn* [117] the court stated:

"The contention on behalf of the respondent is that when the Legislature of an act it impliedly prohibits it, and that

113 1989 (3) SA 773.

114 *Botha (now Griesel v Finanscredit (Pty) Ltd* 1989 (3) SA 773.

115 1926 (AD) 99.

116 *Schierhout v Minister of Justice* 1926 (AD) 99.

117 1925 (AD) 266.

the effect of the prohibition is to render the act null and void, even if no declaration of nullity is attached to the law. The general proposition may be accepted, but it is not a hard and fast rule when applicable. After all, what we have to get at is the intention of the Legislature if we are satisfied in any case that the Legislature did not intend to render it invalid, we should not be justified in holding that it was. As Voet (1.13.16) `but that which is done contrary to law is not ipso jure null and void, where the content with a penalty laid down against those who contravene it.' Then after some instances in illustration of this principle, he proceeds: `The reason for all I take to be that in these and the like cases greater inconveniences and impropriety would result from the rescission of what was done, than would follow the act its done contrary to the law. These remarks are peculiarly applicable to the present case, and I find it difficult to conceive that the Legislature had any intention to enacting the directions referred to in sec. 116(1) other than that of punishing the executor who did not comply with them." [118]

In more recent cases involving the illegality of contracts, the Cape High Court, in the case of *Lende v Goldberg* [119] dealt with the following facts: Lende, the appellant, who at all material times had been disqualified, by the provisions of the Blacks (Urban Areas) Consolidation Act 25 of 1945, from being in the Cape Peninsula, was dismissed from her employment with the respondent, without notice and without payment in lieu of notice, immediately upon the respondent's discovering that she was not in possession of a work permit as required by the provisions of s 10 bis of the Act. Lende's action, in a magistrate's court, for recovery of salary and/or payment in lieu of notice, was dismissed because, as the respondent had breached the provisions of s 10 bis, the contract of employment was found to have been illegal and null and void *ab initio*. On appeal, the appellant contended that, upon a proper interpretation of s 10 bis, a contract which was entered into, contrary to its provisions, was not itself prohibited by that section and that the legislature, thus, could not have intended that such a contract should be void.

The court, referring to a string of authorities, concluded, after considering the intention of the legislature:

"In my view all these indications point to the conclusion that the Legislature intended a contract in contravention of ss (1) of S 10 bis to be a nullity and of no force and effect. I do not think that the fact that the section is not per se directed at the Black employee vitiates this conclusion. Probably for good reasons the Legislature considered it not prudent to expose the employee to a criminal penalty and consequently it was neither necessary nor appropriate to make ss (1) in terms applicable also to the employee. It seems to me, however, to be necessarily implied by the section that a Blank employee cannot claim (289) to be lawfully employed contrary to the terms of the subsection and that such an employee could not therefore claim specific performance of the contract itself or any relief involving enforcement of the terms of, or the contractual incidents of, the contract."

Consequently the court held:

"I am therefore of the opinion that the Legislature intended a contravention of S 10 bis to be a nullity ab initio and that, in as much as plaintiff's claim is clearly based on the extract and would require recognition of the contract for

118 *Standard Bank v Estate van Rhyn* 1925 (AD) 266 at 274-275.

119 1983 (2) SA 284 (C).

its enforcement, the magistrate correctly gave judgement against the plaintiff." [120]

In an Appellate Division case of *Metro Western Cape (Pty) Ltd v Ross,* [121] the court was confronted with the interpretation of an ordinance as provided for in terms of The Registration and Licensing of Business Ordinance 15 of 1953 (C) and whether the contracts in question were rendered illegal. Consequently the court held:

"I am consequently of the view that on a proper construction of the ordinance the purpose thereof is sufficiently served by the penalties prescribed for illegal trading. The ordinance was not intended to render contracts entered into between a trader and his customers void. Indeed the avoidance of the contracts concluded by a trader with his customer would cause grave inconvenience and injustice to innocent members of the public without furthering the object of the ordinance." [122]

Duress and Undue Influence

The South African courts have, for decades, recognized that there are circumstances when the courts will set aside a contract, in favour of one of the contracting parties, on the ground that his/her consent was improperly obtained. Two of these factors giving rise to the void-ability of the contract include duress and undue influence.

In one of the first cases involving duress, wherein a South African court had to decide upon the effect of consent improperly obtained through threat or force, was that of *White Bros v Treasurer-General,* [123] in which De Villiers CJ stated:

"Where a man is forced by menaces to his person to make payments which he is not legally bound to make, it cannot be said that there is a total absence of consent - but, in as much as his consent is forced and not free, the payment is treated as involuntary and therefore subject to restitution." [124]

Sometime later, in the case of *Broodryk v Smuts N.O.*, [125] the court dealt with an exception to the plaintiff's declaration.

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120 *Lende v Goldberg* 1983 (2) SA 284 (C) 289.

121 1986 (3) SA 181 (A).

122 *Metro Western Cape (Pty) Ltd v Ross* 1986 (3) SA 181 (A) 195.

123 (1883) 2 SC 322, 351.

124 *White Bros v Treasurer-General* (1883) 2 SC 322, 351.

125 1942 (TPD) 47.

The plaintiff alleged that he had entered into a contract of voluntary enlistment and had taken the prescribed oath under a threat that, failing such enlistment, he would be regarded as a person unwilling to support the Government and would be interned. At the time of enlistment he was a road-worker, employed by the Government. He was married, with a minor child dependant upon him. He also alleged that the threat was made by the officials, in the service of the Government, who were authorized to enlist persons for military service and to give them information in this connection. He claimed rescission of the contract, citing JC Smuts in his capacity as the Prime Minister and Minister of Defence, as the defendant. The defendant exempted to the declaration on the grounds, *inter alia*, that the duress alleged was insufficient to support a claim for the rescission of the contract.

Ramsbottom J, with reference to the five elements enunciated in Wessels on Contract (Vol. 1, Para 1167), namely:

(1) Actual violence or reasonable fear;
(2) The fear must be caused by the threat of some considerable evil to the party or his family;
(3) It must be the threat of an imminent or inevitable evil;
(4) The threat or intimidation must be contra bonos mores;
(5) The moral pressure used must have caused damage.

The court subsequently held *"the evil alleged to have been threatened would undoubtedly be considerable both to the plaintiff and his family. Should he be deprived of his freedom and his family be deprived of his support, it would be a grave matter to them. The fear of unlawful imprisonment, including unwarranted internment is a grave matter."*

Consequently, the court held *"to threaten to exercise that power not because the person threatened is a danger to the state but because he is unwilling to join the army or to volunteer for service outside South Africa would, I think, clearly be contra bonos mores."* [126]

The court also, consequently, held that a contract entered into through fear, induced by the duress of a third party, is voidable, on the principle that there is no consent. In a subsequent decision of *Arend v Astra Furnishers (Pty) Ltd,* [127] the court was confronted by

126 *Brooderyk v Smuts NO* 1942 (TPD) 47.

127 1974 (1) SA 298 (C).

the following facts, namely:

The respondent sued the appellants on an acknowledgement of debt regarding money and goods, allegedly misappropriated by the first appellant and a deed of suretyship in respect of this indebtedness, signed by the second appellant. When the appellants entered an appearance to defend, the respondent applied for summary judgement under Rule of Court 32, alleging in a supporting affidavit that no *bona fide* defences could be raised against the claims. Both appellants opposed this application. Presently relevant is the first appellant's allegation that he had been moved to sign the acknowledgement by duress.

Corbett J recognised duress as a defence when he stated:

"(305) It is clear that contract may be vitiated by duress (metus), the raison d'etre of the rule apparently being that intimidation or improper pressure renders the (306) consent of the party subjected to duress no true consent (see Broodryk v Smuts NO 1942 TPD 47 at p 53; also Steiger v Union Government 1919 NPD 75 at p 79)."

The court went on to recognise the different forms of duress and the elements required when Corbett J stated:

"Duress may take the form of inflicting physical violence upon the person of a contracting party or inducing in him a fear by means of threats. Where a person seeks to set aside a contract, or resist the enforcement of a contract, on the ground of duress based upon fear, the following elements must be established.

(i) The fear must be a reasonable one;
(ii) It must be caused by the threat of some considerable evil to the person concerned or his family.
(ii) It must be the threat of an imminent or inevitable evil;
(iv) The threat or intimidation must be unlawful or contra bonos mores;
(v) The moral pressure used must have caused damage.
(See Broodryk v Smuts NO supra at pp 51-2)"

The court consequently summed up the South African law as follows:

"..... It seems to me that an important consideration is the fact that, generally speaking an agreement of the type under discussion would constitute an unlawful compounding. This would not only render the threat unlawful, from the point of view of the application of the principles of duress, but would vitiate the entire agreement as being void for illegality (cf. the comment on the Janse Rautenbach case, supra, in 1970 Annual Survey at p 106)."

With regard to the acknowledgement of debt in question the court held:

"I hold that the validity of the acknowledgement of debt cannot be upheld on the ground that plaintiff was merely receiving that to which he was in any event entitled ....
(311) In view of the foregoing I have come to the conclusion that generally speaking a contract induced by the threat of criminal prosecution is unenforceable on the ground of duress and, in certain instances, also on the

ground that it involves the compounding of a crime and the stifling of a prosecution." [128]

In a subsequent case of *Hendricks v Barnett,* [129] the court relied upon the dictum of De Villiers CJ in *White Brothers v Treasurer-General* (1883) 2 SC 322 at pp351-2, wherein it was stated:

"Where a man is forced by menaces to his person to make payments which he is not legally bound to make, it cannot be said that there is a total absence of consent - but, in as much as his consent is forced and not free, the payment is treated as voluntary, and therefore subject to restitution." [130]

The Witwatersrand Division of the High Court in 1979 dealt with the case of *Machanick Steel and Fencing (Pty) Ltd v Wesrhodean (Pty) Ltd; Machanick Steel and Fencing (Pty) Ltd v Transvaal Cold Rolling (Pty) Ltd*. [131] The following were the facts presented:

The applicant, a steel merchant, alleged that the respondents, to whom it had supplied steel for the purpose of its being converted to sheeting, had misappropriated the finished product by selling it for their own account. It claimed an amount of R128 000.00 in terms of an acknowledgement of debt, annexure B, under which the respondents undertook to pay the amount in instalments together with interest at 12%, on the grounds that the whole sum had become due by virtue of the operation of an acceleration clause contained in the contract. The respondents averted that annexure B was not binding on them, inter alia, because it had been entered into under duress or because it amounted to an unlawful compounding of an offence.

Nestadt J recognises the defence of duress and endorses the basic elements of this defence as set out by Ramsbottom J in *Broodryk v Smuts NO* 1942 TPD 47 at 51-2 namely:

"1. Actual violence or reasonable fear;
2. The fear must be caused by the threat of some considerable evil to the party or his family.
3. It must be the threat of an imminent or inevitable evil;
4. The threat or intimidation must be unlawful or contra bonos mores;
5. The moral pressure used must have caused damage."

128 *Arend v Astra Furnishes (Pty) Ltd* 1974 (1) SA 298 (C).

129 1975 (1) SA 765 (N).

130 *Hendricks v Barnett* 1975 (1) SA 765 (N).

131 1979 (1) SA 265 (W).

Nestandt J set out the Transvaal courts' approach to the defence of duress in the following terms:

" ..... it seems to me that in deciding whether the contract had been entered into under duress or whether it amounts to a compounding, the same test in determining whether the threat of prosecution was contra bonos mores has to be applied, namely did the creditor thereby exact or extort something to which he otherwise was not entitled." [132]

Relying on the case of *Arend and Another v Astra Furnishers (Pty) Ltd* 1974 (1) SA 298 (C), in which it was held by a Full Bench that, generally speaking, a contract induced by the threat of criminal prosecution is unenforceable on the ground of duress and, in certain instances, also on the ground that it involves the compounding of a crime and the stifling of a prosecution. The court held this position should be followed.

Undue influence has been recognised by the South African courts as a defence to a contract consented to, where undue influence is used in concluding the agreement.

The *locus classicus* in this regard is the Appellate Division (as it was known then) case *Preller v Jordaan,* [133] the facts of this case included: Jordaan, an elderly farmer, entered into a contract with Preller, a medical practitioner, who for years had acted as his doctor and adviser, in terms of which he gave and transferred to Preller four farms - to be administered by Preller for the benefit of Jordaan's wife and farm labourers. Preller had subsequently transferred one of the farms to his son and two of them to his daughter.

Jordaan averred that at the time the contract had been entered into he had been sick, and bodily, spiritually and mentally weak and exhausted; he had been influenced in an improper and unlawful manner by Preller and would never have entered into the contract had he not been so weak and exhausted and totally under the influence of his doctor. He claimed against Preller (first appellant) an order declaring that the authority to pass transfer that he had signed, and the transfer, was null and void, together with an order for the retransfer to him, of the farm which Preller had retained. Against the son and daughter (second and third appellants), he claimed re-transfer of the farms registered in their names.

The defendants raised an exception to Jordaan's declaration on the grounds that it

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132 *Machanick Steel and Fencing (Pty) Ltd v Wesrhodean (Pty) Ltd*; *Mackanick Steel and Fencing (Pty) Ltd v Transvaal Cold Rolling (Pty) Ltd* 1979 (1) SA 26 50 (W).

133 1956 (1) SA 483 (A).

disclosed no cause of action, because undue influence was not a good ground for setting aside the transaction in Roman-Dutch Law. The Orange Free State Provincial Division dismissed the exception and the defendants appealed. In the appeal it was contended, for the first time on behalf of the son and daughter, that, as the transaction was voidable and not void, and as transfer had been passed to them, Jordaan could not claim back the farms from them by *vindicatio*.

The court, per Fagan JA, considered the Roman-Dutch Law authorities and, in particular, Introduction to Roman-Dutch Law P204, Voet 2.14.9, 2.14.18 and translated by Gane:

"It is true also that no obligation appears to have been contracted when sick persons in stress of anguish tender to their Aesculapiuses, who do not even ask for them, much less wring them out by fear, specious promises to meet the event of their cure - promises which they would never have tendered had they calmly reflected that the restoration to health does not depend on the art of doctors merely, nor does the decision of life and death rest with them. This is simply what the Emperors stated in their written answer that "We allow doctors to take what sound men offer for attendance, but not what men in danger promise in return for health." [134]

Fagan JA found that, with reference to the Roman-Dutch sources, the grounds for *restitutio in integrum* in Roman-Dutch law were wide enough to cover a matter where a person exerts an influence over another, which weakens the weaker party's resistance, as well as his will to resist. Moreover, the stronger party would then exert his influence in an unscrupulous manner and in so doing, to influence the weaker to agree to a transaction to his prejudice, which normally he would not enter into.

Relying on several cases in which restitution was sought due to undue influence, *inter alia, Executors of Serfonteyn v O'Haire* 1873 Buch 47; *Armstrong v Magid and Another* 1937 AD 269 (per De Villiers RA, op bl. 273, en De Wet RA, op bl 276); *Ktzenellenbogen v Katzenellenbogen and Joseph* 1947 (2) SA 528 (W); *Mauerberger v Mauerberger* 1948 (4) SA 902 (KPA) en sake daar aangehaal op bl 910-11; *Ratanee v Maharaj and Another* 1950 (2) SA 538 (D) en (KLA), the court recognised the void-ness of these type of agreements in a later judgement by the Appellate Division (as it was known then). The court dealt with the following facts in the case of *Patel v Grobbelaar*: [135] The respondent consulted Dr Patel, an herbalist, in connection with his marital problems. The latter, portraying himself as a `Slams' and the possessor of supernatural powers, suggested, *inter alia,* that he was capable of capturing Grobbelaar's spirit and confining it in a bottle. Grobbelaar belonged to

134 Voet 2.14.9, 2.14.18 translated by Gane.

135 1974 (1) SA 532.

that stratum of society known for its gullibility, particularly as regards the doings and goings-on of ghosts and wandering spirits..... He was a simple, artless, wholly naive person. He believed Patel's claims and a relationship of dependence developed. At Patel's instigation, Grobbelaar acknowledged, in writing, that he owed Patel R40 000, an admission which was totally without foundation. A mortgage was subsequently registered over Grobbelaar's farm to secure his supposed indebtedness to Patel.

The court a quo set aside the mortgage on account of the undue influence exercised by the latter.

The Appellate Division, with reference to the case of *Preller v Jordaan* 1956 (1) SA 483 (A), confirmed that the onus to discharge, in these types of cases involving undue influence, included:

"(1) than an influence was exerted over one of the contracts;
(2) That the influence over the over contractant weakened that other's powers of resistance and renders his will pliable;
(3) Such a person exercises his influence in an unconscionable manner to persuade the other to agree to a prejudicial transaction which he would not have entered into with normal freedom of will;" [136]

The court consequently held that the contract entered into under undue influence is voidable.

Fraud

The South African courts, for many decades, have identified fraud as one of the exceptions or defences to the *caveat subscriptor* rule. [137]

The courts have, however, added a proviso to the above principle, namely; despite fraudulent conduct but, the signatory is aware of the fraudulent fact and still signs or where the signatory was negligent in concluding the contract, he cannot resile from the contract as he/she is bound by his signature on the doctrine of estoppels, in that the *caveat subscriptor* rule applies. [138]

136 *Patel v Grobbelaar* 1974 (1) SA 532.

137 *Burger v Central* SAR 1903 TS 571, 578; *Goedhals v Maasey-Harris and Co* 1939 EDL 314, 322; *George v Fairmead* 1958 2 SA 465 (A) 471; *Glenhurd Hotels (PVT) Ltd v England* 1972 (2) SA 660 (RA) 662; *National and Grindlays Bank Ltd v Yelverton* 1972 (4) SA 114 (R) 117; *Janowski v Fouche* 1978 (3) SA 16 (0); See also *Donners Motors (PVT) Ltd v Kufinya* 1968 (1) SA 434 (RA) of an unsuccessful attempt to use the *caveat subscriptor* doctrine as a fraudulent trap.

138 *Musgrove and Watson (Rhodesia) (PVT) Ltd v Rotta* 1978 (2) SA 918 (R); *Standard Credit Corporation Ltd v Naicker* 1987 (2) SA 49 (N).

The courts have had no difficulty, especially, with contracts containing exemption clauses, in prohibiting exemption from liability for fraud. In the words of Innes CJ in *Wells v SA Alumenite Co*: [139]

"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." [140]

In the Wells case the fraudulent misrepresentation was made by the salesman.

That was also the position adopted by the court in the case of *Goodman Brothers (Pty) Ltd v Rennies Group Ltd*. [141]

In this case, 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 narrowly defined, but extended to any deliberate dishonest conduct (such as theft) by a contracting party.

Cloete J also held:

"An agent, who concludes a contract for and on behalf of his principal, does so for the benefit of his principal. To allow the principal to take advantage of fraudulent misrepresentation by relying on a clause excluding liability for misrepresentations by the servant or agent would encourage fraud." [142]

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139 1927 (AD) 69.

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

141 1997 (4) SA 91.

142 *Goodman Brothers (Pty) Ltd v Rennies Group Ltd* 1977 (4) SA 91 at 99.

Our courts have also, on occasions, held that where loss, damage, shortage or delay was occasioned by, or through, the wilful conduct of the supplier or contractor, no exclusionary clause would serve to relieve it from liability. [143]

In *Hughes v SA Fumigation Co (Pty) Ltd* [144] Herbstein J said: *"If the contractor deliberately caused the fire no exclusionary clause would serve to relieve it from liability."* [145]

Contra however, *Galloon v Modern Burglar Alarms (Pty) Ltd* [146] and *Micor Shipping (Pty) Ltd v Tregor Golf and Sports (Pty) Ltd,* [147] in which cases the view was expressed that a party could exempt himself from liability *"even for his own wilful default."*

9.2.1.3 Legal Opinion

The *caveat subscriptor* rule is firmly entrenched in the South African Law of Contract. Crudely translated it means `*let the signer beware'*. As a general rule it has been accepted, by the South African legal writers and the South African courts, that a person who signs a contractual document thereby signifies his/her assent to the document. [148]

The effect of the *caveat subscriptor* rule is this, once a person has signed a contractual document, but it subsequently turns out that the terms of the contract are not to his/her liking, he/she cannot complain, as he/she has no one to blame but himself. The contracting party who faces that position can, generally therefore, not recile from the contract and rely

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143 *SA Railways and Harbour v Conradie* 1921 (AD) 137 143; See also *Essa v Divaris* 1947 (1) SA 753 (A) 767; *Citrus Board v South African Railways and Harbours* 1957 (1) SA 198 (A) 205.

144 1961 (4) SA 799 (C).

145 *Hughes v SA Fumigation Co (Pty) Ltd* 1961 (4) SA 799 (C).

146 1973 (3) SA 647 (C).

147 1973 (3) SA 743 (C).

148 For legal writings see Christie *The Law of Contract in South Africa* (2001) 199; Joubert *The General Principles of the Law of Contract* (1987) 85; Farlam and Hathaway *The Case Book on the South African Law of Contract* (1979) 65; Woker "Caveat Subscriptor: How careful are we expected to be? (2003) 15 *SA Merc. LJ* 109 at 110. For case law see *Burger v Central South African Railways* 1903 TS 571; *George v Fairmead (Pty) Ltd* 1958 (2) 465 (A); *Glenburn Hotels PVT Ltd v England* 1972 (2) SA 660 (RA); *Micor Shipping (Pty) Ltd v Tregor Golf and Sports (Pty) Ltd and Another* 1977 (2) SA 709 (W); *Diners Club SA (Pty) Ltd v Thorburn* 1990 (2) SA 870 (C); *Booysen v Sun International (Bophuthatswana) Ltd* Case No 96/3261 delivered 23 March 1988 (WLD) (Unreported); *Durban's Water Wonderland (Pty) Ltd v Botha and Another* 1959 (1) SA 982 (SCA); *Home Fires Transvaal CC v Van Wyk and Another* 2002 (2) SA 375 (W); *Solar (Pty) Ltd v Divwatt (Pty) Ltd* 2002 (4) SA 681 (SCA); *Hartley v Pyramid Freight (Pty) Ltd t/a Sun Couriers* 2007 (2) SA 599.

on mistake to escape liability, as the law dictates that a reasonable man, generally, takes care that the document, a contracting party signs, correctly reflects his/her intention. [149] But, signing a document, without reading it, does not in every instance mean that the signatory will be bound by it. The law allows for instances where one's signature can be voided, for example, through mistake, misrepresentation, illegality, duress, undue influence, fraud etc. [150]

The rationale for the exception to the general rule is founded upon the reliance theory, in that, in circumstances wherein it has been found that there was no true agreement between the parties, alternatively, where a contractant had not created a reasonable impression that she/he intended to be bound by the terms of the agreement, that contractant cannot be bound by that agreement.

For that reason, the contracting party who relies on a signature must have a reasonable belief that the signatory intends to be bound by the terms of the agreement and not be aware that a mistake had been made or he/she was in some way responsible for the fact that the signatory was not aware of the contents of the contract. [151]

Both the legal writers and the courts do recognise certain special defences which have the effect that, despite the contracting party appending his/her signature to a contract, he/she is not bound by the terms. The special defences include the ignorance or handicap of the signatory, to whom the contents of the document, so signed, have been inaccurately explained or where a trap has been set for the signatory or the document contained a term

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149 For legal writings see Christie *The Law of Contract in South Africa* (2001) 199; Joubert *The General Principles of the Law of Contract* (1987) 85; Farlam and Hathaway *The Case Book on the South African Law of Contract* (1979) 65; Woker "Caveat Subscriptor: How careful are we expected to be? (2003) 15 *SA Merc. LJ* 109 at 110. For case law see *Burger v Central South African Railways* 1903 TS 571; *George v Fairmead (Pty) Ltd* 1958 (2) 465 (A); *Glenburn Hotels PVT Ltd v England* 1972 (2) SA 660 (RA); *Micor Shipping (Pty) Ltd v Tregor Golf and Sports (Pty) Ltd and Another* 1977 (2) SA 709 (W); *Diners Club SA (Pty) Ltd v Thorburn* 1990 (2) SA 870 (C); *Booysen v Sun International (Bophuthatswana) Ltd* Case No 96/3261 delivered 23 March 1988 (WLD) (Unreported); *Durban's Water Wonderland (Pty) Ltd v Botha and Another* 1959 (1) SA 982 (SCA); *Home Fires Transvaal CC v Van Wyk and Another* 2002 (2) SA 375 (W); *Solar (Pty) Ltd v Divwatt (Pty) Ltd* 2002 (4) SA 681 (SCA); *Hartley v Pyramid Freight (Pty) Ltd t/a Sun Couriers* 2007 (2) SA 599.

150 For legal writings see Farlam and Hathaway *The Case Book on the South African Law of Contract* (1979) 65; Woker "Caveat Subscriptor: How careful are we expected to be? (2003) 15 *SA Merc.LJ* 109 at 110. For case law see *Morrison v Anglo Deep Gold Mines Ltd* 1905 TS 775 setting out the general exception to the rule.

151 For legal writings see Woker `Caveat Subscriptor" How careful are we expected to be?' (2003) 15 *SA Merc. LJ* 110-111; Christie *The Law of Contract in South Africa* (2001) 199-200; Farlam and Hathaway *The Case Book on the South African Law of Contract* (1979) 65-66. For case law see *Home Fires Transvaal CC v Van Wyk and Another* 2002 (2) SA 375(w); *Solar (Pty) ltd v Divwatt (Pty) Ltd* 2002 (4) SA 681 (SCA).

which the reasonable man would not expect to find therein. [152]

The other defences to the *caveat subscriptor* rule include firstly, misrepresentation. It is especially in exclusionary clauses, which are couched in the form of an admission, that for example, no representation had been made, alternatively that the contracting party had not been influenced by any representation, that both the legal writers and the courts have shown protection towards the contracting party who is most affected by the hardship which these clauses often bring. [153]

The rationale for the intervention is said to be founded upon the fact that the South African Legal writers and the courts alike, opine that fraud or wilful conduct, to the detriment of a contracting party, should never be encouraged. Hence, exemption clauses, containing exemptions for fraudulent misrepresentation and conduct, are ineffective on the ground of public policy. [154] Likewise, exemption clauses exonerating a contracting party for wilful conduct will not be upheld. [155]

One of the other underlying reasons for the intervention arises from the fact that through the misrepresentation made by one of the contracting parties, there is dissensus between the parties. For that reason, a remedy for fraudulent misrepresentation cannot be excluded by a prior agreement between the parties. [156]

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152 See Christie *The Law of Contract in South Africa* (2003) 201-203. For case law see *Shepherd v Farrell's Estate Agency* 1921 TPD 62; *Du Toit v Atkinson's Motors Bpk* 1985 (2) SA 893 (A); *Spindrifter (Pty) Ltd v Lester Donovan (Pty) Ltd* 1986 (1) SA 303 (A) regarding terms or the contents which had changed from when the negotiations had started; In *Katzen v Mgune* 1954 (1) SA 277 (T) the *caveat* doctrine was not applied against an ignorant and handicapped signatory to whom the contents of the document were inaccurately explained; In *Dlovo v Brian Porter Motors Ltd* 1994 (2) SA 518 (C) the contracting party who signed, may rely on the special defence that the reasonable man would not expect to find unexpected terms in the contract.

153 For legal writings see Lubbe and Murray *Farlam and Hathaway Contract Cases, Material, Commentary* (1988) 340; Christie *The Law of Contract in South Africa* (2001) 199-200; Kahn "Imposed Terms in Ticket and Notices" *Businessman's Law* (1974) 159. For case law see *Wells v SA Alumenite Co* 1927 AD 69 at 72. See also *Sissons v Lloyd* 1960 (1) SA 367 (SA); *Claassens v Pretorius* 1950 (1) SA 738 (0); *Trollip v Jordaan* 1961 (1) SA 238 (A); *Allen v Sixteen Sterling Investments (Pty) Ltd* 1974 (4) SA 164 (D); *Goldberg and Another v Carstens* 1997 (2) SA 854 at 859.

154 For legal writings see Lubbe and Murray *Farlam and Hathaway Contract Cases, Material, Commentary* (1988) 340; for case law see *Wells v SA Alumenite Co* 1927 AD 69; *Sissons v Lloyd* 1960 (1) SA 367 (SA); *Claassens v Pretorius* 1950 (1) SA 738 (0); *Trollip v Jordaan* 1961 (1) SA 238 (A).

155 *Hughes v SA Fumigation Co (Pty) Ltd* 1961 (4) SA 799 (C).

156 For legal writings see Joubert *The Law of South Africa* Volume 5 Part 1 (1994) Par at 148, 150; Lubbe and Murray *Farlam and Hathaway Contract Cases, Materials, Commentary* (1988) 340; Kerr *The Principles of The Law of Contract* (1998) 404-405; Christie *The Law of Contract in South Africa* (1996) 205. For case law see *Allen v Sixteen Sterling Investments (Pty) Ltd* 1974 (4) SA 164 (D); *Goldberg and Another v Carstens* 1997 (2) SA 854 at

Although the South African courts have previously acknowledged that relief on the basis of misrepresentation may be excluded by means of contractual stipulation, [157] today it appears fairly settled that where the contractual provisions, based upon misrepresentation, are regarded as contrary to public policy, the courts will not hesitate to pronounce these clauses as ineffective and void. [158]

Besides relying upon public policy to curb the exploitation of contracting parties where one of the contracting parties invokes an exclusionary clause to escape liability arising from misrepresentation, the courts have also limited the effect of exemption clauses.

In these circumstances, by restrictive interpretation therefore, where more than one ground of liability exists, the clause will then be given the minimum of effectiveness, by being interpreted to involve the least degree of blameworthiness. [159] The *contra proferentum* rule has also been widely adopted by the South African courts. The rule works as follows: What must be established firstly, is what the parties intended the exemption clause to convey? Where doubt exists, in which the defendant is the proferens, the clause must be construed against him. [160]

It is especially, in the case of *Van der Westhuizen v Arnold* [161] that the court cautions:
"There does not, therefore, appear to be any clear authority for a general principle that exemption clauses should be construed differently from other provisions in a contract, But that does not mean that courts are not, or should

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157 For case law see *Maritz v Pratley* (1894) 11 SC 345; *National and Overseas Distributory Corporation (Pty) Ltd v Potato Board* 1958 (2) SA 473 (A); *Trollip v Jordaan* 1961 (1) SA 238 (A); *Janowski v Fourie* 1978 (3) SA 16 (O); *Goldberg and Another v Carstens* 1997 (2) SA 854 at 858-859.

158 For legal writings see Joubert *The Law of South Africa* Volume 5 Part 1 (1994) Par at 148, 150; Lubbe and Murray *Farlam and Hathaway Contract Cases, Materials, Commentary* (1988) 340; Kerr *The Principles of The Law of Contract* (1998) 404-405; Christie *The Law of Contract in South Africa* (1996) 205. For case law see *Wells v SA Alumenite Co* 1927 (AD) 69. See also *Sissons v Lloyd* 1960 (1) SA 367 (SA); *Claassens v Pretorius* 1950 (1) SA 738 (O); *Trollip v Jordaan* 1961 (1) SA 238 (A).

159 For legal writings see Van der Merwe et al *Contract: General Principles* (2003) 215-216; Christie *The Law of Contract in South Africa* (1996) 204, 209-210; Kerr *The Principles of the Law of Contract* (1998) 258-259; Aronstam *Consumer Protection, Freedom of Contract and The Law* (1979) 33-36, 206; Lubbe and Murray *Farlam and Hathaway Contract Cases, Materials, Commentary* (1988) 340. For case law see *Essa v Divaris* 1947 (1) SA 753 (A); *South African Railways and Harbours v Lyle Shipping Co Ltd* (1958 (3) SA 416 (A).

160 For case law see *Bristow v Lycett* 1971 (4) SA 223 at 236. See also *Galloon v Modern Burglar Alarms (Pty) Ltd* 1973 (3) SA 647 (C); *Van der Westhuizen v Arnold* 2002 (6) SA 457 (SCA) 458; *Government of the Republic of South Africa v Fibre Spinners* 1978 (2) SA 794 (A) at 804.

161 2002 (6) SA 457 (SCA) at 468.

not be, wary of contractual exclusions, since they do deprive parties of rights that they would otherwise have had at common law. In the absence of legislation regulating unfair contract terms, and where a provision does not offend public policy or considerations of good faith, a careful construction of the contract itself should ensure the protection of the party whose rights have been limited, but also give effect to the principle that the other party should be able to protect himself or herself against liability insofar as it is legally permissible. The very fact, however, that an exclusion clause limits or ousts common law rights should make a court consider with great care the meaning of the clause, especially if it is very general in its application. This requires a consideration of the background circumstances, as described in Coopers and Lybrand v Bryant (above) and a resort in surrounding circumstances if there by any doubt as to the application of the exclusion." [162]

The second general defence to the *caveat subscriptor* rule is that of mistake or *justus error*, as it is also known. In the South African Law, it is also described as a mistake which is reasonable and justifiable and of which the law takes notice. [163]

A unilateral mistake is, however, not enough for a contracting party to escape the consequences of a contract. But, if the party was labouring under some misapprehension and the other party knew of his mistake, or if a reasonable person would have known of the mistake, or he/she caused the mistake, the contracting party who relies upon the mistake, to be reasonable, may recile from the contract, provided the mistaken party can show he/she would not have entered into the contract had he/she known the truth. [164]

A mutual mistake, on the other hand, is recognized and occurs where the contracting parties are at cross purposes and not *ad idem*. Mutual mistake resulting from a misrepresentation may result in the contract be declared void *ab initio* provided it can be shown the mistake was reasonable. [165]

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162 *Van der Westhuizen v Arnold* 2002 (6) SA 457 (SCA) at 468.

163 For legal writings see Christie *The Law of Contract* (2003) 363; Lubbe and Murray *Farlam and Hathaway Contract Cases, Materials, Commentary* (1988) 132ff. For case law see *Burger v Central SAR* 1903 TS 571; *SAR and H v Conradie* 1922 AD 137; *Goedhals v Massey-Harris and Co* 1939 EDL 314; *Bhikhagie v Southern Aviation (Pty) Ltd* 1943 4 SA 105 (E); *Mathole v Mothle* 1951 (1) SA 256 (T); *George v Fairmead (Pty) Ltd* 1958 (2) SA 485 (A); *Glenburn Hotels (PVT) Ltd v England* 1972 (2) SA 660 (RA); *National and Grindays Bank Ltd v Yelveton* 1972 (4) SA 114 (R); *Du Toit v Atkinson's Motors Bpk* 1985 (2) SA 893 (A); *Spin Drifter (Pty) ltd v Lester Donovan (Pty) Ltd* 1996 (1) SA 303; *Keens Group Co (Pty) Ltd v Lötter* 1989 (1) SA 585 (C); *Diners Club SA (Pty) Ltd v Thorburn* 1980 (2) SA 870 (C); *Hartley v Pyramid Freight (Pty) Ltd t/a Sun Couriers* 2007 (2) SA 509.

164 For legal writings see Christie *The Law of Contract* (2003) 365; Kerr *The Principles of the Law of Contract* (2002) 251. For case law see *Musgrove and Watson (Rhodesia) (PVT) Ltd v Rotta* 1978 (4) SA 656 (R); *Shepherd v Farelo's Estate Agency* 1921 (TPD) 62; *Du Toit v Atkinson's Motors Bpk* 1985 (2) SA 893(A); *Spin Drifter (Pty) Ltd v Lester Donovan (Pty) Ltd* 1986 (1) SA 303. The latter cases concern a contracting party remaining silent, notwithstanding, knowing the other contracting party is under a mistaken belief. See also *Keens Group Co (Pty) Ltd v Lötter* 1989 (1) SA 585 (C) re setting a trap for the other contracting party to make a mistake. See further *Diner's Club SA (Pty) Ltd v Thorburn* 1980 (2) SA 870 (C).

165 For legal writings see Christie *The Law of Contract* (2003) 378.

Other instances in which the South African courts have held an error to be justus include:

(1) Where an ignorant and handicapped signatory, to whom the contents of the document were inadequately and inaccurately explained; [166]

(2) Representations have been made during negotiations which are inconsistent with the terms of the contract to be signed; [167]

(3) Where the signatory is misled by the format of the written document, for example, by tucking away an important clause in very fine, small print; [168]

(4) Where a document is signed without reading it but the document contained a term or terms which the reasonable man would not expect to find therein. [169]

The third defence to the *caveat subscriptor* rule is that of illegality. Despite the signatory signing the written agreement, the law does not hold the signatory to the contract, as a valid contract cannot come into existence if the agreement is illegal. It has been a long-standing principle in South African law, that a contract which is illegal is void. [170]

In general terms, a contract is said to be illegal if the making of it, or the performance agreed upon, or the ultimate purpose of both parties in contracting, is prohibited by statute law or common law, contrary to public policy or *contra bones mores*. [171]

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166 For case law see *Katzen v Mguno* 1954 (1) SA 277 (T).

167 For case law see *Spindrifter (Pty) Ltd v Lester Dononvon (Pty) Ltd* 1986 1 SA 303 (A); *Kempston Hire (Pty) Ltd v Snyman* 1988 (4) SA 465 (T); *Dlovo v Braam Porter Motors Ltd* 1994 (2) SA 518 (C) 526; *Diners Club SA (Pty) Ltd v Livingstone* 1995 (4) SA 493 (W) 495; *Fourie v Hansen* (2000) 1 ALL SA 510 (W) 517.

168 For case law see *Keens Group Co (Pty) Ltd v Lötter* 1989 (1) SA 585 (C) 590; *Dlovo v Brian Porter Motors Ltd v Livingstone* 1995 (4) SA 495; See also the significant comments of Sachs J in *Barkhuizen v Napier* 2007 (5) SCA 323 (CC).

169 For case law see *Dlovo v Brian Porter Motors Ltd* 1994 (2) 518 (C) 525; Fouche v Hansen (2000) 1 ALL SA 510 (W) 516.

170 For legal writings see Joubert *The Law of South Africa* First Review 5 Part 1 (1994) Par 167; Christie *The Law of Contract* (2003) 115ff; Lubbe and Murray *Farlam and Hathaway Contract Cases Materials Commentary* (1988) 238-241

171 For legal writings see Christie *The Law of Contract* (1987); Kerr *The Principles of the Law of Contract* (2002) 181ff; Joubert *LAWSA* (1994) Par 167; Joubert *General Principles of the Law of Contract* (1987) 129ff. For case law dealing with common law illegality see *Eastwood v Shepstone* 1902 TS 294; *Padayachey v Lebese* 1942 (TPD) 10; *Magna Alloys and Research (SA) (Pty) Ltd v Ellis* 1984 (4) SA 874 (A); *Botha (now Griesel) v Finanscredit (Pty) Ltd* 1989 (3) SA 773. For case law dealing with statutory regulations see *Jajbhay v Cassim* 1939 (AD) 537; *Osman v Reis* 1976 (3) SA 710 (C); *Standard Bank v Estate Van Rhyn* 1925 (AD) 266; *Linde v Goldberg* 1983 (2) SA 284 (C); *Metro Western Cape (Pty) Ltd v Ross* 1986 (3) SA 181 (A).

South African legal writers [172] hold the view that exemption clauses, in certain circumstances, may be struck down, due to illegality, where they are contrary to public policy. Although there are no *numerus clauses*, a few notable examples have emerged including: contracts which undermine the safety of the state and public order; contracts concerning or affecting the maintenance of the sexual morality of the community and the sanctity of marriage and the family; contracts which promote forced labour etc.

It is also well established that, exemption clauses purporting to exclude liability for wilful acts, whether of a delictual nature or constituting a breach of contract, are regarded as ineffective, for the want of legality on the grounds of public policy. [173]

Although it is generally accepted that exemption clauses excluding liability for ordinary negligence and gross negligence (*culpa lata*) escape the effect of illegality, and are regarded as effective and not against public policy, [174] there are voices who hold the view that, notwithstanding the generally accepted principle as enunciated hereinbefore, there are rights which are inalienable and may never be waived, forfeited, or transformed in a contract. [175]

The writer Hopkins [176] persuasively argues that, although not every instance where there is an unequal bargaining position between the contracting parties necessarily justifies intervention by the courts, where a contracting party's human dignity is impaired during the contracting process, intervention by the courts may very well be appropriate.

The writer further persuasively argues that before a contracting party may legally limit,

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172 See Van der Merwe et al *Contract: General Principles* (2003) 215; Kerr *The Principles of the Law of Contract* (2002) 404-405; Christie *The Law of Contract in South Africa* (2003) 204-205; Lubbe and Murray *Farlam and Hathaway Contract Cases, Materials, Commentary* (1988) 238-340; Joubert *The Law of South Africa* (1994) Par 163-165.

173 Lubbe and Murray *Farlam and Hathaway Contract Cases, Materials, Commentary* (1988) 425; Van der Merwe et al *Contract: General Principles* (2003) 215; Kerr *The Principles of the Law of Contract* (2002) 405-406; Christie *The Law of Contract in South Africa* (2003) 205-206.

174 See Lubbe and Murray *Farlam and Hathaway Contract Cases, Materials Commentary* (1988) 425; 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* 2001-3 597 at 599; Hopkins "Constitutional rights and the question of waiver: How fundamental are fundamental rights?" (2001)16 *SAPR/SAPL* 122.

175 Hopkins "Constitutional rights and the question of waiver: How fundamental are fundamental rights?" (2001) *SAPR/SAPL* 122 at 137.

176 "Constitutional Rights and the question of waiver: How fundamental are fundamental rights?" (2001) *SAPR/SAPL* 122 at 133.

through a waiver or exemption clause, a contracting party's rights and which effects a party to a contract's constitutional right, two requirements first have to be met, namely, `*reasonableness*' and `*proportionality*'. The latter requirement represents a balance between a socially obtained benefit and the harm done. [177]

The afore state argument, it is submitted, contributes very richly in considering the central theme of this thesis, especially in assessing whether an exclusionary clause in a hospital contract, in which the hospital's (including its staff) liability may be waived, regardless of the hospital, through it's staff, acting negligently in treating the patient.

It is argued that the hospital/hospital staff's duty to care and exercise reasonable skill is a right which a patient cannot waive.

The fourth general exception to the *caveat subscriptor* rule is that of duress and undue influence. Both duress (*metus*) and undue influence are defences which may be successfully raised where an exemption clause, included in a contract, was so included through the abusive conduct of one contractant over another. The abusive conduct may take the form of pressure, which in itself is manifested through duress and undue influence. [178]

The rationale for the recognition of both duress and undue influence lie in the fact that consent (although given) was not freely obtained when the transaction was entered into. In the event of duress, usually threat is present which induces a contracting party to conclude the contract, whereas, in the event of undue influence, the capacity of one of the contracting parties, due to illness, age, lack of education, emotional immaturity etc, to make a decision independently is impaired and his/her will is rendered pliable. [179]

In both instances, the law will not stand back and allow someone to suffer to his/her prejudice, especially where the pressure is exercised unlawfully, or *contra bonos mores* or

177 Hopkins "Constitutional rights and the question of waiver: How fundamental are fundamental rights?" (2001) *SAPR/SAPL* 122 at 133.

178 For the legal writings see Joubert *The Law of South Africa* Volume 5 Part 1 (1994) Par 151; Van der Merwe et al *Contract: General Principles* (2003) 214-215. For case law involving duress see *White Bros v Treasurer-General* (1883) 2 SC 322, 351; *Broodryk v Smuts N.O.* 1942 (TPD) 47; *Arend v Astra Furnishers (Pty) Ltd* 1974 (1) SA 298 (C); *Hendricks v Barnett* 1975 (1) SA 765 (W); *Machanick Steel and Fencing (Pty) Ltd v Wesrodean (Pty) Ltd*; *Mackanick Steel and Fencing (Pty) Ltd v Transvaal Cold Rolling (Pty) Ltd* 1979 (1) SA 269 (W). For case law involving undue influence see *Preller v Jordaan* 1956 (1) SA 483 (A); *Patel v Grobbelaar* 1974 (1) SA 532.

179 See Kerr *The Principles of the Law of Contract* (2002) 318ff 328; Lubbe and Murray *Farlam and Hathaway Contract Cases Materials Commentary* (1988) 362, 374; Christie *The Law of Contract* (2003) 355-358, 360.

the influence induces the party seeking relief to assent to the contract. [180]

Whereas when duress is invoked, as a defence, due to improper conduct in terms of the law, the agreement is voidable at the instance of the contracting party who is adversely affected by the improper conduct. [181] The effect of undue influence, especially where a contracting party assents due to fraud or wilful conduct, is that the contract is regarded, by the courts, as void *ab initio*. [182]

Finally, fraud has also been identified, by both the South African legal writers and the courts alike, as one of the exceptions or defences to the *caveat subscriptor* rule. [183]

The rationale for allowing a contracting party, who signs an agreement, to resile from the contract is based on the law placing a prohibition on the pre-contractual representation of a false fact, in which the signatory is induced to act thereupon, to his prejudice. Public policy dictates that such conduct is invalid and *contra bones mores* and void. [184]

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180 For legal writings see Kerr *The Principles of the Law of Contract* (2002) 318, 327-328; Lubbe and Murray *Farlam and Hathaway Contract Cases, Materials, Commentary* (1988) 362, 595; Christie *The Law of Contract in South Africa* (1996) 355-358, 361. For case law concerning duress see *Broodryk v Smuts N.O.* 1942 (TPD) 47; *Arend v Astra Furnishers (Pty) Ltd* 1974 (1) SA 298 (C); *Hendricks v Barnett* 1975 (1) SA 765 (W); *Machanick Steel and Fencing (Pty) Ltd v Wesrodean (Pty) Ltd; Mackanick Steel and Fencing (Pty) Ltd v Transvaal Cold Rolling (Pty) Ltd* 1979 (1) SA 269 (W). For case law concerning undue influence see *Preller v Jordaan* 1956 (1) SA 483 (A); *Patel v Grobbelaar* 1974 (1) SA 532.

181 For legal writings see Joubert *LAWSA* (1994) Par 151; Christie *The Law of Contract* (2003) 349; Lubbe and Murray *Farlam and Hathaway Contract Cases, Materials, Commentary* (1988) 367ff; Kerr *The Principles of the Law of Contract* (2002) 319. For case law see *Broodryk v Smuts N.O.* 1942 (TPD) 47.

182 For legal writings see Christie *The Law of Contract* (1987) 361; Lubbe and Murray *Farlam and Hathaway Contract Cases, Materials, Commentary* (1988) 395; Kerr *The Principles of the Law of Contract* (2002) 327-328. For case law see *Preller v Jordaan* 1956 (1) SA 483 (A); *Patel v Grobbelaar* 1974 (1) SA 532.

183 For legal writings see Christie *The Law of Contract* (2003) 201; Kerr *The Principles of the Law of Contract* (2002) 104-105, 330-331; Lubbe and Murray *Farlam and Hathaway Contract Cases, Materials, Commentary* (1988) 330. For case law see *Burger v Central SAR* 1903 TS 571; *Goedhals v Massey-Harris and Co* 1939 EDL 314, 322; *George v Fairmead (Pty) Ltd* 1958 (2) SA 485 (A); *Glenburn Hostels (PVT) Ltd v England* 1972 (2) SA 660 (RA); *National and Grindays Bank Ltd v Yelverton* 1972 (4) SA 114 (R); *Janowski v Fourie* 1978 (3) SA 16 (0). See also *Donners Motors (PVT) Ltd v Kuftinya* 1968 (1) SA 434 (RA) of an unsuccessful attempt to use the *caveat subscriptor* doctrine as a fraudulent trap.

184 For legal writings see Lubbe and Murray *Farlam and Hathaway Contract Cases, Materials, Commentary* (1988) 330; Christie *The Law of Contract* (2003) 210; Kerr *The Principles of the Law of Contract* (2002) 188. For case law see *Wells v SA Alumenite* 1927 AD 69; *Goodman Brothers (Pty) Ltd v Rennies Group Ltd* 1997 (H) SA 91. These cases dealt with contracts containing exemption clauses in prohibiting exemption from liability for fraud. See also the more recent case of *Afrox Health Care Bpk v Strydom* 2002 (6) SA 21 at 34 Para (10). See also the position for wilful conduct *SA Railways and Harbour v Conradie* 1921 AD 137, 143; See also Essa v Divaris 1947 (1) SA 753 (A) 767; *Citrus Board v South African Railways and Harbours* 1957 (1) SA 198 (A) 205; *Hughes v SA Fumigation Co (Pty) Ltd* 1961 (4) SA 791 (C).

9.2.2 ENGLAND

Before the different exceptions to the *caveat subscriptor* rule in English Law are discussed, it is necessary to briefly look at the legal position surrounding the *caveat subscriptor* rule in general.

In the English Law of Contract, as a general rule, in the absence of fraud or misrepresentation, a person is bound by his signature to a document, whether he reads it or understands it, or not. [185]

For that reason, people who put their signature to contracts without reading or understanding them are treated with very little sympathy. Likewise, a person will, therefore, be taken to have notice of and to be bound by, all the provisions of a contract which has been signed, whether the contract has been read or not. This includes, according to the legal writers, people who are careless in signing documents. [186]
As will be seen from what follows, English Law does, however, recognise that in certain instances contracting parties may deviate from the *caveat subscriptor* rule in invoking defences, including, misrepresentation, duress, mistake, illegality and undue influence. Mistake, on the other hand, may include the defence of *non est factum*. [187]

In order to have a greater understanding of the aforementioned requirements, it is necessary to briefly deal with each requirement individually.

9.2.2.1 Legal Writings

Misrepresentation

Misrepresentation has been recognised by English legal writers as a defence to pre-contractual statements, which turn out in the end (after conclusion of the agreement) to be a misstatement of fact and which induced the other contracting party, to enter into the agreement, which he would, otherwise, not have entered into.[188]

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185 Koffman and MacDonald *The Law of Contract* (2004) 337; McKendrick *Contract Law Text, Cases and Materials* (2005) 651; Stone *Principles of Contract Law* (1998) 202; Stone *The Modern Law of Contract* (2003) 302; Beatson *Anson's Law of Contract* (2002) 335.

186 Stone (1998) 202; Stone (2003) 302; McKendrick (2005) 651; Treitel *The Law of Contract* (2003) 329; Beatson (2002) 335.

187 Stone (1998) 202; Stone (2003) 302; McKendrick (2005) 651; Treitel (2003) 329; Beatson (2002) 335.

188 Beatson (2002) 243ff; Koffman and MacDonald (2004) 356ff; Stone (2004) 266ff; Stone (1998) 177ff; McKendrick (2004) 310ff; O'Sullivan and Hilliard *The Law of Contract* (2004) 310ff; Treitel (2003) 343.

English legal writers are *ad idem* that, before a contracting party may successfully rely upon misrepresentation as a remedy to rescind the contract or to claim damages, certain requirements must first be met, including:

(1) The false statement or representation must have been made by one of the contracting parties to the other;
(2) It must be a statement of fact, not an opinion of law;
(3) And the statement must have induced the other party to enter into the contract. [189]

The general rule is that the false statement must have been made by, or on behalf of, the other contracting party. For that reason, if a person has entered into a contract on the basis of a misrepresentation by a third party, this will have no effect on the contract.

Only a misrepresentation of fact will give rise to liability. Other sorts of statements, such as exaggerated, flippant comments not intended to be taken seriously (sometimes referred to as mere puffs), statements of opinion, or statement of future intention, will generally not be actionable. [190]

English writers are also in agreement, mere silence does not generally constitute a misrepresentation, what is required is some positive statement or some conduct from which a statement can be implied, in order to amount to an operative misrepresentation. [191] There are, however, some exceptions to the general rule, namely, the maker of the statement must not give only half the story on some aspects of the facts; if a statement is made, but then circumstances change, making the statement false, a failure to disclose this will be treated as a misrepresentation. [192] Certain contracts, such as those of insurance, are treated as being of the utmost good faith (*uberima fidei*) and as requiring the contracting party to disclose all relevant facts. There are, furthermore, also some contracts which involve a fiduciary relationship, which may entail a duty to disclose, for example, between a solicitor

189 Stone (2003) 260-261; Stone (1998) 173-174; Beatson (2002) 237; McKendrick (2005) 657; Koffman and MacDonald (2004) 350; O'Sullivan and Hilliard (2004) 300; Treitel (2003) 340-341.

190 Treitel (2003) 330; Koffman and MacDonald (2004) 343; O'Sullivan and Hilliard (2004) 300; Beatson (2002) 237; McKendrick (2005) 659-660; Stone (1998) 174; Stone (2003) 261.

191 Beatson (2002) 237-238; Stone (2004) 262-263; Stone (1998) 174-175; McKendrick (2005) 659; Koffman and MacDonald (2004) 346; O'Sullivan and Hilliard (2004) 296-297.

192 Stone (2004) 263-264; Stone (1998) 174-175; O'Sullivan and Hilliard (2004) 297-298' Beatson (2002) 238; Koffman and MacDonald (2004) 347-350.

and client, doctor and patient, agent and principal. [193]

It is not enough for the claimant to rely on the remedies available for misrepresentation, by pointing out some false statement of fact made by the defendant prior to the conclusion of the agreement; it must be shown, as well, that the claimant relied upon the representation to such an extent that it induced the contract. [194]

The remedies available for misrepresentation depend, to some extent, on the state of mind of the person making the false statement.

In modern misrepresentation law, the inducing of the formation of a contract may either be fraudulent, negligent, or innocent. Depending on whether the false statement was made fraudulently, negligently or innocently, the remedies available may be under common law and equity and/or the *Misrepresentation Act*, 1967. [195]

Consequently, the state of mind at the time when the claimant was induced into entering into the agreement will be looked at.

The three categories misrepresentation in English Law resort includes:

(a) Fraudulent misrepresentation

At common law a fraudulent misrepresentation renders the contract voidable at the instance of the party misled. In addition, it also gives rise to an action for damages in respect of the deceit and the injured party will be entitled to recover damages in respect of any loss which may be suffered by reason of the fraud. What has to be established though, is that there was clear knowledge that the statement made was false and the absence of any belief in the truth.

(b) Negligent misrepresentation

A person who has been induced to enter into a contract as a result of negligent misrepresentation, made to him or to her by the other party to the agreement, is

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193 Koffman and MacDonald (2004) 350-351; Beatson (2002) 241-242; McKendrick (2005) 661; Stone (2004) 264-265; Stone (1998) 175-177; Treitel (2003) 338; O'Sullivan and Hilliard (2004) prefers to speak about `reliance' as the causation requirement instead of inducement which ought to be restricted to fraud.

194 Koffman and MacDonald (2004) 350-351; Beatson (2002) 241-242; McKendrick (2005) 661; Stone (2004) 264-265; Stone (1998) 175-177; Treitel (2003) 338; O'Sullivan and Hilliard (2004) 338 prefers to speak about `reliance' as the causation requirement instead of inducement which ought to be restricted to fraud.

195 Beatson (2002) 243ff; Koffman and MacDonald (2004) 356ff; Stone (2004) 266ff; Stone (1998) 177ff; McKendrick (2005) 657; O'Sullivan and Hilliard (2004) 310ff; Treitel (2003) 343.

entitled to rescind (as is the case of fraud), the agreement.

The claimant also has a statutory right to damages in terms of the *Misrepresentation Act*, 1967, more particularly Section 2(1) of the act which provides:

> *"Where a person has entered into a contract after a misrepresentation has been made to him by another party thereto and as a result thereof he has suffered loss, then, if the person making the misrepresentation would be liable to damages in respect thereof had the misrepresentation been made fraudulently, that person shall be so liable notwithstanding that the misrepresentation was not made fraudulently, unless he proves that he had reasonable grounds to believe and did believe up to the time the contract was made that the facts represented were true."* [196]

(c) Innocent misrepresentation

The term innocent misrepresentation is defined to mean a misrepresentation in which no element of fraud or negligence is presented. [197]

Where a person had been induced to enter into a contract as a result of an innocent misrepresentation made to him by the other contracting party, he/she is entitled to the remedy of rescission or to damages in terms of the *Misrepresentation Act*, 1967. Where a contracting party has been misled by an innocent misrepresentation by the other contracting party, the party so misled may plead the misrepresentation as a defence to an action against him for specific performance of the contract. [198]

Mistake

Mistake is also regarded, by English legal writers, as a ground on which a contract may be set aside by the courts. Although mistake is generally regarded as another form which allows for an exception to the general rule of contract, namely, the freedom of contract or sanctity of contract, in its application, it is rather the exception than the rule. [199] It is generally regarded therefore, as another exception to the *caveat subscriptor* rule.

But, the legal writers are, generally, *ad idem* that the rules designed for allowing a contracting party to successfully invoke such a ground for setting aside a contract, impose

196 Sec 2(1) of the *Misrepresentation Act*, 1967.

197 Beatson (2002) 251ff; Koffman and MacDonald (2004) 366.

198 Beatson (2002) 251; Koffman and MacDonald (2004) 366.

199 Stone (2003) 281; McKendrick (2005) 572; Beatson (2002) 308; Stone (1998) O'Sullivan and Hilliard (2004) 448ff; Koffman and MacDonald (2004) 306ff.

a fairly heavy burden on the party who seeks to make use of it. [200]

The rationale for such reasoning is said to be founded upon the pillars of contract law, in that, to allow a party each time to conveniently say *"I am sorry, I made a mistake"* and recile from a contract, would be to strike at the purposes of the law of contract, which has as one of its primary functions, the provision of a structure, within which, people can organize their commercial relationships with a high degree of certainty. [201]

On the other hand, English legal writers do acknowledge that one of the fundamental principles of English Law of Contract is that contracting parties as far as possible should be assisted in giving effect to their intentions. Therefore, if either, or both, of the parties have genuinely made a mistake as to the nature of their contract, to enforce the agreement may be contrary to their intentions. Intervention by the courts, according to the writers, may thus be necessary, using mistake, even if it means destroying contractual obligations. To hold the parties strictly to their agreement, according to them, would be unjust. [202]

The effect of mistake in contract is stated, by *Treitel,* [203] thus: *"mistake negatives consent where it puts the contractants at cross-purposes, namely, as to prevent them from reaching agreement, for example, they intend to contract on different terms etc."* [204]

The effect of a mistake at common law is that, where it has been invoked successfully as a defence, the contract is rendered void *ab initio,* as if the contract had never existed, and therefore, as far as it is feasible, the contractants must be placed in the position they were in before the contractants concluded the purported agreement.

But, English Law is particularly clear, before mistake at common law may successfully be invoked as a defence, one or two requirements must first be met. They include:

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200 Stone (2003) 281; McKendrick (2005) 571; Beatson (2002) 308; Stone (1998) 187; Beatson (2002) 308; O'Sullivan and Hilliard (2004) 449ff.

201 Stone (2003) 281; Stone (1998) 187; Beatson (2002) 308; McKendrick (2005) 571; O'Sullivan and Hilliard (2004) 449.

202 Stone (1998) 187; Stone (2003) 281; Beatson (2002) 309; Treitel (2003) 286.

203 Treitel (2003) 286.

204 Treitel (2003) 286.

(1) The mistake as to the other party or as to the subject matter of the contract must be fundamental. What it means is this, the mistake must relate to something which both contracting parties have accepted in their minds as an essential and integral element of the subject matter. [205]

(2) The mistake must also induce the contract and be operative. What this entails is that the one contracting party induced the mistaken party to enter into the contract. A mistake, on the other hand, will be operative when a party to the contract acts on a representation to his detriment, or ambiguity is present, or the mistake is known to the other party. [206]

Non est factum

Non est factum is an extension of the defence of mistake. It can be invoked by someone who does not understand a document that he has signed. But, the defence of *non est factum* operates within very narrow limits, in that it will only be successfully invoked in rare instances. [207] A claimant who seeks to rely on this defence needs to comply with two requirements. Firstly, he needs to establish that he was permanently or temporarily unable, through no fault of his own, to have, without explanation, any real understanding of the document he has signed. Secondly, he is required to show that there was a risk, or substantial difference, between the document which he signed and the document which he thought he had signed.

Duress

The recognition of duress as a defence has been acknowledged by the English legal writers as a further illustration of the general trend towards the erosion of the sanctity of contract. In this regard the common law has always recognised that duress of the person constitutes grounds for avoidance of a contract. The underlying idea, surrounding the acceptance of duress as a defence, is said to be that it is consistent with the will theory of contract, since, a contract induced by duress is not made with full intent. [208]

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205 Treitel (2003) 298; Beatson (2002) 319; McKendrick (2005) 572.

206 Treitel (2003) 298, 304-308; Stone (2003) 288 opines that an operative mistake can arise *"where the mistake has a sufficiently serious effect in relation to matters which are fundamental to the contract."*

207 McKendrick (2005) 651; Treitel (2003) 329; Koffman and MacDonald (2004) 338; Stone (1998) 202-203; Stone (2002) 302-303; Beatson (2002) 332-333.

208 Peden *The Law of Unjust Contracts including the Contracts Act* 1980 (NSW) (1982) 10.

The authors *O'Sullivan and Hilliard* [209] describe duress as an *"act involving one party's coercing or pressuring the other party into making a contract."* [210]

Traditionally, the principal forms of this defence included, duress of the person and duress of goods. English writers are also of the view that outside the category of duress to the person, the English law has been slow to develop. [211] During 1976 another form of duress, namely economic duress, found its niche in English law, when the legal writers recognized its existence. [212]

A brief discussion on the main characteristics of each principal form follows.

In so far as duress of the person is concerned, this is the most frequently used form of duress, for which relief is sought and given, at common law. The act of duress, generally, takes the form of a threat of violence to the person, whether actual or threatened, in concluding the contract. Actual threat, for example, can include a contract signed at gunpoint, whereas, an illegitimate threat can include a non-violent, express or implicit act, whereby pressure is applied to a person leaving him with no practical choice, but to enter into the agreement. [213] Although, the term `illegitimate' is used to determine whether there is a sufficient, causal link between the illegitimate pressure and the entry, by the claimant, into the contract, factors such as the illegitimate pressure can be a cause of the claimant's decision to enter into the contract and could be indicative. [214]

Duress of goods is recognized, by most legal writers today, as a fully fledged defence. Moreover, it has now been fairly settled English legal writers are in general agreement that a threat to seize another's property, or to damage it (duress to property), will justify a claim of duress and result in the ensuing contract being set aside. [215]

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209 *The Law of Contract* (2004) 338.

210 O'Sullivan and Hilliard (2004) 338.

211 McKendrick (2005) 314; O'Sullivan and Hilliard (2004) 339; Poole *Textbook on Contract Law* (2004) 352.

212 McKendrick (2005) 714; O'Sullivan and Hilliard (2004) 342; Poole (2004) 353.

213 O'Sullivan and Hilliard (2004) 339; McKendrick (2005) 714; Poole (2004) 352.

214 McKendrick (2005) 714.

215 Poole (2004) 352; O'Sullivan and Hilliard (2004) 341; McKendrick (2005) 724.

It is now also well established that economic duress serves as the third principal form of duress, recognized by English law. [216] Typical situations raising the possibility of a claim of economic duress include, where for example, one party threatens breach of contract unless the contract is renegotiated, and the other agrees rather than face disastrous consequences as a result of the breach, contract changes are achieved by means of unfair pressure or extortion. [217]

The English legal writers recognize that in order to rely on economic duress as a ground to set aside an agreement, the following ingredients need to be shown to be present, namely:

(a) Coercion of the will that vitiates consent; and
(b) The pressure or threat must be illegitimate, and
(c) which is a significant cause inducing the claimant to enter into the contract. [218]

The illegitimate pressure of threat is said to be something more than the `*rough and tumble of the pressures of normal commercial bargaining*'. The pressure exerted must also be executed, which distinguishes it from normal conduct. Factors which will influence the courts in determining whether `*illegitimate*' pressure was exercised or not, may include, the arm's length commercial dealings between two trading companies, the lawful nature of the threat; the bona fide belief of entitlement by the defendant; the bad faith shown by one of the parties; a threat to breach an agreement etc. [219]

The ingredient `*significant cause*' entails that relief will only be given for economic duress, if the threat or pressure was the main or overwhelming reason why the victim agreed to enter into the agreement. Factors influencing this ingredient include whether the victim had another choice to escape entering into the agreement; whether legal remedies existed to assist the victim; whether the victim protested; did the victim take steps to avoid entering into the agreement; would a reasonable person have acted as the victim did. [220]

The effect of raising duress successfully as a defence will result in the contract being set

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216 McKendrick (2005) 724ff; O'Sullivan and Hilliard (2004) 341-342; Poole (2004) 353ff.

217 O'Sullivan and Hilliard (2004) 341-342; Poole (2004) 353.

218 Poole (2004) 354-358; O'Sullivan and Hilliard (2004) 342-343; McKendrick (2005) 715-718.

219 Poole (2004) 355-357; O'Sullivan and Hilliard (2004) 343-347; McKendrick (2005) 729.

220 O'Sullivan and Hilliard (2004) 349-350; Poole (2004) 357.

aside and any money paid could be recovered. [221]

Undue Influence

Undue influence, like misrepresentation, duress and mistake is a recognized defence in English Contract law, which may render a contract voidable. In other words, the relieved party can seek to rescind or `set aside' the contract. Where he is a defendant, he may choose so, by raising it as a defence, alternatively, where he is a plaintiff who has to ward off a counterclaim against him, he may do so by raising undue influence as a defence to the counterclaim. [222]

The argument surrounding the recognition of this type of defence is said to be based on striking the right balance between protecting the vulnerable from exploitation, without unduly patronizing them or restricting their freedom to contract. [223]

Although there is no clear cut definition for undue influence, (the academic writers finding it difficult to define) [224] nonetheless, it has been described before as *"an act in which one party exploits another contracting party for his own advantage, which, arises from a relationship built on trust and confidence or vulnerability and dependence between the two parties."* [225]

Because of its difficulty to define and the many forms it takes, a distinction is drawn between actual undue influences and presumed undue influences. [226]

On the one hand, actual undue influence can be equated with the type of pressure required to establish duress. The unacceptable conduct takes the form of improper pressure or coercion, such as unlawful threats. For that reason, it has been stated before, that undue influence overlaps with the principle of duress. [227]

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221 Poole (2004) 352; O'Sullivan and Hilliard (2004) 339; McKendrick (2005) 715.

222 O'Sullivan and Hilliard (2004) 359-360; Poole (2004) 358-359.

223 O'Sullivan and Hilliard (2004) 360.

224 O'Sullivan and Hilliard (2004) 360; McKendrick (2005) 753.

225 O'Sullivan and Hilliard (2004) 360; Poole (2004) 359.

226 McKendrick (2005) 753; O'Sullivan and Hilliard (2004) 361.

227 McKendrick (2005) 753; Poole (2004) 360.

Examples of such acts may include: where someone gives in to a campaign of sustained pressure, or, someone agrees to a transaction not freely and voluntary entered into. What needs to be shown is that their free will to enter into or to dealing with a particular contract was in some way overcome by the influence of another. [228]

But, there are also instances where, although there is no evidence of undue influence, yet, a subtle level of influence is exerted, arising from the relationship between the two parties, as a result of which, the vulnerable and dependant suffers loss. There may be no documentation assisting in proving undue influence, for that reason, depending on the evidence, undue influence could be presumed on the facts, unless, there was evidence to the contrary to rebut the presumption. [229]

But, the relationship itself has to fall into a class of relationship in which the law presumed that one party was in a position to exercise influence, or dominion, over the other, for example, parent and child, guardian and ward, doctor and patient, solicitor and client, trustee and beneficiary. Here, a relationship of trust and confidence exists between the parties. [230]

Once the relationship has been proved and a suspicious transaction is shown, this would be sufficient for the presumption of undue influence to kick in and the defendant bears the onus to rebut the presumption. It is left, thereafter, for the court to consider whether the presumption has been rebutted. [231]

The effect of undue influence, as was seen in the opening remark, is that contracts affected by undue influence are void-able, not void. One of the reasons advanced is that the doctrine is not concerned with the reality of consent, but with the protection of victims of improper behaviour. Since tainted contracts are only void-able, the victim must bring a claim for rescission or have the agreement set aside. [232]

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228 Poole (2004) 361.

229 O'Sullivan and Hilliard (2004) 361.

230 McKendrick (2005) 755; O'Sullivan and Hilliard (2004) 364ff; Poole (2004) 361ff.

231 McKendrick (2005) 755; O'Sullivan and Hilliard (2004) 363ff; Poole (2004) 365.

232 Poole (2004) 366ff; O'Sullivan and Hilliard (2004) 373.

Illegality

In the workings of English law, public interests sometimes demand that an ostensibly valid contract may be declared unenforceable as it is tainted by illegality. [233]

In this way, the courts interfere to render contracts which are "*illegal*" unenforceable. The underlying reasons for the law's intervention in this way is said to firstly, lie in the fact that it serves as a deterrent, in that, the law does not allow a person to benefit in any way from "*illegal*" behaviour, and secondly, protecting the integrity of the judicial system by ensuring that the courts are not seen, by law-abiding members of the community, to be lending their assistance to claimants who have defied the law. [234]

The source of the illegality, itself, as will be seen hereinafter, may arise by statute or by virtue of the principle of common law. [235] In certain instances the law prohibits the agreement itself, and the contract, by its very nature, is illegal. In other instances, which form the majority of cases, the illegality lies in the object which one, or both, of the contractants have in mind or in the method of the performance. [236]

Where the illegality arises by way of statute, the following give rise to the contract being illegal from the outset, namely:

The words of a statute may expressly prohibit a particular type of contract. When contracting parties, nevertheless, enter into an agreement, the contract is said to be illegal *per se*. In other instances the statutory prohibition might also be inferred from the terms of the statute.

In that event, a close examination of the precise term of the statute is necessary, in order to ascertain that parliament intended to prohibit a particular type of contract.

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233 McKendrick (2003) 348ff; Stone (2003) 343; Beatson (2002) 804-805; O'Sullivan and Hilliard (2004) 413ff; Treitel (2003) 439ff; Poole (2004) 379.

234 Stone (2003) 343-344 quoting Atiyah An Introduction to the Law of Contract (1995) 342-344; see also Treitel (2003) 439 who suggests that the rationale for intervention by the courts lies in the fact that *"illegal" contracts bring about a state of affairs of which the law disapproves as it harms the public."*

235 Beatson (2002) 804-805; McKendrick (2003) 34ff; Stone (2003) 343; Poole (2004) 379; O'Sullivan and Hilliard (2004) 413ff; Treitel (2003) 429ff.

236 Beatson (2002) 804.

There are, however, instances where the contract, when entered into, was not illegal *per se* as expressly prohibited by a statute, but, the contract was performed in a manner which rendered the agreement illegal. [237]

There are also situations where, although a contract is not expressly or impliedly prohibited by statute, nevertheless, the policy of the common law dictates that the agreement cannot be enforced. Agreements outlawed in terms of the policy dictates, include: Agreements to commit a crime or civil wrong, or to perpetrate a fraud, agreements which injure the state in its relations with other states, agreements which tend to injure good government, agreements which tend to prevent the course of justice; agreements which tend to abuse the legal process; agreements which are contrary to good morals etc. [238]

The effects of illegality of contracts in English law is this: The general rule is that the courts will neither enforce an illegal contract nor will they permit the recovery of any benefit arising from the performance of an illegal contract. The two common law rules are founded in the maxims, *ex turpi cause non oritur actio* (no action can be based on a disreputable cause) and *in pari delicto potior est conditio defendentis* (where both parties are equally at fault, the position of the defendant is stronger). But neither rule is without exceptions. The courts will protect an innocent party, who is unaware of an illegal act, committed by the defendant, in the course of performance of the contract, in that the innocent party may be entitled to enforce the contract, notwithstanding the illegality.

Furthermore, while the courts will not, in general, enforce an illegal contract, a party to an illegal contract may be able to obtain damages for a breach of collateral warranty, where the defendant is held to have warranted that he will perform the contract lawfully, but fails to do so, for example in licensing cases. [239]

9.2.2.2 Case Law

The English courts, in general, have, for centuries, enforced, to this end, the *caveat subscriptor* rule. The English courts have often been very reluctant to assist contracting

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237 O'Sullivan and Hilliard (2004) 429-432; Poole (2003) 344-345; McKendrick (2003) 348-352; Stone (1998) 251-253.

238 McKendrick (2003) 352-365; Treitel (2003) 439-477; O'Sullivan and Hilliard (2004) 414ff; Poole (2004) 384-387; Beatson (2002) 807-810; Stone (1998) 251-253; Stone (2003) 344-351.

239 Beatson (2002) 845-847; O'Sullivan and Hilliard (2004) 433ff; Poole (2000) 387-389; Stone (1998) 253; Stone (2003) 351-357; McKendrick (2003) 395ff.

parties, who put their names to contacts without reading or understanding them. For that reason, a person of sound mind and literacy, would be taken to have noticed the terms of an agreement and be bound by all the provisions of a contract which had been signed, whether they have been read or not. [240]

Even where a contracting party has been careless in signing the document or has simply failed to read the document properly, the courts will be unsympathetic. [241] But despite the court's reluctance to come to the rescue of contracting parties who sign contracts without reading or understanding them, or act carelessly in signing contracts without reading the contents, the courts have recognised exceptions to the *caveat subscriptor* rule, namely, misrepresentation, mistake (including *non est factum*), duress and undue influence.

Consequently, each of these exceptions, which serve as fully fledged defences, will be discussed briefly.

Misrepresentation

The English courts have for century's recognised misrepresentation as a defence. This is a remedy available to a contracting party, who was induced into entering into an agreement, to avoid a contract. [242]

English courts do recognize that misrepresentation may take place through a positive act or through an omission. An example of the latter occurs where there is non-disclosure of certain facts. According to the English courts, a contracting party is bound to disclose only facts which he/she knew (or which he/she would have known if he/he had not *"wilfully shut his eyes"* to them. [243] He/she may also be under a duty to disclose facts which he/she ought to have known, if there is a "*special relationship*" between the parties. This formed the subject matter in *Hedley Byrne and Co Ltd v Heller and Partners Ltd,* [244] in which the claimants suffered loss as a result of having given credit to a firm called Easi Power Ltd, in

240 *L'Estrange v Graucob* (1934) 2 KB 394.

241 *United Dominions Trust Ltd v Western* (1976) QB 513 at 343.

242 *Smith v Hughes* (1871) LR 6 QB 597. In this case, the court identifies the rationale for recognizing this type of defence, namely `a man of high honour would not take advantage of the ignorant'.

243 *Blackburn, Low and Co v Vigors* (1887) 12 App. Cas 531; *Economides Commercial Union Assurance Co plc* (1998) QB 587 at 602.

244 (1964) A.C. 465 at 494, 502, 538, 539.

reliance on a reference, carelessly given, by Easi Power's bank, who knew of the purpose for which the reference was required. Although the court decided that the bank was not liable, nevertheless, the House of Lords made it clear that, had there been no disclaimer in the contract entered into between the contracting parties, the bank would have owed, to the claimants, a duty to take reasonable care arising from the "special relationship" between the claimants and the bank.

The duty of disclosure may also arise from a professional skill, in which, the representor owes a duty of care towards, for example, a client and he makes the statement in the exercise of some professional skill. [245]

But, this duty of care is not restricted to professional people. It now exists at common law, even in a purely commercial relationship, such as a landlord and tenant. This formed the subject matter in *Esso Petroleum Co Ltd v Marden*. [246] In this case the facts relied upon amounted, briefly, to this; tenant was induced to take a lease of a petrol station, from an oil company, by a statement made by an experienced salesman, on the company's behalf, as to the potential future turnover of the premises. Following the principles laid down in the Hedley Byrne case, the court held; as the tenant had relied on the salesman's superior knowledge and experience, there existed a duty of care, at common law, to disclose the true facts.

The English courts have identified several requirements which must first be complied with, before the courts will recognise misrepresentation as a defence and grant the necessary relief. The requirements include: As mere silence does not constitute a misrepresentation, [247] what is required is a positive statement or some conduct from which a statement can be implied. [248] Where a contracting party makes a representation which is true at the time it is made, but, which the representor knows has subsequently become false, the representor is bound to disclose the changing circumstances to the other party. [249]

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245 *Hedley Byrne and Co Ltd v Heller and Partners Ltd* (1964) A.C. 494.

246 (1976) QB 801.

247 *Keates v Lord Cadogen* (1851) 10 C.B. 591.

248 *Walters v Morgan* (1861) 3 De G.F. and J 718; *Spice Girls Ltd v Aprilia World Service B.V.* (2000) E.M.L.R. 478. In this case the participation by the Spice Girls in the making of a commercial to be shown in the future constitutes a representation by conduct that no-one had the intention to leave the group.

249 *Davies v London and Provincial Marine Insurance Co* (1878) 8 Ch. D 469; *White v O'Flanagan* (1936) Ch. 575.

The English courts have also stated that the statement made prior to concluding the agreement must be one of fact, not opinion, or law. This formed the subject matter in the case of *Bisset v Wilkinson*. [250] The facts, briefly stated, were: Wilkinson agreed to purchase, from Bisset, certain lands at Avondale, in the Southern Island of New Zealand, for the purpose of sheep farming. Wilkinson did so in reliance on Bisset's statement that he estimated the lands would carry two thousand sheep. Bisset had not, and no other person, in truth, had, at any time, carried out sheep-farming on the lands in question. When Bisset claimed the balance of the purchase price, Wilkinson counter-claimed rescission of the contract on the ground of misrepresentation.

The Privy Council consequently held that the statement was merely an opinion, honestly held, by Bisset and not one of fact. Accordingly, the claim for rescission failed.

The English courts have also held a mere commendatory, or so-called puff, is insufficient to qualify as a misrepresentation. Where, for example, at a sale by auction, land was described by the auctioneer as "fertile and improvable" but was, in fact, found to be abandoned and useless, the court, in *Dimmock v Hallett*, [251] found this statement to be *"lawful flourishing description and not a statement of fact."*

One of the requirements paramount to misrepresentation is; the representation must hold a real inducement to the party to whom the statement is made. Whether or not a person, who has entered into a contract, was induced to do so by a particular representation, is a question of fact. The test was laid down by Lord Blackburn in *Smith v Chadwick* [252] when he stated:

> *"I think that if it is proved that the defendants with a view to induce the plaintiff to enter into a contract made a statement to the plaintiff of such a nature as would be likely to induce a person to enter into a contract, and if it is proved that the plaintiff did enter into the contract, it is a fair inference of fact that he was induced to do so by the statement."* [253]

This requirement is sometimes referred to as material. In other words, it must be a statement which affects the judgement of a reasonable person or induces that person to

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250 (1927) A.C. 177.

251 (1866) L.R. 2 ch. App 21; See also *Lambert v Lewis* (1982) A.C. 225 at 262-3.

252 (1884) 9 App. CAS. 187.

253 *Smith v Chadwick* (1884) 9 App. Cass. 187.

enter into the contract without making the enquiries as he would otherwise make. [254]

It is, further, a requirement that the person to whom the misrepresentation was made must have relied on it, to such an extent, that it invoked him to enter into the agreement. [255]

English case law does recognise the three different categories of misrepresentation, namely; fraudulent, negligent or innocent and have formulated the appropriate relief, depending upon the frame of mind of the contracting party making the misstatement. [256]

In so far as fraudulent misrepresentation is concerned, a party willing to rely upon fraud must show the following, as per Lord Herschell in *Derry v Peek*: [257]
"First, in order to sustain an action of deceit, there must be proof of fraud, and nothing of that will suffice. Secondly, fraud is proved when it is shown that a false representation has been made, (1) knowingly, or (2) without belief in its truth, or (3) recklessly, carelessly whether it be true or false. [258]

The remedies available for fraudulent misrepresentation include, affirming of the contract and a damages claim for deceit or rescission of the contract and sue for damages. [259]

An action for negligent misrepresentation was recognised for the first time in the case of *Hedley Byrne and Co Ltd v Heller and Partners Ltd,* [260] in which the House of Lords extended liability in damages in tort, to negligent misstatement, in cases, where there is a duty of care in instances of an assumption of responsibility, such as to create a `*special relationship*'. The remedies available include, claims for damages that are foreseeable.

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254 *Smith v Chadwick* (1884) 9 App. CAS. 187 at 196. See also *Barton v County Natwest Ltd* (1999) Lloyd's Rep 408.

255 *Pan Atlantic Insurance Co Ltd v Pine Top Insurance Co Ltd* (1995) 2 A.L. 501; *Spice Girls v Aprilia World Service BV* (2002) EWCA 15 at 68-72.

256 *Pan Atlantic Insurance Co Ltd v Pine Top Insurance Co Ltd* (1995) 2 A.; 501; *Spice Girls v Aprilia World Service B.V* (2002) EWCA 15 at 68-72.

257 (1990) 14 App. CAS. 337.

258 *Derry v Peek* (1990) 14 App. CAS 377 at 374.

259 *Long v Lloyd* (1958) 2 All ER 402; *Leaf v International Galleries* (1950) 2 KB 86; (1950) 1 All ER 693; *Derry v Peek* (1990) 14 App. Cas 377; *Smith New Court Securities Ltd v Scimgeour Vickers (Asset Management) Ltd* (1997) AC 254.

260 (1964) A.C. 465.

Innocent misrepresentation has been recognised by the English courts. The party, to whom the innocent misrepresentation was made, is entitled to the remedy of rescission or to damages in lieu of rescission. [261]

Besides the remedy under common law, the courts also recognise a claim for damages under the *Misrepresentation Act*, 1967. In *Howard Marine and Dredging Co Ltd v A Oeden and Sons (Excavations) Ltd* [262] the court held that Section 2(1) of the *Misrepresentation Act* goes further than the common law which requires a special relationship or special skill before the representation will be recognised. The statute, according to the court, imposes an absolute obligation not to state facts which the representor cannot prove it had reasonable ground to believe were true. The damages, recoverable under this statute, include the damages directly flowing from the misrepresentation although not foreseeable. [263]

In so far as the exclusion of liability for misrepresentation is concerned, although at common law, a party to a contract was entitled to exclude his liability for misrepresentation, except in cases of fraud, [264] the courts have recognised that with the enactment of the *Misrepresentation Act*, 1967, the *Unfair Contract Terms Act*, 1977 and the *Unfair Terms in Consumer Contracts Regulations*, 1999, exemption clauses are *prima facie* invalid. But, the courts are empowered to give effect to them, if they were fair and reasonable terms included in a contract, having regard to all the circumstances. [265] But, the English Courts have held, a clause purporting to exclude liability for fraudulent misrepresentation will generally not be held to be reasonable. [266]

Mistake

The English courts, as far as possible, give effect to the fundamental principle of English Law, namely, to give effect to the intentions of the parties to a contract. Nevertheless, the

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261 *Redgrave v Hurd* (1881) 20 Ch. D. 1.

262 (1978) QB 574.

263 *Roy Scott Trust Ltd v Rogemon* (1991) 2 QB 297; *South Australia Asset Management Corp. v York Montage Ltd* (1997) A.C. 191 at 214.

264 *Pearson (s) and Son Ltd v Dublin Corporation* (1907) A.C.351; *Toomey v Eagle Star Insurance Co Ltd* (No 2) (1995) 2 Lloyds Rep 88 at 91-92.

265 *Walker v Boyle* (1982) 1 W.L.R. 475; *McCullough v Lane Fox and Partners* (1996) 49 Con. L.R. 124.

266 *Thomas Witter Ltd v TBS Industries* (1996) 2 ALL.E.R. 573 at 598; *South West Water Services Ltd v International Computers Ltd* (1999) B.L.R. 420.

English courts do recognise the possibility of mistake, affecting or even destroying the contractual obligations between the contracting parties. They do also recognise that, in appropriate circumstances, mistake affects the intentions of the contracting parties, so much so, that it vitiates consent. But, the English courts do caution, the power to intervene in this way should be used with considerable circumspection. [267]

English case law does also clearly distinguish between the different categories of mistake. In this regard, Lord Atken in *Bell v Level Bros Ltd* [268] identifies two types of mistake which may affect a contract, namely, those which nullify consent or put differently, the agreement, and those, which negate consent or the agreement.

The courts have held, consent is nullified where both parties make a fundamental mistake of fact, which may include, mistake as to the existing of the subject-matter; [269] mistake as to the identity of the subject-matter; [270] mistake as to the possibility of performing the contract; [271] legal impossibility; [272] mistake as to quality; [273] mistake as to the quantity. [274]

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267 *Bell v Lever Bros Ltd* (1932) A.C. 161 at 217 per Lord Atken stated *"if mistake operates at all, it operates so as to negative or in some cases nullify consent."*

268 (1932) A.C.161.

269 *British Homephone Ltd v Kunzi* (1932) 152 LT 589 at 593; *Galloway v Galloway* (1914) 30 T.K. 531 (This case involved the dealings of a purported marriage which did not exist); *Stricklam v Turner* (1852) 7 EX 208 (This case dealt with the purchase of an annuity under circumstances which the annuitant had died prior to the purchase, resulting in the annuity no longer existed).

270 *Grains and Fourrages SA v Hayton* (1997) 1 Lloyds Rep 628. Here both parties thought they were dealing with one thing when they were in fact dealing with another.

271 *Skeikh Bros v Ochsner* (1957) A.C. 136 following the principles laid down in Bell v Lever Bros (1932) A.C. 161. In this case it was a physical impossibility to produce the quantity of sisal intended by the parties.

272 *Bell v Lever Bros Ltd* (1932) A.C. 161 at 213 as a matter of law that what is intended cannot be executed. *Norwich Union Fire Insurer Society Ltd v Price* (1934) A.C. 455 at 463.

273 *Kennedy v Panama, ET v Royal Mail Co* (1867) L.R. 2 QB. 980 where the mistake is an error in substantia relates to the "substance" of the matter; *Bell v Lever Bros Ltd* (1932) A.C. 161 but stringent requirements accompany such relief. *Leaf v International Galleries* (1950) ZK.4. 86; *Solle v Butcher* (1950) 1 K.B. 671; *Oscar Chess Ltd v Williams* (1957) 1 WLR 370. In these cases it was commonly held that a mere mistake was not sufficed to render a contract void.

274 *Cox v Prentice* (1815) M and S 344; *De Vaux v Connolly* (1849) 8 C.B. 640 at 659. A contract may be treated as void for mistake where it inter alia affects the weight of for example a silver bar. In *Bell v Lever Bros Ltd* (1932) A.C. 161 the court put the position in the following terms: *"I agree that an agreement to take an assignment of a lease for five years is not the same thing as to take an assignment of a lease for three years, still less a term for a few months."*

Instances in which mistake negates consent, arise in circumstances in which the parties are at such cross-purposes that they do not reach agreement. But, before it can be held that a mistake had negative consent, which resulted in the agreement being rendered void, certain requirements must first be complied with, which include:

(1) The mistake must be fundamental in inducing the contracting party to enter into the agreement. [275]

(2) A mistake can be fundamental if one of the contracting parties is mistaken as to the identity of the other. [276]

Consent is also negative where there is a mistake as to the subject matter, in other words, if one party intends to deal with one thing and the other with a different one. [277] Likewise, mistake as to the terms of the contract negatives the agreement. [278]
In English Law, a mistake was held to have induced "mistaken belief" in the following cases. In *Bell v Lever Brothers Ltd,* [279] the *locus classicus* on mistake in contract, Lord Thankerton spoke about *"..... can only properly relate to something which both must have necessarily accepted in their minds as an essential and integral element of the subject matter."* [280]

An additional requirement is that the mistake must be operative. The courts have also held it occurs due to ambiguity, [281] but, the mistake must be known to the other party and nevertheless, the other contracting party induces him to enter into the agreement. [282]

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275 *Cundy v Lindsay* (1878) 3 APP CAS 459. In this case the court set aside the agreement where one of the contracting parties did not intend to deal with the other. In *Shogun Finance Ltd v Hudson* (2001) EWCA Civ. 1000 (2002) QB 834 This is a case involving the forgery of the name of the contracting party, the court of appeal held that X was no party to the agreement.

276 *Phillips v Brooks Ltd* (1919) 2 K.B. 243; *Denrant v Skinner* (1948) 2 K.B. 164; *Lewis v Averay* (1972) 1 QB 198; *Whittaker v Campbell* (1984) QB 319.

277 *Smith v Hughes* (1871) L.R. 6 Q.B. 597; *Sullivan v Constable* (1932) 49 T.L.R. 369.

278 *Bell v Lever Bros Ltd* (1932) A.C. 161 at 235; *Raffies v Wichelhaus* (1864) 2 Hand C 906.

279 1932 A.C. 161 at 235.

280 *Bell v Lever Bros Ltd* 1932 A.C. 161 at 235.

281 *Raffles v Wickerhaus* (1864) 2 HandC906.

282 *Lundy v Lindsay* (1878) 3 App. CAS 459; *Smith v Hughes* (1871) C.R. 6 QB 597.

Non est factum

Although the courts, as was discussed earlier, are not inclined to be sympathetic towards people who put their names to contracts without reading or understanding them, especially, where contracting parties are of clear mind, [283] there are exceptional circumstances however, where the courts will allow a plea of *non est factum*. [284] But, before the defence may successfully be invoked and for the courts to grant such relief, what has to be shown is that, the claimant falls into the category of those with `*defective education, illness, or innate incapacity*". [285]

A further requirement laid down by the courts is that, the claimant ought not to have been careless in concluding the agreement, and that, the document signed was radically different from that which it was supposed to be. [286]

Duress

Duress has been recognized and applied by the English courts, as an English Common Law defence, in numerous cases, spanning over several decades. [287]

English case law however, distinguishes between three principal forms of duress at common law. In the first place, there is duress to the person, which takes the form of

283 *Thoroughgood v Cole* (1582) 1 and 129, 2 Co; *Saunders v Anglin Building Society* (1971) AC 1004; *Norwich and Peterborough Building Society v Steed* (No 2) (1993) 1 ALL ER 330; *L'estrange v Graucob* (1934) 2 KB 394, (1934) ALL ER Rep 16, 152; *Saunders v Anglia Building Society* (1971) AC 1004.

284 *Gallie v Lee* (1969) 2 Ch 17 (1969) 1 ALL ER 1066, (1969) 2 WLR 901; *Saunders v Anglia Building Society* (1971) AC 1004; *Lloyds Bank PLC v Waterhouse* (1990) FAM LAW 23; *Thoroughgood v Cole* (1582) 1 and 129, 2 Co; *Foster v Mackinnon* (1869) LR 4 CP 704 at 711.

285 *Saunders v Anglia Building Society* (1971) AC 1004 at 1016; See also *Lloyds Bank PLC v Waterhouse* (1990) Fam. Law 23.

286 *Saunders v Anglia Building Society* (1971) AC 1004 at 1016; See also *Lloyds Bank PLC v Waterhouse* (1990) Fam. Law 23.

287 *Skeate v Beale* (1841) 11 AD @ E 893; *Williams v Bayley* (1886) LR 1 HL 200; *Barton v Armstrong* (1976) 1 AC 104; *Occidental Worldwide Investment Corp. v Skibs A/S Avanti* (1976) 1 Lloyds Rep 293; *North Ocean Shipping Co Ltd v Hyanday Construction Co Ltd* (1979) 3 WLR 419; *Pao On v Lau Yiu Long* (1979) 3 WLR 435; (1980) AC 614; *Dimskall Shipping Co SA v International Transport Worker's Federation (The Evia Luck)* (1991) 4 ALL ER 871 (1992) 2 AL 152; *Dimskall Shipping Co SA v International Transport Workers Federation, (The Evia Luck)* (1991) 4 ALL ER 871; *Universe Tankships Inc of Moncovia v International Transport Worker's Federation, The Universe Sentinel* (1983) 1 AC 366; *Bands Contracts and Design Ltd v Victor Green Publications Ltd* (1984) 1 CR 419; *Atlas Express Ltd v Kafco (Importers and Distributors Ltd* (1989) 1 ALL ER 641; *Camillion Construction Ltd v Felix* (UK) Ltd (2001) QB 51; *CTN Cash and Carry Ltd v Gallacker Ltd* (1994) 4 ALL ER 714; *GMAC Commercial Credit Ltd v Dearden Unreported* May 28 (2002); *Huyton SA v Peter Cremer GMBH and Co* (1999) 1 Lloyd's Rep 620; *Williams v Roffey Bros and Nicholls (Contractors) Ltd* (1991) 1 QB 1; *DSDN Sub Sea Ltd v Petroleum Geo-Service ASA* (2000) BLR 530.

either a physical act or an illegitimate threat, coercing or pressurizing the other party into making a contract. [288]

The best known case involving duress to the person is that of *Barton v Armstrong*. [289] The facts briefly stated include: Armstrong was the chairman of a company and Barton was its managing director. Armstrong made death threats against Barton to persuade Barton to buy out Armstrong's shareholding in the company, but ironically, Barton wished to acquire Armstrong's shares anyway, because, he thought (wrongly, as things turned out) that this was a commercially desirable course of action. So Barton executed a deed purchasing Armstrong's shares, but, later regretted the transaction and sought to undo the transaction. Armstrong argued that Barton would have executed the deed even if there had been no threats, so his threats were not a `*but for*' cause and thus, there should be no relief.
The Privy Council, hearing the appeal, per Lord Cross, recognised the most general form of duress namely:

"for if A threatens B with death if he does not execute some document and B, who takes A's threats seriously, executes the document it can be only in the most unusual circumstances that there can be any doubt whether the threats operated to induce him to execute the document."

Applying the facts of this case to the law applicable Lord Cross found:

" ..... that during the 10 days or so before the documents were executed Barton was in genuine fear that Armstrong was planning to have him killed if the agreement was not signed. His state of mind was described by the judge as one of `very real mental torment' and he believed that his fears would be at an end when once the documents were executed."

Lord Cross concludes:

" ..... if A's threats were "a" reason for B's executing the deed he is entitled to relief even though he might well have entered into the contract if A had uttered no threats to induce him to do so." [290]

Although the English courts, at one stage, were reluctant to recognize duress in respect of goods, [291] in more recent English decisions, in the 1970's and 1990's, in the cases of

288 *Barton v Armstrong* (1976) 1 A.C. 104 involves a threatened or actual violence; Williams v Bayley (1886) LR 1 HL 200 involves a threat of imprisonment.

289 (1976) 1 A.C. 104.

290 *Barton v Armstrong* (1976) 1 A.C. 104.

291 See the case of *Skeate v Beale* (1841) 11 AD @ E 893.

Occidental Worldwide Investment Corpn v Skibs A/S Avanti; [292] *North Ocean Shipping Co Ltd v Hyunday Construction Co Ltd*; [293] *Pao On v Lau Yiu Long*; [294] *Dimskall Shipping Co SA v International Transport Worker's Federation (The Evia Luck)* [295] the continued validity of *Skeate v Beale* must be considered doubtful.

It is especially in the case of *Dimskall Shipping Co SA v International Transport Workers Federation (The Evia Luck)* [296] that Lord Goff made it clear that pronouncement in *Skeate v Beale* (1841) 11 AD and El 983 has been replaced by what Lord Goff describes as `economic duress'. This is how Lord Goff sets out the position:

"We are here concerned with a case of economic duress. It was at one time thought that, at common law, the only form of duress which would entitle a party to avoid a contract on that ground was duress of the person. The origin for this view laid in the decision of the Court of Exchequer in Skeate v Beale (1941) 11 Ad and El 983. However, since the decisions of Kerr J in Occidental Worldwide Investment Corporations v Skibs A/S Avanti (The Siboen and The Sibotre) (1976) 1 Lloyd's Rep 293, of Mocatt J in North Ocean Shipping Co Ltd v Hyunday Construction Co Ltd (1979) QB 705, and of the Judicial Committee of the Privy Council in Pao On v Lau Yiu Long (1980) AC 614, that limitation has been discarded, and it is now accepted that economic pressure may be sufficient to amount to duress for this purpose, provided at least that the economic pressure may be characterised as illegitimate and has constituted a significant cause inducing the plaintiff to enter into the relevant contract." [297]

The third principal form of duress is that of economic duress recognised by the English courts for the first time in the case of *Occidental Worldwide Investment Corporation v Skibs A/S Avanti (The Siboen and the Sibotri)*. [298]

However, obiter, Micatia J recognized that a contract could be voidable because economic duress had been present when it was made, and that is now an accepted principle. `*Economic*' duress simply refers to the fact that it is the economic interest of the individual which is being threatened, and if the law will react to threats even to that interest, it can be

292 (1976) 1 Lloyd's Rep 293.

293 (1979) 3 WLR 419.

294 (1979) 3 WLR 435.

295 (1992) 2 AC 152.

296 (1992) 2 AC 152.

297 *Dimskall Shipping Co SA v International Transport Worker's Federation* (The Evia Luck) (1992) 2 A.C. 152 at 165.

298 (1976) 1 Lloyd's Rep 293.

said that there is a general principle, in English law, that duress will render a contract voidable. The law is now prepared to look at a very wide range of threats in deciding if the decision to contract was made in unacceptable circumstances or not.

One of the difficulties experienced by the courts after economic duress was first recognised as a defence, was to identify the elements that had to be proved in order to make out a case of economic duress. But, in *Pao v Lau Yiu Long,* [299] the Privy Council not only approved Kerr J's distinction between commercial pressure and coercion sufficient to vitiate consent, it also laid down the following list of enquiry for a determination as to coercion:

"Whether the person alleged to have been coerced did or did not protest; whether, at the time he was allegedly coerced into making the contract, he did or did not have an alternative course open to him such as an adequate legal remedy; whether he was independently advised; and whether after entering the contract he took steps to avoid it. All these matters are, as was recognised in Maskell v Horner (1915) 3 KB 106, relevant in determining whether he acted voluntarily or not." [300]

Furthermore, Lord Scarman also identified two essential conditions for the operation of the doctrine of economic distress, namely:

(a) Coercion of the will that vitiates consent; and

(b) The pressure or threat must be illegitimate.

Most of these types of cases involve a situation where there was no practical choice other than to agree to enter into an agreement. This formed the subject matter in numerous cases, examples of which appear below.

In *B and S Contracts and Design Ltd v Victor Green Publications Ltd,* [301] the Court of Appeal held that the defendants had been affected by duress because they had no realistic choice other than to pay.

Similarly, in *Atlas Express Ltd v Kafco (Importers and Distributors) Ltd,* [302] the defendant had no realistic choice other than to sign a revised contract for carriage of its goods because it could not, at such short notice, have obtained alternative carriage for the goods

299 (1979) 3 WLR 435; (1980) A.C. 614.

300 *Pao v Lau Yiu Long* (1979) 3 WLR 435 at 450.

301 (1984) ECR 419.

302 (1989) 1 ALL ER 641.

and without the ability to deliver, it would have lost the contract to supply its major customer (Woolworths).

What has to be shown is that the victim would not otherwise have made such a contract, or would not otherwise have contracted on those terms [303] and that the pressure was illegitimate. As to the meaning of what is deemed to be illegitimate or when is a threat `*illegitimate*' for the purposes of the law relating to economic duress? This question was decided in *DSDN Sub Sea Ltd v Petroleum Geo-Services ASA*. [304]

Dyson J, delivering the judgement, stated that:

"In determining whether there has been illegitimate pressure, the court takes into account a range of factors. These include whether there has been an actual or threatened breach of contract; whether the person allegedly exerting the pressure has acted in good or bad faith; whether the victim had any realistic practical alternative but to submit to the pressure; whether the victim protested at the time; and whether he affirmed and sought to rely on the contract. These are all relevant factors. Illegitimate pressure must be distinguished from the rough and tumble of the pressures of normal commercial bargaining." [305]

The court subsequently found that the threat was not, in the circumstances, illegitimate, since it was reasonable behaviour by a contractor acting *bona fide* in a different situation.

The effect of a successful plea of economic duress is that it renders a contract voidable, in that the coercion of the will vitiates consent. The victim may also claim restitution. [306]

Undue Influence

One of the other exceptions to the *caveat subscriptor* rule recognized by the English courts is that of undue influence.

One of the earliest cases, in which the doctrine of undue influence was recognized by the English courts, occurred in the mid 1800's in the case of *Smith v Kay,* [307] in which, a

303 *Huyton SA v Peter Cremer GMBH and Co* (1999) 1 Lloyd's Rep 620.

304 (2000) BLR 530.

305 *DSND Sub Sea Ltd v Petroleum Geo-Service ASA* (2000) BLR 530 at 545; See also *Universe Tankships Inc. Of Moncovia v International Transport Worker's Federation, The Universe Sentinel* (1983) 1 AC 366.

306 *Occidental Worldwide Investment Corporation v Skibs A/S Avanti* (1976) 1 Lloyd's Rep 293; *North Ocean Shipping Co Ltd v Hyundai Construction Co Ltd* (1979) QB 705; *Pao v Lau Yiu Long* (1980) AC 614; *Hayton SA v Peter Cremer GMBH and Co* (1999) 1 Lloyd's Rep 620 at 636-639; *B and S Contracts and Design Ltd v Victor Green Publications Ltd* (1984) 1 CR 419 CA; *Universe Tankships of Moncovia v International Transport Workers Federation (The Universe Sentinel)* (1983) 1 AC 366 HC.

307 (1893) 1 CH 736.

young man came completely under the influence of an older man, called Johnston, with whom he was living. As soon as Kay reached 21, Johnston persuaded him to execute various securities in his favour. Fraud was alleged, but the House of Lords held that the securities could be set aside on another ground, that of undue influence.

English law cases, until the case of *Royal Bank of Scotland PLC v Etridge (No 2),* [308] always distinguished between actual undue influences and presumed undue influence. From its plain meaning, actual undue influence, usually involved an act of inducement or domination. In the past, cases of domination frequently involved spiritual advisers. An example thereof occurred in *Morley v Loughman*. [309] This was an action brought by executors to recover $140,000, paid by the deceased to a member of a religious sect. Wright J, in finding for the plaintiffs, said that there was no need to show a special relationship between deceased and defendant, because `*the defendant took possession, so to speak, of the whole life of the deceased, and the gifts were the effect of that influence and domination*'. [310]

In a more recent case of *CIBC Mortgages p/c v Pitt,* [311] the House of Lords treated this as a case involving actual undue influence. In this case, the defendant had been induced to agree to a second mortgage on the family home as security for a loan to finance share purchases. She had not wanted to go ahead with the scheme, but, had given in to a campaign of sustained pressure. The principal issue for decision, in this case, was whether her claim of undue influence could succeed without her being able to prove that the transaction was to her manifest disadvantage? The House of Lords held that in a (Class 1) case of actual undue influence, the transaction need not be one that is disadvantageous to the party affected.

The court, in the case of *Royal Bank of Scotland plc v Etridge (No 2),* [312] emphasizes the following characteristics of actual undue influence in the context of husband and wife relationships, namely:

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308 (1998) 4 ALL ER 707 (2002) UK HL 44 (2002) 2 AC 773.

309 *Morley v Loughman* (1893) 1 CH 730.

310 *Morley v Loughman* (1893) 1 CH 730.

311 (1994) 1 AC 200.

312 (2002) UKHL 44 (2002) 2 AC 773.

"Undue influence has a connotation of impropriety. In the eye of the law, undue influence means that influence has been misused. Statements or conduct by a husband, which do not pass beyond the bounds of what may be expected of a reasonable husband in the circumstances, should not, without more, be castigated as undue influence. Similarly, when a husband is forecasting the future of his business, and expressing his hopes or fears, a decree of hyperbole may be only natural. Courts should not too readily treat such exaggerations as misstatements. Inaccurate explanations of proposed transaction are a different matter." [313]

Presumed undue influence has been widely recognised in English law. Prior to the decision of *Royal Bank of Scotland plc v Etridge (No 2),* [314] what was required, by the courts, was for the complainant to show that the relationship between the parties fell within certain recognised relationships, or, on the facts, it was shown to be a relationship where one party placed trust and confidence in the other, before it would be presumed that undue influence existed. Examples of cases in which the courts have held that a relationship of trust and confidence existed include; the attorney and client relationship, doctor and patient relationship, religious relationship between the church and its members etc.

In so far as the attorney and client relationship is concerned, in the case of *Wright v Carter* [315] the plaintiff executed a deed of trust whereby the whole of his property (present and future) was held on trust, for his two children and his solicitor, in equal shares! The court had no hesitation in finding that a presumption of undue influence arose and had not been rebutted by the solicitor.

The best known example of the relationship between the church and its members is that of *Allcard v Skinner*. [316] In this case Miss Allcard, a wealthy young woman, consented to become a professed member of the order. She bound herself to observe the rules of the order, including poverty, which required members to give up all their property; seclusion, which prevented members seeking outside advice without permission; and obedience, which told members to regard the voice of the Mother Superior as the voice of God. Miss Allcard transferred large sums of money and stocks to the Mother Superior, but later left the order and sought to set the gifts aside. The Court of Appeal held that the presumption of undue influence arose (although Miss Allcard's claim was barred by her delay in bringing it).

The court concluded:

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313 *Royal Bank of Scotland plc v Etridge (No 2)* (2002) UKHL 44 (2002) 2 AC 773 32-33.

314 (2002) UK HL 44 (2002) 2 AC 773, 32-33.

315 (1903).

316 (1887) 36 CHD 145, CA.

"It is plain that equity will not allow a person who exercise or enjoys a dominant religious influence over another to benefit, directly or indirectly by the gifts which the donor makes under or in consequence of such influence." [317]

There are relationships which the law regards as special, incorporating elements of trust and confidence, so that influence can be automatically assumed. Examples thereof include a relationship between solicitor and client, doctor and patient, parent and child, banker and customer. [318] Applying the principle laid down in *Royal Bank of Scotland plc v Etridge (No 2),* [319] where the relationship falls within the category of protected relationship, the presumption of influence is now automatic and indisputable, but, notwithstanding, [320] if evidence suggests that the influence was `*undue*' or is suspicious, the presumption will arise and it will be up to the party alleged to have exercised the undue influence, to show that no undue influence was, in fact, exercised. He can do this by showing, for example, that independent advice was received. [321]

A further requirement, laid down by the courts, in a presumed influence case is that there must be something about the transaction which `*calls for an explanation*' or the so called `*suspicious transaction*' case. The original test was defined in *Allcard v Skinner*: [322]

"The mere existence of such influence is not enough in such a case but if the gift is so large as not to be reasonably accounted for on the ground of friendship, relationship, charity or other ordinary motives on which ordinary men act, the burden is on the donee to support the gift." [323]

Later cases changed the wording of this requirement by shifting the language used to a `*manifestly disadvantageous transaction*'. [324] The presumption of undue influence is then derived from the reasoning that a party, making an unfettered decision, would not freely

317 *Allcard v Skinner* (1887) 36 CHD 145 AC.

318 *National Westminister Bank Ltd v Morgan* (1985) AC 686; *Lloyds Bank Ltd v Bundy* (1975) QB 326.

319 *Royal Bank of Scotland plc v Etridge (No 2)* (1998) 4 ALL ER 705 (2002) UKHL 44 (2002) 2 AC 773.

320 *Royal Bank of Scotland plc v Etridge (No 2)* (1998) 4 ALL ER 705 (2002) UKHC 44 (2002) 2 AC 773.

321 *Royal Bank of Scotland plc v Etridge (No 2)* (2002) UKHL 44 (2002) 2 AC 773.

322 (1887) 36 CHD 145 AC.

323 *Allcard v Skinner* (1887) 36 CHD 145 AC.

324 *National Westminister Bank v Morgan* (1985) AC 686.

choose to enter into a manifestly disadvantageous contract. This requirement was questioned by a number of decisions, [325] until its position in establishing undue influence was reaffirmed in the case of *Royal Bank of Scotland plc v Etridge (No 2)*. [326] In this case, Stuart-Smith LJ made the point that evidence of manifest disadvantage is `*a powerful evidential factor*'. This reasoning was also followed by the House of Lords, in which Lord Nicholas confirmed that manifest disadvantage to the claimant would be evidence that the influence exercised was `*undue*' or at least raised suspicion.

Once it has been established that the presumption of undue influence has arisen, the presumption can be rebutted by showing that the complainant was not, in fact, induced to enter the contract through the defendant's improper influence, but rather, that he did so quite freely and fully aware of the situation. What will also assist is to show that independent advice was obtained. [327]

The effect of undue influence, if established, is that the contract is voidable, not void. The claimant may, thus, elect whether to continue with the contract or seek rescission thereof. [328] Restitutionary relief can also be sought in association with rescission of the contract. [329]

Illegality

Illegality, in the English case law, impacts on the law of contract in many different ways. The impact of illegality was summed up two and a half centuries ago, by Lord Mansfield, in the case of *Holman v Johnson* [330] as follows:

"No court will lend its aid to a man who founds his cause of action upon an immoral or illegal act, if from the plaintiff's own stating or otherwise. The cause of action appears to arise ex turpi causa, or the transgression of a positive law of this country, there the Court says he has no right to be assisted. It is upon this ground that the court goes not for the sake of the defendant, but because they will not lend their aid to such a plaintiff." [331]

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325 *CIBC Mortgages plc v Pitt* (1994) 1 AC 200; *Barclays Bank plc v Coleman* (2000) 3 WLR 405.

326 (1998) 4 ALL ER 705 (2002) UKHL 44 (2002) 2 AC 773.

327 *Royal Bank of Scotland plc v Etridge (No 2)* 2002 UKHL 44 (2002) 2 AC 773; *Inche Noriah v Shaik Allie Bin Amar* (1929). In this case the court laid down the test for rebuttal in general terms namely: *"that the gift was made after the nature and effect of the transaction had been fully explained to the donor by some independent and qualified person so completely as to satisfy the court that the donor was acting independently of any influence of the donee and with the full appreciation of what he was doing."*

328 *Allcard v Skinner* (1887) LR 36 CHD 145.

329 *Dunbar Bank plc v Nademen* (1998) 3 ALL ER 876.

330 (1775) 1 Cowp. 34.

331 *Holman v Johnson* (1775) 1 Cowp. 34.

The English courts, throughout the centuries, have had difficulty in classifying the separate heads of illegality. From a study of the case law, it appears that the English courts treat the illegality of contracts in two main streams. In the first main stream, illegality covers all contracts which are considered to be contrary to public policy. In the second main stream, illegality covers contracts which are affected by statutory prohibition.

Returning to the first main stream, contracts which the courts will not enforce because they are contrary to public policy are, generally, agreements to commit a crime, agreements to commit a civil wrong or fraud or agreements to defraud the revenue.

As long ago as 1866, in the case of *Pearce v Brooks,* [332] the court considered whether an agreement to provide a prostitute with goods for use in her trade was illegal and unenforceable. The facts of the case included the following:

The defendant, a prostitute, hired a decorative brougham, from the plaintiff coach builders, as part of her display to attract men. The plaintiffs alleged that the defendant returned the brougham in a damaged condition and that she had failed to pay the instalments on the hire of the brougham. The plaintiffs brought an action to recover the instalment of 15 Guineas, which had not been paid and to recover in respect of the damage done to the brougham.

Pollock CB, in delivering the judgement, set out the law applicable in the following terms:

"I have always considered it as settled law, that any person who contributes to the performance or an illegal act by supplying a thing with the knowledge that it is going to be used for that purposes, cannot recover the price of the thing so supplied."

The court continues:

"Nor can any distinction be made between an illegal and an immoral purpose, the rule which is applicable to the matter is, ex turpi causa non oritur actio and whether it is immoral or an illegal purpose in which the plaintiff has participated, it comes equally within the terms of the maxim, and the effect is the same: no cause of action can arise out of either the one or the other ..... If, therefore, this article was furnished to the defendant for the purpose of enabling her to make a display favourable to her immoral purposes, the plaintiff can derive no cause of action from the bargain." [333]

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332 (1866) LR 1 Ex 213; See also *Benyon v Nettleford* (1850) 3 MAC and G 94 where a man undertakes to pay monies to a woman if she becomes his mistress.

333 *Pearce v Brooks* (1866) LR 1 Ex 213.

The court consequently held that the agreement was illegal and unenforceable.

Another case, which clearly illustrates the legal principles applicable to illegal contracts, is that of *St John Shipping Corporation v Joseph Rank Ltd*. [334] In this case, a ship, registered in Panama, carried grain from a US port to the UK. The ship was overloaded, so that its `*load line*' was submerged, contrary to the provisions of the *Merchant Shipping Safety and Load Line Conventions Act* 1932. Although the overloading enabled the ship to earn an extra $2,295 in freight, the maximum statutory fine (which was levied in this case) was only $1,200, with the result that the statute was ineffective in removing the incentive to overload. The defendants, who were owners of some of the cargo, withheld $2,000 of the freight due under the contract and another cargo owner withheld $295. The plaintiff ship-owners sued to recover the withheld freight. The defendants argued that, as the ship-owners had performed the contract in an illegal manner, they were not entitled to recover any part of the freight due.
Devlin J set out the legal position as follows:

"There are two general principles. The first is that a contract which is entered into with the object of committing an illegal act is unenforceable. The application of this principle depends upon proof of the intent at the time the contract was made, to break the law, if the intent is mutual the contract is not enforceable at all, and, if unilateral, it is unenforceable at the suit of the party who is proved to have it. This principle is not involved here. Whether or not the overload was deliberate when it was done, there is no proof that it was contemplated when the contract of carriage was made. The second principle is that the court will not enforce a contract which is expressly or impliedly prohibited by statute. If the contract is of this class it does not matter what the intent of the parties is, if the statute prohibits the contract, it is unenforceable whether the parties meant to break the law or not as significant distinction between the two classes is this. In the former class you have only to look and see what acts the statute prohibits; it does not matter whether or not it prohibits a contract; if a contract is deliberately made to do a prohibited act, that contract will be unenforceable. In the latter class, you have to consider not what acts the stature prohibits, but what contracts it prohibits, but you are not concerned at all with the intent of the parties; if the parties enter into a prohibited contract, that contract is unenforceable." [335]

The court, consequently, held that the agreement entered into was enforceable, as the right to claim freight from the defendants was not brought into existence by crime.

In a subsequent case concerning the illegality of a contract and the effect thereof, the Queen's Bench, in the case of *Archibold's (Freightage) Ltd v S Spanglett Ltd* [336] also dealt with the freight loss of whisky. The facts included: The defendants, who were furniture

334 (1957) 1 QB 267.

335 *St John Shipping Corporation v Joseph Bank Ltd* (1957) 1 QB 267.

336 (1961) 1 QB 374, Court of Appeal.

manufacturers in London, owned vehicles with "C" licences, which permitted them to carry their own goods, but not the goods of others. The plaintiffs were carriers with offices in London and Leeds, whose vehicles carried "A" licences, enabling them to carry the goods of others, as well as their own goods. One of the plaintiffs' employees, in their London office, arranged with a person from the defendant's office, for the defendants to carry some goods, for the plaintiffs, to the plaintiff's Leeds office. The plaintiff believed that the defendants had "A" licences for their vehicles and were not aware of the fact that the defendants' vehicles had only "C" licences. Having made his deliveries in Leeds, the defendant's driver, Mr Randall, told Mr Field, the plaintiffs' traffic manager in the Leeds office that he had just brought a load, for them, from London and wished to take another load back to London. The driver arranged with the traffic manager to carry a load of whisky to London. That load of whisky was stolen as a result of the driver's negligence. The plaintiffs brought an action for damages against the defendants. The defendants argued that the plaintiffs were not entitled to recover damages because the contract was illegal as a result of the fact that their vehicle did not have an "A" licence.
The trial judge found for the plaintiffs. The Court of Appeal dismissed the defendants' appeal and held that the plaintiffs were not prevented from suing for damages, as a result of the illegality, because they did not know the vehicle only had a "C" licence and, that being the case, the contract of carriage was not, itself, illegal under the relevant statute, nor was it *ex facie* illegal.

Pearce LJ, delivering the judgement, set out the legal position in the following terms:

"If a contract is expressly or by necessary implication forbidden by statute, or it is ex facie illegal, or if both parties know that through ex facie legal it can only be performed by illegality or is intended to be performed illegally, the law will not help the plaintiff in any way that is a direct or indirect enforcement of rights under the contract. And for this purpose both parties are presumed to know the law."

Applying the facts *in casu* the court concluded:

"The plaintiffs were never in delicto since they did not know the vital fact that would make the performance of the contract illegal. In my view, therefore, public policy does not constrain us to refuse our aid to the plaintiffs and they are therefore entitled to succeed. I would dismiss the appeal." [337]

Contracts to commit crimes or civil wrongs, as previously stated, would be illegal. A good illustration thereof can be found in the case of *Parkinson v College of Ambulance*. [338] In this

337 *Archbolds (Freightage) Ltd v S Splanglett Ltd* (1961) 1 QB 374, Court of Appeal.

338 (1925) 2 KB 1.

case, an officer of the defendant charity promised to arrange for Parkinson to receive a knighthood if he made a substantial donation to the charity. Parkinson donated $3000 but received no knighthood, so he sued for the return of his money. Lush J decided the agreement was illegal and unenforceable and stated the position as follows:

"I cannot feel any doubt that a contract to guarantee or undertake that an honour will be conferred by the Sovereign if a certain contribution is made to a public charity or if some other service is rendered, is against public policy and, therefore, an unlawful contract to make. Apart from being derogatory to the dignity of the Sovereign who bestows the honour, it would produce, or might produce, the most mischievous consequence. No court could try such an action and allow such damages to be awarded with any propriety or decency." [339]

Other examples of contracts which fall into this main stream include those agreements injurious to the State, agreements which tend to injure good government, agreements which tend to prevent the course of justice, agreements which tend to abuse the legal process and agreements which affect marriages. For the purposes of this research and given the constraints, case law in respect of the above mentioned will not be entertained.

Consequently, the second main stream will be looked at and discussed very briefly. In this regard, agreements contrary to statutory prohibitions are illegal. What is looked at is the intention of the legislature. An example thereof occurred in the case of *RE Mahmoud and Ispahani* [340] in which the facts were:

The regulation applicable to the contract was the Seeds, Oils and Fats Order 1919, which provided that a person shall not buy or sell linseed oil `*except under and in accordance with the terms of a licence*'. The plaintiffs, who had a licence, asked the defendant if he had a licence. The defendant replied that he did when, in fact, he did not. The plaintiffs sold linseed oil to the defendant but the defendant refused to accept delivery. When sued for damages for non-acceptance, the defendant took the point that the contract was illegal on account of the fact that he did not have a licence to purchase the linseed oil. The Court of Appeal held that the plaintiffs were not entitled to bring their action for damages. Atkin LJ stated:

"When the court has to deal with the question whether a particular contract or class of contract is prohibited by statute, it may find an express prohibition in the statute, or it may have to infer the prohibition from the fact that the statute imposes a penalty upon the person entering into that class of contract. In the latter case one has to examine very carefully the precise terms of the statute imposing the penalty upon the individual. One may find that the statute imposes a penalty upon an individual, and yet does not prohibit the contract if it is made with a

339 *Parkinson v College of Ambulance* (1925) 2 KB 1.

340 (1921) 2 K.R. 716.

party who is innocent of the offence which is created by the statute." [341]

On the facts, the Court of Appeal concluded that the intention was to prohibit the making of the contract, whether or not the party seeking to enforce the contract was responsible for the violation of the requirements of the system. Consequently, the contract could not be enforced.

The consequences of illegality are that the courts will neither enforce an illegal contract nor will they permit the recovery of the value of benefits, conferred on another party, in the performance of an illegal contract.

These two general rules are expressed in the maxims *ex turpi causa non oritue actio* (no action can be based on a disreputable cause) and *in delicto potior est conditio defendentis* (where both parties are equally at fault, the position of the defendant is stronger).

But, the said general rules are not without exception. For that reason, in some cases, the courts adopt a very severe attitude and refuse to assist a person implicated in the illegality, in any way whatsoever. The courts' attitude, in general, is no better expressed than by Lord Goff in the case of *Tinsley v Milligan* [342] when he stated:

"The principle is not a principle of justice; it is a principle of policy, whose application is indiscriminate and so can lead to unfair consequences as between the parties to litigation. Moreover the principle allows no room for the exercise of any discretion by the court in favour of one party or the other." [343]

The effect thereof is that the defence of illegality does not exist for the benefit of the defendant, but for the benefit of society as a whole.

But, the English courts have been prepared to deviate from the general rule when the circumstances so dictate.

The case of *Archbold's (Freightage) Ltd v S Spanglett Ltd* [344] demonstrates that an innocent

341 *Re Mahmoud and Ispahane* (1921) 2 K.B. 716.

342 (1994) 1 A.C. 340.

343 *Tinsley v Milligan* (1894) 1 A.C. 340 at 355; For the long standing decision in which it was held that illegal contracts are unenforceable see *Holman v Johnson* (1775) 1 Cowp. 34.

344 *Archbolds (Freightage) Ltd v S Spanglett Ltd* (1961) 1 QB 374.

party, who is unaware of an illegal act committed by the defendant in the course of performance of the contract, may be entitled to enforce the contract, notwithstanding the illegality.

The court may also conclude, as a matter of construction, that the effect of a statutory provision is to impose a punishment on a party who breaches the statute, but, not to render unenforceable a contract, the performance of which involves a breach of the statute.

The exception to the general rule has been recognized by the English courts in circumstances which *"would not amount to an affront to the public conscience to afford the plaintiff the relief he sought."* [345] Recovery may, depending on the innocence of the one contracting party, be afforded such a party. [346] Restriction may also be available where one party withdraws before the illegal purpose is carried into effect. [347]

9.2.2.3 Legal Opinion

The *caveat subscriptor* rule is very much part of the English law of contract. People, who put their signature to contracts without reading or understanding them, are treated with very little sympathy. For that reason, the signatory must beware as he/she will be taken to have noticed and be bound by, all the provisions he/she has signed, whether the contract has been read or not. This includes contracting parties who had been careless in signing or signed in haste. [348]

Therefore, as a general rule, in the absence of a valid defence, a person is bound by his/her signature to a document, whether he/she reads it or understands it, or not. [349]

The defences or exceptions to the *caveat subscriptor* rule include misrepresentation,

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345 *St John Shipping Corporation v Joseph Bank Ltd* (1957) 1 QB 267.

346 *Howard v Shirlstar Container Transport Ltd* (1990) 3 ALL ER 366. See also *Thackwell v Barclays Bank PLC* (1986) 1 ALL ER 676; *Shanskal v Al-Kistaine* (2001) 2 ALL ER (COMM) 60.

347 *Tribe v Tribe* (1996) CH 106.

348 For legal writings see Stone *Principles of Contract Law* (1998) 202; Stone *The Modern Law of Contract* (2003) 302; McKendrick *Contract Law Text, Cases and Materials* (2005) 651; Treitel *The Law of Contract* (2003) 329; Beatson *Anson's Law of Contract* (2002) 335. For case law see *L'Estrange v Graucob* (1934) 2 KB 394; *United Dominions Trust Ltd v Western* (1976) QB 513 at 543.

349 For legal writings see Koffman and MacDonald *The Law of Contract* (2004) 337; McKendrick *Contract Law Text, Cases and Materials* (2005) 651; Stone *Principles of Contract Law* (1998) 202; Stone *The Modern Law of Contract* (2003) 302; Beatson *Anson's Law of Contract* (2002) 335. For case law see *L'Estrange v Graucob* (1934) 2 KB 394; *United Dominions Trust Ltd v Western* (1976) QB 513 at 543.

mistake, duress, undue influence, illegality and fraud. [350]

Misrepresentation, in English law, may manifest itself through a positive act, for example, an experienced salesman makes a representation which turns out to be false, [351] or it may manifest through an omission, where a person is obliged to disclose certain facts but wilfully shuts his/her eyes to them or where a special relationship exists, for example, a professional relationship or a commercial relationship from which a duty of disclosure arises and one of the contracting parties fails to disclose the true facts. [352] Before a party can successfully rely on misrepresentation as a defence to an action, it must be shown, firstly, that the statement made before the conclusion was one of fact, not an opinion of law [353] nor a mere puff; [354] secondly, the representation held a real inducement which is a question of fact; [355] thirdly, the party, to whom the misrepresentation was made, relied thereupon

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350 For legal writings see Stone *Principles of Contract Law* (1998) 202; Stone *The Modern Law of Contract* (2003) 302; McKendrick *Contract Law Text, Cases and Materials* (2005) 651; Treitel *The Law of Contract* (2003) 329; Beatson *Anson's Law of Contract* (2002) 335. For case law see *Smith v Hughes* (1871) LR 6 QB 597 recognizing misrepresentation; *Bell v Lever Bros Ltd* (1932) A.C. 161 recognizing mistake; *Skeate v Beale* (1841) 11 AD and ER 893; *Barton v Armstrong* (1976) 1 AC 104; *Dimskall Shipping SA v International Worker's Federation (The Evia Luck)* (1951) 4 ALL ER 871. *Camillion Construction Ltd v Felix (UK) Ltd* (2001) 312 - recognising duress as a defence; *Smith v Kay* (1893) 1 CH 736; *CIBC Mortgages PLC v Pitt* (1994) 1 AC 200; *Royal Bank of Scotland PLC v Etridge (No 2)* - recognizing undue influence as a defence; *Holman v Johnson* (1775) 1 Cowp. 34; *Pearce v Brooks* (1866) LR 1 Ex 213; *St John Shipping Corporation v Joseph Bank Ltd* (1957) 1 QB 267; *Archbolds (Freitage) Ltd v S Spanglett Ltd* (1961) 1 QB 374 - Court of Appeal recognizing illegality as a defence.

351 For legal writings see Beatson *Anson's Law of Contract* (2002) 243ff; Koffman and MacDonald *The Law of Contract* (2004) 356ff; Stone *Principles of Contract Law* (1998) 177ff; Stone *The Modern Law of Contract* (2004) 266ff; McKendrick *Contract Law Text, Cases and Materials* (2004) 310ff; Treitel *The Law of Contract* (2003) 343; O'Sullivan and Hilliard *The Law of Contract* (2004) 310ff; For case law see *Hedley Burne and Co Ltd v Heller and Partners Ltd* (1964) A.C. 465; *Esso Petroleum Co Ltd v Marden* (1976) QB 801.

352 For legal writings see Koffman and MacDonald The Law of Contract (2004) 340; Beatson Anson's Law of Contract (2002) 337-338; McKendrick Contract Law Text, Cases and Materials (2005) 657-661; Treitel The Law of Contract (2003) 330; Stone Principles of Contract Law (1998) 174-177; Stone The Modern Law of Contract (2004) 262-265; O'Sullivan and Hilliard The Law of Contract (2004) 296-298, For case law see Blackburn, Low and Co v Vigors (1887) 12 App Cas 531; Economides Commercial Union Assurance Co PLS (1998) QB 587; Hedley Byrne and Co Ltd v Heller and Partners Ltd (1964) A.C. 465; Esso Petroleum Co Ltd v Marden (1976) QB 801.

353 For legal writings see Treitel The Law of Contract (2003) 370; Koffman and MacDonald The Law of Contract (2004) 343; O'Sullivan and Hilliard The Law of Contract (2004) 300; Beatson Anson's Law of Contract (2002) 337; McKendrick Contract Law Text, Cases and Materials (2005) 659-660; Stone Principles of Contract Law (1998) 174; Stone The Modern Law of Contract (2003) 261; For case law see Bisset v Wilkinson (1927) AC 177.

354 For legal writings see Treitel *The Law of Contract* (2003) 370; Koffman and MacDonald *The Law of Contract* (2004) 343; O'Sullivan and Hilliard *The Law of Contract* (2004) 300; Beatson *Anson's Law of Contract* (2002) 337; McKendrick *Contract Law Text, Cases and Materials* (2005) 653-660; Stone *Principles of Contract Law* (1998) 202; Stone *The Modern Law of Contract* (2003) 268; For case law see *De Marook v Hallett* (1866) L.R. 2 EH App 21; *Lambert v Lewis* (1982) A.C. 225.

355 For legal writings see Koffman and MacDonald *The Law of Contract* (2004) 340-351; Beatson *Anson's Law of Contract* (2002) 241-243; McKendrick *Contract Law Text, Cases and Materials* (2005) 661; Treitel *The Law of*

and acted thereupon to conclude the agreement. [356]

English law recognizes three different categories of misrepresentation, depending upon the frame of mind of the party making the misstatement, misrepresentation could take the form of fraud, negligence or innocence. [357]

The remedies available are founded in common law, in respect of which the party who has been caught by this misrepresentation may seek affirmation of the contract and pursue a damages claim for deceit, alternatively seek rescission of the contract and sue for damages [358] or to sue for damages in terms of the *Misrepresentation Act* 1967. [359]

In so far as the exclusion of liability for misrepresentation is concerned, the English courts, relying upon the *Unfair Contract Act*, 1977 and the *Unfair Terms in Consumer Contracts Regulations* 1989, have held that exemption clauses are *prima facie* invalid, unless the courts find that the term is fair and reasonable. [360] But the courts have been very strict on clauses purporting to exclude liability for fraud. They are invalid. [361]

Contract (2003) 338; Stone *Principles of Contract Law* (1998) 115-177; Stone *The Modern Law of Contract* (2004) 264-265; O'Sullivan and Hilliard *The Law of Contract* (2004) 338 who speak about `reliance' as the causation requirement instead of inducement which ought to be restricted to fraud. For case law see *Smith v Chadwick* (1884) 9 App. CAS 187; *Barton v County NatWest Ltd* (1999) Lloyds Rep 408.

356 For legal writings see Beatson *Anson's Law of Contract* (2002) 243-247, 251ff; Koffman and MacDonald *The Law of Contract* (2004) 351-358ff; Stone *Principles of Contract Law* (1998) 179-180ff; Stone *The Modern Law of Contract* (2004) 266-272ff; O'Sullivan and Hilliard *The Law of Contract* (2004) 322ff; Treitel *The Law of Contract* (2003) 345; For case law see *Pan Atlantic Insurance Co Ltd v Pine Top Insurance Co Ltd* (1995) 2 A.L. 501; *Spice Girls v Aprilia World Service* (2002) EWCA 15 at 68-72; See *Derry v Peek* (1990) 14 App Cas 337 re fraudulent misrepresentation; *Hedley Byrne and Co Ltd v Heller and Partners Ltd* (1964) A.C. 465; *Redgrave v Hurd* (1881) 20 CH D.1 re innocent misrepresentation.

357 For legal writings see Beatson *Anson's Law of Contract* (2002) 243ff, 247-248; Koffman and MacDonald *The Law of Contract* (2004) 356, 360-380; Stone *Principles of Contract Law* (1998) 177-178; Stone *The Modern Law of Contract* (2004) 169, 266ff; O'Sullivan and Hilliard *The Law of Contract* (2004) 310ff 322; Treitel *The Law of Contract* (2003) 343-345; For case law see *Long v Lloyd* (1958) 2 All ER 402; *Leaf v International Galleries* (1950) 2 KB 86 (1950) 1 All ER 693; *Derry v Peek* 14 App Cas 377; *Smith New Court Securities Ltd v Soimgeour Vickers (Asset Management) Ltd* (1997) AC 254.

358 For legal writings see Beatson *Anson's Law of Contract* (2002) 243ff, 247-248; Koffman and MacDonald *The Law of Contract* (2004) 356, 360-380; Stone *Principles of Contract Law* (1998) 177-178; Stone *The Modern Law of Contract* (2004) 169, 266ff; O'Sullivan and Hilliard *The Law of Contract* (2004) 310ff 322; Treitel *The Law of Contract* (2003) 343-345; For case law see *Long v Lloyd* (1958) 2 All ER 402; *Leaf v International Galleries* (1950) 2 KB 86 (1950) 1 All ER 693; *Derry v Peek* 14 App Cas 377; *Smith New Court Securities Ltd v Soimgeour Vickers (Asset Management) Ltd* (1997) AC 254.

359 For the recognition of S2(1) of the Misrepresentation Act 1967 see *Howard Marine and Dredging Co Ltd v A Oeden and Sons (Excavations) Ltd* (1978) QB 574.

360 *Walker v Boyle* (1982) 1 W.L.R. 473; *McCullouch v Lane Fox and Partners* (1996) 49 Con. L.R. 124.

361 For legal writings see Beatson *Anson's Law of Contract* (2002) 261ff; Koffman and MacDonald *The Law of Contract* (2004) 378-379ff; Stone *Principles of Contract Law* (1998) 184ff; Stone *The Modern Law of Contract*

The English legal writers and the courts alike, although very much in favour of the freedom of contract and the sanctity of contract, do recognize mistake as a defence and an exception to the *caveat subscriptor* rule. This, nonetheless, remains very much an exception to the rule. [362]

The rationale for recognizing mistake as an exception to the *caveat subscriptor* rule is said to be based upon the intentions of the contracting parties, in respect of which, effect must be given. If therefore, either or both of the contracting parties have made a genuine mistake as to the nature of the agreement the enforcement of the contract would be contrary to their intentions. Intervention is therefore necessary, using mistake, even if it means destroying contractual obligations. To reason otherwise, it is argued, would be unjust. [363]

The effect of mistake in contract is that mistake negates consent and prevents the contracting parties from reaching agreement, for example, on different terms. [364] In other words, where mistake has been successfully invoked as a defence, the contract is rendered void *ab initio,* as if the contract had never existed. The contracting parties must also be placed in the same position they were in before the conclusion of the purported agreement. [365] English law writers and the courts recognise three particular types of mistake at

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(2004) 276-278ff; McKendrick *Contract Law Text, Cases and Materials* (2005) 712-713; O'Sullivan and Hilliard *The Law of Contract* (2004) 324ff; Treitel *The Law of Contract* (2003) 388-389; For case law see *Thomas Witter Ltd v TBS Industries* (1996) 2 ALL E.R. 573 at 598; *South West Water Services Ltd v International Computers Ltd* (1998) B.L.R. 420.

362 For legal writings see Beatson *Anson's Law of Contract* (2002) 261ff; Koffman and MacDonald *The Law of Contract* (2004) 378-379; Stone *Principles of Contract Law* (1998) 184ff; Stone *The Modern Law of Contract* (2004) 276-278ff; McKendrick *Contract Law Text, Cases and Materials* (2005) 712-713ff; O'Sullivan and Hilliard *The Law of Contract* (2004) 234ff; Treitel *The Law of Contract* (2003) 388-389. For case law see *Bell v Lever Bros Ltd* (1932) A.C. 161.

363 For legal writings see Stone *Principles of Contract Law* (1998) 187; Stone *The Modern Law of Contract* (2003) 281; Treitel *The Law of Contract* (2003) 286; Beatson *Anson's Law of Contract* (2002) 309. For case law see *Bell v Lever Bros Ltd* (1932) A.C. 161.

364 For legal writings see Beatson *Anson's Law of Contract* (2002) 336; Koffman and MacDonald *The Law of Contract* (2004) 308; Stone *Principles of Contract Law* (1998) 192-193; Stone *The Modern Law of Contract* (2003) 289; McKendrick *Contract Law Text, Cases and Materials* (2005) 572; O'Sullivan and Hilliard *The Law of Contract* (2004) 451-452; Treitel *The Law of Contract* (2003) 286. For case law see *Cox v Prentice* (1815) Mand S. 344; *De Vaux v Connolly* (1849) 8 C.B. 640; *Bell v Lever Brothers Ltd* (1932) A.C. 161; *Cundy v Lindsay* (1878) 3 App CAS 459; *Shogun Finance Ltd v Hudson* (2001 EWCA Civ. 1000 (2002) QB 834.

365 For legal writings see Beatson *Anson's Law of Contract* (2002) 336; Koffman and MacDonald *The Law of Contract* (2004) 308; Stone *Principles of Contract Law* (1998) 192-193; Stone *The Modern Law of Contract* (2003) 289; McKendrick *Contract Law Text, Cases and Materials* (2005) 572; O'Sullivan and Hilliard *The Law of Contract* (2004) 451-452; Treitel *The Law of Contract* (2003) 286. For case law see *Cox v Prentice* (1815)

common law, namely: common mistake, [366] mutual mistake, [367] and unilateral mistake. [368]

For a contracting party to be successful in raising mistake as a defence, both the English writers and the English courts lay down certain requirements, namely: firstly, the mistake must be fundamental. In other words, it is an essential and integral part of the subject matter; secondly, the mistake must induce the conclusion of the contract. In other words, the one party to the contract induces the other contracting party to act on a representation to his/her detriment. [369]

English law also recognises the *non est factum* principle as an extension of mistakes, which is also recognized as an exception to the *caveat subscriptor* rule. The principle works on this basis, namely, where someone does not understand a document that he/she signs, but can show that he/she falls into the category of those with defective education, illness, or innate incapacity, the courts will come to such a contracting party's rescue and allow a plea of *non est factum* to stand. [370]

Mand. 344; *De Vaux v Connolly* (1849) 8 C.B. 640; *Bell v Lever Brothers Ltd* (1932) A.C.161; *Cundy v Lindsay* (1878) 3 App CAS. 459; *Shogun Finance Ltd v Hudson* (2001 EWCA Civ. 1000 (2002) QB 834.

366 For legal writings see Stone *Principles of Contract Law* (1998) 188; Stone *The Modern Law of Contract* (2003) 282; McKendrick *Contract Law Text, Cases and Materials* (2005) 521; Treitel *The Law of Contract* (2003) 286ff; Beatson *Anson's Law of Contract* (2002) 310; O'Sullivan and Hilliard *The Law of Contract* (2004) 449ff.

367 For legal writings see Stone *Principles of Contract Law* (1998) 188; Stone *The Modern Law of Contract* (2003) 302; Treitel *The Law of Contract* (2003) 298ff; Beatson *Anson's Law of Contract* (2002) 310-311; Koffman and MacDonald *The Law of Contract* (2004) 306.

368 For legal writings see Treitel *The Law of Contract* (2003) 298, 304-308; Stone *The Modern Law of Contract* (2003) 288; Beatson *Anson's Law of Contract* (2002) 319; McKendrick *Contract Law Text, Cases and Materials* (2005) 572. For case law see *Cundy v Lindsay* (1878) 3 App Cas 459; *Raffles v Wickerhouse* (1864) 2HandC 906; *Smith v Hughes* (1871) C.R. 6 QB 597; *Shogun Finance Ltd v Hudson* (2001) EWCA Civ. 1000 (2002) QB 634; *Phillips v Brooks Ltd* (1919) 2 K.B. 243; *Denrant v Skinner* (1948) 2 K.B. 164; *Lewis v Averay* (1972) 1 QB 198; *Whittaker v Campbell* (1984) QB 319; *Bell v Lever Brothers Ltd* (1932) A.C. 161.

369 For legal writings see Treitel *The Law of Contract* (2003) 298, 304-308; Stone *The Modern Law of Contract* (2003) 288; Beatson *Anson's Law of Contract* (2002) 319; McKendrick *Contract Law Text, Cases and Materials* (2005) 572. For case law see *Cundy v Lindsay* (1878) 3 App Cas 459; *Raffles v Wickerhouse* (1864) 2HandC 906; *Smith v Hughes* (1871) C.R. 6 QB 597; *Shogun Finance Ltd v Hudson* (2001) EWCA Civ. 1000 (2002) QB 634; *Phillips v Brooks Ltd* (1919) 2 K.B. 243; *Denrant v Skinner* (1948) 2 K.B. 164; *Lewis v Averay* (1972) 1 QB 198; *Whittaker v Campbell* (1984) QB 319; *Bell v Lever Brothers Ltd* (1932) A.C. 161.

370 For legal writings see McKendrick *Contract Law Text, Cases and Materials* (2005) 651; Treitel *The Law of Contract* (2003) 329; Koffman and MacDonald *The Law of Contract* (2004) 338; Stone *Principles of Contract Law* (1998) 202-203; Stone *The Modern Law of Contract* (2002) 302-303; Beatson *Anson's Law of Contract* (2002) 335. For case law see *Gaieie v Lee* (1969) 2 Ch 17 (1969) 1 ALL ER 1066 (1969) 2 WLR 901; *Saunders v Anglia Building Society* (1971) AC 1004; *Lloyds Bank PLC v Waterhouse* (1990) FAM LAW 23; *Thoroughgood v Cola* (1582) 1 129, 2 Co; *Foster v Mackinnon* (1869) LR 4 CP 704 at 711.

The recognition of duress and undue influence, as separate defences, by the English writers and the courts, is a further illustration of the general trend towards the emotion of contractual freedom and the sanctity of contract, whereas, the underlying idea surrounding the acceptance of duress as a defence, is said to be consistent with the "*will*" theory of contract, since, a contract induced by duress is not made with full intent, [371] the argument surrounding the recognition of undue influence as a defence is said to be based on striking the right balance between protecting the vulnerable from exploitation, without unduly patronizing them or restricting their freedom to contract. [372]

In so far as duress is concerned, English law recognises three forms of duress, namely: firstly, duress of one of the contracting parties which manifests itself by a threat of violence; [373] secondly, duress in respect of goods; [374] and thirdly, the latterly established form of duress, namely, economic duress. [375] Before one of the contracting parties can successfully rely on economic duress as a defence, both the legal writers and the courts, advocate that certain requirements must first be met. They include coercion of the will that vitiates consent; the pressure or threat must be illegitimate; the pressure or threat must be

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371 For legal writings see Peden *The Law of Unjust Contracts including the Contracts Act* 1980 (NSW) (1982) 10. For case law see *Skeate v Beale* (1841) 11 AD @ E 893; *Williams v Bayley* (1886) LR 1 HL 200; *Barton v Armstrong* (1976) 1 AC 104; *Occidental Worldwide Investment Corpn. v Skibs A/S Avanti* (1976) 1 Lloyds Rep 293; *North Ocean Shipping Co Ltd v Hyanday Construction Co Ltd* (1979) 3 WLR 419; *Pao On v Lau Yiu Long* (1979) 3 WLR 435; (1980) AC 614; *Dimskall Shipping Co SA v International Transport Worker's Federation (The Evia Luck)* (1991) 4 ALL ER 871 (1992) 2 AL 152; *Universe Tankships Inc of Moncovia v International Transport Worker's Federation, The Universe Sentinel* (1983) 1 AC 366; *BandS Contracts and Design Ltd v Victor Green Publications Ltd* (1984) 1 CR 419; *Atlas Express Ltd v Kafco (Importers and Distributors Ltd* (1989) 1 ALL ER 641; *Camillion Construction Ltd v Felix (UK) Ltd* (2001) 312; *CTN Cash and Carry Ltd v Gallacker Ltd* (1994) 4 ALL ER 714; *GMAC Commercial Credit Ltd v Dearden* Unreported May 28 (2002).

372 For legal writings see O'Sullivan and Hilliard *The Law of Contract* (2004) 360. For case law see *Royal Bank of Scotland PLC v Etridge (No 2)* (2002) UKHL 44 (2002) 2 AC 773, *Allard v Skinner* (1887) 36 CHD 145, Ca.

373 For legal writings see O'Sullivan and Hilliard *The Law of Contract* (2004) 339; McKendrick *Contract Law Text, Cases and Materials* (2005) 714; Poole *Textbook on Contract Law* (2004) 352. For case law see *Barton v Armstrong* (1976) 1 A.C. 104.

374 For legal writings see Poole *Textbook on Contract Law* (2004) 352; O'Sullivan and Hilliard *The Law of Contract* (2004) 341; McKendrick *Contract Law Text, Cases and Materials* (2005) 724. For case law see *Occidental Worldwide Investment Corp v Skibs A/S Avanti* (1976) 1 Lloyd's Rep 293; *North Ocean Shipping Co Ltd v Hyanday Construction Co Ltd* (1979) 3 W.L.R. 419; *Pao On v Lau Yiu Long* (1979) 3 W.L.R. 435; *Dimskall Shipping Co SA v International Transport Worker's Federation (The Evia Luck)* (1972) 2 AL 192.

375 For legal writings see McKendrick *Contract Law Text, Cases and Materials* (2005) 724ff; O'Sullivan and Hilliard *The Law of Contract* (2004) 341-342; Poole *Textbook on Contract Law* (2004) 353ff. For case law see *Dimskall Shipping Co SA v International Transport Worker's Federation (The Evia Luck)* (1992) 2 AC 152; *Occidental Worldwide Investment Corporation v Skibs A/S Avante (The Siboen and the Siborth)* (1976) 1 Lloyd's Rep 293.

significant causing the claimant to enter into the contract against his/her will. [376]

The effect of duress being raised successfully as a defence is this, the contracting party who suffers such duress, including economic duress, may choose to recile from the contract, the contract being void-able at his/her instance. The contract may, thus, be set aside and restitution claimed. [377]

Undue influence may take two forms, firstly, actual undue influence, sometimes equated with the pressure exerted to establish duress, for example, improper pressure or coercion in the form of unlawful threats, [378] and secondly, a subtle level of influence is exerted arising from the relationship between the two parties, as a result of which, the vulnerable and dependant party suffers loss at the hands of the superior or stronger party. [379]

In these circumstances, what is required from the vulnerable and dependant party is to show that a relationship existed, which, arising from the relationship, led to the exercise of influence or dominion over the vulnerable party. What he/she also needs to show is the fostering of a suspicious transaction. [380] Once this is shown, in practise, a presumption arises that undue influence has taken place. An onus is then placed upon the defendant to rebut the presumption. Thus, he/she can show, for example, that there was a free exercise of independent will or that independent advice had been given to the vulnerable party. [381]

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376 For legal writings see Poole *Textbook on Contract Law* (2004) 354-358; O'Sullivan and Hilliard *The Law of Contract* (2004) 342-343; McKendrick *Contract Law Text, Cases and Materials* (2005) 715-718, 729. For case law *Dimskall Shipping Co SA v International Transport Worker's Federation (The Evia Luck)* (1991) 4 ALL ER 871; *Occidental Worldwide Investment Corporation v Skibs A/S Avante (The Siboen and the Siborth)* (1976) 1 Lloyd's Rep 293; *B and S Contracts and Design Ltd v Victor Green Publications Ltd* (1984) ECR 419; *Pao v Lau Yiu Long* (1979) 3 WLR 435 (1980) A.C. 614; *Atlas Express Ltd v Rafco (Importers and Distributors) Ltd* (1989) 1 ALL ER 641; *DS DN Sub Sea Ltd v Petroleum Geo-Services ASA* (2000) BLR 530.

377 For case law see *Occidental Worldwide Investment Corpn v Skibs A/S Avanti* (1976) 1 Lloyds Rep 293; *North Ocean Shipping Co Ltd v Hyanday Construction Co Ltd* (1979) 3 WLR 419; *Pao On v Lau Yiu Long* (1980) AC 614; *Huyton SA v Peter Cremer GMBH and Co* (1999) 1 Lloyd's Rep 620; *DSDN Sub Sea Ltd v Petroleum Geo-Service ASA* (2000) BLR 530; *BandS Design Ltd v Victor Green Publications Ltd* (1984) 1 CR 419 CA: *Universe Tankships of Moncovia v International Transport Workers Federation (The Universe Sentinel)* (1983) 1 AC 366 HL.

378 For legal writings see McKendrick *Contract Law Text, Cases and Materials* (2005) 753; Poole *Textbook on Contract Law* (2004) 360. For case law see *Royal Bank of Scotland PLC v Etridge (No 2)* (1998) 4 ALL ER 707 (2000) UK HC 44 (2002) 2 AC 773; *CIBC Mortgages PLC v Pitt* (1994) 1 AC 200.

379 For legal writings see McKendrick *Contract Law Text, Cases and Materials* (2005) 755; O'Sullivan and Hilliard *The Law of Contract* (2004) 364ff; Poole *Textbook on Contract Law* (2004) 361. For case law see *Royal Bank of Scotland PLC v Etridge (No 2)* (2002) 4 UK HL 44 (2002) 2 AC 773; *Allcard v Skinner* (1887) 36 CHD 145, Ca; *National Westminister Bank Ltd v Morgan* (1985) AC 686; *Lloyds Bank Ltd v Bundy* (1975) QB 326.

380 For legal writings see McKendrick *Contract Law Text, Cases and Materials* (2005) 755; O'Sullivan and Hilliard *The Law of Contract* (2004) 363ff; Poole *Textbook on Contract Law* (2004) 360. For case law see *National Westminister Bank Ltd v Morgan* (1985) AC 686; *Lloyds Bank Ltd v Bundy* (1975) QB 326; *Royal Bank of Scotland PLC v Etridge (No 2)* (1998) 4 ALL ER 707 (2000) UKHL 44 (2002) 2 AC 773.

381 For legal writings see McKendrick *Contract Law Text, Cases and Materials* (2002) 755ff; O'Sullivan and Hilliard

The effect of undue influence, if established, is that the contract is voidable at the instance of the claimant, who can elect to continue with the contract or seek rescission. In addition, restitution relief can also be sought in association with rescission of the contract. [382]
Illegality is also regarded, by English Law, as an exception to the *caveat subscriptor* rule and a fully fledged defence. The rationale for the recognition of this exception is founded in the principle that no person, whose cause of action is grounded upon an immoral or illegal act, should be assisted by the law. [383]

It further lies in the fact that, if the law were to stand back and not interfere with illegal contracts, they would harm the public and especially, public interest, in that the perception would arise amongst law-abiding workers of the community that the judicial system assists those who have defeated the law. [384]
The source of illegality, according to the English legal writers and the courts, may arise by statute or by virtue of the principles of common law. [385]

The effect of illegality of contracts, in the English law, amounts briefly to this. The general rule is that the courts will neither enforce an illegal contract nor will it permit the recovery

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The Law of Contract (2004) 363-368ff; Treitel *The Law of Contract* (2003) 419ff; For case law see *Royal Bank of Scotland PLC v Etridge (No 2)* UKHL 44 (2002) 2 AC 773; *Allcard v Skinner* (1887) 36 CHD 145 AC; *National Westminister Bank v Morgan* (1985) AC 686.

382 For legal writings see Poole *Textbook on Contract Law* (2004) 366ff; O'Sullivan and Hilliard *The Law of Contract* (2004) 373. For case law see *Allcard v Skinner* (1887) LR 36 CHD 145; *Dunbar Bank plc v Nadermen* (1998) 3 ALL ER 876.

383 For legal writings see McKendrick *Contract Law Text, Cases and Materials* (2003) 348ff; Stone *The Modern Law of Contract* (2003) 343-344; Beatson *Anson's Law of Contract* (2002) 804-805; O'Sullivan and Hilliard *The Law of Contract* (2004) 413ff; Treitel *The Law of Contract* (2003) 439ff; Poole *Textbook on Contract Law* (2004) 379. For case law see *Hillman v Johnson* (1775) 1 Coup 34.

384 For legal writings see Stone *The Modern Law of Contract* (2003) 343-344 quoting Atiyah *An Introduction to the Law of Contract* (1995) 342-344; See also Treitel *The Law of Contract* (2003) 439 who suggests that the rationale for intervention by the courts lies in the fact that *"illegal contracts bring about a state of affairs of which the law disapproves as it harms the public".* For case law see *Pearce v Brooks* (1866) LR 1 EX 213; *Benson v Nettleford* (1850) 3 MAL and G 94; *St John Shipping Corporation v Joseph Rank Ltd* (1957) 1 QB 267.

385 For legal writings see Beatson *Anson's Law of Contract* (2002) 804-805; Stone *The Modern Law of Contract* (2003) 343; Poole *Textbook on Contract Law* (2004) 379; O'Sullivan and Hilliard *The Law of Contract* (2004) 413ff; Treitel *The Law of Contract* (2003) 429ff. For case law contra to public policy see *Pearce v Brooks* (1866) LR 1 EX 213; *Benyson v Nettleford* (1850) 3 MAL and G 94; *St John Shipping Corporation v Joseph Rank Ltd* (1957) 1 QB 267; *Archbolds (Freightage) Ltd v S Spanglett Ltd* (1961) 1 QB 374; Court of Appeal; *Parkinson v College of Ambulance* (1925) 2 KB 1; *Alexander v Rayson* (1936) 1 KB 169. For case law contrary to statute see *Re Mahmoud and IS Pa Hani* (1921) 2 KB 716; *Mohamed v Alala and Co (a firm)* (2000) 1 WLR 1815.

of any benefit arising from the performance of an illegal contract. This is founded in the common law maxims of *ex turpi cause non oritur actio* (no action can be based on a disreputable cause) and *in pari delicto potior est conditio defendentis* (where both parties are equally at fault, the position of the defendant is stronger). [386]

English Law does, however, recognise exceptions to the general rule. The reasoning thereof is to protect the innocent party, who may want to enforce the contract. So, in this way, part of the contract may be enforced but the part which includes the illegality, may not. But, courts will not enforce any part of a contract where damages may be claimed by the aggrieved party. [387]

9.2.3 UNITED STATES OF AMERICA

9.2.3.1 Legal Writings

In American law the *caveat subscriptor* rule is widely used. The rule, in general, amounts to this, one who signs a contract cannot avoid it on the ground that he or she did not attend to its terms, or did not read it. [388]

The position has also been stated, namely, in the absence of fraud or misrepresentation, a party to a contract is legally bound by its terms, whether or not he or she has read them. For that reason, in the absence of fraud or deception, one who signs a contract, which he or she has had an opportunity to read and understand, is chargeable, in law, with knowledge of the terms of the contract which they sign. They can, therefore, not be heard to say that he or she did not read the contract or know its contents. [389]

Furthermore, where a party signs a contract without reading it, notwithstanding the fact that he or she can read and had the opportunity to read the document he or she signs, he or she cannot avoid the effect of his or her signature merely because he or she was not

386 For legal writings see Beatson *Anson's Law of Contract* (2002) 845-847; O'Sullivan and Hilliard *The Law of Contract* (2004) 433ff; Stone *The Modern Law of Contract* (2003) 351-357; Stone *Principles of Contract Law* (1998) 253; McKendrick *Contract Law Text, Cases and Materials* (2003) 395ff. For case law see *Holman v Johnson* (1775) 1 Cowp. 34; *Tinsley v Milligan* (1984) 1 AC 340.

387 For legal writings see Beatson *Anson's Law of Contract* (2002) 845-847; O'Sullivan and Hilliard *The Law of Contract* (2004) 413ff; Poole *Textbook on Contract Law* (2000) 387-389; Stone *Principles of Contract Law* (1998) 351-357; Stone *The Modern Law of Contract* (2003) 343-344; McKendrick *Contract Law Text, Cases and Materials* (2003) 375ff. For case law see *Archbolds (Freightage) Ltd v S Sanglett Ltd* (1961) 1 QB 374.

388 Calamari and Perillo *The Law of Contracts* (1977) 67; Calamari and Perillo *The Law of Contracts* (1987) 410.

389 Calamari and Perillo (1977) 67; Calamari and Perillo (1987) 410.

informed of the contents of the instrument, or through the fact that he or she took the word of some person as to what it contained. [390]

When dealing with pre-printed forms, for example, adhesion contracts where the contract terms appear in small print on the back of the contract, the facts of which must, consequently, be examined, to determine whether the person who signed the contract should have, as a reasonable person, understood the contained terms on the reverse side. [391] Where a party signs in haste, due to the fact that he or she is busy, the fact that the execution of signing is done hurriedly does not excuse him or her for his or her failure to read the contract terms. [392]

The American legal writers, generally, hold the view that one is under a duty to learn the contents of a contract before signing it. If therefore, in the absence of fraud, duress, undue influence and the like, he or she fails to do so, he or she is presumed to know the contents, and signs at his or her own peril. If it turns out afterwards to be to the disadvantage of one of the contracting parties who so acts, he or she must suffer the consequences of his or her negligence. He/she cannot be excused and deny his or her obligation under the contract. [393]

For that reason, he or she cannot be heard to say that the contract signed does not express the real contract, or that the provisions are contrary to his or her intentions or understanding, or that he or she did not understand the terms used. [394]

Illiteracy is, *per se, is* not an absolute defence, in that; the illiteracy of a contractual party will not excuse him or her from the duty of learning the contents of a written contract. There are, however, instances in which illiteracy may, when considered in the light of other facts, such as fraud or overreaching, afford a sufficient basis for invalidating an illiterate's contract. [395]

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390 Calamari and Perillo (1977) 69; Calamari and Perillo (1987) 410.

391 Calamari and Perillo (1977) 68.

392 Calamari and Perillo (1977) 69.

393 Calamari and Perillo (1977) 69.

394 Calamari and Perillo (1977) 70.

395 Calamari and Perillo (1977) 73.

A party's mere ignorance occasioned by his or her limited intelligence and understanding of the language and of the contents of the contract which he or she voluntarily executes, is not, in the absence of fraud, a ground for avoiding it. [396]

According to the American legal writers, there is a duty on an illiterate person to procure some person to read and explain the contents of the instrument to him or her. Where such a contracting party fails to procure a party to assist him or her to read and explain the contents, his or her negligence precludes him or her from afterwards pleading that he or she did not understand the contents, or that he or she did not assent to its provisions. [397]

The rationale for enforcing the principle of the *caveat subscriptor* rule is said to be to give stability to written agreements. [398]

But, the American legal writers do acknowledge that, in modern times, the true assent of contracting parties has come more and more under the spotlight. Under this view, true assent does not exist unless there is a genuine opportunity to read the clause in question and the impact is explained by the dominant party and understood by the other party, who has a reasonable choice to accept or reject the clause. This is especially the case in pre-printed forms or standardized agreements, where the reasonable man would not have expected to find such a clause, often being oppressive, unfair, indecent or unconscionable. [399]

The *caveat subscriptor* rule is, therefore, also subject to the exception that such failure to read and to acquaint oneself of the contents of a contract before signing it may be excused where there are special circumstances or an emergency exists.

Furthermore, if a party's failure to read and understand the terms of the contract, before signing it, results from the procedurally unconscionable behaviour of a party in a stronger bargaining position, the party's duty to read and understand the contract before signing it is obviated. [400]

Other defences to the *caveat subscriptor* rule include mistake, misrepresentation, undue

396 Calamari and Perillo (1977) 73.

397 Calamari and Perillo (1977) 73.

398 Calamari and Perillo (1977) 69.

399 Calamari and Perillo (1987) 427.

400 Calamari and Perillo (1977) 72.

influence, duress and illegality.

Consequently, each of the exceptions to the *caveat subscriptor* rule will be discussed briefly.

Misrepresentation

Misrepresentation is recognized by the America legal writers as one of the exceptions to the *caveat subscriptor* rule. It is acknowledged as a fully fledged defence where a contractant relies upon deceit to recile from a contract. [401]

Misrepresentation and fraud are often regarded, by the American legal writers, as synonymous, especially where deceit is present, nonetheless, the legal writers do distinguish between intentional and unintentional misrepresentation. [402] Unintentional misrepresentation, in this context, is made up of negligent and innocent misrepresentation. [403]

Whenever a party relies upon fraudulent misrepresentation as a defence, the American legal writers and the courts alike, expect certain requirements to be met before a contracting party may successfully avoid the transaction by resiling from the contract.

The first requirement to be met is the presence of a representation. This may be deduced from the conduct of the party concerned, for example, one of the contractants makes a statement regarding a subject matter concerning the transaction. [404] What is, however, required in so far as the representation is concerned, the misrepresentation made, must be of fact and not merely on erroneous statement of opinion. For that reason, language used in furtherance of typical trade talk or a mere puff, for example, *"best buys"* or "*finest quality*" etc, is not, according to the American legal writers, a misrepresentation and ought to be dismissed by the legal system. [405]

In certain instances, where the representation is not accompanied by disclosure of all the facts or there is partial disclosure of the facts (a half truth), this may constitute a misrepresentation. This is applicable, especially, due to the nature of certain transactions, for example, contracts of surety-ship and insurance. It may also be dependant on the

401 Calamari and Perillo (1987) Para 9-14.

402 Calamari and Perillo (1987) Para 9-14.

403 Calamari and Perillo (1987) Para 9-14.

404 Calamari and Perillo (1987) Para 9-17.

405 Calamari and Perillo (1987) Para 9-17.

relationship between the parties. Where the parties stand in a fiduciary relationship, there is a duty of disclosure of material facts. In the law of medical malpractice, for example, a rule of *"informed consent"* has evolved in recent years, in which the patient has to be apprised of the procedures to be adopted during treatment, or during surgery and all risks must be disclosed by the physician. [406]

The second requirement for fraudulent misrepresentation concerns the knowledge of the falsity. What is required to be shown is that the representation was made, with the knowledge of its falsity, with intent to deceive and that it would be acted upon in a certain way. [407]

Moreover, with fraudulent misrepresentation, unlike in unintentional misrepresentation, the fact misrepresented does not have to be material to rely upon avoidance. [408]
The third requirement focuses upon the element of deception and reliance. Before relief for misrepresentation may be given, the contracting party relying on it must show that a causal connection existed between the representation and the conclusion of the agreement. The party relying upon the defence must also show that he/she was deceived by the misrepresentation upon which he/she relied on concluding the contract. [409]

The fourth requirement concerns the aspect of injury or prejudice. Injury or prejudice takes the form that the defrauded party either obtains something less than he/she bargained for, or, something substantially different from what he was led to expect. [410]

The affect of fraudulent misrepresentation is to render the said transaction void. [411]

American legal writers also hold the view that in some instances, especially property transactions, the affect is that the transaction is void i.e. *non est factum*. Where a defrauded party elects to stand on the transaction, he/she may keep what they received

406 Calamari and Perillo (1987) Para 9-10.

407 Calamari and Perillo (1987) Para 9-14.

408 Calamari and Perillo (1987) Para 9-14.

409 Calamari and Perillo (1987) Para 9-15.

410 Calamari and Perillo (1987) Para 9-16.

411 Calamari and Perillo (1987) Para 9-22.

and sue for damages, alternatively, avoid the transaction and claim restitution. [412]

Mistake

Mistake is also regarded, by the American legal writers, as an exception to the *caveat subscriptor* rule. [413] Mistake, in the law of contracts, has often been stated as an unintentional act or omission arising from ignorance, surprises, or misplaced confidence. [414]

Mistake, in the law of contract in America, may take two forms, namely, unilateral mistake in which only one of the contractants makes a mistake and mutual mistake, where both of the contracting parties share the mistake. In other words, each of the contracting parties labours under the same misconception. [415]

The mistake may apply to the nature of the contract, the identity of the person with whom it is made or the identity or existence of the subject matter. [416]

The position with regards to unilateral mistake, according to the legal writers, appears to be the following, namely: those courts should grant relief from a unilateral mistake provided:

"(1) Enforcement of the contract against the mistaken party would be oppressive or unconscionable;

(2) If the mistake relates to an essential, material aspect of the contract and the mistaken party exercises ordinary care." [417]

The relief afforded a contracting party relying on unilateral mistake, may include avoidance through rescission, if he/she so elects. [418]

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412 Calamari and Perillo (1987) Para 9-23.

413 Calamari and Perillo (1987) Para 9-25; Corpus Juris Secundum Volume 17 (1999) 74; Hunter (1999-2000) Para 19.2; Jaeger Vol 13 (1970) 8.

414 Corpus Juris Secundum Volume 17 (1999); Hunter (1999-2000) Para 19.2; Calamari and Perillo (1987) Para 9-26; Jaeger Vol 13 (1970) 8.

415 Corpus Juris Secundum Volume 17 (1999) 60; Hunter (1999-2000) Para 19.2; Calamari and Perillo (1987) Para 9.26.

416 Corpus Juris Secundum Volume 17A (1999) 60; Hunter (1999-2000) Para 19.3; Calamari and Perillo (1987) Para 9.26.

417 Calamari and Perillo (1987) Para 9-27; Hunter (1999-2000) Para 19.3; Corpus Juris Secundum Volume 17A (1999) 75.

418 Calamari and Perillo (1987) Para 9-27.

The position with regard to mutual mistake is viewed as follows by the American legal writers, namely; where both parties share a common assumption about a vital, existing fact upon which they conclude their agreement and it turns out that the assumption is false, the transaction may be avoided. This is said to apply where the parties are operating under different mistakes about the same vital fact. [419] There are many examples where the contracting parties may be mistaken which include, but are not limited to, the existence, ownership, or identity of the subject matter, the quality of the subject matter, the acreage of land etc. [420]

The effect of mutual mistake on material facts or matters in a contract will justify the granting of the necessary relief to the party against whom it is sought to be enforced. In order to avoid the contract, the party relying upon the relief, must show that the mistake relates to a fact which constitutes, or goes to, the very essence, or basis, of the contract and is material. [421] The usual remedies for mutual mistake are rescission or reformation of the contract. [422]

Duress

Duress is also recognized in the American Law of Contract as one of the exceptions to the *caveat subscriptor* rule. In the broad sense it is often referred to as those cases where a party to a contract was "*deprived of freedom of will".* [423]

American contract law recognizes three main streams of duress, namely, threat of physical threat, economic pressure, and any other threat. [424]

The scope of duress, in its traditional sense, is said to relate to personal violence or a threat thereof, or imprisonment or threat of imprisonment, [425] threats of physical injury or

419 Calamari and Perillo (1987) Para 9.26; Jaeger Vol 13 (1970) 3.

420 Calamari and Perillo (1987) Para 9.26; Hunter (1999-2000) Para 19.3 Corpus Juris Secundum Vol. 17A (1999) 60.

421 Corpus Juris Secundum Volume 17A (1999) 60.

422 Corpus Juris Secundum Volume 17A (1999) 79; Calamari and Perillo (1987) Par 9.26.

423 Jaeger (1970) 659.

424 Calamari and Perillo (1987) 337.

425 Jaeger (1970) 660, 663-685.

wrongful imprisonment or prosecution of a family member or other close relative, [426] threats of wrongfully destroying or withholding something; [427] any other wrongful act that compels a person to manifest apparent assent to a transaction, precluding him from exercising free will and judgement in entering into a transaction. [428] During the twentieth century, economic or business duress was added [429] to the list of traditional patterns. In this regard there are circumstances, in American law, under which economic pressure may invalidate an otherwise enforceable contract. [430]

Before a party may, however, successfully rely on duress as a defence, certain requirements must first be met. The requirements include:

(1) It must appear that the consent of the party seeking to avoid the transaction was coerced. What must be shown is that the contracting party was actually induced by the duress to give consent which would otherwise not have been forthcoming.[431]

(2) The threat need not be of such a nature that it will move brave men. Any unlawful threat which does, in fact, overcome the will of the person threatened, and induces him/her to an act which he/she would not otherwise have done, constitute duress. [432]

(3) The pressure must be wrongful. [433] There are no *numerus clausus* of examples illustrating when acts are deemed to be wrongful. For the purpose of this research it is not necessary to enter into discussions regarding these various examples.

(4) Where the parties stand in a special relationship, giving one a pre-dominating

426 Jaeger (1970) 661, 686-693.

427 Jaeger (1970) 663, 697 ff.

428 Jaeger (1970) 660-663.

429 Jaeger (1970) 664 ff.

430 Jaeger (1970) 664.

431 Jaeger (1970) 666.

432 Jaeger (1970) 669.

433 Jaeger (1970) 669.

leverage over the other, advice or persuasion, depending on the circumstances, may be found to be coercing the will of the person addressed. [434]

(5) Whether the party exercising the coercion has been unjustly enriched or the transaction brought about results unfair to the victim. [435]

But, it is especially, economic or business duress which has been added to the growing evolution and development of duress. The legal conception of economic duress is said to lay in the fact that a person is forced to act against his own will, leaving that person no option or choice as to whether he will do the thing or perform the act. [436]

Economic duress as a defence occurs quite frequently in, for example, foreclosure of mortgage where one of the parties, wrongful, with knowledge of the falsity of the claim, attempts to foreclose on a mortgage. [437]

A threat of the breach of the contract would constitute duress if the breach would, if carried out; result in irreparable injury because of the absence of an adequate legal or equitable remedy. [438]
The effect of duress in American Law is this, like fraud and mistake, which may completely prevent the mutual assent necessary for the formation of a contract or a bargain is executed, because the expression of mutual assent thereto was improperly obtained, the transaction is void. [439]

In certain instances, contracts entered into under duress may be considered voidable and are capable of being ratified after the duress is removed. [440]

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434 Jaeger (1970) 682.

435 Calamari and Perillo (1987) 338-340.

436 Jaeger (1970) 718.

437 Jaeger (1970) 719.

438 Calamari and Perillo (1987) 338.

439 Jaeger (1970) 772-773; Calamari and Perillo (1987) 349.

440 Jaeger (1970) 775-776.

The transaction is voidable at the election of the coerced party. [441]

Undue Influence

A further exception to the *caveat subscriptor* rule, which is recognised by the American legal writers and the courts alike, is that of undue influence. It serves as a defence if the transaction sought to be enforced was the product of unfair persuasion. [442]

The American legal writers recognise two broad categories of undue influence cases. In the first instance, one of the contracting parties uses his/her dominant psychological position in an unfair manner, to induce the subsequent party, to consent to an agreement to which he would not, otherwise, have consented.

In the second instance, a contracting party uses his/her position of trust and confidence, rather than dominance, to unfairly persuade the other contracting party to enter into the transaction. [443]

These types of cases are usually decided by assessing direct evidence. This often takes the form of proof of the existence of a confidential relationship, based on trust and of a transaction benefitting the person in whom trust and confidence rest.

The position in American Law is this, once the aforementioned is proved, a burden of proof is placed upon the party benefitting to show that the transaction was not procured by undue influence. [444] American legal writers also recognise that circumstantial evidence may very well tip the scale in proving the presence of undue influence. *Calamari and Perillo* [445] identify the following indicators, which, if present, may well show, circumstantially, that undue influence was present. Firstly, the mental and physical weakness and psychological dependency of one of the contracting parties will show the susceptibility of the party influenced. Secondly, the existence of a confidential relationship, such as: trustee-beneficiary, attorney-client, physician-patient, and pastor-parishioner, provides evidence of the opportunity to exercise undue influence. Thirdly, there must be evidence of a disposition

441 Calamari and Perillo (1987) 347.

442 Calamari and Perillo (1987) Para 9.12.

443 Calamari and Perillo (1989) Para 9-10.

444 Calamari and Perillo (1987) Para 9-10.

445 *The Law of Contracts* (1987) Para 9-10.

to exercise undue influence, for example, the influentional party took the initiative in the transaction. Fourthly, where, evidence shows the unnatural nature of the transaction.

Once the above is shown, there is a *prima facie* case of undue influence. It is then open to the influencer to show by rebuttal evidence that the transaction was fair. [446]

The remedy available for the party who wishes to rely on undue influence to avoid the contract is to seek cancellation and restoration of the *status quo*. [447]

Illegality

The illegality of a contract, from the very nature of the wording, influences the validity in the American Law of Contract.

The illegality of contracts or contractual terms, therefore, has certain legal affects in the American Law of Contract. In the American textbooks the term illegality is covered under *"illegal bargains"*.

In terms of the First Restatement of contracts, illegal bargains are found to be `*illegal*' if, either its formation or its performance is criminal, tortuous or otherwise opposed to public policy. [448]

The Second Restatement, however, avoids the term `illegal' and deals with all such unenforceable bargains under the concept *"public policy"*. In this regard, a contract that violates the criminal law is not necessarily against public policy. The Second Restatement, in this regard, is said to bring about great judicial flexibility in considering the effect of the parties against public policy. [449]

In that regard, public policy is used as a rationale for striking down contracts or contract clauses on grounds of immorality, unprofessional conduct, criminal conduct etc. In the latter instance, the contamination of a contract or contract clauses resulting from the violation of

446 Calamari and Perillo (1987) Para 9-10.

447 Calamari and Perillo (1987) Para 9-10.

448 Calamari and Perillo (1987) 345.

449 Calamari and Perillo (1987) 887.

the law of crimes or torts may be set aside due to public policy. [450]

The *in pari delicto potier est conditio defendentis* maxim is still very much part of the American contract law, in that the law protects those from loss through unlawful acts. As a general rule, illegal bargains are therefore unenforceable and often void. [451] This occurs in cases of hard core illegality, for example, a promise to buy, in exchange for a promise to commit, say, murder. [452]

The following are examples where the American courts have held generally, that these type of contracts are void due to their illegality, namely, bargains with alien enemies or in aid of enemies, [453] agreements involving the violation of settled public policy of a foreign state, [454] agreements to indemnify for illegal acts. [455]

Any attempt to exempt a contractant from liability for a future intentional tort, or for a future wilful act, or one of gross negligence, is void. [456] It has also been held that a promise not to sue for future damages caused by simple negligence, may be valid, however, such bargains are not favoured, and such bargains are usually construed not to confer this immunity. [457] A purported exemption from statutory liability, however, is void even though the cause is simple negligence. [458]

Unconscionable agreements, under the *Uniform Commercial Code,* [459] have also been identified as illegal, where abuse relates; firstly, to procedural deficiencies in the formation of the contract, taking the form of deception or inducement, without giving the contracting

450 Calamari and Perillo (1987) 887.

451 Calamari and Perillo (1987) 888.

452 Calamari and Perillo (1987) 888.

453 Jaeger (1970) 112-115.

454 Jaeger (1970) 120-126.

455 Jaeger (1970) 126-131.

456 Jaeger (1970) 131-140.

457 Jaeger (1970) 141-142.

458 Jaeger (1970) 144-145.

459 S2-302 of the *Uniform Commercial Code.*

part prejudiced, sufficient opportunity to bargain. Secondly, the abuse involves the substantive contract terms which may include violations of public interests, unexpectedly harsh terms, and the use of fine-print clauses, including the absence of reasonable expectations. [460]

Under the said code, a court may exercise the following powers, namely, refuse to enforce the agreement, enforce the remainder of the contract excluding the unconscionable clause, and limit the unconscionable clause so as to avoid an unconscionable result. [461]

Fraud

Fraud, according to the American legal writers, deprives a contract of legal validity or even prevents an agreement from having legal force. [462]

Before the defrauded party will be successful in being granted the appropriate relief, the following elements of fraud must be present, namely:

(1) A false representation, actual or implied, or the concealment of a matter of fact, material to the transaction, made falsely.
(2) Knowledge of the falsity or statements made with such utter disregard and recklessness that knowledge is inferred.
(3) Intent to mislead another into relying on the representation.
(4) Injury as a consequence of that reliance.
(5) Reliance - with a right to rely. [463]

According to *Jaeger* [464] all the above mentioned elements must be present, simultaneously, before a proper finding of fraud can be made.

What is also significant, according to *Jaegar,* [465] is the existence of mistake of the defrauded party as to a material fact, wrongfully induced by the other, in order that it might

460 Jaeger (1970) 214-215 FF; Calamari and Perillo (1987) 337.

461 Jaeger (1970) 215.

462 Jaeger Volume 12 (1970) 321.

463 Jaeger Volume 12 (1970) 330.

464 *A Treatise on the Law of Contracts* Volume 12 (1970) 330.

465 *A Treatise on the Law of Contracts* Volume 12 (1970) 324-325.

be acted upon, or, in cases where there is a duty of disclosure, to take advantage of, with knowledge of its falsity, without disclosing same [466] even when making an innocent misrepresentation, the contracting party thereafter discovers the truth, but, silently allows another to act on the misrepresentation, the party so defrauding is guilty of fraud. [467]

The act of the fraudulent party, who induces a person to assent to do something which he would not otherwise have done, is void. The innocent party, in effect, states that this is not his/her contract, in fact, it is not a contract at all [468] where the defrauded party had performed before fraud is discovered, and he/she may apply for rescission and the return of the performance.

9.2.3.2 Case Law

The recognition and rationale for the existence of the *caveat subscriptor* rule is formulated as follows in the leading American case of *Hoshaw v Cosgriff*: [469]

"The courts are unanimous in holding that a person, having the capacity and opportunity to read a contract, cannot avoid the contract on the ground of mistake, if he signs it without reading, where there are no special circumstances excusing his failure to read it. It is the duty of every contracting party to learn and know the contents of a contract before he signs and delivers it."

The court continues:

"To permit a party to admit that he signed it, but deny that it expresses the agreement he made would absolutely destroy the value of all contracts." [470]

The effect of a contracting party not reading the contents of a contract or familiarizing himself/herself of the terms of the agreement is stated as follows, in the case of *Upton v Tribilock*: [471]

"It will not do for a man to enter into a contract and when called upon to respond to its obligations, say that he did

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466 Jaeger Volume 12 (1970) 377-380.

467 Jaeger Volume 12 (1970) 333.

468 Jaeger Volume 12 (1970) 402.

469 247 F 22 (CCA8).

470 *Hoshaw v Cosgriff* 247 F22 (CCA8). See also *Hettrick Mfg. Co v Waxahachie Cotton Mills* 1 F2d 913 (CCA 6); *Columbian Nat. L. Ins Co v Black* 35 F2d 571 (CCA 10) 71 ALR 128; *Ford Motor Co v Pearson* 40 F2d 858 (CCA 9).

471 91 US 45, 23 L. Ed 203.

not read it when he signed it, or did not know what it contained." [472]

The rule, although harsh in application, is said to be founded upon the fundamental principle of the security of business transactions and the integrity of contracts demands that it be rigidly enforced by the courts. [473]

The same rule is said to apply even without a signature. Where a party, therefore, accepts a document, for example, a Bill of Lading, Passenger Tickets, Insurance policies, Warehouse receipts and accepts the said documents without reading the contents or familiarized himself/herself with the contents, his/her conduct constitutes acceptance and a contract comes into being upon the provisions contained therein. [474]

But the American courts do make exceptions to the general rule. One of the widely recognized exceptions is that of fraud, even though a contracting party has, carelessly, failed to read the contract which he signed. The condition however, is that the other party knew of his/her ignorance and fraudulently induced it or took advantage of it. [475] The above principle is well illustrated in an Arkansas case of *Belew v Griffis,* [476] in which the court held:

"There is a well-recognized exception to the rule that a party is bound to know the contents of a paper which he signs; and that is where one party procures another to sign a writing by fraudulently representing that it contains the stipulations agreed upon, when, in fact, it does not, and where the party signing relies on the faith of these representations, and is thereby induced to omit the reading of the writing which he signs. It is well settled that a written contract which one party induced another to execute by false representations as to its contents is not enforceable, and the party so defrauded is not precluded from contesting the validity of the contract, by the fact that he failed to read it before attaching his signature." [477]

In so far as contracts of adhesion are concerned, it appears that the American courts tend to treat contracts of adhesion, or standard form contracts, differently from other contracts. In this regard, even if assent to the contract may be inferred and even in the absence of fraud, where the terms of the contract, or the contract, contravene public policy or are

472 *Upton v Tribilock* 91 US 45, 23 L. Ed 203; See also *Rossi v Douglas* 203 MD 190, 192, 100 A.2d 3, 7 (1953).

473 *United States v Castillo* 120 F. Supp 522 (DC D NM); *Rossi v Douglas* 203 MD 190, 192, 100 A.2d 3, 7 (1953).

474 *Regan v Custom Craft Homes, Inc* 170 Colo 562, 565, 463 P.2d 463, 464 (1970).

475 *United States v Castillo* 120 F.Supp 522 (DC D NM).

476 249 Ark. 589, 46 S.W. 2d 80 (1970); See also *Estes v Republic National Bank of Dallas* 462 S.W. 2d 273 (Tex 1970).

477 *Belew v Griffis* 249 Ark 589, 460 S.W. 2d 80 (1970).

unconscionable, the contract is invalid and unenforceable. Perhaps one of the most significant cases to have emerged in this regard is the case of *Weaver v American Oil Co*. [478] The court was tasked to consider a lease by an oil company to an individual. The lease, signed without reading the lease, under which he agreed, *inter alia*, to indemnify the lessor as a result of damages caused by the lessor's negligence. The majority opinion first read that the *"duty to read"* rule had no application to the case because *"the clause was in fine print and contained no title heading."*

This conclusion would have ended the matter under traditional rules, but the court seemed anxious to break new ground, for it hastened to add:

> *"When a party show(s) that the contract, which is to be enforced, was 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, 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. 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."* [479]

The same approach was employed by the court in the much quoted case of *Henningsen v Bloomfield Motors Inc*. [480]

In this case Henningsen, a consumer, brought an action for personal injuries against both the vendor and manufacturer of his automobile. Relying upon a provision in the contract of sale that an express warranty contained therein was in lieu of all other warranties, express or implied, the defendants argued that the plaintiff's action should be limited to a claim for defective parts. The court, in referring to legislation, held:

> *"True, the Sales Act authorizes agreements between buyer and seller qualifying the warranty obligations. But quite obviously the Legislature contemplated lawful stipulations (which are determined by the circumstances of a particular case) arrived at freely by parties of relatively equal bargaining strength. The lawmakers did not authorize the automobile manufacturer to use its grossly disproportionate bargaining power to relieve itself from liability and to impose on the ordinary buyer, who in effect has no real freedom of choice, the grave danger of injury to himself and others that attends to the sale of such a dangerous instrumentality as a defectively made automobile. In the framework of this case, illuminated as it is by the facts and the many decisions noted, we are of the opinion that Chrysler's attempted disclaimer of an implied warranty of merchantability and of the obligations arising there from is so inimical to the public good as to compel an adjudication of its invalidity."* [481]

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478 257 Ind. 458, 276 NE 2d 144 (1971).

479 *Weaver v American Oil Co* 257 Ind. 458, 276 NE 2d 144 (1971) at 147-148.

480 32 N.J. 358, 161 A.2d 67 (1960).

481 *Henningsen v Bloomfield Motors Inc* 32 N.J. 358, 161 A.2d 67 (1960).

The exception to the traditional duty to read principle was also stated as follows in the leading case of *Williams v Walker-Thomas Furniture Co*. [482] In this matter there was an instalment sales agreement which provided and resulted in, *"a balance due on every item purchased until the balance due on all items, whenever purchased, was liquidated."* As a result, in the event of a default on any one item, all items could be repossessed. The court, in concluding that the fairness of the clause needed to be tested at trial, stated:

"Ordinarily, one who signs an agreement without full knowledge of its terms might be held to assume the risk that he has entered a one-sided bargain. But when a party of little bargaining power, and hence little real choice, signs a commercially unreasonable contract with little or no knowledge of its terms, it is hardly likely that his consent, or even an objective manifestation of his consent, was ever given to all the terms. In such a case the usual rule that the terms of the agreement are not to be questioned should be abandoned and the court should consider whether the terms of the contract are so unfair that enforcement should be withheld." [483]

Misrepresentation

Misrepresentation is one of the exceptions to the *caveat subscriptor* rule and is a defence which vitiates and avoids a transaction brought about by a contract. It is widely recognized by the American courts all over the United States of America.

The difference between misrepresentation and fraud is said to amount to this, *"if the mistake of one party is not induced by the other, with, neither knowledge of the error, nor, wilful indifference in regard to it, there is misrepresentation but not fraud"*. [484]

In the case of *Pasko v Trela*, [485] "misrepresentation", said the court, *"means any manifestation by words or other conduct by one person to another that, under the circumstances, amounts to an assertion not in accordance with the facts"*. [486]

This was illustrated in the case of *Manhattan Credit Co v Burns*. [487] In this case, the facts briefly stated, amounted to this. The appellants bought a new car and were assured by the respondent that he would insure the car for the full amount of the unpaid balance. Later, when the automobile was destroyed, it turned out that the insurance coverage did not

482 350 F.2d 445 (D.C. Cir 1965).

483 *Williams v Walker-Thomas Furniture Co* 350 F.2d 445 (D.C. CIR 1965) at 449-50.

484 *Pasko v Trela* 153 NEB 759, 46 NW 2d 139; See also *Halsell v First National Bank of Muskogie* 48 Okla 535, 150 489.

485 153 NEB 759, 46 NW 2d 139.

486 *Pasko v Trela* 153 NEB 759, 46 NW 2d 139; See also *Halsell v First National Bank of Muskogie* 48 Okla 535, 150 489.

487 230 Ark 418, 323 SW 2d 206.

materialise. The court, on appeal, confirmed the approach by the court a quo, when it stated: *"Burns' version of the matter is strongly corroborated by the recital in the contract, namely, that the insurance was to be not less than the total amount owed on the note. We think this proof sufficient to establish the fact that the contract was obtained by misrepresentation ....."* [488]

Before, however, misrepresentation may be proved to be present, certain requirements first have to be met. This, in turn, depends upon whether the misrepresentation is an innocent misrepresentation or one which is not innocent. Depending then on what type of misrepresentation a court is dealing with, so it will determine what requirements are to be met by a defrauded party to recile from an agreement or seek cancellation. For that reason, the existence of innocent misrepresentation and one which is not innocent, will determine whether the presence of materiality of misrepresentation has to be proved or not. [489] The position is summarized as follows in the case of *Rosenberger v Livingston*: [490]

> *"..... Materiality of the mistake induced by innocent misrepresentation is essential while materiality is not essential if a mistake induced by fraud produces the intended consequences. One who makes an innocent misrepresentation of an unimportant fact has no reason to suppose that his statement will cause action, but fraud is directed to that very end, or is expected to achieve it, and if the result if achieved the fraudulent person cannot be allowed to insist on this bargain."* [491]

The effect of fraudulent misrepresentation where *non est factum* is present, the purported transaction is regarded as void. This is founded on the basis of the absence of that degree of mutual assent which is a prerequisite to the formation of the binding contract, i.e., the absence of the proverbial *"meeting of the minds"*. [492] Where the misrepresentation is made innocently, the American courts have allowed relief in the form of rescission. It is therefore not necessary that the party making the misrepresentation should have known that it was false. [493] The rationale for the relief is said to be founded on the principle that it would be

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488 *Manhatten Credit Co v Burns* 270 Ark 418, 323 SW 2d 206; See also *Hilderbrand v Craves* 169 Ark 210, 275 S.W. 524; *Green v Bush* 203 Ark 883, 159 S.W. 2d 458.

489 *Jordan v Guerra* 23 Cal 2d 469, 144 P2d 349.

490 166 Kan 259, 200 P2d 329.

491 *Rosenberger v Livingston* 166 Kan 259, 200 P2d 329; See also *Clark v Kirsner* 196 MD 52, 74 A 2d 830; *Weiss v Gumbert* 191 OR 119, 227 P2d 812.

492 *New Jersey Mortgage and Investment Co v Dorsey*, 60 NJ Super 299, 158 A 2d 712 Affd 33 NJ 448, 165 A 2d 297; *Bank Credit Inc v Bethed* 68 NJ Super 62, 172 2d 10.

493 *Herman v Mutual Life Ins Co* 108 F 2d 678 (CCA3); *Sellars v Grant* 196 F 2d 677 (CA5). Relief was granted in these cases where there was an erroneous assumption that a certain state of fact existed. In *Giendale Corp v Crawford* 207 MD 148, 114 A 2d 33 the court held a material misrepresentation even though innocently made,

unjust and inequitable to permit a person who has made a false representation, even innocently, to retain the fruits of the bargain induced by such representation. [494]

Mistake

The American courts do recognize mistake, as with misrepresentation, undue influence, duress etc, as a fully fledged defence and which may be used as a ground for rescinding a contract. [495]

Mistake has been defined in many different ways; the emphasis, often, on the one end of the scale, focusing on the mental attitude of the contract party or parties, [496] on the other end of the scale, the focus is placed on the acts leading to the legal consequences. [497]

A comprehensive definition is also given in the case of *Moffett, Hodgkins and Clarke Co v City of Rochester,* [498] in which the court formulates the definition in the following detailed language, namely:

"But where the mistake is of so fundamental a character, that the minds of the parties have never, in fact, met; or where an unconscionable advantage has been gained, by mere mistake or misapprehension; and there was no gross negligence on the part of the plaintiff, either in falling into the error, or in not sooner claiming reasons ..... Equity will interfere, in its discretion, in order to prevent intolerable injustice."

The courts also recognize that mistake takes two forms, namely, unilateral mistake and mutual mistake.

The rationale for recognizing unilateral mistake as a ground for rescission is recognized by the courts as, *"there was never a meeting of the minds of the parties which could give rise to the contract ....."* [499]

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may be sufficient to warrant rescission.

494 *Smith v Richards* 13 Pet (US) 26 10 L Ed 42; See also *Lockwood v Christakos* 181 F 2d 805 (CA DC).

495 *Kennie v Westbrook* (ME) 254 A. 2d 39; *Hudson Structural Steel Co v Smith and Rumery Co* 110 ME 123, 85 A. 384; *Nodak Oil Co v Mobil Oil Corp* 391 F.Supp 276.

496 *Mercury Oil Refining Co v Oil Workers International Union Cio*, 187 F.2d 980 (CA10); *Stevens v Illinois Central R. Co* 234 F.2d 562 (CA5); *Baltimore Trust Co v Holland*, 32 DEL OH 307, 85 A 2d 367.

497 *Meek v Hurst* 223 MO 688, 122 S.W. 1022; *Wolz v Venard* 235 MO 67 S.W. 760.

498 178 U.S. 373, 44 L. Ed. 1108, 20 S.Ct 957 quoted with approval in a number of cases such as *Hearne v Marine Ins Co* 20 Wall 488, 22 L.Ed 395; *Kutsche v Ford*, 222 Mich 442, 192 N.W. 714; *Donaldson v Abrahams* 68 Wash 208, 122 1003.

499 *Moffett, Hodgkins and Clarke Co v City of Rochester* 178 US 373, 44 L.Ed 1108, 20 S.Ct 557.

This principle is deeply embedded in the American law of contract, as one of the golden rules of concluding a contract, in that, there must be the meeting of the minds of the contracting parties or, put differently, mutual assent. [500]
For that reason it was stated in the case of *Rexford v Phillippi*: [501]

"Where parties assume to contract, and there is a mistake with reference to any material part of the subject matter, there is no contract, because of the want of mutual assent necessary to create one; and, in this connection, it has been said that mistake does not so much affect the validity of a contract as it does to prevent its inception, and that mistake may be such as to prevent any real agreement from being formed, so that the apparent contract is void both in law and equity." [502]

But, the American courts have laid down strict criteria before a contracting party may be relieved from a unilateral mistake in his bid for rescission. The proper circumstances in which rescission will be granted include:

`*"(1) the mistake is of such consequence that enforcement would be unconscionable;*
(2) the mistake relates to substance of consideration;
(3) the mistake occurred despite exercise of ordinary care; and
(4) it is possible to place other party in status quo." [503]

The courts will not grant rescission of a contract on ground of mistake against a contracting party whose conduct did not contribute to, or induce mistake, and who will obtain no unconscionable advantage there-from. [504]

Besides unilateral mistake, the American courts also recognize mutual mistake as a means to avoid a contract. Mutual mistake has then been defined, by the American courts, as:

"A mutual mistake is one which is reciprocal and common to both parties, each alike labouring under the same

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500 *Martens and Co v City of Syracuse* 183 App. Div. 622; *City of Syracuse v Sarkisian Brothers Inc et al* 87 A.D. 2D 984; *Fields v Cornet et al* 70 S.W. 2d 954, 958.

501 *Rexford v Phillippi* 337, MO 389, 84 S.W. 2d 628; *Stone v Stone et al* 176 S.W. 2d 464, 468.

502 *Rexford v Phillippi* 337 MO 389, 84 S.W. 2d 628.

503 *McGough Company v Jane Lamb Memorial Hospital* 302 F.Supp 482; *City of Syracuse v Sarkisian Brothers Inc et al* 87 A.D. 2d 984. See also *Dvorak v Kuhn* 175 N.W. 2d 697 wherein the court found a mistake to comprise of: *"1. An unconscious ignorance or forgetfulness of a fact, past or present, material to the contract; or 2. Belief in the present existence of a thing material to the contract which does not exist, or in the past existence of such a thing which has not existed."* See further *Fields v Cornett et al* 70 S.W. 2d 954, 957.

504 *Bvorak v Kuhn* 175 N.W. 2d 697, 702; *Mcadoo White et al v Berrenda Mesa Water District of Kern County* 7 Cal App 3d 894.

misconception in respect to the terms of the written instrument." [505]

Whereas the relief available for a unilateral mistake is that of the rescission of the contract, with mutual mistake, the remedy sought is that of reformation. [506] The court must attempt to give effect to the intention of the contracting parties. In so doing the court acquires full knowledge of all the facts existing at the time. In other words, a court of equity will correct the mistakes and in so doing, carry into effect their intention. [507]

Duress

Duress is recognized as a fully fledged defence by the American courts. In addition, it is regarded as an exception to the *caveat subscriptor* rule. One of the reasons advanced therefore is the fact that, per definition, the exercise of a contracting party's will is waived due to a wrongful act or threat.

Duress has, then, been defined by the American courts as:

"..... a condition where one is induced by a wrongful act or threat of another to make a contract under circumstances which deprive him of the exercise of his free will, and it may be conceded that a contract executed under duress is voidable." [508]

The scope of duress is not confined to situations involving threats of personal injury or imprisonment. It also includes any wrongful threat, which wrongfully puts a contractual party in such fear as to act against his will. [509]

The test for duress is stated as follows:

"..... Whether the threat has left the individual bereft of the quality of mind essential to the making of a

505 *Stevens v Illinois Central R. Co* 234 F2d 562 (CA5); *Coleman v Ill Life Ins Co* 82 S.W. 616, 26 Ky, Law Rep. 900; *Reiss v Wintersmith* 241 Ky. 470, 44 S.W. 2(d) 609, 613; *Fields v Cornett et al* 70 S.W. 2d 954.

506 *Fields v Cornett et al* 70 S.W. 2d 954; *Twin Forks Ranch Inc v Brooks* 120 N.M. 832, 907 P.2d 1013; *Drink, Inc v Martinez* 89 N.M. 662, 664, 556 P.2d 348, 350 (1976).

507 *Buckingham Savings Bank v Rafoul* 124, Vt. 427, 209, A 2d 738; *Stewart Oil Co v Sohie Petroleum Co* 202 F.Supp 952 (ED Ill).

508 *Shlensky v Shlensky* quoted with authority in *Kaplan v Kaplan* 25 Ill 2d 181, 182 N.E. 2d 706. See also *Austin Instrument Inc v Loral Corporation* 29 N.Y. 2d 124, 272 N.E. 2d 533, 324 N.Y.S. 2d 22; *Wise v Midtown Motors Inc* 231 Minn. 46, 42 N.W. 2d 404; *The First Bank of Cincinnati v Pepper et al* 454 F.2d 626.

509 *Kaplan v Kaplan* 25 Ill 2d 181, 182 N.E. 2d 706.

contract." [510]

In modern times, especially with the extension of commercial practise, the concept of economic, or business, duress has also evolved. [511]
The American courts, including the Supreme Court of the United States, recognize that there are circumstances under which economic pressure may invalidate an otherwise enforceable contract. The existence of economic duress is demonstrated by:

"..... proof that immediate possession of needful goods is threatened or by proof that one party to a contract has threatened to breach the agreement by withholding goods unless the other party agrees to some further demand." [512]

Although it has been stated that the application of economic duress depends upon the circumstances of each individual case, [513] nonetheless, the courts have laid down certain criteria, which must be shown, before duress can been found to exist. The criteria include:

"(1) that one side involuntarily accepted the terms of another;
(2) that circumstances permitted no other alternative; and
(3) that the circumstances were the result of coercive acts of the opposite party." [514]

In the case of *The United States v Bethlehem Steel Corp.,* [515] the court emphasized that the status of the parties and the equality of the bargaining power of the parties, are factors influencing duress. In this case it was found that the imbalance of power of the United States Government over a single private corporation (The Respondent) resulted in duress being present.

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510 *Decker v Decker* 324 Ill 457, 155 N.E. 349; *Slade v Slade* 310 Ill App 77, 33 N.E. 2d 951 17A Am Jur.; *Kaplan v Kaplan* 25 Ill 2d 181, 182 N.E. 2d 106 at 186.

511 *Austin Instrument, Inc v Coral Corporation* 29 N.Y. 2d 124, 272 N.E. 2d 533. 324 N.Y.S. 2d 22; *Leeper et al v Beltrami* 54 Cal. 2d 195, 347 F.2d 12, 1 Cal Rptr. 12; *Bethlehem Steel Corporation et al v United States Shipping Board Merchant Fleet Corporation* 315 U.S. 289, 62 S.Ct 581; *First Data Resources Inc v Omaha Steaks International of Cincinnati v Pepper* 1 Cox et al 454 F.2d 626.

512 *Austin Instrument, Inc v Loral Corporation* 29 N.Y. 2d 124, 272 N.E. 2d 533, 324 N.Y.S. 2d 22; *Mercury Mach Importing Corp v City of New York*, 3 N.Y. 2d 418, 425, 165 N.Y.S. 2d 517, 520, 144 N.E. 2d 400; *Du Pont de Nemours and Co v J.L. Hass Co* 303 N.Y. 785, 103 NE 2d 896; *Gallagher Switchboard Corp v Heckler Elec Co* 36 Misc 2d 275, 232 N.Y.S. 2d 590.

513 *Morrill v Amoskeag Savings Bank* 90 N.H. 358, 9 A 2d 519.

514 *United States v Bethlehem Steel Corp* 315 U.S. 289, 301, 62 S.Ct. 581, 86 L.Ed 855; *French v Schoemaker* 74 Wall (U.S) 314, 332, 20 LED 852.

515 315 U.S.289, 301, 62 S.Ct. 581, 86 LED 855.

The effect of the presence of duress has been found to be, void, [516] or void-able, [517] depending on the circumstances.

Undue Influence

The American courts recognise undue influence as another exception to the *caveat subscriptor* rule in that it has been held, by the American courts, to be a proper defence at law. [518]

The nature and scope of undue influence was very aptly stated, by the Californian Appeal Division, in the case of *Odorizzi v Bloomfield School District,* [519] wherein Fleming J stated:

"In essence undue influence involves the use of excessive pressure to persuade one vulnerable to such pressure, pressure applied by a dominant subject to a servient object. In combination, the elements of undue susceptibility in the servient person and excessive pressure by the dominating one make the dominant person's influence undue, for it results in the apparent will of the servient person being in fact the will of the dominant person." [520]

The American courts have remarked that an all embracing definition of undue influence is not that easy, nonetheless, a number of definitions have been given to the term, including:

"That dominion acquired by one person over the mind of another which prevents the latter from exercising his discretion, and which destroys his free agency." [521]

In terms of the *American Civil Code,* undue influence is defined as: [522]

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516 *United States v Bethlehem Steel Corp* 315, U.S. 289, 301, 62 S.Ct 581, 86 LED 855; *The First National Bank of Cincinnati v Pepper, Cox et al* 454 F.2d 620.

517 *Kaplan v Kaplan* 25 Ill 2d 181, 182 N.E. 2d 706; *Austin Instrument Inc v Coral Corporation* 29 N.Y. 2d 124, 272 N.E. 2d 533, 324 N.Y.S. 2d 22; *First Data Resources Inc v Omaha Stears International* 209 NEB 327, 307 N.W. 2d 790.

518 *Wells Fargo Bank and Union Trust Co v Brady*, 116 Cal App 2d 381, 254 F.2d 71; *Zeigler v Illinois Trust and Savings Bank* 245 Ill 180, 91 N.E. 1041, 28 NS 1112.

519 246 Cal. App 2d 123.

520 *Odorizzi v Bloomfield School District* 246 Cal App 2d 123, I31; *Trustee of Jesse Parker Williams Hospital v Nisbet* 191 Ga. 821, 14 SE 2d 64; *Merrit v Easterly* 226 IA 514, 284 N.W. 397.

521 *Re Estate of Telsrow* 237 IA 672, 22 N.W. 2d 792.

522 Civ. Code S1575 quoted with approval in the case of *Odorizzi v Bloomfield School District* 246 Cal App 2d 123 at 130.

"..... Taking an unfair advantage of another's weakness of mind, or taking a grossly oppressive and unfair advantage of another's necessities or distress." [523]

The existence of undue influence is often determined by the relationship between the two contracting parties, which relationship often takes the form of a confidential relationship or a fiduciary trust relationship. [524]
The reported cases, in these types of matters, usually involves elderly, sick, senile persons who are coerced, or persuaded, by lawyers who stand in a position of trust to them, or by others, who, because of their close friendship or position of trust, have an influence to bear over the weak, sick or elderly, to execute wills or deeds under pressure. [525]

Other instances in which the courts have held that a person had wrongly been persuaded to sign a document and that the signature had been secured by the use of undue influence, include, a patient who was confined to a hospital and given a release form to sign which contained the release of claims for personal injuries. The agent, who had persuaded her to sign, spent the better part of two hours persuading her to sign. The evidence led indicated that the patient was highly nervous at the time and in a hysterical condition and suffering great pain. She, consequently, signed the release in order to terminate the intervention. [526]

The rationale for the recognition of this defence has been stated before as amounting to: *"A valid contract can be entered into only when there is a meeting of minds of the parties under circumstances conducive to a free and voluntary execution of the agreement contemplated. It must be conceived in good faith and come into existence under circumstances that do not deprive the parties of the exercise of their own free will."* [527]

The effect of the court finding that a transaction was concluded due to undue influence is

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523 Section 13-311 RCM 1947.

524 *Raney v Raney* 216 Ala. 30, 34, 112 So. 313, 316; *McCullough v Rogers* 431 So. 2d 1246; *Schroeder v Ely and Ely* 161 N.E.B. 252, 73 N.W. 2d 165.

525 *Malone v Malone* 155 Cal. App 2d 161; *Stewart v Marven* 139 Cal. App 2d 769; *Odorizzi v Bloomfield School District* 246 Cal. App 2d 123; *McCollough v Rogers* 431 So. 2d 1246; *Schroeder v Ely and Ely* 161 N.E.B. 252, 73 N.W. 2d 165; *Blackmer v Blackmer* 165 Mont. 69 525 P.2d 559.

526 *Weger v Rocha* 138 Cal. App 109, 32 P.2d 417.

527 *Fyan v McNutt* (1934) 266 Mich. 406 294 N.W. 146.

this; the court based on equity will not hesitate to set the contract aside. [528]

Illegality

The illegality of contracts or contractual terms in the American law of contract, as was previously stated, may arise during the formation stage, or where the performance of the contracts is criminal, tortuous or otherwise opposed to public policy.

Examples of contracts which were found to be illegal, as the contract was found to be against public policy and void, may, briefly, be highlighted as follows:

In the case of *Stone et al v William Steiner MFC Co,* [529] the court of New Jersey had to decide whether an employment contract, to aid a manufacturer in securing contracts with the Navy Department, was void as against public policy, if the arrangement involved, or promoted sinister or corrupt means to accomplish its end and tended to bring influence to bear on representatives of the Navy Department, to act other than to the sole advantage of the department, and it was unnecessary that the parties to the employment contract, themselves, contemplated corrupt means or that representatives of Government should act, otherwise than for advancement of the Government?
The defence raised is that the agreement is illegal because it is against public policy, or to state it more properly, that the consideration for the agreement in question is, in part illegal, as against public policy.

Consequently the court with regard to the legal principles surrounding illegal contracts held:
"The general principle involved is that contracts which tend to injure the public service of the Government are against public policy and void, particularly when they influence executive or administrative action, and especially contracts which provide for a contingent compensation."

The court held the contract sued on, and the consideration on which it was based, was void as against public policy.

The American courts have also held that contracts entered into, which would have the effect of aiding an enemy, or of diminishing the national power, were effectively illegal. [530]

528 *Schroeder v Ely and Ely* 161 N.E.B. 252, 72 N.W. 2d 165.

529 N.J. Misc 353, 39 A. 2d 241.

530 *Clements v Ytunbia* 81 N.Y. 285; *Bowman v Coffroth* 55 PA 15.

Likewise, agreements involving the violation of foreign laws would be against public policy. [531]

Any agreements which tend to promote illegal activity have been held to be opposed to public policy and void, by the American courts. This position was firmly established in the case of *Smith v McCullough et al*. [532] This case involved the lease of land from the Quapain Indian Settlers for a period longer than the maximum permissible period of 10 years. The relief sought by the plaintiffs was full recognition of their lease, despite a statutory act, at the time, prohibiting an extension.

The plaintiff's contention was that the defendant's lease was void, given the nature of the lease and the term exceeding 10 years. The court found the lease to be void and stated:

"We think that conclusion overlooks the nature and purpose of the restrictions in the acts of 1895 and 1897. The purpose of the restrictions was to give the needed protection, and they should be construed in keeping with that purpose."

The court, consequently, held the lease agreement to be illegal and therefore invalid.

There are numerous cases involving policies taken out on the insured's own life, payable to himself, his executors, administrators and which are silent on the subject of suicide. The insured thereafter, whilst in a sane state, takes his own life when he is able to comprehend the wrongfulness of his act. One of these cases is that of *Ritter v Mutual Life Ins. Co of New York*. [533]
The court rules against the executors and put the position as follows:

"If a person should apply for a policy expressly providing that the company should pay the sum named if or in the event the assured, at any time during the continuance of the contract, committed self-destruction, being at the time of sound mind, it is reasonably certain that the application would be instantly rejected. It is impossible to suppose that an application of that character would be granted."

Referring to other matters in which it is stated:

"In support of the general proposition that the law will not enforce contracts and agreements that are against the public good, and therefore are forbidden by public policy, reference is often made to the case of Society v Boland, 4 Bligh (N.S.) 194, 211, known as `Fauntleroy's Case'."

531 225 F.2d 248 (CAZ).

532 270 U.S. 456, 46 S.Ct. 338.

533 169 U.S. 139, 18 S.Ct. 300.

Referring to academic writings, the court embraces the principle that militates against upholding the insurance policies where suicide is committed and declared:

"It would render those natural affections which make every man desirous of providing for his family an inducement to crime; for the case may well be supposed of a person insuring his life for that purpose, with the intention of committing suicide. For a policy, moreover, to remain in force when death arose from any such cause, would be a fraud upon the insurers; for a man's estate would thereby benefit by his own felonious act." [534]

The court consequently held that death by suicide was not a risk intended to be covered as it is against public policy.

The American courts have also intervened in contracts involving public service. In this regard, a contract exempting the public utility from its duties has been held to be illegal and, as such, invalid as against public policy.

In the case of *Chicago and N.W. Ry Co v Davenport et al,* [535] the vexed issue to be decided was whether the railway company, which had been found to have acted as a common carrier in transporting a circus train, could validly contract with the circus to indemnify the rail road for liability incurred in moving the circus train?

The court subsequently held:

"If the appellant Railroad occupied the status of a common carrier subject to the provisions of the Interstate Commerce Act, then it is patent that the spirit and prohibitions of that Act would avoid the provisions of this contract insofar as it provides indemnity for injuries to the Railroad's own employees. Indeed appellant Railroad does not, and reasonably cannot, contend that in its capacity as a common carrier it can require a shipper to indemnify against injuries to his employees." [536]

The court, consequently, held the indemnity signed was an illegality and against public policy.

In another matter involving an elevator company in the matter of *Otis Elevator Co v Maryland Casualty Co,* [537] the elevator company was employed to inspect and repair a

534 *Ritter v Mutual Life Ins. Co of New York* 169 U.S. 139, 18 S.Ct. 300; *Bloom et al v Franklen Life Insurance Company* 1884 WL 5727 (Ind.).

535 205 F.2d 589. For a case in which similar principles were enunciated *New York Cent. R. Co v Mohney* 252 U.S. 152, 40 S.Ct. 289.

536 *Chicago and N.W. Ry Co v Davenport et al* 205 F.2d 589.

537 95 Colo. 99, 33 F.2d 974.

passenger elevator. It impliedly agreed to exercise due care.

Before commencing its activities, the elevator company entered into an agreement, including an indemnity agreement in which it undertook, *inter alia,* not to be liable for any damages caused for any accident, injury, breakage or damage.

The court, when looking at the validity of the exemption clause, found:

"The public had the right to expect and demand that the elevator as a carrier of the public would be kept safe for its use. It was the business of Otis Company, contracted for consideration, to inspect and repair the said elevator, with that safety for the public in view, and the law will not permit it to escape liability for its negligence therein, by a contract which is against public policy, such as is the one relied on here." [538]

Fraud

Fraud, according to the American courts, vitiates and avoids all human transactions, including private contracts. [539] It is generally regarded as odious and fatal in a court of law. The definition, often received with approval by the American courts, is this:

"Acts, omissions, or concealments which involve a breach of legal and equitable duty, trust or confidence justly reposed, and are injurious to another, or by which an undue and unconscientiously advantage is taken of another." [540]

Before a defrauded party may successfully sue the fraudulent party for damages in an action of deceit, or to enable the defrauded party to rescind the transaction, the American courts require the defrauded party to show the presence of essential elements which include:

"(1) the misrepresentation of a material fact, falls within the knowledge of the party making it;
(2) made with the intent to deceive; and
(3) which in fact does deceive the other party to his injury." [541]

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538 *Otis Elevator Co v Maryland Casualty Co* 99 Colo. 99, 33 F.2d 974.

539 *Weil Clothing Co, Inc v Glasser* 213 F.2d 296 (CA5); *William Whitman Co v Universal Oil Products Co* 125 F Supp 137 (D DEL); *Berry v Robotka* 9 Ariz. App 461 453 P2d 372; *Smith v Whitman* 39 N.J. 337, 189 A 2d 15; *Mackenzie v Prudential Insurance Co* 411 F2d 781 (CA6); *Occidental Life Insurance Co v Bob le Roy's Inc* 413 F2d 819 (CA5); *Kleiner v Walker* 256 A 2d 779 (DC CA).

540 *New York Life Insurance Co v Nashville Trust Co* 200 Tenn. 513, 292 SW 2d 749, 59 ALR 2d 1086 quoting *Smith v Morrison* 49 Tenn. 230 and I Bouvier, *Law Dictionary* P613; In the case of *Carruth v Allen* (Tex. Civ. App.) 368 S.W. 2d 672 fraud is defined by the court as *"a false statement of a material fact made to be acted on and actually believed and acted on with consequential injury to the person acting thereon."*

541 *Parker v Hensel* 242 NC 211, 87, SE 2d 201; *Rucker v Tietz* (OKLA.) 374 P2d 341; *Deyo v Hudson* 225 N.Y. 602, 612, 122 N.E. 635, 638; *Ochs v Woods* 221 N.Y. 335, 338, 117 N.E. 305, 306.

What is important, for a party who has been defrauded, is to show, especially, that the misrepresentation was material, before a court may take notice of it as a fraud. [542] The misrepresentation is said to be material *"where a misrepresentation would be likely to affect the conduct of a reasonable man with reference to a transaction with another person."* [543]

Whether it would be likely to influence a reasonable person to enter into a proposed contract formed the subject matter for decision making in the use of *Russel v City of Rogers*. [544] This was an action for damages, instituted by the City of Rogers, to recover judgement for a sum of money, under an oral contract, by which the appellant, Russel, agreed to pay the city at the rate of $2.00 a foot for 4337 feet of shield line, to be used, by the city, in an underdeveloped subdivision owned by Russell.

Russel admits that the line was laid by the city, but, his defence is that he was induced by misrepresentation to enter into the contract.

The appeal court held that Russel would, undoubtedly, have been influenced by the statement. The court held that had he known the true facts, there was no reason, whatever, for him to agree to make a cash payment as soon as the line was laid, for he could have obtained exactly the same benefits by paying, during a period of years, small instalments. The court consequently held that the misrepresentation was not merely an expression of opinion about what might happen in future, it amounted to a positive statement.

The remedies available to the defrauded party, depend upon whether the fraud constitutes the tort of deceit, or whether it is based upon a misrepresentation in contract in common law. In the first instance, the defrauded party may elect to keep the transaction intact, keep what he/she received, and sue for damages, [545] alternatively he/she may choose to void the

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542 *Mogar v Williams* 26 ALA 469; *Williams v McFadden*, 23 Fla 143, 1 S.618; *Ruff v Jarrett* 94 ILL 475; *Long v Woodman* 58 ME 49; *Hedden v Griffen* 136 Mass 229; *Kaplan v Scoher* 254 Mass 180, 150 NE 9, 42 ALR 1142; *Smith v Chadwick* 20 CH D 27.

543 *Pasko v Trela* 153 NEB 759, 46 N.W. 2d 139; See also *Eitran v Equitable Life Assurance Society of the United States*, 6 AD 2d 697, 174 NYS 2d 553 Affd 5 N.Y. 2d 1005, 185 NYS 2d 262 in which it was decided that misrepresentation as to the treatment for a heart disease, was material.

544 236 Ark 713, 368 S.W. 2d 89.

545 *Meige v Bachler* 762, F.2d 621; See also *Gordon v Burr* 506 F.2d 1080 (2d Cir. 1974).

transaction and claim restitution. [546] In the latter instance, the defrauded party may seek restitution. [547]

9.2.3.3 Legal Opinion

The *caveat subscriptor* rule is widely recognised by the American legal writers and the courts, and so, form an integral part of the American contract law. The general operation and affect of the rule amounts to this, any person who signs a contract without familiarizing himself/herself with the terms of the contract, by not reading the content of the contract, or not asking for clarity of certain terms not understood, cannot avoid the contract on the grounds that he/she did not read it nor familiarise himself/herself with the terms thereof. [548]

The American law is very clear, therefore, on a contracting party's duty to read, namely, any party to a contract is legally obliged, through a duty, to learn the contents of a contract before signing it. If therefore, in the absence of fraud, duress, undue influence and other like defences, the contractant fails to do so, he or she is presumed to know the contents and therefore signs at his or her own peril. If it turns out that the contents of the contract or the obligations that flow there from are not favourable to the signing party, he must therefore suffer the consequences of his negligence. He/she is thus not excused and cannot therefore deny his/her obligation under the contract. [549]

The rule is strictly enforced and includes in its web illiterate people, or those who are ignorant, or with limited intelligence and understanding. They will also, generally, not escape the consequences of their failure to read a contract, or to familiarise themselves with the contents of a contract. They are expected, therefore, to get someone to assist

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546 *Hamral v Skinner* 265 ALA 9, 89 So. 2d 70 (1956); *Jennings v Lee* 105 Arix 167, 461 P.2d 161 (1969).

547 *Johns Hopkins Univ. v Hutton* 488 F2d 912 (4th cir 1973); *Moore v Farm and Ranch Life Ins Co* 211 Kan. 10, 565 P.26 666 (1973).

548 For legal writings see Calamari and Perillo *The Law of Contracts* (1977) 67; Calamari and Perillo *The Law of Contracts* (1987) 410; Jaeger *A Treatise on the Law of Contracts* Vol 1 (1957) 97. For case law see *Hoshaw v Coxcraft* 247 F 22 (CAA) See also *Metrick Mfg. Co v Waxahackie Cotton Mills* 1 F2d 913 (CCA 6); *Columbian Nat. L. Ins Co v Black* 35 F2d 571 (CCA 10) 71 ALR 128; *Ford Motor Co v Pearson* 40 F2d 858 (CCA 9); *Upton v Trebilock* 91 US 45, 23 L ed 203; *Rossi v Douglas* 203 Md 190, 192, 100 A. 2d 3, 7 (1953).

549 For legal writings see Calamari and Perillo *The Law of Contracts* (1977) 67; Calamari and Perillo *The Law of Contracts* (1987) 410; Jaeger *A Treatise on the Law of Contracts* Vol 1 (1957) 97-98. For case law see *Upton v Trebilock* 91 US 45, 23 L Ed 203; *Rossi v Douglas* 203 Md. 190, 192, 100 A. 2d 3, 7 (1953); *United States v Castillo* 120 F Supp 522 (DCD NM); *Belew v Griffiths* 249 Ark 589, 460, S.W. 2d 80 (1970).

them. [550]

The rationale for the traditional rule is said to give stability to written agreements, or to enshrine an element of sacrosanct to writing. [551]

In modern times, especially, with the introduction and domination of contracts of adhesion or standard contracts, there is strong argument for the view that these types of contracts, which are not individually negotiated, do not bring the assent with them, if true assent exists at all. For that reason, the view is espoused that, especially in certain contracts, the impact of the contents, including the terms and conditions of the applicable contract, should be explained by the dominant party and understood by the other party, who then has a reasonable choice to accept or reject the contract or terms. The applicability thereof, is found, especially, where terms are oppressive, unfair, indecent or unconscionable. [552]

Misrepresentation is recognized by the American law as one of the exceptions to the *caveat subscriptor* rule. It is acknowledged as a fully fledged defence where a contractant relies upon deceit to recile from a contract. The defence has the affect to vitiate and void a transaction brought about by a contract. [553]

Misrepresentation comprises intentional misrepresentation and unintentional misrepresentation. Intentional misrepresentation, where deceit is present, is often referred to as fraudulent misrepresentation. On the other hand, unintentional misrepresentation is made up of negligent and innocent misrepresentation. [554]

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550 For legal writings see Calamari and Perillo *The Law of Contracts* (1977) 67; Calamari and Perillo *The Law of Contracts* (1987) 410; Jaeger *A Treatise on the Law of Contracts* Vol 1 (1957) 97-98. For case law see *Upton v Trebilock* 91 US 45, 23 L Ed 203; *Rossi v Douglas* 203 Md. 190, 192, 100 A. 2d 3, 7 (1953); *United States v Castillo* 120 F Supp 522 (DCD NM); *Belew v Griffiths* 249 Ark 589, 460, S.W. 2d 80 (1970).

551 For legal writings see Calamari and Perillo *The Law of Contracts* (1977) 67; Calamari and Perillo *The Law of Contracts* (1987) 410; Jaeger *A Treatise on the Law of Contracts* Vol 1 (1957) 97. For case law see *Smith v Standard Oil Co* 727 GA 268, 180 S.E. 2d 691 (1971); *Ellis v Mullen* 34 N.C. App 367, 238 S.E. 2d 187 (1977).

552 For legal writings see Calamari and Perillo *The Law of Contracts* (1987) 427. For the effect of standardized contracts without reading the contents see *Regan v Custom Craft Homes, Inc* 170 Colo. 562, 565, and 463. But the courts have held that the duty to read rule succumbs to contracts even in the absence of fraud where public policy is contravened or the contract is unconscionable or the contract is invalid and unenforceable because of unfairness or unreasonableness. See *Weaver v American Oil Co* 257 Ind. 458, 276 N.E. 2 144 (1971) at 147-148; *Henningsen v Bloomfield Motors Inc* 32 N.J. 358, 161 A. 2d 67 (1960); *Williams v Walker-Thomas Furniture Co* 350 F.2d 445 (D.C. Cir 1965) at 449-50.

553 For legal writings see Calamari and Perillo *The Law of Contracts* (1987) Para 9-14; Jaeger *A Treatise on the Law of Contracts* Vol 12 (1970) 323 ff. For case law see *Pasko v Trela* 153 NEB 759, 46 N.W. 2d 139; See also *Halsel v First National Bank of Muskogee* 48 Okla. 535, 150 P4.

554 For legal writings see Calamari and Perillo *Contracts* (1987) Para 9-14; Jaeger *A Treatise on the Law of Contracts* Vol 12 (1970) 323 ff, 344 ff. For case law see *Jordan v Guerra* 27 Cal 2d 469, 144 P2d 349.

The rationale for this type of defence is based upon the principles that, firstly, through the representation, the contracting party making same, undertakes to carry out his/her promise. If done falsely, with the intent to deceive, the law will not stand back and allow someone to contract to his/her prejudice. It would therefore be unjust and inequitable to permit a person, who has made a false representation, to retain the fruits of the bargain induced by such representation. [555]

Secondly, it is founded on the principle that the formation of a binding contract is founded upon the mutual assent of the parties to the contract. Where there is an absence of the required degree of mutual assent, i.e. the absence of the proverbial `*meeting of the minds*', the purported contract is void. [556]

The second exception to the *caveat subscriptor* rule, recognized in the American law of contract, is mistake. The rationale for the exception to the rule is, as with misrepresentation, anchored in the mental attitude of the contracting parties. [557] Moreover, it happens in matters where the mistake is so fundamental in character that the minds of the parties never met, with the result that an unconscionable advantage would be gained if the purported agreement were be allowed to stand. [558]

The legal effect of the aforementioned circumstances are, generally, the contract is void [559] but, there are also views expressed that the effect of mistake as a defence, depending on the parties own desires, the seriousness of the mistake, the court's ability to straighten out

555 For legal writings see Calamari and Perillo *Contracts* (1987) Para 9-14. For case law see *Smith v Richards* 13 Pet (US) 26 10 L Ed 42. See also *Lockwood v Christakos* 181 F2d 805 (CA DC).

556 For legal writings see Calamari and Perillo *The Law of Contracts* 1987 Para 9-19. For case law see *New Jersey Mortgage and Investment Co v Dorsey*, 60 NJ Super 299, 158 A 2d 712 Affd. 33 NJ 448, 165 A 2d 297; *Bank Credit Inc v Rethea* 68 NJ Super 62, 172 F 2d 10.

557 For legal writings see Calamari and Perillo *The Law of Contracts* (1987) Para 9-25; Corpus Juris Secundum - *A Contemporary statement of American Law* Volume 17 (1999) 74; Hunter *Modern Law of Contracts* (1999-2000) Para 19.2; Jaeger *A Treatise on the Law of Contracts* Vol. 13 (1970) 8. For case law see *Kennie v Westbrook (ME)* 254 A.2d 39; *Hudson Structural Steel Co v Smith and Rumery Co* 110 ME 123, 85 A. 384; *Nodak Oil Co v Mobil Oil Corp* 391 F.Supp. 276.

558 For legal writings see Calamari and Perillo *The Law of Contracts* (1987) Para 9-27; Hunter *Modern Law of Contracts* (1999-2000) Para 19.2; Corpus Juris Secundum - *A Contemporary statement of American Law* Volume 17A (1999) 75. For case law see *Moffet, Hodgkins and Clarke Co v City of Rochester* 178 US 373, 44 L.Ed 1108 20 S.C.; *Martens and Co v City of Syracuse* 183 App. Div, 622; *City of Syracuse v Sarkisian Brothers Inc et al* 87 A.D. 2d 984; *Fields v Cornet et al* 70 S.W. 2d 954, 958.

559 For legal writings see Corpus Juris Secundum - *A Contemporary statement of American Law* Volume 17A (1999) 60. For case law see *Rexford v Phillippi* 337 MO 389, 84 S.W. 2d 628.

the problem, would be avoidance through rescission, or reformation of the contract. [560] The latter remedy is especially applicable where mutual mistake is shown, whereas the former is applicable where unilateral mistake is shown. [561]

Undue influence is a further exception to the *caveat subscriptor* rule, recognized by the American legal writers and the courts alike. It serves as a defence if the transaction, sought to be enforced, was the product of unfair persuasion. [562] American law of contract recognizes two forms of undue influence. In the first instance, a contracting party in a dominant psychological position may use his/her position, in an unfair manner, to induce the weaker contracting party to consent to an agreement he/she would, otherwise, not have consented to. In the second instance, where two parties stand in a trust and confidence position and the one contracting party, unfairly, persuades the other contracting party to enter into the transaction. [563]

These types of matters usually involve the elderly, the sick or senile persons, who are coerced or persuaded by lawyers in a confidential position, or position of trust to them, who persuade the vulnerable to enter into the transaction. [564]
The rationale of undue influence as a defence stems from the fact that, as with

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560 For legal writings see Corpus Juris Secundum - *A Contemporary statement of American Law* Volume 17A (1999) 60, 79; Calamari and Perillo *The Law of Contracts* (1987) Para 9.26; Hunter *Modern Law of Contract* (1999-2000) Para 19, 12. For case law see *McGough Company v Jane Lamb Memorial Hospital* 302 F.Supp. 488; *City of Syracuse v Sarkisian Brothers Inc et al* 87 A.D. 2d 984.See also *Dvorak v Kuhn* 175 N.W. 2d 697; *Reed v Landon* 166 Cal App 2d 476, 483, 333 P.2d 432, 437 quoted in *Walton v Bank of California National Association* 218 Cal App 2d 527, 32 Cal. Rapt. 856; *Mcadoo White et al v Berrenda Mesa Water District of Kern County* 7 Cal App 2 476, 483, 333 P2d 432, 437.

561 For case law see *Field v Cornett et al* 70 S.W. 2d 954; *Twin Forks Ranch Inc v Brooks* 120 N.M. 832 907 P.2d 1013; *Drink, Inc v Martinez* 89 N.M. 662, 556 P.2d 348, 350 (1976).

562 For legal writings see Calamari and Perillo *The Law of Contracts* (1987) Para 9.12; Jaeger *A Treatise on the Law of Contracts* Vol 13 (1970) 776ff. For case law see *Wells Gargo Bank and Union Trust Co v Brady*, 116 Cal App 2d 381, 254 F.2d 71; *Zeigler v Illinois Trust and Savings Bank* 245 Ill 180, 91 N.E. 1041, 28 Ira N.S. 1112.

563 For legal writings see Calamari and Perillo *The Law of Contracts* (1989) Para 9-10; Jaeger *A Treatise on the Law of Contracts* Vol 13 (1970) 776ff. For case law see *Odorizz v Bloomfield Schools District* 246 Cal App 2d 123; *Trustee of Jesse Parker Williams Hospital v Nisbet* 191 Ga. 821, 14 SE 2d 64; *Merrit v Easterly* 226 IA 514, 284 N.W. 397; *Raney v Raney* 216 Ala. 30, 112 So, 313, 318; *McCollough v Rogers* 431 So 2d 1245; *Schroeder v Ely and Ely* 161 N.E.B. 252, 73 N.W. 2d 165.

564 For legal writings see Calamari and Perillo *The Law of Contracts* (1987) Para 9-10; Jaeger *A Treatise on the Law of Contracts* Vol 13 (1970) 784ff. For case law see *Malone v Malone* 155 Cal App 2d 161; *Steward v Marven* 139 Cal App 2d 769; *Odorizzi v Bloomfield School District* 246 Cal App 2d 123; *McCullough v Rogers* 431 So 2d 1246; *Schroeder v Ely and Ely* 161 N.E.B. 252, 73 N.W. 2d 165; *Blackmer v Blackmer* 165 Mont. 69 525 P.2d 559.

misrepresentation and mistake, there is no meeting of minds when the purported agreement is executed. [565]

The effect of the courts establishing that a transaction was concluded due to undue influence is this, the transaction is voidable. The party who wishes to rely on undue influence should he/she choose to avoid the contract, may seek cancellation and restoration of the status quo. [566]

Another exception to the *caveat subscriptor* rule is that of duress. The rationale for the acceptance of duress as a defence lies in the deprivation of one of the contracting party's freedom of will. [567]

The scope of duress is not restricted to situations involving threats of personal injury or imprisonment. It also includes any wrongful threat, which wrongfully puts a contractual party in such fear as to act against his/her will. This also includes economic pressure. [568] It is especially economic or business duress, which has been added to the growing evolution and development of duress. The nature of this type of duress lies in the fact, that a person is forced to act against his own will leaving that person no option or choice as to whether he will do the thing, or perform the act. [569]

The rationale for the recognition of the defence, as with all the other exceptions to the *caveat subscriptor* rule, is founded on the pressure that is borne on the contracting party who is compelled to assent to a transaction, notwithstanding the fact that he/she is

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565 See *Fyan v Monut* (1934) 266 Mich. 406 254 N.W. 146.

566 For legal writings see Calamari and Perillo *The Law of Contracts* (1987) Para 9-10; Jaeger *A Treatise on the Law of Contracts* Vol 13 (1970) 304ff. For case law see *Schroeder v Ely and Ely* 161 N.E.B. 252 72 N.W. 2d 165.

567 For legal writings see Jaeger *A Treatise on the Law of Contract* (1970) 659. For case law see *Shlensky v Shlensky* quoted with authority in *Kaplan v Kaplan* 25 III 2d 181, 182 N.E. 2d 708. See also *Austin Instrument Inc v Loral Corporation* 29 N.Y. 2d 124, 272 N.E. 2d 533, 324 N.Y.S. 2d 22; *Wise v Midtown Motors Inc* 231 Minn. 46, 42 N.W. 2d 404; *The First Bank of Cincinnati v Pepper et al* 454 F.2d 626.

568 For legal writing see Calamari and Perillo *The Law of Contracts* (1987) 337. For case law see *Kaplan v Kaplan* 25 III 2d 181, 182 N.E. 2d 706.

569 For legal writings see Jaeger *A Treatise on the Law of Contract* (1970) 718. For case law see *Austin Instrument Inc v Coral Corporation* 29 N.Y. 2d 124, 272 N.E. 2d 533, 324 N.Y.S. 2d 22; *Leeper et al v Beltrami* 54 Cal 2d 195, 347 F.2d 12, 1 Cal Rptr. 12; *Bethlehem Steel Corporation et al v United States Shipping Board Merchant Fleet Corporation* 315 U.S, 289, 62 Ct 581; *First Data Resources Inc v Omaha Steaks International of Cincinnati v Petter* 1 Cox et al 454 F.2d 626.

precluded from exercising free will and judgement. [570]
In America, the criteria for the presence of economic and business duress has crystallised. The status of the parties and the equality of the bargaining power of the contracting parties are factors influencing duress. [571]

The effect of the presence of duress has been found to be void, [572] or voidable, [573] depending on the circumstances.

Illegality is a further exception to the *caveat subscriptor* rule and widely recognised as a defence by the American legal writers, as well as the courts. In very broad terms, illegality manifests itself either in the formation of the purported agreement, or its performance is criminal, tortuous or opposed to public policy. [574]

In this regard, the *in pari delicto potier est conditio defendentis* maxim still plays a huge role in American contract law, in that the law protects those from loss through unlawful acts. The categories of unlawful acts are innumerable. For the purpose of this research, the examples given were restricted to those that are relevant to the topic under research. These include, generally, agreements which tend to promote illegal activity which is opposed to public policy, [575] for example, insurance policies taken out on an insured's life, where-after, the insured commits suicide to the benefit of the beneficiary, [576] or illegal abortions where no medical necessity is indicated for the abortion, [577] purported contracts, involving public

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570 For legal writings see Jaeger *A Treatise on the Law of Contract* (1970) 664ff. For case law see *Austin Instrument, Inc v Loral Corporation* 29 N.Y. 2d 124, 272 N.E. 2d 533, 324 N.Y.S. 2d 22; *Mercury Mach Importing Corp v City v New York*, 3 N.Y. 2d 418, 425, 165 N.Y.S. 2d 517, 520, 144 N.E. 2d 400; *Du Pont de Nemours and Co v J.L. Hass Co* 303 N.Y. 785, 103 N.E. 2d 896; *Gallagher Switchboard Corp v Heckler Elec. Co* 36 Misc 2d 275, 232 N.Y.S. 2d 590.

571 For case law see *United States v Bethlehem Steel Corp* 315 U.S. 289, 301, 62 S. Ct 581, 86 LED 855.

572 For legal writings see Jaeger *A Treatise on the Law of Contracts* (1970) 772-773; Calamari and Perillo *Contracts* (1987) 349. For case law see *United States v Bethlehem Steel Corp* 315, U.S. 289, 301, 62 S.Ct. 581, 88 LED 855; *The First National Bank of Cincinnati v Pepper, Cox et al* 454 F.2d 620.

573 For legal writings see Jaeger *A Treatise on the Law of Contracts* (1970) 775-776. For case law see *Kaplan v Kaplan* 25 Ill 2d 181, 182 N.E. 2d 706; *Austin Instrument Inc v Coral Corporation* 29 N.Y. 2d 124, 272 N.E. 24 533, 324 N.Y.S. 2d 22; *First Data Resources Inc v Omaha Stears International* 209 NEB 327, 307 N.W. 28 790.

574 For legal writings see Calamari and Perillo *Contracts* (1987) 345. For case law see *Stone et al v William Steiner MFO Co* N.J. Misc 353, 39 A. 2d 241; *Noble v Mead-Morrison Manufacturing Co* 237 Mass. 5 129 N.E. 669.

575 For legal writings see Calamari and Perillo *Contracts* (1987) 888-890.

576 For legal writings see *Smith v McCullough et al* 270 U.S. 456, 46 S.Ct. 338.

service, containing an exemption clause, indemnifying the public utility from its duties. [578] The effect of the conclusion of such contracts is that these types of contracts are illegal, void and unenforceable. [579]

Unconscionable agreements, under the *Uniform Commercial Code,* [580] have also been identified as illegal where abuse relates, firstly, to procedural deficiencies in the formation of the contract, and secondly, the abuse involves the substantive contract terms which includes violation of public interest, unexpectedly harsh terms. [581]

Fraud proper, may for the purpose of this research, be regarded as a final exception to the *caveat subscriptor* rule. In this regard, both the American legal writers and the courts alike, held the view that fraud deprives a contract of its legal validity, or may even prevent an agreement from having legal force. [582]

The rationale for acknowledging fraud as an exception is found in the fact that, the party who is defrauded by the fraudulent party, is so induced to assent to do something which he/she would not otherwise have done. The effect of the presence of fraud in contract is said to be odious and fatal, void *ab initio*. [583]

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577 *Rutken v Reenfeld* 229 F.2d 248 (CAZ); *Bloom et al v Franklen Life Insurance Company* (1884) WL 57 27 (Ind.); *Wells v New England Mut. Life Ins Co. cf Boston*, Mass 191 Pa 207, 43 A.126.

578 For legal writings see Jaeger *A Treatise on the Law of Contracts* (1970) 148-149. For case law see *Chicago and N.W. Ry. Co v Davenport et al* 205 F.2d 589; *New York Cent. R. Co v Moltney* 252 U.S. 152, 40 S.Ct. 289; *Rowe v Colorado and S.R. Co* Tex Civil. App 205 S.W. 73; *Otis Elevator Co v Maryland Casualty Co* 95 Colo. 99, 33 F.2d 974; *Mohawk Drilling Company v McCullough Tool Company* 271 F.2d 627.

579 For legal writings see Calamari and Perillo *Contracts* (1987) 887-890; Jaeger *A Treatise on the Law of Contracts* (1970) 131-140. For case law see *Rutkin v Reenfeld* 229 F.2d 248 (CAZ); *Smith v McCollough et al* 270 U.S. 456, 46 S.Ct. 94; *Ritter v Mutual Life Ins Co of New York* 109 U.S. 139 18S.Ct 300; *Bloom et al v Franklen Life Insurance Company* (1884) WL 57 27 (Ind.); *Wells v New England Mut. Life Ins Co of Boston*, Mass 191 Pa 207, 43 A.126; *Chicago and N.W. Ry Co v Davenport et al* 205 F.2d 589; *New York Cent. R. Co v Moltney* 252 U.S. 152, 40 S.Ct. 289; *Rowe v Colorado and S.R. Co* Tex Cilvil. App 205 S.W. 73; *Otis Elevator Co v Maryland Casualty Co* 95 Colo. 99, 33 F.2d 974; *Mohawk Drilling Company v McCullough Tool Company* 271 F.2d 627.

580 S2-702 of the *Uniform Commercial Code.*

581 Jaeger *A Treatise on the Law of Contracts* (1970) 214-215ff; Calamari and Perillo *Contracts* (1987) 337.

582 For legal writings see Jaeger *A Treatise on the Law of Contract* Vol 12 (1970) 321. For case law see *Weil Clothing Co, Inc v Glasser* 213 F.2d 296 (CA5); *William Whitman Co v Universal Oil Products Co* 125 F Supp 137 (D DEL); *Berry v Robotka* 9 Ariz. App 461 453 P2d 372; *Smith v Whitman* 39 N.J. 337, 189 A2d 15; *McKenzie v Prudential Insurance Co* 411 F 2d 781 (CA6); *Occidental Life Insurance Co v Bob Le Roy's Inc* 413 F2d 819 (CA5); *Kleiner v Walker* 256 A 21 779 (DC CA).

583 For legal writings see Jaeger *A Treatise on the Law of Contracts* Volume 12 (1970) 402. For case law see *New York Life Insurance Co v Nashville Trust Co* 200 Tenn. 513, 292 SW 2d 749, 59 ALP 2d 1096; *Smith v Morrison*

But, where a defrauded party elects to keep the transaction intact, having previously performed, before detecting the fraud, he/she may sue for damages. But, if he/she chooses to avoid the transaction, the defrauding party may claim restitution. [584]

9.3 Summary and Conclusions

It is evident from the previous Chapter that the impact of freedom of contract, universally, is far-reaching and profound. What emerged as well is that, jurisprudence developed which caused acceptance, by the legal writers and the courts alike, that an individual is free to decide whether, with whom, and on what terms, to contract. Once a contract has been concluded, the wishes of the contracting parties must be adhered to, by the exact enforcement of the contractual obligations. One of the principles which flow from the doctrine of the freedom of contract and the sanctity of contract is the *caveat subscriptor* rule. The *caveat subscriptor* rule has the effect that once a contracting party concludes a written contract by signing the agreement, the contracting party is bound by the agreement, notwithstanding the subsequent cause and effect, alternatively, that the terms of the contract are not to his/her liking. It is generally accepted that the contracting party cannot complain as he/she has no-one to blame but himself. For that reason, the *caveat subscriptor* rule has crudely been translated as `*let the signer beware*'. The rationale for its continued recognition is said to lie in the fact that the *caveat subscriptor* rule brings about stability to written agreements. It is also said that it enshrines an element of sacrosanct to writing.

But, despite the profound influence of the *caveat subscriptor* rule, this Chapter highlights the exceptions to the *caveat subscriptor* rule, which also serve as total defences to the said rule. The exceptions include the defences of misrepresentation, mistake, undue influence, duress, illegality and fraud. The Chapter highlights the traits of each of these defences and what is required to prove each type of defence. This Chapter further highlights the remedies available to a contracting party who successfully relies on any of the particular defences available.

The rationale for the acceptance or recognition of the aforementioned exceptions to the rule, which also serve as total defences, are founded upon the "*will*" theory and true

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49 Tenn. 290; *Carruth v Allen* (Tex Civ. App.) 368 S.W. 2d 672.

584 *Meige v Baehler* 762 F.2d 621; See also *Gordon v Burr* 506 F.2d 1080 (2d Civ. 1974); *Hamral v Skinner* 265 ALA 9, 789 So. 2d 70 (1956); *Jennings v Lee* 105 Ariz. 167, 461 P.2d 161 (1969).

assent. This is especially relevant where the terms of the agreement, contained in the standard contract, are oppressive, unfair, indecent or unconscionable. In those circumstances, where a contracting party has not been afforded a genuine opportunity to read the clause containing the terms called to question, or may not understand the nature and effect of such terms, true assent could not have been forthcoming. From the discourse in this Chapter, it is certain, that there appears to be no uniformity in the different jurisdictions, whether agreements in those circumstances are unenforceable. It is especially in South Africa where the situation is far from satisfactory. With that in mind, in the next Chapter an investigative study is undertaken to determine what influence factors such as the principle of fairness, the doctrine of unconscionability and agreements contrary to public policy have on these types of terms or contractual provisions.

What does emerge from this Chapter is that misrepresentation, mistake, illegality, duress, undue influence and fraud are fully fledged defences in the law of contract. They are also regarded as exceptions to the *caveat subscriptor* rule. The recognition of these exceptions to contractual freedom and the doctrine of sanctity of contract are founded upon their being no *animus contrahendi. It is also founded upon* there being a lack of consensus between the contracting parties and the law will not allow a party from benefitting from illegal behaviour. Consent, if not been freely given when the transaction is entered into for example, agreements involving fraud are odious and there for, invalid.

Consequently, factors such as the principle of fairness, the doctrine of unconscionability, agreements contrary to public policy impacting on contractual freedom will be looked at.

Chapter 10

Factors influencing the Law of Contract in general and impacting on medical contracts

10.1 Introduction

The discussions in Chapters 8 and 9 reveal that the ethos of freedom of contract and the sanctity of contract is deeply entrenched in academic minds, the convictions of the legal community, especially judges, who have to adjudicate on issues of contract law as well as

other legal scholars. Such is the influence that, Sachs J, in *Barkhuizen v Napier* [1] remarks *"the doctrine of sanctity of contract and the maxim pacta sunt servanda have through judicial and text-book repetition come to appeal axiomatic, indeed mesmeric, to many in the legal world."* [2] What also emerged during the discourse in Chapter 9 is that the *caveat subscriptor* rule, a consequence which flows from the doctrine of freedom of contract, has and continues to play a cardinal role in the application of the law of contract, universally. The rationale for the continued recognition and implementation of the rule is said to give stability to written agreements or to enshrine an element of sacrosanct to writing. This position has taken centre stage especially since the adoption and recognition of standardized contracts, or, as they are sometimes referred to, contracts of adhesion. But, what has also emerged during these discussions is that during the post classical period and thereafter, the doctrine of freedom of contract is seen not to be unlimited. This position has been recognized, especially, where the contracting parties stand in an unequal bargaining position and the consequences, flowing from their actions in concluding an agreement, would lead to unfair and often, harsh results. Certain factors have been identified as vitiating real consent and therefore, interfering with the doctrine of freedom of contract and sanctity of contract. These factors include *inter alia* fraud, undue influence, and the principle of fairness, unconscionable-ness and contracts, or provisions of contracts, which are found to be contrary to public policy.

Some of these factors were merely mentioned in the two last chapters. To flesh out the core subject matter and to do justice to the research undertaken in this thesis it is, therefore, of import that these factors be discussed in greater detail. The aim is to consider the nature and scope of each factor individually and to demonstrate how they impact upon contractual freedom. Consequently, having identified three of the mainstream factors important for the research undertaken, the principle of fairness, unconscionable-ness and public policy will be considered in this chapter. What will also be determined is how they impact on freedom of contract in countries such as South Africa, England and the United States of America.

The principle of fairness in the law of contract is said to have had a very rich heritage, anchored in the foundation of equity. It is sometimes referred to as the principle of good faith or *boni fides* and was received in the different jurisdictions from Roman [3] or Roman

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1 2007 (5) SA 323 (CC) Para 141.

2 Per Sachs J in *Barkhuizen v Napier* 2007 (5) SA 323 (CC) Para 141.

3 Many legal writers have written about the origin of principle of good faith or *boni fides* of which the most apt

Dutch Law. [4]

During the Roman law period, the iudex (judge as it is today), through the system of equity used by the courts, acquired an equitable discretion to decide a case before them based upon what they perceived to be fair and reasonable. Through the writings of Justinian, the inferior bargaining position of weaker contracting parties was recognized. To protect them from abuse of contractual power, the courts introduced the element of good faith in the interpretation and performance of contracts.

The *exceptio doli* also served as a powerful tool in bringing about a just solution especially, where the conduct of the contracting parties, or the provisions, were improper or in bad faith. [5]

The recognition of the principle of good faith received very mixed reactions in the South African jurisdiction. Whereas, the legal writers generally viewed, and continue to do so today, that the principle of good faith or fairness is a means of curtailing unlimited freedom of contract and the concept of *pactum sunt servanda*, [6] the South African courts have

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writings in South African legal writings is found in the writings of Grove "Kontraktuele gebondenheid, die vereistes van die goeie trou, redelikheid en billikheid" 1998 (61) *THRHR* 687 at 688-689. The writer holds the view that the principle of good faith originated in the distinction made in Roman law between *negotia stricti iuris* and *negotia bonae fidei*. See also Fletcher "The role of good faith in the South African law of contract" *Responsa Meridiana* (1997) 1ff wherein the writer states that the principle applicable in our law of contract today, namely, consensual contracts are *"based upon the bona fides of both, or all parties"* is derived from the Roman Law *negotia bonae fidei*. For that reason, our legal writers have asserted again and again that all contracts are *bonae fidei*.

4 For the reception of the Roman law principles in South Africa via Roman Dutch Law see the writings of other legal writers Zimmerman and Visser Southern Cross (1996) 240; Hutchinson et al *Principles of South African Law* 1991) 443; Kerr *Principles of the Law of Contract* (2002) 301, 646; Hahlo and Kahn *The South African legal system and its background* (1968) 137; Van Aswegen "The Future of South African Contract Law" 1994 (57) *THRHR* 456 137.

5 The writings of Zimmerman and Visser (1986) 218-219; Van der Merwe et al (2003) 231; Lubbe and Murray (1988) 389; Fletcher (1997)11ff; Aronstam (1979) 168-184; Kerr (2002) 642; Hahlo (1981) 71; Hopkins "Standard-form contracts and the evolving idea of private law justice: A case of democratic capitalist justice versus natural justice" *TSAR* (2003) 155; Hawthorne "Public policy and micro-lending - Has the unruly horse died? *THRHR* (2003) 115-116.

6 Many motivational reasons have been advanced by the different academic writers. In this regard Van Aswegen (1994) 448 at 456 argue that freedom of contract and *pacta sunt servanda* brought with it inequalities which necessitated the introduction of mechanisms such as fairness, justice and good faith in contract to counter substantial injustices in the law of contract. Lotz "Die Billikheid in die Suid-Afrikaanse Kontraktereg" (Unpublished inaugural lecture Unisa 1979) 11-12 promotes the utilization of *bona fides* or good faith as a mechanism to advance *"honesty in contract and the prohibition of unreasonable promotion of one's own interests"*. Support for this view is found in the writings of Fletcher (1997) 1 at 2. Christie (2001) 19-20 believes good faith as a mechanism will go a long way to create and enforce moral and ethical values in contract especially, where courts are confronted with "the unfair enforcement of a contract". Support for this view is espoused by Zimmerman

clearly shown a mixed reaction towards recognizing the principle. More recently, despite the mixed reactions from legal writers and the courts alike, the Supreme Court of Appeals, when confronted with a golden opportunity to bring about law reform in the South African law of contract, squandered the opportunity in the cases of *Brisley v Drostky* [7] and *Afrox Healthcare Bpk v Strydom*. [8] In the case of *Brisley v Drotsky,* [9] the Supreme Court of Appeals refused to follow the Cape Provincial Division judgements of *Miller and Another NNO v Dannecker,*[10] in which Ntsebeza AJ, followed the minority decision of Olivier JA in *Eerste Nasionale Bank van Suidelike Afrika Bpk v Saayman NO,* [11] wherein the learned Judge found that the principle of *bona fides* is very much part of the modern law of contract in South Africa, it being part and parcel of the moral and ethical values of justice, equity, and decency, as well as *Janse van Rensburg v Grieve Trust CC,* [12] wherein Van ZYl

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(1996) 256. The writer also calls for legislative intervention whereby courts will openly be obliged to perform their duty of policing unfair contract terms. See further Van Aswegen (1994) 458 who finds for the courts to be given an equitable discretion to declare invalid or modify a contract or contractual clause which does not conform to the standard of good faith. The courts as early as 1881 in *Judd v Fourie* (1881) 2 EDC 41 (76) expressed the view that good faith is required in all contracts. The Appellate Division as far back as 1923 in the case of *Neugebauer and Co v Herman* 1923 AD 564 also endorsed the principle that *boni fides* is required from both parties to a contract of sale. It was especially, with the interpretation of contracts where the contracts were ambiguous and capable of more than one construction that the courts adopted a practice to consider good faith as means to seek an answer. This position was recognized in *Trustee, Estate Cresswell and Durbach v Coetzee* 1916 (AD) 14, Rand Rietfontein Estates Ltd v Cohen 1937 (AD) 317 in which use was made of equitable construction. The South African courts, including the Appellate Division (as it was then) recognized the principle that all contracts are *bonae fidei*. See *Meskin NO v Anglo American Corporation of SA Ltd and Another* 1968 (4) SA 793 (W); *Savage and Lovemore Mining (Pty) Ltd v International Shipping Co (Pty) Ltd* 1987 (2) SA 149; *Paddock Motors (Pty) Ltd v Igesund* 1976 (3) SA 16 (A); *Tuckers Land and Development Corporation (Pty) Ltd v Hovis* 1980 (1) SA 645 (A). In the latter case the court specifically states the requirement of *bona fides* underlies our law of contract. The curtain was however, drawn on the recognition of *bona fides* as a criterion in contract law and more in particular, that *bona fides* had developed to fulfil the function of the *exceptio doli*. The court continues to make it clear an equitable discretion with our courts, is no part of our law. See however, the Jansen JA minority decision. But the recognition of good faith as a norm in the South African law of contract flared up in a number of cases *inter alia* the minority judgement of Olivier JA in *Eerste Nasionale Bank van Suidelike Afrika Bpk v Saayman NO* 1997 (4) SA 302 (A). The learned Judge argues that there is a close connection between the doctrine of *bona fides* and that of public policy, public interest and suggests that *bona fides* becomes a open norm or free floating defence. Van Zyl J in the case of *Janse van Rensburg v Grieve Trust CC* 2000 (1) SA 315 (C) pleaded for the development of good faith as a norm to control unconscionable and unfair contracts. A similar approach was taken by Ntsebeza AJ in *Miller and Another NNO v Donnecker* 2001 (1) SA 928 (C) when following the minority judgement of Olivier JA in *Eerste Nasionale Bank van Suidelike Afrika Bpk v Saayman NO* 1997 (4) SA 302 (SCA). The re-introduction was also pleaded for by Davis J in *Mort NO v Henry Shields-Cheat* 2001 (1) SA 404 (C).

7 2002 (4) SA 1 (SCA).

8 2002 (6) SA 27 (SCA).

9 2002 (4) SA 1 (SCA).

10 2001 (1) SA 928 (C).

11 1997 (4) SA 302 (SCA).

J found justification for an application of good faith in the fact that such an interpretation was consonant with the spirit and values contained in the Bill of Rights, and the *Mort NO v Henry Shields-Chiat* [13] case, in which Davis J supported the reasoning of Van Zyl J in *Janse van Rensburg v Grieve Trust* (supra), that in performing their constitutional mandate the courts could use the concept *boni mores* to infuse our law of contract with the concept of `good faith'.

One of the reasons advanced by the courts is this, to give judges, *carte blanche,* discretion to ignore contractual principles which they regard as unfair and unreasonable, would be in conflict with the rules of practise. Such practise, according to the Supreme Court of Appeals, would be in conflict with the principle of *pacta sunt servanda* and the pronouncements of the enforcement of contractual provisions will, ultimately, be determined by the presiding judge, who has to determine whether the circumstances of the case are fair and reasonable or not. The further argument is advanced that the criteria would no longer be the principles of law but the judge himself/herself.

In a subsequent judgement of *Afrox Healthcare Bpk v Strydom,* [14] the court, per Brand AJ, expressed a strong opinion against the minority judgement of Oliver AJ in the case of *Eerste Nasionale Bank van Suidelike Afrika Bpk v Saayman NO,* [15] and the Cape High Court decisions discussed *supra*. The court, consequently, supported the views expressed by Cameron AJ in *Brisley v Drotsky,* [16] in which it was stated that good faith or *bona fides* has never been an independent, free-floating principle in South Africa as an aid to pronounce on the validity or invalidity of contractual provisions. This position was again supported by Ngcobo J delivering the majority judgement in *Barkhuizen v Napier*. [17]

But, following the decisions of *De Beer v Keyser and Others*[18], *Afrox Healthcare Bpk v*

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12 2000 (1) SA 315 (C).

13 2001 (1) SA 464 (C).

14 2002 (6) SA 27 (SCA).

15 1997 (4) SA 302 (SCA).

16 2002 (4) SA 1 (SCA).

17 2007 (5) SA 323 (CC).

18 2002 (1) SA 827 (SCA).

Strydom[19], *Brisley v Drotsky,* [20] the writer *Hawthorne* [21] was critical of the court for not considering properly the contention that the contractual provisions (indemnity clause in the Afrox case), were contrary to the principle of good faith. For that reason, the writer contends, the time is ripe that *"an imprecise notion of good faith should be given precision by our courts, that the sacrosanct freedom of contract should be tempered by this same good faith in order to end the abuse of the contractual terms."*

This is supported by the writers *Lubbe and Murray* [22] who regard the concept of *bona fides* as *"an informing principle in our law of contract"* which *"will show up the unconscionability aspect after the conclusion of the contract, having regard to it being contrary to the principle of bona fides."* This, the author's state, would be a positive development in the South African law of contract and which aligns with the development in overseas jurisdictions.

There are also constitutional challenges by certain legal writers who suggest that the constitutional dispensation has the necessary potential to decide by equity, whether a contractual provision is unreasonable, unconscionable or oppressive. [23] *Hawthorne* [24] suggests that the open norms of the common law such as; *bona fides*, public policy, and *boni mores* should be developed in accordance with the constitutional mandate.

But, there is opposition to the suggestion that *"good faith"* be developed to form an open norm of the law of contract. It is fact that *"good faith"* is unlikely to provide justification for a paradigm shift.

The South African Law Commission, in its Report [25] and Draft Bill, [26] does however suggest

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19 2002 (6) SA 211 (SCA).

20 2002 (4) SA 1 (SCA).

21 "Closing of the open norms in the law of contract" (2004) *THRHR* 294 at 298-301.

22 (1988) 733-774.

23 Cockrell "Second-guessing the exercise of contractual power on rationality grounds" 1997 *Acta Juridica* 26 41-43; Christie (1997) 3H-1I; Glover "Good faith and procedural unfairness in contract" 1998 *THRHR* 328-325; Hutchinson (1991) 720.

24 Hawthorne (2003) 115.

25 South African Law Commission Report on *Unreasonable Stipulations in Contracts and the Rectification of Contract* (1998) 56.

that a paradigm shift is necessary as a corrective mechanism to the current position. Authority should be given to the courts to cope with unreasonableness, unconscionable ness or oppressiveness in contract.

The principle of fairness is a concept which found favour with the English courts as far back as 1770. The Chancery during this period regularly set aside transactions which, they felt, were excessively harsh or unfair. In the eighteenth century, the adoption of the principle of fairness was based upon public interests, as the courts believed it was their duty to protect the weaker contracting parties from exploitation by the stronger parties to the contract. This situation, according to the writer *Atiyah,* [27] still seems to be the position today, in that the English courts still protect a contracting party where the contract, or provisions of the contract, is unfair or inequitable. But, despite the recognition which good faith has received in protecting weaker contractants against unfairness and inequity, good faith, according to the English writers *McKendrick* and *Beatson et al*, [28] has never featured as a separate defence such as public policy, fraud etc.

But, notwithstanding the difference of opinion expressed by the English legal writers, and the reluctance shown by English courts, sometimes, to make use of the principle of good faith, the legislature stepped in by introducing the *Unfair Contract Terms Act* 1997 and the *Unfair Terms in Consumer Contracts Regulation* 1999. The legislative intervention had as its aim, the adoption and protection of good faith in contract in order to bring about fairness in contractual terms. It is especially where exemption clauses have been included in contracts, excluding liability for personal injuries caused by negligence, that the courts have used their discretion to declare these clauses ineffective on the ground of unfairness. [29]

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26 Section 1(1) of the Draft Bill on the *Control of Unreasonable or Oppressiveness in Contracts or Terms* (1998) 56.

27 *The Rise and Fall of Freedom of Contract* (1999) 337-340.

28 *Contract Law Text, Cases and Materials* (2003) 533 respectively *Contra* Bronswood *Contract Law: Themes for the twenty first century* 2000 Paras 5.15-5.18 who suggests that the absence of good faith leaves the case of contract ill-equipped to achieve fair results, leaving judges unable to do justice at all. But English courts have not been averse to adopting the principle of good faith. The expectancies of contracting parties, by the courts, have metaphorically been expressed as "playing fair", "coming clean" etc. See *Inter Foto Library Ltd v Stilleto Visual Programme Ltd* (1989) 1 Q.B. 433, 439. In the leading English case of Walford v Miles (1992) 2 AC 128 the Court of Appeal emphasizes the need for negotiations to take force in good faith. But the court also does not support the protagonists who suggest that good faith should be a free-floating defence. But since this case certain English courts have come out in favour of good faith.

29 Beatson Good Faith and Fault in Contract Law (1995) 14-15. It is especially, the writer Chitty *Chitty on Contracts* (1999) Para 1.024 who emphasizes fairness, or reasonableness, where provisions of a contract are interpreted. In this regard, he suggests, the more unreasonable the result, the more unlikely it is that the parties can have intended it. The interpretation of the good faith requirement in the *Unfair Terms in Consumer Contracts Regulations* 1994 receive the attention of the House of Lords in the case of *Director General of Fair Trading v First*

The American law of contract was profoundly influenced by its English counterpart. From very early days the principles of equity governing contracts, *inter alia,* the various degrees of bargaining unfairness and the harsh results they bring with them, as well as the impact of unfair terms upon contracting parties, found their way into the American law of contract. [30]

A further principle received in American law of contract is that of good faith, which was viewed as a `safety valve' adopted by Judges to ensure fairness in contracting. This was founded upon the philosophy that ethics and fairness, in law, form part of contract. [31]

Although judges, at the time, used public policy to develop fairness in contract, in order to protect the public welfare against unfair contracts and contractual terms leading to unreasonable hardship, it was considered, at the time that not enough was done by the courts. For that reason, American contract law extended its safety mechanism against contractual abuse by accepting the interventions that good faith, fair dealing and unconscionable-ness brought with them. [32]

The philosophy behind including good faith as part of the intervention is said to be based on the reasonable expectations of the contracting parties, which in turn is premised upon community-based standards.

In this regard, a paradigm shift was caused in the American law of contract, in that, there was a movement away from the extreme individualism, of the nineteenth century and early part of the twentieth century, to societal norms and values which have become one of the trademarks of the twentieth century and beyond. Apart from the "reasonable expectation"

National Bank (2001) UKHL 52 in which the court gives recognition to the principle of good faith.

30 For a discussion on the influence of the English law see Hillman *The Richness of Contract Law* (1997) 130-131. As far as case law is concerned, as far as 1926 in the case of *Cobb et al v Whitney* 124 Okla 188, 255, 566, 1013 (1926) the court in recognizing the principles of right and fair dealings state the aim thereof is to achieve "*justice between man and man*" but even before this case in 1873 the Supreme Court of the *United States in Railroad Company v Lockwood* 84 LS 357 (1873) reflected on the `fairness and reasonableness in contracts'.

31 It is especially legal writers such as Summers "The general duty of good faith - its recognition and conceptualization" 69 *CORNELL L.REV* (1982) 143-144; Newman "The hidden equity: An analysis of the moral content of the principles of equity" 19 *Hastings L.J.* (1967) 129-130, 147 and Dematteo *Equitable law of contracts: Standards and Principles* (2001) 10-16 who devote their attention to the rationale for the reception of good faith in contract law in America.

32 Dematteo (2001) 153-155 emphasize that it was especially the increase in the use of standard form contracts which often lead to the exploitation of contractual parties which lead to an acute awareness that other intervening in the form of good faith etc was necessary.

motivation alluded to hereinbefore, other factors also included the demand for justice based upon the seeking, by the community, of what is fair and unfair. [33]

The recognition of community interests and standards in contracts has had a significant influence on the law of contract in America.

Some of the issues identified as affecting community interests include, the concern about one-sided and often unfair contracts involving unsophisticated contractants, the unequal bargaining positions of some contracting parties, the imprudent judgements of, especially, the weaker and often, unsophisticated, contracting parties. [34]

Besides the common law interventions by the courts, the legislature also stepped in, in promoting fair dealings in contracts. [35]

The intervention and acceptance of the principle of good faith, as previously discussed, is said to have made inroads into the fundamental doctrine of freedom of contract, in that, the courts are, today, less reluctant to increase their focus on justice and fairness, instead of always promoting freedom of contract at the expense of justice and fairness. [36]

Another factor universally recognised in different jurisdictions, more particularly, in the

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33 The legal writer Dematteo (2001) 153-155 views the shift from extreme individualism to community based norms and standards as an important shift in contractual philosophy.

34 It is the issues affecting community interests which Dematteo (2001) 157 opines that poses a threat to public welfare. The writer at 160-161 suggests that with the acceptance of the equitable principles such as good faith or fairness when interpreting contractual terms or provisions the courts are given an opportunity of fulfilling a court's duty to administer justice and to ensure contracting parties act justly towards each other and to avoid the advancement of self-interest.

35 The American Law Institute in 1979 promulgated Section 205 of the *Second Restatement of Contracts* setting forth an obligation of good faith in every contract as well as fair dealings between contracting parties.

36 It is the legal writer Nassar *Sanctity of contracts revisited: A study in the theory and practice of long-term international commercial transactions* (1995) 180 who writes that although the principle of sanctity of contract remains strong, it has to a certain extent given way to equitable considerations. The adoption of these principles has caused the American courts in *Henningsen v Bloomfield Motors* 161 A. 2d 69 N.J. 1960 to state that *"freedom of contract is not such an immutable doctrine ..... so that courts cannot fail to be influenced by any equitable doctrines ....."* In the case of *Kriegler v Roman* 58 N.J. 522, 279 A. 2d 640 (1971) the court recognizes that courts should not hesitate to declare as unconscionable the contracts that are contrary to good faith, honesty in fact, and observance of fair dealings. The special relationship between the contracting parties has also in the past been recognized as imposing a special duty of good faith and fair dealing. See the case of *Carnival Cruise Lines Inc v Shute* 499 U.S. 585 (1991); *Broemmer v Abortion Services of Phoenix* 840 P.2d 1012, 1015 Ariz (1992).

jurisdictions selected for the purpose of research in this thesis, is that of the principle or doctrine of unconscionable-ness. Although, as will be seen from what follows in this Chapter, in some jurisdictions the doctrine of unconscionable-ness is regarded as a free-floating defence, on the same level as public policy, fraud, etc. In other jurisdictions the doctrine is not regarded as a complete defence. Consequently, it is of import that the role of the doctrine of unconscionable-ness be discussed in this Chapter as it appears in the jurisdictions selected.

In South Africa, as will be seen from the contents of this Chapter that follows, the doctrine of unconscionable-ness has never become an independent defence, despite its roots emanating from Roman law.

South African legal writers have described the meaning and effect of unconscionable-ness in different terms. [37] But, notwithstanding the description given, there seems to be consensus amongst the writers that its application is very limited in South Africa, with its focus on the abuse of weak bargaining power contracting parties. From the discourse that follows, what will emerge is, apart from limited legislative intervention, [38] aimed at providing relief where unconscionable terms and conditions have been put into a contract leading to harsh results. It should however, be noted, the legislative intervention does not provide for general criterion of control, nor do they give the courts a control power to strike down unconscionable terms in a contract, irrespective of the nature, content or subject-matter or the unequal bargaining position in which one of the contracting parties may find himself/herself in.

The South African courts have, also, not assisted in developing the common law as means to put preventative measures in place, to prevent harm being done through the exploitation of persons having weak bargaining power. [39] Apart from the application of the rules of

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37 The most relevant description varies from unacceptable conduct in contracting or an unfair act in attempting to enforce a contract. See Lubbe and Murray (1988) 388, to the above or disproportionate or unequal bargaining power, see Aronstam (1979) 42.

38 The *Hire-Purchase Act*, the *Rent Control Act*, the *Sale of Land on Instalments Act* etc.

39 It is Aronstam (1979) 26-27 who is particularly critical of the South African courts' role in handling unconscionable contractual conduct. For the reluctance of the courts to interfere see the Appellate Division approach in *Wells v South African Alumenite Company* 1927 AD 69, 73. In *Techni-Pak Sales (Pty) Ltd v Hall* 1968 (3) SA 23, (W) 238 the Witwatersrand Division also cautioned against the `shattering of the concept of sanctity of contract'. The Appellate Division again showed its reluctance to enquire into the unconscionable ness in *Oatorian Properties (Pty) Ltd v Maroun* 1973 (3) SA 77 (A). More recently, the Supreme Court of Appeals in three more recent judgements of *Brisley v Drotsky* 2002 (4) SA 1 (SCA) 35 C.E.; *De Beer v Keyser and Others* 2002 (1) SA 827 (SCA); *Afrox Healthcare Bpk v Strydom* 2002 (6) 21 (A) demonstrated that the courts will not outright recognize

interpretation, *inter alia,* the *contra proferentem* rule; the courts have been particularly reluctant to extend the principles of the common law to curb unconscionable contractual conduct. It has been suggested therefore, that the legislature step in and bring about a paradigm shift in South Africa, by putting in place a doctrine of relief against unconscionable transactions. [40]

The doctrine of unconscionable-ness, as far back as the second half of the 17th century, found its way into English law as part of the adoption of equitable relief to protect the weak, the foolish and the thoughtless from exploitation and oppressions. It was, especially, the court of Chancery which struck down unreasonable and unconscionable agreements. It was especially in transactions of unfair bargain, in which the equitable relief in this form was applied. [41]

The influence of the doctrine of unconscionable-ness began to be felt in its application, especially with the advent and the increase in the usage of standard from contracts. In this way, concern was placed on the substantive fairness of contract, i.e., the nature of the contract, rather than the events which lead to the formation, i.e., procedural fairness.

What is, however, significant to note, is that despite the widespread use of unconscionable-ness and the application thereof by the English courts, [42] it has never become a fully fledged defence in English law. In fact, during the 20th century the English courts became more reluctant or less willing, to use the doctrine of unconscionable-ness to strike down contracts or contractual clauses, notwithstanding their unfairness. As will be seen from the discussions in this Chapter, a debate rages between the legal writers whether the doctrine

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unconscionable-ness as an independent defence.

40 Aronstam (1979) 42 and Hawthorne (2003) 116-118 are particularly in favour of legislature intervention to bring about the establishment of a doctrine of relief against unconscionable transactions. This was also mooted by the South African Law Commission in 1998.

41 The rationale for the recognition of unconscionable-ness to strike down unfair bargains is stated by the legal writers Peden, Chin Nyuk-Yin, McKendrick, Treital and Beatson as stamping out unfair, inequitable agreements entered into in an unconscientious manner, where advantage is often taken by the stronger contracting party over the foolish or the weaker contracting party.

42 The cases in which the courts were prepared to give relief where unconscionable bargains were present include *Earl of Aylesford v Morris* (1873) 8 CH App 484, *Fry v Lane* (1888) 30 CHD 312, *Knights Bridge Trust Estate v Byrne* 1933, *Cityland and Property Holdings Ltd v Dabrah* (1968); *Multi Service Bookbinding Ltd v Marden* (1979) CH 84; *Lloyds Bank Ltd v Bundy* (1975) QB 326; *Hart v O'Connor* (1985) AC 1000 PC; *Bovitany v Pegott* (1993) 69 PandCR 298; *Credit Lyonnais Bank v Burch* (1997) 1 ALL ER 144; *Contra Royal Bank of Scotland P/C v Etrider (No 2)* in which the court decline to apply the doctrine.

of unconscionable-ness ought to be retained. [43] There has been a suggestion by *Sayton* [44] that the doctrine of unconscionable-ness ought to be codified.

Unconscionable-ness is a concept which is widely accepted and known, in the United States of America, in contract law. The doctrine found its way into American law via English law, and similarly, its foundations are galvanised in equity, ethics and fairness in law.

The application of the doctrine was particularly enforced with the advent and usage of adhesion contracts or standardized contracts. The rationale for its application in respect of standardized contracts is founded by the American legal writers, on different grounds. But, generally, it concerns the harshness and unreasonableness which inequality of bargaining power brings. [45]

The American courts, when adopting and enforcing the doctrine of unconscionable-ness, did so in individualized cases, so much so, that there was no blanket application in all cases, irrespective of the results often being oppressive and harsh. Moreover, this resulted in a lack of consistency shown by the American courts, so much so, that critics remarked that the application of the doctrine was regarded as highly unreliable and unpredictable. [46]

Consequently, what followed was the advocacy of contractual reform by many American

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43 Beal "Unfair Contract Terms Act" *British Journal of Law and Society* Vol. 5, No 1 (Summer 1978) and Collins *The law of contract* (1997) 251 express the view that where as in British law of contract, the system is geared predominantly on freedom of contract, there ought to be no interference. *Contra* Waddams "Unconscionability in Contracts" *The Modern Law Review* Vol. 39 (4) July (1976) 369 at 371 who suggests that despite the recognition of the criteria of unconscionable-ness, freedom of contract will be retained.

44 "The unequal bargain doctrine" Lord Denning in *Lloyds Bank v Bundy* (1976) 22 *MCGILL LJ* 94 at 108.

45 Deutsch *Unfair contracts - The doctrine of unconscionability* (1972) 1-4 and, Williston *A Treatise on the Law of Contracts* (1957) Para 1763A expresses the view that it is especially, standard contracts including disclaimers of warranties and limitation of remedies, which are often one-sided in favour of companies, which brings oppressive and harsh results that need to be curbed, with relief being given through unconscionability in contract.

46 The first traces of the application of the doctrine of unconscionability goes back to 1811 in *Cutler v How* 8 Mass. 257 (1811) and *Baxter v Wales* 12 Mass. 365 (1815). The courts continued to motivate for the recognition of the doctrine in the latter part of the 19th century in *Scott v United States* 79 U.S. (12 Wall) 443, 445 (1870) and the Supreme Court decision of *Hume v United States* 132 U.S. 406 (1889). First attempts were made to find a general application of unconscionability in 1942 in the case of *United States v Bethlehem Steel Corp* 315 U.S. 284, 312 (1942) in which the court lay down a general rationale for the doctrine. The courts progressed in their attempts to generalize the application by embodying some principles eventually incorporated in the *Uniform Commercial Code* 1965. One such case was that of *Campbell Soup Co v Wentz* 172 F2d 80 (CA) 1948; See also *Henningsen v Bloomfield Motors Inc* 75 Alr 2d 1 (1960) 24.

writers. It was felt, at the time that, legislative intervention would lead to greater consistency in stamping out the unfairness and harshness of certain contracts, or contractual provisions.

What followed was the enactment of S2-302 (1) of the *Uniform Commercial Code,* 1965. The effect thereof was that the courts were encouraged to openly strike down provisions, harmful to a contracting party, and which were unconscionable at the time it was made. The Code also gave the judges greater power to police agreements, or clauses and to identify clauses which, due to their unconscionable-ness, should be stuck down. The application of the Code found favour amongst the American legal writers and the courts alike, and has most certainly left its mark in the American law of contract, as a factor impacting on contractual freedom. [47]

Public policy, apart from the other factors impacting on contractual freedom, as discussed infra, is possibly the most widely recognised and used defence, in the jurisdictions chosen for this thesis, which limits contractual freedom and the enforcement of contractual agreements once entered into, i.e., the *pacta sunt servanda*. This is particularly relevant in the South African law of contract. [48]

The rationale for the existence of public policy as a defence, in modern times, is said to lie in the broader concept of paternalism, in which public interest demands that the courts protect the weaker party in the law of contract. The effect thereof is that public policy demands that a contract offending against the public interest, be struck down and declared invalid. [49]

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47 The most prominent American legal writers Llewellyn *The common law tradition* (1960) 675 and who is regarded as the principal architect of the Code sets out the advantages which the Code brings with it. The writers Summers and Hillman, *Contract and related obligations - The doctrine and practice* (1987) 577, express the view that the Code reflects the moral sense of the community in curbing the harshness and oppressiveness which some contracts bring. The American courts in a number of landmark cases have expressed their approval with the enactment of the Code. The rationale for its enactment is discussed with approval in *Jones v Star Credit Group* 59 Misc 2d 189, 298 N.Y.S. 2d 264. It is especially in cases involving disclaimers in contract which has inspired the American courts to enforce S2-302 of the Code. See the judgement of the New York Supreme Court of Appeals in the case of *Industrialised Automated and Scientific Equipment Corp v R.M.E. Enterprises Inc* 58 A.D. 2d 482, 396 N.Y.S. 2d 427.

48 In this regard the author Kahn *Contract and Mercantile law* (1988) 32, expresses the view that our common law has, in a sense, encroached on the freedom and sanctity of contract by its condemnation of contracts against public policy. Hutchinson et al (1991) 431 identifies the need for the freedom of contract in the form of public policy, when he states *"the necessity for doing simple justice between man and man".*

49 It has long been established in South Africa, by the Appellate Division, in the cases of *Morrison v Anglo Deep Gold Mines Ltd* 1905 (AD) 775; *Jajbhay v Cassim* 1939 (AD) 577, *Sasfin (Pty) Ltd v Beukes* 1989 (1) SA 1 (A), *Botha (now Griesel) v Finanscredit (Pty) Ltd* 1989 (3) SA 773 (A), that courts will not shrink from their duty of declaring

It is, however, a firmly entrenched principle, embedded by our legal writers and the courts alike, that the power to declare a contract, or a term in a contract, invalid as *contra bonos mores* ought to be exercised sparingly and only in the clearest of cases. [50] There are no numerus clauses as to precisely when the courts will come to the rescue of a contracting party who has been harmed. Many writers suggest numerous different criteria to be used as aids in determining when the courts should step in and assist. [51] What is significant is the fact that judicial thinking is influenced by two main streams, namely; common law factors, *inter alia,* agreements injuring public service, unreasonable restraint of trade agreements, and agreements to escape liability for fraud as statutory enactments affecting public interests.

Strong voices have also been raised to include good faith, or *bona fides,* in determining whether public policy forbids the enforcement of the contract. [52]

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a contract contrary to public policy when the occasion so demands, even if it means restricting a person's liberty or freedom to act. There is also the stance taken by the Transvaal Division in *Eastwood v Shepstone* 1902 TS 294.

50 It appears from the South African writings, that, where public harm will be caused, or public interests will be adversely affected, the courts should step in to protect the public. See Joubert (1997) 215 and Jordaan "The Constitution's impact on the law of contract in perspective" 2004 *De Jure* 58 at 61. This was the clear message of our Supreme Court of Appeal in the more recent judgements of *De Beer v Keyser and Others* 2002 (1) SA 827 (SCA), *Brisley v Drotsky* 2002 (2) SA 1 (SCA); *Afrox Healthcare Bpk v Strydom* 2002 (6) SA 21 (SCA), in which the court, in all three matters, emphasized the fact that although the courts have the powers to invalidate bargains on the ground of public policy, the impropriety of the transaction should be convincingly established in order to justify the exercise of the power. The Supreme Court of Appeal, in all these matters, place emphasis on the freedom of contract and sanctity of contract and point out that public policy, generally, favours the utmost freedom of contract. But, as will be seen, infra the dicta in the three well-known cases, did not escape severe criticism from our legal writers. In this regard Hawthorne infra, suggests that *pacta sunt servanda* should not be placed on a pedestal at the expense of unconscionable terms or contracts, thus `effectively eliminating equality'. It is especially in the case of *Afrox Healthcare Bpk v Strydom, supra that* the court missed a golden opportunity to follow the mainstream of foreign jurisdictions, wherein disclaimer clauses against liability for medical negligence are viewed as an infringement of *boni mores* or against public policy. Instead, the court chose to keep the South African legal position in a swamp, in which morality has no place, but business considerations weigh more heavily than normative medical ethics.

51 The criteria used by the various writers include; the general sense of justice of the community which manifests itself in the form of public opinion. But, cautions Christie (2005) 400, 402, superficial public opinion does not suffice, as it swings like a weather cock. This approach, it is argued, causes stability to the law of contract as it is not left at the mercy of future public opinion.

52 It is especially Hefer "Billikheid in die kontraktereg volgens die Suid-Afrikaanse Regskommissie" *TSAR* 2000-1142 at 153-154 and Van Aswegen (1994) 448 at 458-459, who believe, the process of contracting requires honesty and good faith, and prohibits the unreasonable promotion of one's own interests. There is a long history of South African case law preceding the *Bank of Lisbon South Africa Ltd v Ornelas* 1988 (3) SA 580 (A) which used the concept "good faith" to determine whether public policy had been violated or not. They include *Tuckers Land Development Corp (Pty) Ltd v Hoves* 1980 (1) SA 645 (A), *Mutual and Federal Insurance Co Ltd v Oudtshoorn Municipality* 1985 (1) SA 419 (A). The death knell to this practice was, however, given in the case of *Bank of Lisbon South Africa Ltd v Ornelas supra*. From time to time, as with support in legal writings, our courts do find

The principles of equity, fairness and reasonableness are also seen, by many South African writers, as a determining factor in invalidating a contract, or contractual provisions, which are harsh and oppressive. [53]

Although some legal writers have grappled, over the years, with the question of whether morality and ethics influence public policy, which may lead to the invalidity of contracts; more recently greater calls have been made for their application in invalidating contracts. [54]

More recently normative medical ethics and medical law principles have also been mooted, by academic legal writers, as factors which ought to be considered when deciding the unenforceability of contracts or contractual provisions due to public policy. [55]

The main thrust of the argument in support of the recognition of normative ethics is this: normative medical ethics and medical principles bring about medical standards of behaviour against which the behaviour of practitioners and hospitals, as well as nurses, ought to be measured. [56]

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justification for an application of good faith. The cases of *Janse van Rensburg v Grieve Trust CC* 2000 (1) SA 315 (C) and *Miller and Another NNO v Donnecker* 2001 (1) SA 928 (C) are however, not cases decided in the Supreme Court of Appeals.

53 The legal writers, who have paid careful attention to this factor, include those mentioned in infra. This factor is also supported by the South African Law Commission, who recognized the need for legislation against unfairness, unreasonableness, unconscionability or oppressiveness, as it serves public interest. The South African courts, though not over-eager to stick their necks out to nullify agreements merely because they appear to be unreasonable or unfair, in the cases of *Zuurbekom Ltd v Union Corporation Ltd* 1947 (1) SA 514 (A); *Paddock Motors (Pty) Ltd v Ingesund* 1975 (3) SA 294 (D); *Louw and Co (Pty) Ltd v Richter* 1987 (2) SA (W) have, especially in restraint clauses, decided not to enforce contracts that are unfair or unreasonable.

54 Joubert (1997) 132-137 argues that good morals and public interests do not provide certainty as they differ, from society to society, both in place and in time. Hutchinson et al (1991) 435, however, argue that agreements are against good morals where they offend our conscience, or sense of what is right, or modesty'. Van der Merwe et al (2003) 231, argue that they impact on the ideals of individual autonomy and freedom of action. The influence of ethics, and how they impact on public policy, has been recognized in different ways by the South African legal writers. Zimmerman et al (1996) 246, see the role of ethics as being vital in curbing the exploitation, by the stronger party in a contract, of the weaker contracting party. Hawthorne (2004) *THRHR* 274, suggests that good faith should become an underlying ethical value. The South African courts have, from time to time, grappled with questions of morality and how these factors influence public policy in deciding whether an agreement is invalid or not. The cases of *Dodd v Hadley* 1905 T.S. 439, *Silke v Goode* 1911 (TPD) 989, *Ailas Organic Fertilizer (Pty) Ltd v Pikkewyn (Pty) Ltd and Others* 1981 (2) SA 173 (T); *Lorimar Productions Inc and Others v OK Hyperama Ltd and Others; Lorimar Productions Inc and Others v Dallas Restaurant*, demonstrate the court's willingness to consider the morals of the market place.

55 The writers Carstens and Kok (2003) 449-452 persuasively argue, in deciding the enforceability of, especially, medical or hospital contracts, medical ethics and medical principles derived from the Hippocratic Oath, the Declaration of Geneva and other medical Codes and ethics, ought to be considered.

56 The primary aim of normative medical ethics, according to Carstens and Kok (2003) 449-452, is set to

Whether medical standards of behaviour may be compromised by the usage of waivers, or disclaimers against medical negligence in hospital contracts forms an integral part of the research undertaken in this thesis. In many jurisdictions, as will be seen in Chapter 13, such attempts to exclude liability for negligent acts by the use of exculpatory clauses or disclaimers would be void as against public policy. [57]

It can also be argued that in this regard, the legal convictions of the community dictate that a breach of an ethical duty, by causing harm to the patient and not to act in the patient's best interest, would also amount to a breach of legal duty.

Foreign law is sometimes also regarded as an influencing factor and as a means of balancing conflicting interests. It is also sometimes regarded as a persuasive authority in shaping the South African law. [58]

Since the arrival of the Interim Constitution 1992 and the Final Constitution, and since South Africa became a Constitutional State, many writers have advocated that the effect of the Constitution and the values derived from the Constitution must be looked at in order to determine whether a contract, or contractual provision, is against public policy or not. [59] The doctrine of public policy has been part and parcel of the English law for many centuries.

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concentrate on "to do no harm" to the patient and to act in the best interests of the patient.

57 The writers Carstens and Kok (2003) 449-452, in this regard, opine *" ..... disclaimers against medical negligence in hospital contracts would amount to an unreasonable/unfair/unethical acceptance on the part of a patient to contract to the possibility of harm (in the form of personal injury/death resulting from medical malpractice by an attending medical practitioner (albeit in the hospital setting) who is ethically bound not to do harm"*.

58 Some of the writers, including Neethling et al (2005) 19-20, 40-41, believe the balancing of conflicting interests involves the convictions of the South African community and not foreign countries. Dugard (1994) 25, on the other hand, believes, with the advent of our constitution, the courts should consider international law in shaping South African law. There are mixed reactions, by the South African courts, on whether foreign law should be followed or not. Kriegler J in *Bernstein v Bester* 1996 (4) BCLR 449 (CC) warns against "*alien concepts or inappropriate precedents*". Other courts, *inter alia,* the Ciskei High Court in *Matinkinca and another v Council of State, Ciskei and Another* 1994 (1) BCLR 17 (CC), talk about `values emerging from the civilized international community'. In *S v Makwanyane* 1995 6 BLCR 665 (CC), Chaskalson P cautions that although we can derive assistance from foreign law, we are not bound to follow it. But in the case of *Carmichell v Minister of Safety and Security and Another (Centre for applied legal studies*) 2001 (4) SA 938 (CC), the Constitutional Court relied heavily on English law and the European Court of Human Rights to develop our common law. The court expressed the view that the South African Constitution encourages our courts to consider foreign law.

59 Van der Merwe et al (2003) 14, 18 suggest that in determining the enforceability courts must look at whether the common law, as it stands, is not incongruent with the Constitution. Christie (1997) 3H-6 suggest, regard must be had whether the provisions of the Bill of Rights would regard the contract or provisions of the contract as against public policy. It is especially, Hopkins (2003) 155 who argues strenuously that the common law which regulate the enforcement of contracts must underline the Bill of Rights.

Owing to the imprecise nature in and inconsistency of, its application in declaring contracts or provisions of contracts against public good or `*contra bonos mores*', the doctrine was subjected to much criticism by judges and writers alike, especially during the 1800's. The term "public policy" was given all kinds of names, the most notable of which was that it was an `unruly horse to ride'. [60]

For that reason, its application in English law has been sparing. Moreover, two fundamental reasons are advanced why some writers have even suggested that the categories of common law are closed, and the doctrine ought only to be applied to a type of contract to which it has not previously been applied. Firstly, there is a lack of certainty in its application. Secondly, parliament's role in passing legislation in an attempt to curb unfair and unreasonable contracts or contract terms [61] has also curbed its development.

But, notwithstanding the aforementioned suggestion, the courts have not been reluctant to declare certain contracts, or contractual provisions, as against public policy where they affect morality, the administration of justice, restraint of trade etc. [62]

American law does recognize public policy as one of the factors which impact upon the validity of contracts or contractual provisions, despite the great emphasis being placed by American legal writers and the courts, on the doctrine of freedom of contract and the sanctity of contract. [63]

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60 It is precisely for that reason why Burroughs J, in the case of *Richardson v Mellish* (1824) 2 Bing 229, would call the maxim `a very unruly horse'. This dictum has been repeated in various dicta over many years, the most recent of which, is the case of *McFarlane v Tayside Health Board* 2000 2. A.C. 59 in which the court also stated that public policy is a term which `reasonable persons may disagree' on.

61 It was stated by Lord Halbury in *Janson v Driefontein Consolidated Mines Ltd* (1902) A.C. 484 that courts should guard against inventing new heads of public policy. The reason, judges can so easily change depending on their moods.

62 But there is sufficient authority that the English courts will defend economical, social and moral conditions; adapt to these changes and consider those factors as perhaps, contrary to public policy. For that reason Lord Denning in *Enderby Town Football Club Ltd v The Football Association Ltd* 1971 CH 591 comments: *"With a good man in the saddle, the unruly horse can be kept in control".* The court in *Johnson v Moreton* (1980) A.C. 37 refers to instances when the courts will interfere, namely, public interest. Likewise in *Cheal v Apex* (1980) 2 A.C. 180 the court comments with authority that public policy `move with the times'. This is echoed in *Ciles v Thompson* (1994) 1 A.C. 142 especially, where contractual terms are `injurious' to the public.

63 It is especially the eminent writer Williston (1972) Para 1630, who regards the right of individuals to enter into contracts, and the prevention of unreasonably restricting them to make their own contracts, as a super-imposing factor in American law, quoting the dictum of *Printing and Numerical Registering Co v Sampson* 19 L.R. Eq. 462, 465 (1879) in which it was stated that *"men of full age and competent understanding shall have the utmost liberty of contracting ..... This being paramount public policy to consider ....."*

The rationale for the recognition of the exception is said to be founded upon the protection of the general public against socially undesirable conduct and injury to public health, safety and welfare. [64]

Although certain definitions have been given to public policy, there is no united description of the concept. It has also been stated that the nature and scope of public policy is to a great extent influenced by contemporary factors such as, social customs, economic needs, and moral aspirations. For that reason there is no absolute rule by which to determine what contracts are repugnant to the public policy.

The American courts throughout the years developed rules and practises in determining whether a contract is against public policy or not. They include looking at each case individually and considering the purpose of the contract and the situation of the parties. Language plays a major role in determining the intention of the contracting parties. [65]

But, it is clear; that the American courts would rather enforce contracts than have contracting parties escape their obligations on the pretext of public policy. For that reason, it has been suggested that exercising their power to declare a contract void as contrary to public policy should be done rarely and with great caution. [66]

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64 The rationale, as enumerated, is clearly stated by the American courts in the following cases, but not necessarily restricted thereto, namely: *Cohen Insurance Trust et al v Stern et al* 297 Ill.App 3d 220 696 N.E. 2d 743, 231 Ill Dec 447; *Schurman-Heinz v Folsom* 328 Ill 321, 330, 159 N.E. 2d 599 (1983); *Diamond Match Co v Rieber* 106 N.Y. 473, 13 N.E. 419 (1887); *Zeitz v Foley* 264 S.W. 2d 267 (1954); *Ingalls v Perkins* 763 P. 761 (1928); *Anderson et al v Blair* 80 So. 31 (1918); *Liccardi et al v Stolt Terminals Inc et al* 178 Ill 2d 540, 687 N.E. 2d 968 227 Ill. Dec 486 (1997); *Perkins v Hegg* 212 Minn. 377, 3 N.W. 2d 671 (1942); *Trotter v Nelson* 684 N.E. 2d 1150 (1997); *Skyline Harvestone Systems v Centennial Insurance Co* 331 N.W. 2d at 109 quoted in *Walker v American Family Mutual Insurance Company* 340 N.W. 598 (1983).

65 This was clearly the position considered and taken in the cases of: *Smith v Idaho Hospital Services Inc d/b/a Blue Cross of Idaho* 89 Idaho 499, 406 P. 2d 696 (1965); *Cohen Insurance Trust v Stern et al* 297 Ill App. 3d 220, 696 N.E. 2d 743, 231 Ill Dec 447 (1998); *Home Beneficial Association v White* 106 N.Y. 473, 13 N.E. 419 (1887); *Anderson et al Blair* 80 So. 31 (1918); *Twin City Pipe Line Co et al v Harding Glass Co* 283 U.W. 353, 51 S.Ct 476 (1931); *Eichelman v Nationwide Insurance Company* 551 Pa. 558, 711 A. 2d 1006 (1998); *Liccardi et al v Stolt Terminals Inc et al* 178 Ill. 2d 540, 687 N.E. 2d 968, 227 Ill. Dec 486 (1997); *Trotter v Nelson* 684 N.E. 2d 1150 (1997).

66 Williston (1972) Para 1630 opines that the power to declare a contract void as contrary to public policy is not open-ended. It should be so declared only in instances where it is clear and unmistakably so. The American courts have, throughout, adopted the same principles in their pronouncements. The principle was enunciated in the following cases, but not necessarily restricted to the mentioned cases, namely: *Hoyt v Hoyt* 213 Tenn. 177, 372 S.W. 2d 300 (1963); *Zeitz v Foley* 264 S.W. 2d 267 (1954); *Home Beneficial Association v White* 180 Tenn. 585, 177 S.W. 2d 545 (1944); *Martin v Alianze Life Insurance Company of North America* 573 N.W. 2d 823 (1998); *Walker v America Family Mutual Insurance Company* 340 N.W. 2d 599 (1983); *Twin City Pipe Line Co et al v Harding Glass Co* 283 U.S. 353, 51 S.Ct 476 (1931); *Diamond Match Co v Rieber* 106 N.Y. 473, 13 N.E. 419 (1887); *Ingalls v Perkins* 763 P. 761 (1928); *Eichelman v Nationwide Insurance Company* 551, Pa 558, 711

Despite the American courts' general reluctance to declare contracts against public policy, both the American writers and the courts recognize that in certain circumstances the courts cannot turn their backs and allow contractants to suffer prejudice because of their lack of understanding. Factors, including, public interest, good morals and the injurious results some contracts or contracting provisions bring, [67] influence public policy.

It is especially in contracts containing exculpatory or exclusionary clauses, in which attempts are made to exonerate contracting parties from liability, notwithstanding their negligent conduct, often with harsh results that the American courts have stepped in and have taken an active stance to protect, particularly, the weaker party. [68] A more in-depth discussion follows in Chapters 11, 12 and 14 *infra*.

10.2 Factors impacting on contractual freedom

10.2.1 The principle of fairness

10.2.1.1 SOUTH AFRICA

10.2.1.1.1 Legal Writings

The principle of fairness, otherwise referred to as good faith or *bona fides*, is a doctrine received into South Africa from Roman Dutch Law. It is said to have a rich heritage, anchored in the foundation of equity. [69]

Equity, as it was known in Roman law, afforded a judge an equitable discretion to decide a case before him, in accordance with what he perceived to be fair and reasonable. [70] In this

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A. 2d 1006 (1998); *Perkins v Hegg* 212 Minn. 377, 3 N.W. 2d 671 (1942); *Cornellier v American Casualty Company* 389 F.2d 641 (1968); *Trotter v Nelson* 684 N.E. 2d 1150 (1997). The American decision of *Organ R.R. and Navigation Co v Dumes* (CCA) 181 F781 (1917) clearly sets out the test, namely, the case must be free from doubt and the injury to the public must be substantial and not theoretical or problematical.

67 The eminent author Williston (1975) 163, emphasizes the duty of the courts to come out in favour of contracting parties who feel hardship under these circumstances. Likewise, public interest plays a significant roll in the American courts' decision to declare a contract void as against public policy.

68 As far as 1921 Mr Justice Cardozo in *Messersmith v American Fidelity Co* 232 N.Y. 161, 133 N.E. 432, 19 A.L.R. 876 (1921) stated *"No one shall be permitted to take advantage of his own wrong."*

69 Grove 1998 (61) *THRHR* 687 at 688-689. The writer holds the view that the principle of good faith originated in the distinction made in Roman law between *negotia stricti iuris* and *negotia bonae fidei*. See also Fletcher *Responsa Meridiana* (1997) 1 at 2 wherein the writer states that the principle applicable in our law of contract today, namely, consensual contracts are "*based upon the bona fides of both, or all, parties*" is derived from the Roman Law *negotia bonae fidei*. For that reason, our legal writers have asserted, again and again, that all contracts are *bonae fidei*. For other legal writings see Zimmerman and Visser (1996) 240; Hutchinson et al (1991) 445; Kerr (2002) 301, 646; Hahlo and Kahn (1968) 137; Van Aswegen 1994 (57) *THRHR* 456.

70 Zimmerman and Visser (1996) 218-219; Van der Merwe et al (2003) 231; Lubbe and Murray (1988) 389; Fletcher 1997 *Responsa Meridiana* 2.

regard, the *exceptio doli* served as a powerful tool in bringing about a just solution. The *exceptio doli* was available as a defence, where the institution of action by the plaintiff, in itself, was improper and in bad faith. [71]

During this period substantial weight began to be placed on the element of good faith in the interpretation and performance of contracts. [72] One of the underlying reasons recognized, was that people in inferior bargaining positions required protection from an abuse of contractual power. For this reason Justinian incorporated a passage into the *Corpus Iuris Civilis*, introducing the need for the rule on *Laesio Enormis* to assist those in a weaker bargaining position. [73]

The recognition in our law of the principle of good faith, or fairness, is viewed by some academic writers, as a means of curtailing unlimited freedom of contract and the concept *pactum sunt servanda*. There are academic writers who have claimed that freedom of contract is not absolute and that it ought to be limited by the principles of justice, *boni mores* and public interest. [74] In addition, other academic writers have also added good faith as a mechanism which impacts on contractual freedom, in that, it has a limiting affect on the contractual relationship of the parties. *Bona fides* or good faith requires from the contractants that they would have mutual respect for each other's, or one another's interests, notwithstanding the fact that they promote their own interests as well. [75]

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71 Zimmerman and Visser (1996) 219; Lubbe and Murray (1988) 389; Aronstam (1979) 168-184; Kerr (2002) 642ff; Van der Merwe et al (2003) 231.

72 Van der Merwe et al (2003) 231; Hahlo *SALJ* (1981) Vol. 98 71.

73 Hopkins *TSAR* 2003-1 155; Hawthorne (2003) *THRHR* 114 at 115-116.

74 Murray and Lubbe (1988) 37; Hawthorne 2004 (67) (2) *THRHR* 294 at 295; Hawthorne "The Principle of Equality in the Law of Contract" 1995 (58) *THRHR* 157 at 167; Kerr (1998) 8; Hawthorne 2003 *THRHR* 114 at 114-115.

75 Grove (1998) (61) *THRHR* 687 at 689; Van der Walt "Aangepaste voorstelle vir 'n stelsel van volkome beheer oor kontrakteervryheid in die Suid-Afrikaanse Reg" 1993 (56) *THRHR* 65 at 67; Van Aswegen 1994 (57) *THRHR* 448 at 456. The writer holds the views that it was especially the inequalities that freedom of contract and *pacta sunt servanda* brought, that necessitated Roman Dutch law to seek such mechanisms as fairness, justice and good faith to ensure that problems of substantial injustices are averted. This found favour in South Africa as well. See also Lubbe "*Bona fides* billikheid en die openbare belang in die Suid-Afrikaanse Reg" 1990 *Stell LR* 16 at 17-25; Lubbe and Murray (1988) 390; Van der Merwe et al (1993) 233-234; Cockrell "Substance and form in the South African Law of Contract" 1992 *SALJ* 56; Lotz (1979) 11-12. The author promotes the utilization of *bona fides* as a mechanism in that it promotes *"honesty and prohibits unreasonable promotion of one's own interests."* See further Hawthorne "The Principle of Equality in the Law of Contract" 1995 (58) *THRHR* 157 at 172; Neels "Die Aanvullende en Beperkende Werking van Redelikheid en Billikheid in die Kontraktereg" *TSAR* 1999-4 684 at 693; Fletcher *Responsa Meridiana* (1997) 1 at 2; Zimmerman and Visser (1996) 241.

What needs to be added however is that good faith, unlike *boni mores* and public interest, never became an independent, free floating basis for setting aside or not enforcing contractual principles, though, it became a relevant criterion in the interpretation of contracts. [76]

There was a time in the South African contract law history when it was generally accepted that the *exceptio doli generalis* was an instrument of equity, generally used as a remedy by the South African Courts. [77]

This remained the position until the death knell was given to the *exception doli generalis* and the principle of good faith in the case of *Bank of Lisbon and South Africa Ltd v De Ornelas* [78] which shocked the legal fraternity, especially, the South African legal writers, who have been very critical of the decision. In the main, the court was criticised for its failure to engage in an in-depth discussion of general policy considerations, as well as its lack of insight and responsibility in bringing about justice for the contracting parties. [79]

Not surprisingly, after the complete absence of the concept of good faith as a principle to be used to correct unreasonable, unconscionable or oppressive contractual provisions, since the majority judgement of *Bank of Lisbon and South Africa Ltd v De Ornelas* 1988 (3) SA 580 (A) 616, many South African legal writers showed a renewed interest in reviving good faith. Many voices went up, calling for the recognition of an appropriate mechanism, aimed at limiting the unfair or unreasonable consequences of the *pacta sunt servanda*. Several academic writers advocated the use of the *bona fides* principle as an independent, free floating mechanism, alternatively, to be used as a component of public interest. The court's

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76 Zimmerman and Visser (1996) 241-243; Hawthorne "The End of *bona fides*" (2003) 15 *SA Merc.LJ* 271 at 275.

77 Van der Merwe et al (1993) 231-232; Hefer *TSAR* 2000-1 142 at 145; the *exceptio doli generalis* is seen by Fletcher *Responsa Meridiana* (1997) 1 at 3 *"as a contract remedies that can give practical application to good faith in contracts".* For case law see *Weinerlein v Goch Buildings Ltd* 1925 AD 282; *Zuurbekom Ltd v Union Corporation Ltd* 1947 1 SA (A); *Paddock Motors (Pty) Ltd v Igesund* 1976 3 SA 16 (A); *Rand Bank Ltd v Rubenstein* 1981 2 SA 207 (W); *Artprint Ltd v Gerber Goldschmidt Group South Africa (Pty) Ltd* 1983 1 254 (A).

78 1988 (3) SA 580 (A).

79 Christie (2006) 15. See also Van der Merwe, Lubbe, Van Huyssteen "The *exceptio doli generalis: requiescat in pace - vivat aequitas"* (1989) 106 *SALJ* 235; Zimmerman "The law of obligations - character and influence of the civilian tradition" 1992 *Stell L.R.* 5 6-9, and see Lambiris "The *exceptio doli generalis* an obituary" (1988) 105 *SALJ* 644; Hawthorne 2004 67 (2) *THRHR* 294 at 295-296; Neels "Die Aanvullende en beperkende werking van redelikheid en billikheid in die kontraktereg" *TSAR* 1999-4 684 at 689; Fletcher *Responsa Meridiana* (1997) 1 at 5; Zimmerman and Visser (1996) 256; Lubbe and Murray (1988) 391; Hawthorne (2003) 15 *SA Merc L.J.*

function was seen by the academics as to correct unreasonable contractual provisions. [80]

More specifically, *Van der Merwe et al* [81] advocate the need for "*substantive justice between contractants".* The authors argue that, despite it being frequently said that "*the South African legal system is equitable*" and contractual transactions involve "*acts of good faith*", it does not follow that contracts "*will be inherently just and fair"*. What is needed is a mechanism "*to ensure contractual fairness*". [82]

Moreover, the authors argue that good faith ought to be given concrete content in regulating the operation of a contract. It is suggested that the duty of good faith be placed on a par with the concept of public policy and public interest. Any conduct contrary to good faith may then be classified as illegal, resulting in the usual consequences of illegality. [83]
Christie, [84] on the role of good faith in modern law, argues that its implementation will go a long way in creating and enforcing moral and ethical values, especially where the courts are confronted with "*the unfair enforcement of a contract"*.
Fletcher [85] highlights the role good faith, as a mechanism, can play in the contractual law sphere, namely, the prevention of *"the unreasonable promotion of one party's own interests to the detriment of the other contracting party ....."* [86] Consequently, the writer advocates that good faith can play a vital role in bringing about procedural or substantive fairness in

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80 Van der Merwe et al (1993) 233; Lubbe and Murray (2003) 390; Zimmerman (1996) 217.

81 Contract - General Principles (2003) 232.

82 Van der Merwe et al (2003) 232.

83 Van der Merwe et al (2003) 233-234. See also Hawthorne 1995 (58) *THRHR* 172 who also pleads for the principle of good faith "*been given concrete content in its application both to particular instances and to the operation of contracts".* He also suggests that good faith be developed in that *"it being imposed as a general duty"* which can be enforced "*ex lege*". See further Hawthorne 2004 67 (2) *THRHR* 294 at 296. He illustrates the importance of the principle of good faith and quotes with authority the writings of Du Plessis - "A History of Remissio Mercedis and Related Legal Institutions." A Doctoral thesis Erasmus Univ Rotterdam (2003) which sets out the functions of the principle of good faith, *inter alia, "it serves as a standard of honesty and fidelity in contractual obligations ..... in accordance with society's precepts of fairness"* and *"governs consensual contracts by using as well, corrective functions of good faith."*
See also the persuasive argument by Van der Walt 1993 (56) *THRHR* 65 at 66 in which the writer prefers good faith as a general criterion as *"good faith requires a strong ethical requirement which would lead to greater legal certainty."* See also Christie (2001) 19; Van der Walt "Aangepaste voorstelle vir 'n stelsel van voorkomende beheer oor Kontrakteervryheid in 'n nuwe Suid-Afrika" *THRHR* 1991 367 at 387.

84 *The Law of Contract in South Africa* (2001) 19-20.

85 *Responsa Meridiana* (1997) 1 at 2ff.

86 Fletcher "The Role of Good Faith in the South African Law of Contract" *Responsa Meridiana* (1997) 1 at 2ff.

contracting. In this regard, the legal writer holds the view that "*if good faith is entrenched legislatively, powerful bargainers will be less able to rely on their access to legal resources as an advantage over consumers.*" [87] This he claims will result in greater protection, ultimately, to the consumer.

Zimmerman et al, [88] on the other hand, advance social responsibility and the return of the ethical foundations, as major factors for the reintroduction of the concept of good faith.

The author further calls for overall legislative intervention as means to *"enable the South African courts openly to perform their duty of policing unfair contract terms."* In this way, Zimmerman argues: *"courts may either declare invalid or modify any contract in any clause within a contract which, in the light of all the circumstances, does not conform to the standard of good faith."* [89]

Van Aswegen [90] also supports the view of other academic discourse, namely, courts should be given a general equitable discretion based on *bona fides "to ensure substantive justice in the creation, contents and enforcement of contracts."* [91]

There are also South African legal writers who view the new Constitutional dispensation as having the necessary potential to create a jurisdiction to decide, by equity, whether any contractual provisions are unreasonable, unconscionable or oppressive. In this regard, *Hawthorne* [92] suggests that the obvious route to follow is "*to develop the open norms of the South African common law, such as bona fides, public policy, and boni mores in accordance with the Constitutional mandate.*" [93]

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87 Fletcher *Responsa Meridiana* (1997) 1 at 2ff.

88 *Southern Cross Civil Law and Common Law in South Africa* (1996) 256.

89 Zimmerman and Visser (1996) 257, The rationale for legislative intervention is expressed as follows by Aronstam (1979) 184: *"..... because the South African courts are extremely reluctant to extend the principles of the common law to vest themselves with a jurisdiction based on principles of equity to deal with problems caused by unconscionable contractual conduct, the legislature introduce or create such a general jurisdiction for them."*

90 1994 (57) *THRHR* 458; See also Van der Walt 1993 (56) *THRHR* 65 who supports the proposed reform in favour of a general criterion in terms of good faith a good faith "*is locally and internationally acknowledged as the term in which ethical requirements and the collective experience of our legal culture"* is considered.

91 Van Aswegen 1994 (57) *THRHR* 458.

92 (2003) 15 *SA Merc.L.J.*

93 Hawthorne "The end of *bona fides*" (2003) 15 *SA Merc.L.J.*

Hawthorne [94] is especially critical of the Supreme Court of Appeals in handling the cases of *De Beer v Keyser and Others* 2002 (1) SA 827 (SCA); *Afrox Healthcare Bpk v Strydom* 2002 (6) SA 21 SCA, *Brisley v Drotsky* 2002 (4) SA 1 (SCA). More especially, the writer is critical of the court for not considering properly the contention that the contractual provisions (indemnity clause in the Afrox case) were contrary to the principle of good faith. For that reason, the writer contends, that the time is ripe that *"an imprecise notion of good faith should be given precision by our courts, that the sacrosanct freedom of contract should be tempered by this same good faith in order to end the abuse of the contractual terms."* [95]

The re-introduction of the concept of *bona fides* is also supported by Lubbe and Murray, [96] who regard the concept of *bona fides* as *"an informing principle in our law of contract"* which *"will show up the unconscionability aspect after the conclusion of the contract, having regard to it being contrary to the principle of bona fides."* This, the author's state, would be a positive development in the South African law of contract and which aligns with the development in overseas jurisdictions.

But, some resistance is given, by some writers, to the reintroduction of the concept of *bona fides*. *Cockrell* [97] reinforces this warning by emphasizing that a subjective concept of good faith is valueless, and an objective concept of good faith will be equally valueless if it is allowed to *"collapse into a malleable notion of reasonableness."* The author suggests that this danger could be avoided by limiting good faith to an obligation and to give some consideration to the legitimate interests of the other party.

Christie [98] endorses the suggestion by Cockrell but adds *"if by `some consideration' one understands the degree of consideration required by public policy one is coming close to linking good faith and public policy into an instrument for developing the common law of contract in confirmatory with the Bill of Rights."*

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94 2004 67 (2) *THRHR* 294 at 298-301.

95 Hawthorne "Closing of the open norms of the Law of Contract 2004 67(2) *THRHR* 294 at 298-301.

96 (1988) 733-734; Support but in a restrictive way can be found in the argument by Neels "Die Aanvullende en Beperkende werking van redelikheid en billikheid in die Kontraktereg" *TSAR* 1999-4 705.

97 "Second-guessing the exercise of contractual power on rationality grounds" 1997 *ACTA JURIDICA* 26 41-43

98 "The Law of Contract and the Bill of Rights" *Bill of Rights Compendium* (2002) 3H-11

Glover [99] warns that equitable notions like good faith and unconscionability *"should be treated with the utmost caution"* as *"the dictates of good faith are unlikely to provide justification for a paradigm shift."*

Other protagonists of good faith not becoming an underlying ethical value or controlling principle, is *Hutchinson* [100] who does not regard good faith as an independent, free-floating basis for setting aside, or not enforcing, contractual principles.

The South African law commission [101] recognised the contractual doctrine of good faith in its *draft Bill*, [102] when it suggested that the South African courts should be given a corrective mechanism in instances where, in a contractual context, *"unreasonableness, unconscionable-ness or oppressiveness"* is present.

The legal writer *Lewis,* [103] in particular, is very critical of the scanty weight given, by the courts, to consideration of fairness. He advocates that the introduction of fairness in contract will bring about greater certainty. Similar criticism is levied, by *Bhana and Pieterse,* [104] at the Supreme Court of Appeal as, in both the Brisley and Afrox cases, the court failed to take proper account of *"the normative considerations of good faith, fairness and equality that were at play in the circumstances."* The writers, consequently, call for a greater role which good faith ought to play in ensuring a just and equitable law of contract. The legal writers also quote from the work of *Hutchison* [105] who explains the role of good faith in contract law, when he states:

"Good faith may be regarded as an ethical value or controlling principle, based on community standards of decency and fairness that underlies and informs the substantive law of contract. It finds expression in various technical rules and doctrines defines their form, consent and field of application and provides them with a moral

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99 "Good faith and procedural unfairness in contract" 1998 (61) *THRHR* 328-335.

100 "Non-variation clauses in contract: Any escape from the Shifren straight jacket" (2001) 118 *SALJ* 720.

101 South African Law Commission Report on *Unreasonable Stipulations in Contracts and the Rectification of Contract* (1998) 56.

102 Section 1(1) of the draft Bill on the *Control of Unreasonableness, Unconscionable ness or Oppressiveness in Contracts or Terms* (1998).

103 "Fairness in South African Contract Law" (2003) 120 *SALJ* 330, 331.

104 "Towards the Reconciliation of Contract Law and Constitutional Values: Brisley and Afrox Revisited" (2005) 122 *SALJ* 865 and articles quoted therein.

105 "Non-variation clauses in contract: Any escape from the Shifren strait jacket?" (2001) 118 *SALJ* 720 at 744-745.

and theoretical foundation. Good faith thus has a creative, a controlling and a legitimating or explanatory function. It is not, however, the only value or principle that underlies the law of contract, nor, perhaps, even the most important one. In the words of Lubbe and Murray: "It does not dominate contract law but operates in conjunction (and competition) with notions of individual autonomy and responsibility, the protection of reasonable reliance in commerce, and views of economic efficiency in determining the contours of contract doctrine. However, it will ensure just results only if judges are alert to their task of testing existing doctrines and the operation of particular transactions against the constantly changing mix of values and policies of which bona fides are an expression." On this view of things ..... the influence of good faith in the law of contract is merely of an indirect nature, in that the concept is usually if not always mediated by some other, more technical doctoral device. Thus for example, while good faith does not empower a court directly to supplement the terms of a contract, or to limit their operation, it might in appropriate cases enable the court to achieve these same results indirectly, through the use of devices such as implied terms and the public policy rule."

Consequently, the writers hold the view that *" ..... to condemn the indirect application of the value of good faith is to sacrifice good faith in its entirety; and amounts to a condemnation of a basic pillar of contract law."* [106]

Support for the proposed legislative reform can be found amongst prominent academic writers and authors. [107] The writer *Lewis,* [108] in particular, calls for the introduction of legislation akin to the United Kingdom, which precludes contractual unfairness, unreasonableness, unconscionability or oppressiveness.

It is respectfully submitted that legislation is a preferred medium of legal reform and the optimal approach available in South Africa today. One of the most significant underlying reasons remains the Supreme Court of Appeal's reluctance to bring about fundamental changes in the law of contract, including, preventative action and policy changes. The court remains steadfast in clinging to precedent i.e., freedom of contract and *pactum sunt servanda*. It is also submitted, that the introduction of legislative enactment of good faith in contracting, will go a long way in overcoming procedural and substantive unfairness in contracts.

10.2.1.1.2 Case Law

The role of *bona fides* has featured quite prominently in South African contract law, until its

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106 Bhana and Pieterse "Towards Reconciliation of Contract Law and Constitutional Values: Brisley and Afrox Revisited" (2005) 122 *SALJ* 865 and articles quoted therein.

107 Van der Walt 1993 (56) *THRHR* 65 at 66; Van Aswegen 1994 (57) *THRHR* 448 at 458-459; Fletcher *Responsa Meridiana* 1997 1 at 11-14; Zimmerman and Visser (1996) 257; Hawthorne 2003 *THRHR* 114; *Contra* Christie (1996) 17; Grove 1998 (61) *THRHR* 687 at 696; Hefer *TSAR* 2000-1 142 at 153-154; Lewis (2003) 120 *SALJ* 330.

108 "Fairness in South African Contract Law" 2003 120 *SALJ* 330, 349.

death knell in the Appellate Division Judgement of *Bank of Lisbon and South Africa Ltd v De Ornelas* 1988 (3) SA 580 (A).

As early as 1881, Barry JP, in the case of *Judd v Fourie*, [109] justified the existence of good faith in contract, by declaring, that *"good faith is required in all contracts."* In one of the earliest examples in which the court relied upon the concept good faith in determining the true intentions of the contracting parties, in leading to the conclusion of a contract, the Appellate Division *Neugebauer and Co v Herman,* [110] per Innes CJ, emphasized the importance of the principle of *bona fides* when it stated:

"The principle is fundamental that bona fides are required from both parties to a contract of sale ....." [111]

During this era, good faith was also viewed as a relevant criterion in the interpretation of contracts. Whilst the courts were not entitled and willing to depart from the clearly expressed intention of the parties, even though the courts considered the contract to be unfair, nevertheless, when the wording in a contract was ambiguous and capable of two constructions, then, it was regarded as appropriate that the court consider good faith as a criterion. Innes CJ stated this position, as long ago as 1916, in the case of *Trustee, Estate Cresswell and Durbach v Coetzee* [112] when he claimed *"it would be proper to avoid a manifestly inequitable result."*

Some twenty years later, De Wet JA, in the Appellate Division case of *Rand Rietfontein Estates Ltd v Cohn* [113] put the position as follows: *"The court will lean to that interpretation which will put an equitable construction upon the contract and will not, unless the intention of the parties is manifest, so construe the contract as to give one of the parties an unfair or unreasonable advantage over the other."*

The South African courts have also, prior in the Bank of Lisbon judgement, recognized that all contracts are *bonae fidei*. This was not confined to matters that arose after consensus had been reached; it applied to the very process of reaching consensus as well. The court,

109 (1881) 2 EDC 41 (76).

110 1923 AD 564 at 573.

111 *Neugebauer and Co v Herman* 1923 AD 564 at 573.

112 1916 (AD) 14 at 19.

113 1937 (AD) 317 at 330.

in *Meskin NO v Anglo American Corporation of SA Ltd and Another,* [114] per Jansen J, categorically stated:

"It is now accepted that all contracts are bona fidei ....."

The learned Judge goes on to add *"there can be no doubt, that in contrahendo our law expressly requires bona fides, a concept of variable content in the light of changing mores and circumstances."* [115]

More specifically, Stegmann J in *Savage and Lovemore Mining (Pty) Ltd v International Shipping Co (Pty) Ltd* [116] stated:

"The proposition that by our law all contracts are bonae fidei is not confined to matters that arise after consensus has been reached; it applies to the very process of reaching consensus. A party who adopts an ambivalent posture, with a view to manipulating the situation to his own advantage, when he can see more clearly where his best advantage lies, has a state of mind that falls short of requirements of bona fides." [117]

The fore stated position was repeated in the case of *Paddock Motors (Pty) Ltd v Igesund,* [118] in which the court, as to the application of the principle of good faith in the South African law of contract, stated:

"An exceptio doli was declared to be available, wherever the raising of the action constituted objectively a breach of good faith. The insertion of the exceptio doli in the formula was considered to empower the Judge to take account of every single circumstance that would render the condemnation of the defendant substantially unjust ....."

And, referring to the judgement of Wessels JA in *Weinerlein v Goch Building Ltd* 1925 AD 282 at p292, in which it was held:

"It is therefore clear that under the civil law the Courts refused to allow a person to make an unconscionable claim even though his claim might be supported by a strict reading of the law."

The court cautions:

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114 1968 (4) SA 793 (W) at 802.

115 *Meskin NO v Anglo American Corporation of SA Ltd and Another* 1968 (4) SA 793 (W) at 804.

116 1987 (2) SA 149 (W).

117 *Savage and Lovemore Mining (Pty) Ltd v International Shipping Co (Pty) Ltd* 1987 (2) SA 149 (W).

118 1976 (3) SA 16 A at 27.

"As today all transactions are bona fide, the field of operation of the exceptio doli generalis is necessarily more restricted. If, however, a contract required to be in writing is considered to be analogous to a negotium strictjuris, then of course the exceptio doli may aptly be applied, as was done by Wessels JA in Weinerleins' case supra. I do not understand the learned Judge to have done more than this, and to have enunciated a general principle that equity should override the substantive law." [119]

In the case of *Tuckers Land and Development Corporation (Pty) Ltd v Hovis* [120] the Appellate Division, again per Jansen JA, commented that the requirement of bona fides underlies and informs the South African law of contract when he stated:

"It would be consonant with the history of our law, and also legal principle, to construe this as an application of the wide jurisdiction to imply terms conferred upon a court by the Roman law in respect of the judicia bonae fidei. It should therefore be accepted that in our law an anticipatory breach is constituted by the violation of an obligation ex lege, flowing from the requirement of bona fides which underlies our law of contract." [121]

Although the Appellate Division, in the case of *Mutual and Federal Insurance Co Ltd v Oudtshoorn Municipality,* [122] regarded "*uberima fides* as an alien, vague, useless expression without any particular meaning in law" the court nevertheless recognised that all contracts are *bona fidei*.

But, the curtain was certainly drawn, in 1988, for the utilization of the *exceptio doli generalis* as a defence, as well as, *bona fides* as a criterion. All fears, at the time, that *bona fides* would become a stronghold in South African Law, were squashed.

In the landmark judgement of *Bank of Lisbon and South Africa Ltd v De Ornelas* [123] Joubert JA, for the majority of the court, jettisoned the *exceptio doli* which, until then, had largely been used as a substitute for *boni fides* in the South African common law of contract. The court held that it could not find any evidence of the existence of a general substantive defence based on equity. The facts of this matter were that the respondents, who were joint managing directors of Ornelas Fishing Company (Pty) Ltd, had asked the Bank, in 1981, for overdraft facilities and been given the facility in the amount of R75 000.00. This was subsequently increased to R125 000.00 and thereafter, in June 1984, to R146

119 *Paddock Motors (Pty) Ltd v Igesund* 1976 (3) SA 16 A at 27.

120 1980 (1) SA 645 (A) at 652.

121 *Tuckers Land and Development Corporation (Pty) Ltd v Hovis* 1980 (1) SA 645 (A) at 652.

122 1985 (1) SA 419 (A) 433.

123 1988 (3) SA 580A.

000.00. On 26 September 1984 the company asked that the limit be raised to R200 000.00. The latter request was refused and the company discharged its entire indebtedness under the overdraft and closed its account with the Bank. When the overdraft facilities had been put in place, the respondents had passed certain mortgage bonds in favour of the Bank, given a negotiable certificate of deposit, and had entered into certain surety-ships. When the account was closed, the appellant company demanded, from the Bank, the return of the negotiable certificate of deposit and the cancellation of the deeds of surety-ship and the mortgage bonds.

The Bank declined, saying that it had a claim, against the company, for R624 197.00 damages for breach of a contract entered into on 7 September 1984, for the forward purchase of dollars, between December 1984 and March 1985, which contract, the Bank claimed, the company had repudiated. The Respondents, in the words of Joubert JA, in effect, by way of replication, alleged that the Bank's conduct amounted to *dolus generalis*.

Whilst the court, per Joubert JA, recognised that in modern law *"all contracts are bonae fidei"* it rejected the proposition that *bona fides* had developed to fulfil the function of the *exceptio doli*.

The court appears to say that whilst good faith was the fountainhead of the wide variety of rules of substantive law in Roman Law *"the exceptio doli generalis has never formed part of Roman-Dutch Law, and, despite the fact that in a number of judgements this court accepted the exceptio as part of our law, the time has now arrived, once and for all, to bury the exceptio as a superfluous, defunct anachronism requiescat in pace."*

Joubert JA, for the majority, also found there was no evidence of *"a general substantive defence based on equity in Roman-Dutch Law"* and also that *"our courts have consistently refused to exercise an equitable discretion to release a party from an unconscionable but otherwise valid contract."*

Jansen JA, in a minority judgement of the court, found that the *exceptio doli* is part of the South African law of contract. The learned Judge placed the *exceptio doli* within the confines of corrective reasonableness and equity when he remarked:

"Seen as a substantive defence the exceptio would imply that in appropriate circumstances a Court could grant relief where the strict law would have an effect contra naturalem acquitatem, and in so doing it would modify the law. Broadly speaking this is what happened in Rome and in the course of time new defences developed as a result (e.g. exceptio non numeratae pecuniae etc). Critics of the survival of the exceptio would have one believe that the defences so developed constituted a numerus clausus to this day. This would deny the possibility of the

law being adapted according to the exigencies of the times and in the light of the changing mores and concepts of fairness and proper conduct."

According to Jansen JA contractual freedom and the principles of *pacta servanda sunt* are not absolute values, in that, sometimes they have to succumb to other considerations namely *"the sense of justice of the community."*

The learned Judge goes further and cites *"rampant inflation, monopolistic practises giving rise to unequal bargaining power and the large scale of standard-form contracts often couched in small print."* [124]

The minority judgement, it is respectfully submitted, is the preferred view, especially in the light of our new constitutional dispensation, in which good faith is consonant with the spirit and values contained in the Bill of Rights. One such right would be the right to equality, which serves to militate against the unequal bargaining position in which the economically weaker contracting parties often find themselves. This will also contribute towards a paradigm shift in the law of contract, which has hitherto made it impossible for the court to shy away from upholding the sanctity of contract, towards engaging good faith as an underlying ethical value, or controlling principle, in protecting the weaker parties, based on the principle of equity.

Besides the academic criticism, as hereinbefore stated, against the majority judgement of the Bank of Lisbon, [125] the South African courts (though sometimes minority judgements), have also, in a number of cases, reviewed the role of good faith in our modern law of contract. Nine years after the fall of the principle of good faith in the Bank of Lisbon case, the Appellate Division, was again confronted with a contractual issue, which Olivier JA in a minority of judgement of *Eerste Nasionale Bank van Suidelike Afrika Bpk v Saayman N.O.,* [126] credited the use of honest dealings, in an attempt to steer a course which could be followed in the application of the norm of good faith in the law of contract.
Consequently, the judge declared the surety agreement and cession a nullity, ordered the share certificates to be returned to the respondent, and dismissed the Bank's counterclaim

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124 *Bank of Lisbon and South Africa Ltd v De Ornelas* 1988 (3) SA 580 at 619 C-D Per the minority judgement of Jansen JA.

125 See Zimmerman (1996) 256 who shortly after the judgement write: *"It is unlikely that Bank of Lisbon will remain the last word on the matter of good faith and contract law."*

126 1997 (4) SA 302 (A).

(307A).

The Learned Judge criticized the way in which the contract had been concluded against the principles of *bona fides* (318I). Olivier JA consequently described the role of *bona fides* as *"eenvoudig om gemeenskapsomvattings ten aansien van behoorlikheid, redelikheid en billikheid in die kontraktereg te verwesenlik."*

Consequently, after analysing the historic development of the doctrine of good faith in the Appellate Division, the learned Judge concluded that the principles of *bona fides*, which are based on the legal convictions of the community, play a *"wye en onmiskenbare rol in the kontraktereg"* (321J-322A).

Secondly, the judge held that there is a close connection between the doctrine of *bona fides*, and those of public policy, public interest and *iusta causa* (322C). Olivier suggests the courts should apply the notion of good faith to all contracts because public policy demands that this should be so (322E).

Thirdly, Olivier JA felt constrained to touch on the thorny issue of the *exceptio doli generalis* as a defence, which the learned Judge regards as inextricably linked to the concept of *bona fides*. Turning to the majority judgement of *The Bank of Lisbon v De Ornelas,* and especially the perception that the Appellate Division had done away with the principle of good faith, he showed that the Appellate Division had continued, after that case, actively to employ the dictates of good faith in deciding contractual disputes, although often under the guise of public policy and the public interest *(Botha (now Griessel) v Finanscredit (Pty) Ltd* 1989 3 SA 773 (A); *LTA Construction Bpk v Administrateur, Transvaal* 1992 1 SA 473 (A)).

Consequently he contended:

"Ek hou dit as my oortuiging na dat die beginsels van die goeie trou, gegrond op openbare beleid, steeds in ons kontraktereg 'n belangrike rol speel en moet speel, soos in enige regsstelsel wat gevoelig is vir die opvattinge van die gemeenskap wat die uiteindelike skepper en gebruiker is, met betrekking tot die morele en sedelike waardes van regverdigheid, billikheid en behoorlikheid." [127]

Sometime later, in 2000, the Cape High Court, per Van Zyl J, in the case of *Janse van*

[127] *Eerste Nasionale Bank van Suidelike Afrika Bpk v Saayman* 1997 (4) SA 302 (A) at 326G.

Rensburg v Grieve Trust CC, [128] dealt with a trade-in agreement between buyer and seller involving their respective liabilities for latent defects and the *aedilitian* actions available. In assessing the competency of our courts to pronounce on the reasonableness and fairness of contractual provisions in contract, in the absence of legislative regulation, Van Zyl J, found justification for an application of good faith in the fact that such an interpretation was consonant with the spirit and values contained in the Bill of Rights (326E). The learned Judge relied on Section 8(3) (a) as a means of developing the common law in so far as rights are concerned. Moreover, Van Zyl J believes that one such a right is the right to equality as provided for in Section 9(1) which reads: `*Everyone is equal before the law and has the right to equal protection and benefit of the law'.*

In dealing with the nature of the trade-in agreement, the court concluded that this was an opportunity for the development of good faith as a norm that governs contractual content and provides a foundation for a doctrine of substantive unconscionability that directly controls unfair contracts (318B).

Consequently, Van Zyl J, recognized equity as a principle of the South African law of contract. He held that in a trade-in agreement, it would be unjust, inequitable, and unreasonable for a seller to be liable for latent defects in a vehicle sold by him, and misrepresentations relating to it, if no similar liability were to attach to the purchaser, in respect of the vehicle traded-in by him (at 325H). He contended that a purchaser would, effectively, be able to deliver a defective trade-in vehicle knowing full well that the seller would not be able to raise the *aedilitian* actions against him. If these actions were available only to the one and not to the other, the legal recognition of the principle of equality would be false (at 325I-J).

The development of the principle of good faith continued, especially, in the Cape High Court. In the case of *Miller and another NNO v Dannecker,* [129] Ntsebeza AJ, decided that a court can refuse to enforce an entrenchment clause where such enforcement would breach the principle of good faith. The learned Judge relied heavily on the minority judgement of Olivier JA in *Eerste Nasionale Bank van Suidelike Afrika Bpk v Saayman NO* 1997 (4) SA 302 (SCA) at 318.

In this regard Ntsebeza AJ supported the two principles laid down by Olivier JA, namely:

128 2000 (1) SA 315 (C).

129 2001 (1) SA 928 (C).

"A Judge may deviate from the decisions of the High Court where their application would be contrary to the principle of bona fides, and bona fides constitute an independent basis for not giving effect to the principles of the law of contract." (938D-F) [130]

The use of the concept `good faith' was also kindled in a Cape decision of *Mort NO v Henry Shields-Chiat,* [131] in which Davis J held that freedom of contract is part of the fundamental right to freedom, which right is enshrined in the Bill of Rights and informs the constitutional value of human dignity. Although he also recognized that, in performing their constitutional mandate, the courts could use the concept `*boni mores*' to infuse our law of contract with the concept good faith (at 325-376 and 326E-F). Regarding good faith, the court identifies the principle as a minimum level of respect for each party's interests, so that, an unreasonable and one-sided promotion of one party's interests at the expense of the other outweighs the sanctity of contract and empowers the court to refuse enforcement.

But, in the end, Davis J nonetheless upheld an agreement entered into by a father of a severely injured minor and an attorney who specializes in road-accident claims. Despite recognizing the concept *bona fides*, Davis J did not give the concept *bona fides* sufficient content to trump the sanctity of contract, which, disappointingly, endorses the perception that it is virtually impossible for a court to stay away from upholding sanctity of contract.

Subsequently, the Supreme Court of Appeals, when confronted with a golden opportunity to bring about law reform in the South African law of contract, squandered the opportunity in the cases of *Brisley v Drotsky* 2002 (4) SA 1 (SCA); *Afrox Healthcare Bpk v Strydom* 2002 (6) SA 27 (A). Instead of infusing the law of contract with equitable principles, founded upon constitutional values, the court continued to entrench the doctrines of freedom of contract and the *pactum sunt servanda*.

The first case of *Brisley v Drotsky,* [132] involved a non-variation clause in which the Appellant rented immovable property from the Respondent. Upon the failure of the Appellant to pay the first month's rental on time, the Respondent sought to terminate the lease and gave the Appellant two weeks to vacate the premises. On appeal, the Appellant

130 *Miller and Another NNO v Donnecker* 2001 (1) SA 928 (C).

131 2001 (1) SA 464 (C).

132 2002 (4) SA 1 (SCA).

raised several arguments against the eviction order. It was argued, inter alia, on behalf of the Appellant, that the enforcement of the non-variation clause, in spite of a subsequent oral agreement, is contrary to the principle of good faith. Consequently, the court looked at the legal position in South Africa with regard to the principle of good faith as a defence.

The majority of the court (Harms, Streicher and Brand JJA) subsequently refused to follow the Cape Provincial Division judgements of *Miller and Another NNO v Donnecker* 2001 (1) SA 928 (C), (in which Ntsebeza AJ followed the minority decision of Olivier JA in *Eerste Nasionale Bank van Suidelike Afrika Bpk v Saayman NO* 1997 (4) SA 302 (SCA) wherein the learned Judge found that the principle of *bona fides* is very much part of the modern law of contract in South Africa, it being part and parcel of the moral and ethical values of justice, equity, and decency), as well as *Janse van Rensburg v Grieve Trust CC* 2000 (1) SA 315 (C) (wherein Van Zyl J found justification for an application of good faith in the fact that such an interpretation was consonant with the spirit and values contained in the Bill of Rights); and the *Mort NO v Henry Shields-Chiat* 2001 (1) SA 464 (C) case (in which Davis J supported the reasoning of Van Zyl J in *Janse van Rensburg v Grieve Trust* (supra) that in performing their constitutional mandate the courts could use the concept `*boni mores*' to infuse our law of contract with the concept of `good faith').

The reasoning of the majority judgement in the Brisley case amount to this:
Firstly, the judgement of Olivier JA, in the case of *Eerste Nasionale Bank van Suidelike Afrika Bpk v Saayman NO* 1997 (4) SA 302 (HHA), does not bind courts in other divisions as it was handed down by a single judge. The court continues to add that, notwithstanding how convincing such minority judgement, it will succumb to the principle of precedence (*stare decisis* rule).

Secondly, they also did not support Judge Olivier's view that *boni fides* ought to be given a more prominent place in the South African Law of Contract. To do so, according to the court, would be too far-reaching. Hence, the court stated, the judgement by a single judge must be approached with great circumspection, as Oliver's reasoning is based on shaky grounds.

The court agreed with the writer Hutchison, who is of the view that good faith was not *"an independent, free-floating basis for setting aside or not enforcing contractual principles"*.

The court consequently weighed up different values, including contractual freedom, and concluded:

"[23] 'n Ander waarde onderliggend aan die kontraktereg is deur Rabie HR in Magna Alloys and Research (SA) (Pty) Ltd v Ellis 1984 (4) SA 874 (A) op 893I-894A onderstreep toe hy daarop gewys het dat `dit in die openbare belang is dat persone hulle moet hou aan ooreenkomste wat hulle aangegaan het. In laasgenoemde verband het Steyn HR in SA Sentrale Ko-op Graanmaatskappy Bpk v Shifren en H Andere 1964 (4) SA 760 (A) op 767A, gewag gemaak van:

> *"die elementêre en grondliggende algemene beginsel dat kontrakte wat vrylik en in alle erns deur bevoegde partye aangegaan is, in die openbare belang afgedwing word"."*

When weighing up the different values, the court suggests the following approach:

"[24] Die taak van howe in die algemeen en van hierdie Hof in besonder is om hierdie grondliggende waardes wat soms met mekaar in botsing kom teen mekaar op te weeg en om by geleentheid, wanneer dit nodig blyk te wees, geleidelik en met verdrag aanpassings te maak. Of A soos Lord Simon of Glaisdale dit stel in Miliangos v George Frank (Textiles) Ltd SALJ15:

> *`Judicial advance should be gradual. One step is enough. It is, I concede, a less spectacular method of progression than somersaults and cartwheels, but it is the one best suited to the capacity and resources of a Judge.'R"*

But, cautions the court:

"Om eensklaps aan Regters 'n diskresie te verleen om kontraktuele beginsels te verontagsaam wanneer hulle dit as onredelik of onbillik beskou is in stryd met hierdie werkswyse. Die gevolg sal immers wees dat die beginsel van pacta sunt servanda grotendeels verontagsaam sal word omdat die afdwingbaarheid van kontraktuele bepalings sal afhang van wat 'n bepaalde Regter in die omstandighede as redelik en billik beskou. Die maatstaf is dan nie meer die reg nie C maar die Regter."

Olivier AJ, in a minority judgement, again highlights the effectiveness of the principle *bona fides* as a corrective tool when he states:

"[76] Hoe moet die bona fides of te wel redelikheid en billikheid in die kontraktereg toegepas word? Vanweë die voortreflike formulering van die antwoord op gemelde vraag deur Neels ((1999) 4 TSAR op 700) haal ek hom woordeliks aan: H

> *"Die howe, so is reeds herhaaldelik betoog, behoort die bevoegdheid tot korreksie beginselmatig en terughoudend uit te oefen. Die beginsels van regsekerheid en outonomie vereis dat die wilsooreenstemming wat die partye tot die kontrak bereik het of the redelike vertroue wat geskep is, as uitgangspunt moet dien (voorlopige regsoordeel). Slegs in gevalle waar die onredelikheid of onbillikheid van die voorlopige regsoordeel duidelik, klaarblyklik, kennelik of onmiskenbaar is (marginale toetsing), moet dit in die finale regsoordeel gekorrigeer word op die grondslag van nuutverfynde reëls en beginsels'."*

In so far as a court's approach in weighing up values, Olivier AJ suggests the following approach should be adopted, namely:

"[78] Dit mag so wees dat die voorgestelde benadering 'n mate van regs-en kommersiële onsekerheid sal invoer, maar dit is die prys wat 'n viriele regstelsel, wat billikheid net so belangrik as regsekerheid ag, moet betaal; 'n balans moet gevind word tussen kontinuiteit van die regsisteem en die aktualiteit van die sosiale werklikheid (Neels 1999 (2) TSAR op 266 ev; 1998 TSAR op 702, 716-17; (1999) 4 TSAR op 685-98). D" [133]

The Supreme Court of Appeal, in a subsequent judgement in the case of *Afrox Healthcare Bpk v Strydom,* [134] further illustrated the court's slavish following of the sanctity of contracts. The facts briefly stated revealed that Afrox was the owner of a private hospital. The respondent had been admitted to this hospital for an operation and remained in the hospital for post-operative medical treatment. Upon admission a contract had been concluded between the parties. During the post-operative medical treatment, certain negligent conduct by one of the hospital's nursing staff caused the respondent to suffer damage. The respondent argued that this negligent conduct of the nurse had constituted a breach of contract by the appellant and instituted an action claiming for the damage suffered.
The respondent contended that the indemnity clause was contrary to the public interest, that it was in conflict with the principles of good faith and that, the admission clerk had had a legal duty to draw respondent's attention to the clause, which he had failed to do.

The court, per Brand AJ, emphasized the constitutional value of contractual autonomy in stating:

"[22] Hierbenewens is art 27(1) (a) nie die enigste konstitusionele waarde wat in onderhawige verband ter sprake kom nie. Soos Cameron AR dit in Brisley v Drotsky (supra Para [94]) stel:

> *"The constitutional values of dignity and equality and freedom require that the courts approach their task of striking down contracts or declining to enforce them with perceptive restraint .... contractual autonomy is part of freedom. Shorn of its obscene excesses, contractual autonomy informs also the constitutional value of dignity."*

And continues:

"[23] Die grondwetlike waarde van kontrakteervryheid omvat, op sy beurt, weer die beginsel wat in die stelreël pacta sunt servanda uitdrukking vind. Hierdie beginsel word deur Steyn HR in SA Sentrale Ko-op Graanmaatskappy Bpk v Shifren en Andere 1964 (4) SA 760 (A) op 767A saamgevat as synde:

> *"die elementêre en grondliggende algemene beginsel dat kontrakte wat vryelik en in alle erns deur bevoegde partye aangegaan is, in die openbare belang afgedwing word."*

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133 *Brisley v Drotsky* 2002 (4) SA 1 (SCA) 1-34.

134 2002 (6) SA 27 (A).

Insofar as the principle of *bona fides* in the South African Law of Contract is concerned, Brand AJ is unsupportive of the minority judgement of Olivier AJ in the case of *Eerste Nasionale Bank van Suidelike Afrika Bpk v Saayman NO* 1997 (4) SA 302 (HHA) and the Cape Town decisions enunciated supra, but, supports the view, but without commenting further, of Cameron AJ in *Brisley v Drotsky* 2002 (4) SA 1 (SCA) when the court stated:

"[31]As alternatiewe basis vir sy saak het die respondent aangevoer dat selfs al sou klousule 2.2 nie met die openbare belang in stryd wees nie, dit steeds onafdwingbaar is omrede dit onredelik, onbillik en strydig met die beginsel van bona fides of goeie trou is. Hierdie basis, wat die Hof a quo blyk te onderskryf het, vind sy oorsprong in die minderheidsuitspraak van Olivier AR in Eerste Nasionale Bank van Suidelike Afrika Bpk v Saayman NO 1997 (4) SA 302 (HHA) op 318 ev en die beslissings van die Kaapse Hooggeregshof wat in navolging daarvan gegee is.

[32]In Brimley v Trotsky (supra) het hierdie Hof egter, by wyse van 'n meerderheidsbeslissing, die uitspraak van Olivier AR in perspektief gestel. Aangaande die plek en rol van abstrakte idees soos goeie trou, redelikheid, billikheid en geregtigheid het die meerderheid in die Brisly saak beslis dat, ofskoon hierdie oorwegings onderliggend is tot ons kontraktereg, dit nie 'n onafhanklike, oftewel 'n `free-floating' grondslag vir die tersydestelling of die nie-afdwinging van kontraktuele bepalings daarstel nie (para [22]); anders gestel, alhoewel hierdie abstrakte oorwegings die grondslag en bestaansreg van regsreëls verteenwoordig en ook tot die vorming en die verandering van regsreëls ken lei, hulle op sigself geen regsreëls is nie. Wanneer dit by die afdwinging van kontraksbepalings kom, het die Hof geen diskresie en handel hy nie op die basis van abstrakte idees nie, maar juis op die basis van uitgekristaliseerde en neergelegde regsreëls. (Sien, byvoorbeeld, Brummer v Gorfil Brothers Investments (supra op 419F-420G).) Derhalwe bied die alternatiewe basis waarop die respondent steun, inderwaarheid geen onafhanklike basis vir sy saak nie." [135]

Most recently, in a Constitutional Court judgement in *Barkhuizen v Napier,* [136] per Ngcobo J, held that good faith is not a self-standing rule, but an underlying value that is given expression through existing rules of law. The court, in this regard, held *"..... Good faith is given effect to by the existing common law rule that contractual clauses are impossible to comply should not be enforced."* But, cautions the court, good faith is not, however, the only value or principle that underlies the law of contracts. In a minority judgement, Sachs J emphasizes that in assessing the validity of standard form terms, a principled approach using objective criteria should be adopted. Moreover, courts should be sensitive to the economic power in public affairs, which ought to be regulated to ensure standards of fairness in an open and democratic society. Sachs J stresses legal convictions of the community, which seeks fair dealings in business/consumer relationships, in contemporary society. Sachs J finds support for his contention in the preamble to the new *Consumer Protection Bill,* published by the Department of Trade and Industry for public comment in the Government Gazette 2862 GN R489 on the 15th March 2006. In this regard the preamble states:

135 *Afrox Healthcare Bpk v Strydom* 2002 (6) SA 27 (A) at 40.

136 2007 (5) SA 323 (CC).

"The people of South Africa recognise-

That is necessary to develop and employ innovative means to-

(a) Fulfil the rights of historically disadvantaged persons and to promote their full participation as consumers;
(b) Protect the interests of all consumers, ensure accessible, transparent and efficient redress for consumers who are subjected to abuse or exploitation in the marketplace; and
(c) Give effect to the internationally recognised customer rights."

Section 3(1) goes on to provide that-

"The purpose of the Act is to promote and advance the social and economic welfare of consumers in South Africa by-

(a) Establishing a legal framework for the achievement and maintenance of a consumer market that is fair, accessible, efficient, sustainable and responsible."

In Chapter 2, which deals with fundamental consumer rights, special attention is given to the question of notice to the consumer of clauses which provide for exemption from liability. Section 50(1) provides that any provision in an agreement in writing that purports to limit in any way liability of the supplier is of no force and effect unless:

"(a) the fact, nature and effect of that provision are drawn to the attention of the consumer before the consumer enters into the agreement;
(b) The provision is in plain language; and
(c) If the provision is in a written agreement, the consumer has signed or initialled that provision indicating acceptance of it."

Sachs J also highlights the further provisions in the Bill, which require that the attention of the consumer be drawn to similar exemptions from liability at an early stage and in a conspicuous manner and in a form that is likely to attract the attention of an ordinarily alert consumer, having regard to the circumstances (section 50(2)(b)(i). Sachs J continues to state: *"The section dealing with determination of whether a term of a contract is unfair or unreasonable provides that a court must have regard to all the circumstances of the case and in particular, the bargaining strength of the parties relative to each other, and whether the consumer knew or ought reasonably to have known of the existence and extent of the term, having regard to any custom of trade and any previous dealings between the parties (section 58(1)(a) and (c))."*

Sachs J, with regard to scholarly opinion on the need for fairness in contracts, states that their approach aligns with the theory that he is developing, which he suggests is *"manifestly in keeping with the Constitutional values of human dignity, equality and freedom."* In the concluding remarks of his minority judgement, Sachs J clearly pleads for legal regulation which *"ensures the basic equity in the daily dealings of the ordinary*

people." [137]

10.2.1.1.3 Legal Opinion

The recognition of the influence of the fairness or good faith in the South African Law of Contract has had mixed reactions ranging from acknowledgement to denial.

It must be noted that prior to the case of *Bank of Lisbon and South Africa Ltd v De Ornelas* 1988 (3) SA 580 (A) the role of *bona fides* featured quite prominently in the South African contract law. Both the courts and academic writers alike recognised the existence of the concept *bona fides* or good faith. The justification for the existence thereof, have taken many forms and have been expressed in many ways ranging from "*all contracts are bona fidei*" or "*good faith is required in all contracts*" [138] to "*the absence of good faith as a criterion would lead to an inequitable result*." [139] As a value, good faith was never recognised without some form of resistance, especially, from those ardent followers of the sanctity of contract rule. They argue that "*the maxim pacta sunt servanda is still the cornerstone of the law of contract and ..... there should be the utmost freedom of contract*." [140] So strong has the influence of the sanctity of contract been that the argument has often been advanced that the sanctity of contract rule has prevented our courts from *"applying equitable solutions in situations where the contract is clearly unfair,*

137 *Barkhuizen v Napier* 2007 (5) SA 323 (CC).

138 See *Judd v Fourie* (1881) 2 EDC 41 (76); *Nengebauer and Co v Herman* 1923 AD 564 at 573; *Meskin No v Anglo American Corporation of SA Ltd and Another* 1968 (4) SA 793 (W) at 802 (A); *Savage and Lovemore Mining (Pty) Ltd v International Shipping Co (Pty) Ltd* 1987 (2) SA 147 (W); *Paddock Motors (Pty) Ltd v Igesund* 1976 (3) SA 16 A at 27; *Tuckers Land Development Corporation (Pty) Ltd v Hoves* 1980 (1) SA 645 (A) at 652; *Mutual and Federal Insurance Co Ltd v Oudtshoorn Municipality* 1985 (1) SA 419 A. For the view of the legal writers see Zimmerman and Visser *Southern Cross Civil Law and Common Law in South Africa* (1996) 240; Hutchinson et al *Wille's Principles of South African Law* (1991) 445; Kerr *The Principles of the Law of Contract* (2002) 301; 646.

139 *Trustee, Estate Cresswell and Durbach v Coetzee* 1916 (AD) 14 at 19; *Rand Rietfontein Estates Ltd v Cohn* 1937 (AD) 317 at 330.

140 See Lotz "Die billikheid in die Suid-Afrikaanse Reg" unpublished inaugural lecture University of South Africa (1979) 1; Lubbe "Bona fides, billikheid en die openbare belang in die Suid-Afrikaanse kontraktereg" 1990 *Stell LR* 7 16, "Estoppel, vertrouensbeskerming en die struktuur van die Suid-Afrikaanse privaatreg" 1991 *TSAR* 1 13-14; Van der Walt "Kontrakte en beheer oor kontrakteervryheid in 'n nuwe Suid-Afrika" 1991 *THRHR* 367 368; Van Aswegen "The future of South African contract law" 1994 *THRHR* 448 456; Lubbe and Murray *Farlam and Hathaway Contract: Cases, materials and commentary* (1988) 20-21; Van der Merwe et al *Contracts - General Principles* (2003) 10; Pretorius "The basis of contractual liability in South African Law (1) 2004 *THRHR* 179 at 189; Zimmerman and Visser *Southern Cross Civil Law and Common Law in South Africa* (1996) 240; Kahn *Contract and Mercantile Law* (1988) 32-33; Hawthorne "The End of *bona fides*" (2003) 75 *SA MERC L.J.* 271 at 274.

harsh and oppressive." [141] As countenance to the latter argument, there are academic writers who hold the view that freedom of contract is not an absolute value and ought to be limited by, *inter alia, boni mores*, public interest and good faith which have, hitherto, not become an independent, free floating value used as a basis, for setting aside contracts or contractual provisions). [142]

At one stage, until it's demise in the case of Bank of Lisbon and South Africa Ltd v De Ornelas 1988 (3) SA 580 (A), the *exceptio doli generalis*, was used as a contractual remedy that could give practical application to good faith in the South African Law of Contract. It served as an instrument of equity and was extensively used by the South African courts and recognised by some of the academic writers. [143]

But the position changed with the majority judgement in the case of *Bank of Lisbon and South Africa Ltd v De Ornelas,* [144] when the court, per Joubert JA, concluded: *"All things considered, the time has now arrived, in my judgement, once and for all, to bury the*

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141 Hopkins "Standard-form contracts and the evolving idea of private law justice: A case of democratic capitalist justice versus natural justice" *TSAR* (2003-1) 155; Hefer "Billikheid in die Kontraktereg volgens die Suid-Afrikaanse Regskommissie" *TSAR* (2000-1) 144, 153.

142 Murray and Lubbe *Farlam and Hathaway Contract: cases, materials and commentary* (1988) 37 390; Hawthorne "Closing of the open norms in the law of contract" 2004 67 (2) *THRHR* 294 at 295; Hawthorne "The principle of equality in the law of contract" 1995 (58) *THRHR* 157 at 167; Kerr *The principles of the law of contract* (1998) 8; Hawthorne "Public policy and Micro-lending: Has the unruly horse died?" 2003 *THRHR* 114 at 114-115; Grove "Kontraktuele gebondenheid, Die vereistes van die goede trou, redelikheid en billikheid" 1999 (61) *THRHR* 687 at 689; Van der Walt "Aangepaste voorstelle vir 'n stelsel van voorkomende beheer oor kontrakteer vryheid in die Suid-Afrikaanse reg" 1993 (56) (SA) *THRHR* 65; Van Aswegen "The future of South African contract law" 1994 (57) *THRHR* 448 at 456. The latter writer holds the view that it was especially the inequalities that freedom of contract and *pacta sunt servanda* brought, that necessitated Roman Dutch Law to seek such mechanisms as fairness, justice and good faith to ensure that problems of substantive injustices are averted." This has now found favour in South Africa as well. See Lubbe "*Bona fides*, billikheid en die openbare belang in die Suid-Afrikaanse reg" 1990 *Stell LR* 16 at 17-25; Van der Merwe et al *Contract: General Principles* (2003) 233-234; Cockrell "Substance and form in the South African Law of Contract" 1992 *SALJ* 56; Lotz "Die Billikheid in die Suid-Afrikaanse Kontraktereg" (Unpublished inaugural lecture Univ 1979) 11-12. The author promotes the utilization of *bona fides* as mechanism in that it promotes "*honesty and prohibits unreasonable promotion of one's own interests"*. See further Hawthorne "The principle of equality in the law of contract" 1995 (58) *THRHR* 157 at 172; Neels "Die aanvullende en beperkende werking van redelikheid en billikheid in die kontraktereg" *TSAR* 1999-4 684 at 693; Fletcher "The role of good faith in the South African Law of Contract" *Responda Meridiana* (1997) 1 at 2; Zimmerman and Visser *Southern Cross Civil Law and Common Law in South Africa* (1996) 241.

143 Van der Merwe et al *Contracts - General Principles* (2003) 231-232; Hefer "Billikheid in die Kontraktereg volgens die Suid-Afrikaanse Regskommissie" *TSAR* 2000-1 142; Fletcher "The Role of Good Faith in the South African Law of Contract" *Responda Meridiana* (1997) 1 at 3. For case law see *Weinerlein v Goch Buildings Ltd* 1925 AD 282; *Zuurbekom Ltd v Union Corporation Ltd* 1947 1 SA 514 (A); *Paddock Motors (Pty) Ltd v Igesund* 1976 3 SA 16 (A); *Rand Bank Ltd v Rubenstein* 1981 2 SA 207 (W); *Arprint Ltd v Gerber Goldschmidt Group South Africa (Pty) Ltd* 1983 1 254 (A).

144 1988 (3) SA 580 (A).

exceptio doli generalis as a superfluous, defunct anachronism Requiescat in pace". Joubert JA also recognised that in modern law *"all contracts are bonae fidei"* but declined to acknowledge that *bona fides* had developed to fulfil the function of the *exceptio doli*. In fact, it appears that whilst the court recognised that good faith was the fountain head of a wide variety of rules of substantive law in Roman law, the court stated the *exceptio doli* had never formed part of the Roman Dutch Law, hence it was defunct in South African Law.

Moreover, the court found there was no evidence of a *"general substantive defence based on equity in Roman Dutch Law"* and also *"our courts have consistently refused to exercise an equitable discretion to release a party from an unconscionable but otherwise valid contract."*

Jansen JA, in a minority judgement of the court, found, on the other hand, that the *exceptio doli* is part of the South African Law of Contract. The learned Judge placed the *exceptio doli* within the confines of *"corrective reasonableness and equity".* He advocates, in his judgement, that the principles of *pacta sunt servanda* are not absolute values and should therefore, sometimes, succumb to other considerations namely *"the sense of justice of the community".* The learned judge demonstrates that monopolistic practises, giving rise to unequal bargaining power and the evil of large scale standard form contracts, are *inter alia,* motivating factors why new corrective action ought to be put in place.
The majority judgement elicited a wide ranging response from, especially, the South African legal writers and eventually, the South African Law Commission.

The thrust of the arguments, in the main, varied and included:

(1) The court failed to engage in an in-depth discussion of general policy considerations and lacked insight and the required responsibility in not bringing about justice for the contractants. [145]

[145] Christie *The Law of Contract in South Africa* (2001) 15; Van der Merwe, Lubbe, Van Huyssteen "The *exceptio doli generalis requiescat in pace - vivat aequitas*" (1989) 106 *SALJ* 235; Zimmerman "The Law of Obligations - character and influence of the civilian tradition" 1992 *Stell L.R.* 5 6-9 and see Lambiris "The *exceptio doli generalis* an obituary" (1988) 105 *SALJ* 644. Hawthorne "Closing of the open norms in the law of contract" 2004 67 (2) *THRHR* 294 at 295-296; Neels "Die aanvullende en beperkende werking van redelikheid en billikheid in die kontraktereg" *TSAR* 1999-4 684 at 689; Fletcher "The Role of good faith in the South African Law of Contract" *Responsa Meridiana* (1993) 1 at 5; Zimmerman and Visser *Civil Law and Common Law in South Africa* (1996) 256; Lubbe and Murray *Farlam and Harthaway Contract: Cases, Materials and Commentary* (1988) 391; Hawthorne "The end of *boni fides*" (2003) 15 *SA MERC L.J.*.

(2) A new mechanism aimed at limiting the unfair or unreasonable consequences of contractual freedom or contractual autonomy, ought to be recognised and applied. *Bona fides*, as an independent mechanism, alternatively, as a component of public interest, alternatively, equity *inter partes* in public interest, has, in this regard, been identified by a number of writers. They contend that the principle of *bona fides* will empower the courts to correct unreasonable contracts or contractual provisions. [146]

(3) The main characteristics of the principle of *bona fides* as a separate mechanism which, the legal writers espouse, ought to be given concrete content in regulating the operation of a contract, include:

(3)(1) It would bring about certainty and economic efficiency, in that, the principle of good faith would provide technical rules, on a par with public policy and public interests. This would result in any contract, deemed to be contrary to good faith to be classified as illegal, resulting in the usual consequences of illegality. [147]

(3)(2) In would serve as a standard of honesty and fidelity in contractual obligations and help form a much needed ethical base in the law of contract. [148]

(3)(3) The principle of good faith will serve as a mechanism which will work

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146 Van der Merwe, Lubbe and Van Huyssteen "The exceptio doli generalis requiescat in pace - vivat aeques" (1984) *SALJ* 235; Van der Merwe *Contract: General Principle* (1993) 2, 233; Lubbe en Murray *Farlam and Hathaway Contract: cases, materials and commentary* (1988) 390; Zimmerman "Good faith and equity"; Zimmerman and Visser *Southern Cross Civil Law and Common Law in South Africa* 1996 256; Lambiris "The exceptio doli generalis" *SALJ* 644; Lewis "The Demise of the exceptio doli to contractual equity" 1990 *SALJ* 26; Hefer "Billikheid in die Kontraktereg volgens die Suid-Afrikaanse Regskommissie" *TSAR* 2000-1 142.

147 Van der Merwe et al *Contract - General principles* (2003) 232-234. See also Hawthorne "The principle of equality in the law of contract" 1995 (58) *THRHR* 172. The writer pleads that the principle of good faith "*be given content in its application both to particular instances and to the operation of contract.*" He also suggests that, good faith be developed and imposed as a general duty" which can be enforced "*ex lege*". See also Van der Walt "Kontrakte en beheer oor kontrakteer vryheid in 'n nuwe Suid-Afrika" *THRHR* (1991) 367 at 387. See further Hawthorne "Closing of the open norms in the law of contract" 2004 67 (2) *THRHR* 294 at 296.

148 Du Plessis "A history of *remissio mercedis* and related legal institutions" A Doctoral Thesis Erasmus Univ. Rotterdam 2003. See also the persuasive argument by Van der Walt "Aangepaste voorstelle vir 'n stelsel van voorkomende beheer oor kontrakteervryheid in die Suid-Afrikaanse reg" 1993 (56) *THRHR* 65 at 66. The writer prefers good faith as a general criterion in that good faith provides a strong ethical requirement, which would, lead to greater legal certainty. See also Zimmerman and Visser *Southern Cross Civil Law and Common Law in South Africa* (1996) 256.

against contracts which, in terms of their content, are unfairly prejudicial against one of the contracting parties, in that, good faith can play a vital role in bringing about procedural or substantial fairness in contracting. [149]

(3)(4) Good faith, if implemented, is also seen as an informing principle, which will show up the unconscionability aspect after the conclusion of the contract, having regard to it being contrary to the principle of fairness or *bona fides*. [150]

(3)(5) Another characteristic identified by several South African legal writers, is the potential *bona fides* has in the Constitutional order. It would create a jurisdiction to decide by equity, whether any contractual provisions are unreasonable, unconscionable or oppressive. What has been suggested is the development of the open norms of the South African common law *inter alia, bona fides*, public policy and the *boni mores* in accordance with the Constitutional mandate. [151]

(4) But there are legal writers who do not support the notion that the principle of good faith should become an independent, free-floating basis for setting aside contracts or contractual provisions, nor, an underlying ethical value or controlling principle. [152]

(5) Perhaps then, in consequence of the difference of opinion between the South

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149 Lubbe "*Bona fides*, billikheid en die openbare belang in die Suid-Afrikaanse Kontraktereg" 1990 *Stell. L.R.* 8-11. Van Aswegen "The future of South African Contract Law" 1994 (5) *THRHR* 458; See also Van der Walt "Aangepaste voorstelle vir 'n stelsel van voorkomende beheer oor kontrakteervryheid in die Suid-Afrikaanse Reg" 1993 (56) *THRHR* 65. The writer supports the proposed reform in favour of a general criterion of good faith as good faith "*is locally and internationally acknowledged as a term in which ethical requirements and the collective experience of our legal culture"* is considered.

150 Lubbe and Murray *Farlam and Hathaway Contract: Cases, materials, commentary* (1988) 773-774.

151 Hawthorne "The end of *bona fides*" (2003) 15 *SA MERC L.J.*; Hawthorne "Closing of the open norms in the law of contract" 2004 67 (2) *THRHR* 294 at 295.

152 Hutchison "Non-variation clauses in contract: Any escape from the Shifren straight jacket" (2001) 118 *SALJ*. Support for this view are to be found in the *Acta Juridica* 26 41-43; writings of Cockrell "Second-guessing the exercise of contractual power on rationality grounds" 1997 Christie "The law of contract and the Bill of Rights" Bill of Rights Compendium (2002) 3H-11. See also Hefer "Billikheid in die kontraktereg volgens die Suid-Afrikaanse Regskommissie" *TSAR* 2000-1 142 at 154; Glover "Good faith and procedural unfairness in contract" 1998 (61) *THRHR* 328-325 See further Neels "Die aanvullende en beperkende werking van redelikheid en billikheid in die kontraktereg" *TSAR* 1999-4 705.

African legal writers and amid the confusion created by majority decision in the case of *Bank of Lisbon and South Africa Ltd v De Ornelas* 1988 (3) SA 580 (A), the South African law commission [153] stepped in, in an attempt to give direction to this impasse, which existed, and continues to exist today. The Commission firstly, recognized good faith as a defence. It was suggested secondly, that the South African legal system should use good faith as a corrective mechanism, especially in instances where, in a contractual context, unreasonableness, oppressiveness or unconscionable-ness is present. Sometime later, in a majority judgement in *Eerste Nasionale Bank van Suidelike Afrika Bpk v Saayman* 1997 (4) SA 302 (A), Olivier JA recognized the principle of good faith, which he regards as based on the legal convictions of the community which play an undeniable role in the law of contract (321J-322A). The learned Judge held that there was a close connection between the doctrine of *bona fides* and public policy, public interests and *iusta cause* (322C). Consequently he suggested that as *bona fides* is a free-floating value, as is the case with public policy etc, public policy demands that good faith should apply to all contracts.

It was however, especially the Cape Provincial Division of the High Court which, sometime later, moved for the reintroduction and application of *bona fides* in the law of contract. Motivation therefore appears to be the absence of legislative regulations and the promotion of the spiritual values of the Bill of Rights enshrined in the Constitution (326E). Reference is particularly made to Sections 8(3) (a) and 9(1) in so far as they concern equality. See the cases of *Janse van Rensburg v Grieve Trust CC* 2000 (1) SA 315 (C); *Miller and another NNO v Donnecker* 2001 (1) SA 928 (C); *Mort NO v Henry Shields-Chiat* 2001 (1) SA 464 (C).

But the clarification of the possible reintroduction of the *bona fides* principle was short lived, in that, after the Supreme Court of Appeal had heard the cases of *Brisley v Drotsky* 2002 (4) SA 1 (SCA); *De Beer v Keyser and Others* 2002 (1) SA 827 (SCA); *Afrox Healthcare Bpk v Strydom* 2002 (6) SA 27 (A), the Supreme Court of Appeal made it clear that the highest court of appeal was not ready for a paradigm shift. The court does not recognize the principle of good faith as an independent free-floating basis for setting aside or enforcing contractual provisions. Nor is the Supreme Court of Appeal prepared to recognize good faith as an independent defence. Instead, the court sought to entrench the

153 South African Law Commission Report on *Unreasonable Stipulations in Contracts and the Rectification of Contract* (1998) 56.

sacrosanctity of the freedom of contract and the *pacta sunt servanda*.

Moreover, it was especially obvious in the *Afrox Healthcare Bpk v Strydom* 2002 (6) SA 27 (A) case, in which Brand AJ flatly ignored the contention, that the contractual provisions (an indemnity clause in a hospital admission form) were contrary to the principle of good faith. Instead, the Supreme Court of Appeal seems to have decided to use the occasion to severely limit, if not eliminate, the application of good faith in the law of contract. [154]

More recently the Constitutional Court, in a majority judgement, in the case of *Barkhuizen v Napier* [155] again chose not to recognize good faith as an independent, or what the court termed, a `self-standing rule'. The court was, however, prepared to accept that good faith was an underlying value that is given expression through existing rules of law. One of the existing rules of law identified by the court is that contractual clauses that are impossible to comply with should not be enforced. As will be seen hereinafter, the court, in the majority judgement per Ngcobo J, singles out public policy as one of the few factors which courts may rely on in pronouncing the validity of contractual provisions, or contract as a whole. The Constitutional Court, save for recognizing the notion of fairness in a public policy context remarks: *"Public policy imports the notions of fairness, justice and reasonableness."* The court, unlike Sachs J in the minority judgement, does not see fairness as a free-floating factor. The courts, per Ngcobo J, in the majority judgement, did however, find that `justice, reasonableness and fairness constituted good faith' but declined to recognize good faith as a free-floating factor. In a dissenting judgement, Sachs J however, develops contract law jurisprudence in South Africa when he refers to `the need for fairness in contracts' which Sachs J views to be *"..... manifestly in keeping with the Constitutional values of human dignity, equality and freedom."* Sachs J further states that the legal convictions of the community call for `reasonable and fair dealing' and `the ensurance of standards of fairness,' which the learned Judge regards as intrinsic to appropriate business/consumer relationships in contemporary society. This approach needs to be welcomed in a changing society, where the ethos of consumer welfarism is encouraged. Sachs J finds support for the developing of his theory in the new *Consumer Protection Bill*.

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154 See in this regard the valid criticism of the Hawthorne "Closing of the open norms in the law of contract" 2004 67 (2) *THRHR* 294 at 295; See also the criticism of Bhana and Pieterse "Towards Reconciliation of Contract Law and Constitutional Values: Brisley and Afrox Revisited" (2005) 122 *SALJ* 865 of the Supreme Court of Appeals reversion to `Classical Libertarian' and hostility to the broader principles of equity and fairness; See also Lewis "Fairness in South African Contract Law" *SALJ* (2003) 330ff.

155 2007 (5) SA 323.

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The Bill aims to protect the interests of consumers against abuse or exploitation in the market place and to promote consumer rights. In particular it also regulates the practise of exempting from liability to contractual provision and the criteria set to be met before these types of contractual provisions are deemed to be valid. The criteria include, *inter alia*, the bargaining strength of the contracting parties and knowledge of the existence and extent of the terms.

It is precisely for that reason, that urgent law reform is needed in the South African Law of Contract.

It is respectfully submitted that legislation is a preferred medium of legal reform and the optimal approach available in South Africa today. One of the most significant underlying reasons remains the Supreme Court of Appeal's reluctance to bring about fundamental changes in the law of contract, including preventative action and policy changes. Instead, it remains steadfast in clinging to precedent i.e. freedom of contract and *pactum sunt servanda*. It is also submitted that, the introduction of a legislative enactment of good faith in contracting, will go a long way in overcoming procedural unfairness in contracts.

It is also respectfully submitted that one of the most effective ways in dealing with the "sanctity of contract" rule, is by introducing good faith as an independent, free-floating mechanism on a par with public interest, the *boni mores* and equity. This will limit, or correct, the unfair, unreasonable and oppressive consequences of the *pactum sunt servande,* as observed in the most recent cases in the Supreme Court of Appeals.

10.2.1.2 ENGLAND

10.2.1.2.1 Legal Writings

The principle of fairness in the English Law of Contract is a concept which found favour with the Chancery as long ago as 1770. During this period it became clear policy of the Chancery that a contract must, basically, "*be fair*". For that reason, Chancellors, during this period, regularly set aside transactions which they felt were excessively harsh or unfair. [157]

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156 The Bill contains broad proposals formulated by a Commission of Enquiry under the auspices of the Department of Trade and Industry Government Gazette under No 28629 GN R489 on the 15th March 2006.

157 Atiyah *The Rise and fall of Freedom of Contract* (1979) 147.

Fairness in contracts began finding favour with the courts in the eighteenth century, during which period the courts assumed a more protective and regulative a role. [158] One of the primary reasons for the recognition of the principle of fairness, by the English courts during this period, was based upon public interest, wherein the courts protected the weaker contracting parties against the exploitation by the stronger contracting parties, especially capitalistic monopolies. [159]

During more modern times, the principle of good faith and unconscionability, founded upon the principles of equity and fairness, emerged. The aim of these principles is for the courts to grant relief against anything that is unfair or in-equable in contract. [160]

But, while English contract law is influenced by the principles of good faith, English law does not, to date, recognise the existence of a doctrine of good faith as a separate defence. [161]

Academic debate amongst English writers has revealed that they are divided on whether good faith ought to become a fully fledged defence, or not. This has sparked off fierce discourse amongst the legal writers and it is especially, *Brownsword*, [162] who has identified the pros and cons of the validity of a doctrine of good faith. The principle reasons against the introduction of a doctrine of good faith have been summarized, by Professor Brownsword, in the following terms:

> *"5.4 Firstly, it cuts against the essentially individualistic ethic of English contract law.*
>
> *5.5 Secondly, it is said that good faith is a loose cannon in commercial contracts. It is also not clear whose (or which) morality or morality standards it is suggested to protect.*
>
> *5.6 Closely related to the second concern, there is a third concern, namely that a doctrine of good faith would call for difficult inquiries into contractors states of mind. It would involve, speculating, about a contractor's reasons.*
>
> *5.7 Good faith would impinge on the autonomy of the contracting parties and is inconsistent with the*

158 Atiyah (1979) 168-169.

159 Atiyah (1979) 220-221.

160 Atiyah (1971) 339-340.

161 McKendrick *Contract Law Text, Cases and Materials* (2003) 533; Beatson and Friedman *Good faith and fault in Contract Law* (1995) 14-15.

162 "Good faith in Contracts" `Revisited' (1997) *CLJ* 111; Brownsword *Contract Law: Themes for the Twenty First Century* (2000) Paras 5.3-5.9; See also Chitty *Chitty on Contracts* (1994) Para 1-024 for the doctrinal dispute over the notion of good faith in English Law.

fundamental philosophy of freedom of contract.

5.8 The final thread of the sceptical negative view is that a general doctrine of good faith goes wrong in failing to recognise that contracting contexts are not all alike." [163]

Brownsword [164] suggests that the following factors support the recognition of a general doctrine of good faith in English contract law:

"5.15 as English law already tries to regulate bad faith dealings, it may be argued that it would be more rational to address the problem directly (rather than indirectly) and openly (rather than covertly) by adopting a general principle of good faith.

5.16 Secondly, in the absence of a doctrine of good faith, it may be argued that the law of contract is ill-equipped to achieve fair results, on occasion leaving judges `unable to do justice at all'.

5.17 Thirdly, the general principle of good faith, it might be argued that, with such a principle, the courts are better equipped to respond to the varying expectations encountered in the many different contracting contexts, and, in particular, it might be argued that the courts are better able to detect co-operative dealing where it is taking place.

5.18 Finally, it is arguable that the beneficial effects of a good faith doctrine go beyond (reactive) dispute-settlement, for a good faith contractual environment has the potential to give contracting parties greater security and, thus, greater flexibility about the ways in which they are prepared to do business." [165]

But, notwithstanding the difference of opinion between the English legal writers and as will be seen, the reluctance of the courts to develop principles that will allow direct control over substantive unfairness, *inter alia,* good faith, legislative intervention in the form of the *Unfair Terms in Consumer Contracts Regulation,* [166] has as its aim the adoption and protection of good faith in contract in order to bring about fairness in contractual terms.

In this regard Regulation 8(1) provides that any `unfair term' in a consumer contract `shall not be binding on the consumer'. The test of `unfairness' is contained in reg 5(1) and covers:

"..... Any term, which contrary to the requirement of good faith, causes a significant imbalance in the party's rights and obligations under the contract to the detriment of the consumer."

163 Brownsword (2000) Paras 5.3-5.8 quoted in McKendrick (2003) 544-545. The writer is also of the opinion that whilst the existing system works, there is no reason to adopt good faith as a general doctrine or principle.

164 *Contract Law: Themes for the Twenty First Century* (2000) Paras 5.15-5.18.

165 Brownsword *Contract Law: Themes for the Twenty First Century* (2000) Par 5.3-5.8.

166 SI 1999/2083.

This definition, with its reference to `good faith', reveals the European origins of the Regulations.

The 1994 regulations contained a schedule of factors which the court should take into consideration in assessing the issue of good faith. The factors included:

"(a) the strength of the bargaining position of the parties;
(b) whether the consumer had an inducement to agree to the term;
(c) whether the goods or service were sold or supplied to the special order of the consumer; and
(d) the extent to which the seller or supplier has dealt fairly and equitably with the consumer." [167]

It is especially *Chitty,* [168] with regard to the legislative intervention in the *Unfair Contract Terms Act* 1977 and the Unfair Terms in Consumer Contracts Regulations 1994, who recognizes the obligations of good faith imposed by the regulations.

In this regard the *Unfair Contract Terms Act* 1977 declares exemption clauses totally ineffective in certain situations, notably, where they attempt to exclude business liability for personal injuries caused by negligence and where they attempt to exclude, or limit, liability for breach of the terms as to quality and fitness for purpose implied by section 14 of the *Sale of Goods Act* 1979 as against someone dealing as a consumer. [169] According to *Chitty* it gives the courts a discretion, in a wide category of other cases, to deny effectiveness to an exemption clause, unless, it is proven to be *"fair and reasonable"* by the person who seeks to rely upon it. [170] *Chitty* also holds the view that in 1994, when the *Unfair Terms in Consumer Contracts Regulations* were issued, it caused to implement into English law, the *European Community Directive on Unfair Terms in Consumer Contracts*. The ambit of the system of control on the ground of unfairness which these regulations impose, is not restricted to exemption, limitation and indemnity clauses, but extends, according to Chitty, to any term which has not been individually negotiated and which, contrary to the requirement of good faith, causes a significant imbalance in the parties' rights and

167 *Unfair Terms in Consumer Contracts Regulations* 1994 quoted in Stone *The Modern Law of Contract* (2002) 251. The writer holds the view that although the list has not been reproduced in the 1999 regulations, it is unlikely that a court will not consider them in assessing good faith when confronted with a similar problem. See also Stone *Principles of Contract Law* (1996) 168-170.

168 *Chitty on Contracts* (1994) pares 1-018 to 1-024.

169 SS2 (1) and 6(2) of the *Unfair Contract Terms Act* 1977.

170 Chitty (1994) Para 1-018 to 1-019.

obligations under the contract, to the detriment of the consumer. [171]

Chitty, [172] advancing a case in favour of the doctrine of good faith emphasizes the principle of fairness in English law. More particularly the following factors are highlighted:

(1) The importance of fairness or reasonableness in the interpretation or construction of contract, i.e. *"the more unreasonable the result the more unlikely it is that the parties can have intended it."*

(2) The common law often resorts to the implication of a term in a contract in a case which could otherwise be considered to be a matter of "good faith in the performance of a contract", in, for example, employers contracts, the employer is obliged to inform an employee of his/her rights in certain instances, here the result, in the absence thereof, would lead to unfair results.

(3) In instances where a person assumes a fiduciary duty, the fiduciary must act honestly and not allow his own interests to conflict with that of the principle, i.e. insurance law.

(4) General considerations of fairness are relevant to the availability of certain equitable doctrines which are significant in the contractual context, for example, estoppels and specific performance.

10.2.1.2.2 Case Law

English law, as far back as 1766, per the dictum of Lord Mansfield C.J. in the case of *Carter v Boehm* [173] has promoted the principle of good faith. In this regard, Lord Mansfield CJ stated that *"[T]he governing principle is applicable to all contracts and dealings. Good faith forbids either party by concealing what he privately knows, to draw the other into a bargain, from his ignorance of that fact, and his believing the contrary. But either party may be innocently silent, as to ground open to both, to exercise their judgement upon."* [174]

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171 Chitty (1994) Para 1-018.

172 *Chitty on Contracts* (1994) Para 1-020 to 1-023.

173 (1766) 3 Burr 1905, 1910.

174 *Carter v Boehm* 1766) 3 Burd 1905, 1910.

Nevertheless, the modern view in English law is that, in keeping with the doctrines of freedom of contract and the binding force of contracts, in English contract law, good faith definitely plays a subsidiary role and has never been regarded as a complete defence. But, that does not imply that good faith has no role to play in English law.

But, in the case of *Interfoto Picture Library Ltd v Stilleto Visual Programme Ltd* [175] Bingham L.J., delivering the judgement, talks about a piecemeal approach when he states:

"In many civil law systems, and perhaps in most legal systems outside the common law world, the law of obligations recognizes and enforces an overriding principle that in making and carrying out contracts parties should act in good faith. This does not simply mean that they should not deceive each other, a principle which any legal system must recognize. Its effect is perhaps most aptly conveyed by such metaphorical colloquialisms as "playing fair", "coming clean" or "putting one's cards face upwards on the table". It is in essence a principle of fair open dealing..... English law has characteristically committed itself to no such overriding principle but has developed piecemeal solutions in response to demonstrated problems of unfairness." [176]

The leading English case on good faith is the decision of the House of Lords in *Watford v Miles,* [177] where it was held that an obligation to negotiate in good faith is not valid.

The facts stated briefly amounted to this: The appellants entered into negotiations, with the respondents, in March 1987, for the purchase of a company belonging to the respondents. A third party had offered $1.9 million (1.9 million pounds) for the business and the premises. The respondents were prepared to warrant, *inter alia*, that, at the date of completion, the resources in the company's bank account would not be less than $1 million. At one stage the parties reached agreement in principle for the sale of the business. A letter, to this effect, was sent to the appellants recording that an agreement had been reached between the parties. The letter also confirmed the appellants would provide a comfort letter, from their bank, guaranteeing the finances. In return the respondents agreed that, upon receipt of the letter they would terminate negotiations with the third party, with a view to concluding an agreement with the plaintiffs. The respondent responded by confirming a deal had been clinched, subject to contract. But, to the appellant's surprise, they received a letter, from the respondents, a few days later stating they had decided to sell the company to a third party. The appellants brought an action for damages against the respondents for, breach of contract for an amount of $1 million. They relied upon an oral

175 (1989) 1 Q.B. 433, 439.

176 *Inter Foto Picture Library Ltd v Stilleto Visual Programme Ltd* (1989) 1 Q.B. 433, 439.

177 (1992) 2 AC 128.

agreement, collateral to the negotiations which preceded the purchase of the company and the land it occupied `subject to contract'.

The consideration for this oral agreement was twofold, firstly, the Watfords agreeing to continue the negotiations and not to withdraw and, secondly, their providing the comfort letter from their bankers in the terms requested.

Furthermore, the justification for the implied term in paragraph 5 of the amended statement of claims was that, in order to give the collateral agreement `business efficacy', the respondents were obliged to `continue to negotiate in good faith'.

The law, as it stood then, is contained in a dictum of Lord Denning MR in the case of *Courtney and Fairbairn Ltd v Talaini Brothers (Hotels) Ltd* (1975) VLR 297, where Lord Denning MR said, at pp 301-302:

"If the law does not recognise a contract to enter into a contract (when there is a fundamental term yet to be agreed) it seems to me it cannot recognise a contract to negotiate. The reason is because it is too uncertain to have any binding force. It seems to me that a contract to negotiate, like a contract to enter into a contract, is not a contract known to the law. I think we must apply the general principle that where there is a fundamental matter left undecided and to be the subject of negotiation, there is no contract."

Consequently, the issues to be decided included: Whether an agreement to negotiate in good faith, if supported by consideration, is an enforceable contract? Lord Ackner held: *"While accepting that an agreement to agree is not an enforceable contract, the Court of Appeal appears to have proceeded on the basis that an agreement to negotiate in good faith is synonymous with an agreement to use best endeavours and as the latter is enforceable, so is the former. This appears to me, with respect, to be an unsustainable proposition. The reason why an agreement to negotiate, like, an agreement to agree, is unenforceable, is simply because it lacks the necessary certainty."*

The court sought to answer the legal question by begging the following question: How can a court be expected to decide whether, subjectively, a proper reason existed for the termination of negotiations?

Lord Ackner replied by stating:

"The answer suggested depends upon whether the negotiations have been determined in good faith. However the concept of a duty to carry on negotiations in good faith is inherently repugnant to the adversarial position of the parties when involved in negotiations. Each party to the negotiations is entitled to pursue his (or her) own interest, so long as he avoids making misrepresentations."

He goes on to state:

"A duty to negotiate in good faith is as unworkable in practice as it is inherently inconsistent with the position of a negotiating party. It is here that the uncertainty lies. In my judgement, while negotiations are in existence either party is entitled to withdraw from those negotiations, at any time and for any reason. There can be thus no obligation to continue to negotiate until there is a "proper-reason" to withdraw. Accordingly a bare agreement to negotiate has no legal content." [178]

Since *Walford v Miles* was decided there have been some signs of a more sympathetic judicial stance towards good faith (see *Timeload Ltd v British Telecommunications p/c* (1995) EMLR 459, *Philips Electronique Grand Publique SA v British Sky Broadcasting Ltd* (1995) EMLR 472, *Balfour Beatty Civil Engineering Ltd v Docklands Light Railway Ltd* (1996) 78 Build LR 42, 67-68, and *Re Debtors* (Nos 4449 and 4450 of 1998) (1999) 1 ALL ER (Comm) 149, 157-158).

The interpretation of the good faith requirement in the *Unfair Terms in Consumer Contracts Regulations* 1994, received the attention of the House of Lords in the case of *Director General of Fair Trading v First National Bank*. [179] This case concerned a term in a loan agreement issued by a bank. The term provided that if the consumer defaulted on an instalment, the full amount of the loan became payable. This is not unusual, but, the term to which exception was taken, and about which the Director General received complaints, was to the effect that interest on the outstanding debt would remain payable, even after a judgement of the court. Thus, a court might order the consumer to pay off the debt by specified instalments, but, the effect of the contract was that interest would continue to accrue, at the contractual rate, while the instalments were being paid.

On appeal the Court of Appeal concluded that the term created `unfair surprise' and did not meet the requirement of `good faith'. Subsequently the House of Lords disagreed. Lord Bingham viewed good faith, in this context, as follows:

"The requirement of good faith in this context is one of fair and open dealing. Openness requires that the terms should be expressed fully clearly and legibly, containing no concealed pitfalls or traps. Appropriate prominence should be given to terms which might operate disadvantageously to the customer. 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

178 *Walford v Miles* (1992) 2 AC 128 at 137-145. Although Lord Ackner did not state expressly that in no circumstances would an English court recognize the validity of a duty of good faith, he nevertheless, in robust language, suggested that he did not envisage any role for a doctrine of good faith in English law. McKendrick, however, suggests that, that does not mean that good faith has no impact at all on English contract law.

179 (2001) UKHL 52; (2002) 1 A.C. 481, (12).

factors listed in or analogous to those listed in Schedule 2 of the Regulations."

Referring to Lord Mansfield's dictum in the eighteenth century and the traces of good faith thereafter, Lord Bingham claims that traces of good faith can still be found in English Law. Turning to the application of the doctrine of good faith in English Law, Lord Bingham remarked:

"..... it is important that the English courts proceed cautiously and only recognize the existence of a doctrine of good faith where they are convinced that the harm that it will do (in terms of the uncertainty that it will bring) is outweighed by the advantages that will be brought by the open articulation of a doctrine of good faith."

Lord Steyn, in the same case, while agreeing with Lord Bingham, took the view that `good faith' was concerned with substance, as well as procedure and will, therefore, overlap with the test of `significant imbalance'. He continues to state:

"The examples given in Sched 3 convincingly demonstrate that the argument of the bank that good faith is predominantly concerned with procedural defects in negotiating procedures cannot be sustained. Any purely procedural or even predominantly procedural interpretation of good faith must be rejected." [180]

10.2.1.2.3 Legal Opinion

The principle of fairness, in the English Law of Contract, has its roots in the policy of the Chancery, dating back to 1770. Transactions deemed to be excessively harsh or unfair were regularly set aside. [181]

Fairness in contract found extensive application in the English courts during the eighteenth century, as the courts, more and more assumed a protective and regulative role. [182] The rationale for the adoption of this principle in the law of contract is said to stem from the protection of public interest, wherein the courts were out to protect the weaker contracting parties from exploitation by the stronger parties to the contract, often the monopolies. [183]

In more modern times, the principle of good faith and unconscionable-ness founded, upon

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180 *Director General of Fair Trading v First National Bank plc* (2001) UKHL52; (2002) 1 A.C. 481, (12). The author Stone (2002) 252 agrees with Lord Steyn's approach as it makes `significant imbalance' an element within an overall test of `good faith'.

181 Atiyah *The Rise and fall of Freedom of Contract* (1979) 147. See also the cases of *Carter v Boehm* (1766) 3 Burr. 1905, 1910.

182 Atiyah (1979) 220-221.

183 Atiyah (1979) 339-340.

the principles of equity and fairness, emerged in English law of contract, where-upon the English courts may grant relief against anything that is unfair, or inequitable in contract. [184]

But, while English contract law is strongly influenced by the principles of good faith, English law, to date, does not recognise the existence of a doctrine of good faith as a separate defence. [185]

There is however, division amongst English legal writers on the question of whether good faith ought to become a fully fledged defence or not. [186] The primary objection to the full scale introduction of good faith as an independent defence is based upon the reasoning that it *"cuts against the essentially individualistic ethic of English contract law",* in which *"freedom of contract is a fundamental philosophy"* that encourages contractual autonomy. [187]

The primary reason advanced for its introduction as a fully fledged defence is based on achieving fair results, leaving judges to do justice between contracting parties. [188]

The English courts have also, per the judges, had differences of opinion on whether good faith ought to be recognised as an independent, free floating defence. Certain courts advocate that English law has committed itself to no such overriding principle, but, may use good faith on a piecemeal basis. [189]

But, there have been some signs of a more sympathetic judicial stance towards good faith. [190] However the situation has, more recently, been summed up by Lord Bingham, in the

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184 Atiyah (1979) 339-340.

185 McKendrick *Contract Law Text, Cases and Materials* (2003) 533 Beatson and Friedman *Good Faith and Fault in Contract Law* (1995) 14-15.

186 Beatson and Friedman "Good faith in Contracts" `Revisited' (1997) *CLR* 111; Brownsword *Contract Law: Themes for the Twenty First Century* (2000) Paras 5.3-5.9; See also Chitty *Chitty on Contracts* (1994) Para 1-024 for the doctrinal dispute over the notion of good faith in English Law.

187 Brownsword "Good faith in Contracts" `Revisited' (1997) *CLR* 111.

188 Brownsword *Contract Law: Themes for the Twenty First Century* (2000) Paras 5.3-5.9; See also Chitty *Chitty on Contracts* (1994) Para 1-023 who advocates the introduction of good faith as a defence based on the fairness it will bring in its application.

189 *Interfoto Picture Library Ltd v Stiletto Visual Programme Ltd* (1989) 1 QB 437, 429. See also the approach of Lord Achner in the case of *Walford v Miles* (1992) 2 AC 128 in which he found, due to the uncertainty which negotiations between contracting parties brings, good faith as a defence is not the answer.

190 See *Timeload Ltd v British Telecommunications p/c* (1995) EMLR 459, *Philips Electronique Grand Publique SA v*

case of *Director General of Fair Trading v First National Bank,* [191] in which the House of Lords per Lord Bingham stated the English judicial approach towards the use of the doctrine of good faith in English law as follows:

"..... it is important that the English courts proceed cautiously and only recognize the existence of a doctrine of good faith where they are convinced that the harm that it will do (in terms of the uncertainty that it will bring) is outweighed by the advantages that will be brought by the open articulation of a doctrine of good faith."

Notwithstanding the difference of opinion between the English legal writers and the reluctance of the court to develop principles that will allow direct control over unfair contracts, Legislative intervention, in the form of the *Unfair Terms in Consumer Contracts Regulation,* [192] was introduced. In terms of the legislation, good faith is used as a basis to bring about fairness. Courts are, therefore, authorized to set aside terms contrary to the requirement of good faith, which cause "a significant imbalance in the party's rights and obligations under the contract to the detriment of the consumer." [193]

10.2.1.3 UNITED STATES OF AMERICA

10.2.1.3.1 Legal Writings

The American law of contract, as was stated earlier, was profoundly influenced by its English counterpart. Spurred by the English influence, the United States of America inherited, from English law, the principles of equity governing contracts, especially in instances where a degree of bargaining unfairness was present, in addition to a finding of unfair terms. In this regard similar equity courts were established in the United States of America. [194]

Good faith was seen as a "*safety valve*" employed by judges to ensure a minimum level of fairness in contracting. [195]

British Sky Broadcasting Ltd (1995) EMLR 472; *Balfour Beatty Civil Engineering Ltd v Docklands Light Railway Ltd* (1996) 78 Build LR 42, 67-68, and *Re Debtors* (Nos 4449 and 4450 of 1998) (1999) 1 ALL ER (Comm) 149, 157-158.

191 (2001) UKHL 52; (2002) 1 A.C. 481, (12).

192 S1 1999/2083.

193 Regulation 5(1) and Regulation 8(1) of the *Unfair Terms in Consumer Contracts* 1999/2083.

194 Hillman *The Richness of Contract Law* (1997) 130-131.

195 Summers "The General Duty of Good Faith - Its Recognition and Conceptualization" 67 *Cornell.L.Rev*. 810, 812 (1982) quoted in Hillman (1997) 143-144.

The historical justification for recognizing good faith in contract stems from the fact that, it is generally accepted in all legal systems, that ethics and fairness in law form part of contract. [196] This stems from the fact that, historically, public policy was developed, by judges, on the basis of their perception that a great need existed to protect the public welfare against unfair contracts or contractual terms leading to unreasonable hardship. [197] But it was, especially, the advent and the increased use of standard forms, increasing the power of the promiser over the contractual relationship, and the lack of the promisee's understanding of the meaning of some of the terms or provisions of the written contract, that forced the courts and the legislature in the United States of America to step in and control abuse in the contracting process. [198]

At the forefront of the intervention was the expansion of the concepts of good faith, fair dealing and unconscionable-ness. [199] The use of the doctrine of good faith was said to involve *"the determining of the reasonable expectations of the contracting parties",* [200] by taking into account the effect of the performance decisions upon the expectations of the other contracting party. [201]

Reasonable expectations, on the other hand, are premised upon community-based standards which have the affect that there is a shift from *"extreme individualism of the late nineteenth and early twentieth centuries to societal norms and values."* [202] Equitification of modern contract has become the order of the day in America. This can be seen especially in private house sales, government contracts, which is said to add some certainty to these types of contracts. [203] Apart from the reasonable expectations theory as a motivating factor for the expansion of the doctrine of good faith or the principles of fairness, other motivating

196 Newman 19 *Hastings L.J.* 147 (1967) quoted in Hillman (1997) 129.

197 Dimatteo *Equitable Law of Contracts: Standards and Principles* (2001) 153-155; Hunter *Modern Law of Contracts* (1999-2000) 10-16ff.

198 Dimatteo (2001) 153-155; Hunter (2001) 144.

199 Dimatteo (2001) 153-155; Hunter (2001) 144.

200 Hillman "An Analysis of the Cessation of Contractual Relations", *Cornell Law Review* 68 (1983) 617, 645 quoted Dimatteo (2001) 153-155; Hunter (2001) 144.

201 Dimatteo (2001) 153-155; Hunter (2001) 144.

202 Dimatteo (2001) 153-155; Hunter (2001) 144.

203 Hunter (1999-2000) 10-18 to 10-24.

factors include, the demand for justice based upon the feeling of what is fair and unfair. [204]

The fact that parties enter into one-sided and often unfair contracts due to their lack of sophistication, the use of standard form contracts drawn up by one of the contracting parties, the unequal bargaining positions of the parties and to imprudent judgement by, especially, the weaker party, has forced the courts to come to their rescue and protect them in the interest of public welfare. [205]

The use of equitable principles such as good faith or fairness when interpreting and enforcing, or, sometimes, not enforcing, contractual terms or provisions, is seen to be a fulfilment of the court's duty to administer justice, and, in so doing, to ensure that both contracting parties act justly towards each other and avoid the advancement of self-interest. [206]

On the other hand, the promotion of fairness and justice in contract, with contract law being part of the social institution, mirrors a reflection of the public conception of justice. For that reason, *Rawls* [207] wrote that the Western canon of fairness dictates that contracts must not only reflect the free will of the contracting parties, but, they must also satisfy the public conception of justice. [208]

This entails that the contracting parties should deal in good faith. Furthermore, fair dealing should result in a fair deal or fair agreement. [209]

In 1979, the American Law Institute promulgated Section 205 of the *Restatement (Second) of Contracts*, which set forth an obligation of good faith performance in every contract namely:

"Every contract imposes upon each party a duty of good faith and fair dealing in its performance and its

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204 Dimatteo (2001) 150.

205 Dimatteo (2001) 157.

206 Dimatteo (2001) 160-161.

207 "Fairness to Goodness", *Philosophical Review* 84 (1975), 536, 543.

208 Rawls *Philosophical Review* 84 (1975), 536, 543 quoted by Dimatteo (2001) 162.

209 Dimatteo (2001) 162-165.

enforcement." [210]

Although no definition is given for the term good faith as such, the commentary to Section 205 of the *Restatement (Second) of Contracts* provides, *inter alia*:

"Good faith performance or enforcement of a contract excludes a variety of type of conduct characterized as involving `bad faith' because they violate community standards of decency, fairness or reasonableness." [211]

The legislative intervention, as discussed hereinbefore, is said to have heralded in a new spirit in the law of contract in the United States of America. [212]

It is general policy of the Code to utilize equitable principles in the furtherance of commercial standards and good faith. In turn, the courts should ascertain the legitimate business aims of the parties and take into consideration the customs and expectations of the business community. [213] All contracts are expected to be equitably reformed to include the obligations of "good faith" and unconscionability. [214]

What has taken place as well, in the process, is that there has been *"a loosening of the grip of the formal requirements and the rejection of a purely formalist approach."* Good faith is generally implied into all contracts in the United States of America. According to *Dematteo*, [215] the introduction of good faith has had profound ramifications for the classical theory's fundamental premise of freedom of contract. [216]

The practical effect of the introduction of good faith in contract, in the United States, has been that the courts, on an ad hoc basis, pursue an inquiry into contract with an increased focus on justice and fairness. There has also, simultaneously, been a general shift in judicial attitude away from the sanctity of contract doctrine, with "conscience" becoming an

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210 S205 *Restatement (Second) of Contracts* (1979).

211 Commentary to S205 *Restatement (Second) of Contracts* (1979).

212 Dimatteo (2001) 166-167.

213 Dimatteo (2001) 167.

214 Dimatteo (2001) 167.

215 Dimatteo (2001) 168.

216 Dimatteo (2001) 172.

important influence in contract law. [217] One legal commentator has stated the position as follows:

"Though the principle of sanctity of contract remains strong, relational elements are on the rise (resulting in) a major shift towards relationalism and a recognition of equitable considerations." [218]

Parties are generally expected to observe a higher standard of fairness in their dealings. Society requires from contracting parties a greater degree of justice, fairness and equity. [219] In this new era, good faith is seen as the legal reflection of the practises of honest and fair dealings. [220]

10.2.1.3.2 Case Law

The English contractual law influence, especially the principles of equity, which had its origin in the equity courts, under the auspices of the Lord Chancellor, in England in the sixteen hundreds, profoundly influenced the law of contract in American Law, so much so, that, still in 1926, in the matter of *Cobb et al v Whitney et al,* [221] the court referred to the Chancery jurisprudence of meting out "equal and exact justice". The court emphasized the jurisdiction of courts of equity, which rests upon the fundamental principles of right and fair dealing and which had as its aim *"justice between man and man"* and the protection of *"the innocent and blameless."* [222]

The fairness and reasonableness of contract within the notion of good faith, has formed the subject for decision-making in the American Courts over a lengthy period of time. The Supreme Court of the United States, as far back as 1873, in the case of *Railroad Company v Lockwood,* [223] was asked to pronounce upon a contract involving a railroad company, which presented a standardized contract containing a waiver of all claims for damages or injuries arising from the loading, transporting and unloading of cattle. The court was, consequently, tasked to pronounce on the validity of such an exemption.

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217 Dimatteo (200) 172.

218 Nassar (1995) 234 quoted in Dematteo (2001) 180.

219 Dimatteo (2001) 181.

220 Dimatteo (2001) 182.

221 124 Okla 188, 255, 566, 1013 (1926).

222 *Cobb et al v Whitney et al* 124 Okla 124 Okla 188, 255, 566, 1013 (1926).

223 84 U.S. 357, (1873).

The court considered a host of cases involving common carriers, including, *inter alia, Dorr v The New Jersey Steam Navigation Company and Standford*, 136 (1850); *Smith v New York Central Railroad Company* 29 Barbour, 132 (1859); *Express Company v Kountze Brothers* 8 ID 342, 353 (1851). Consequently, the court found that, depending on the status and relative position of the parties, the conditions of such an agreement would be rendered void. In this regard, the court held:

"Contracts of common carriers, like those of persons occupying a fiduciary character, giving them a position in which they can take undue advantage of the persons with whom they contract, must rest upon their fairness and reasonableness."

The court continues:

"The proposition to allow a public carrier to abandon altogether his obligations to the public, and to stipulate for exemptions that are unreasonable and improper, amounting to an abdication of the essential duties of his employment, would never have been entertained by the sages of the law." [224]

Fairness and justice also played a crucial role in the case of *Wood v Lucy, Lady Duff-Gordon,* [225] in which Cardozo J utilized the equitable principles by imposing a duty of reasonable efforts in order to salvage the contract.

Following thereupon in using equitable principles to decide the fairness of contract, Cardozo J, in the case of *Jacob and Youngs Inc v Kent,* [226] used substantial performance as *"an instrument of justice"* based on the good faith of the contractor.

The transfiguration of the English Chancery Court's equitable principles to American Jurisprudence was made obvious in the previous mentioned case of *Cobb v Whitney*. [227]

One of the salutary principles of chancery jurisdiction is that it has no immutable rules. It was the keeper of the king's conscience to do investigations, and regardless of the narrow and technical rules of law, mete out equal and exact justice. The Lord Chancellor became the head of these ecclesiastical or chancery courts, and thus the jurisdiction of courts of

224 *Railroad Company v Lockwood* 84 U.S. 357, (1873).

225 222 N.Y. 88, 118 N.E. 214 (1917).

226 230 N.Y. 239; 129 N.E. 889 (1921).

227 124 Okla. 188 (1926).

equity rested upon the fundamental principles of right and fair dealing; its creed was justice between man and man. [228]

The fore stated heralded in methods of overcoming the formal requirements of contract and to strive for reasonableness and fairness in contract.

In the case of *Loblaw Inc v Warren Plaza Inc,* [229] the court also held that, based on equitable principles, the policy of the courts is to construe covenants not too narrowly and to modify or void terms that they view as unfair.
In the case of *Henningsen v Bloomfield Motors Inc,* [230] the court, relying upon *Corbin on Contracts* (1950) 5128 P.188, suggests that *"courts cannot fail to be influenced by any equitable doctrines that are available"*. It is, especially, in instances involving unconscionable provisions in pre-printed, standardized contracts that principles of fairness and equity come into play. For that reason, the court held that:

"Freedom of contract is not such an immutable doctrine as to admit of no qualification in the area in which we are concerned." [231]

The Supreme Court of the United States in the case of *International Ladies' Garment Workers' Union, AFL-Cio v National Labour Relations Board et al,* [232] recognized the need for fundamental fairness, based upon the good faith between the parties in collective bargaining agreements in a labour dispute.

The same principle was previously adopted in the case of *Lewis v Benedict Coal Corp,* [233] in which the court held:

"There is no reason for jettisoning principles of fairness and justice that are as relevant to the law's attitude in the enforcement of collective bargaining agreements as they are to contracts dealing with others affairs." [234]

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228 *Cobb v Whitney* 124 Ola. 188 (1926).

229 163 Ohio St. 581, 127 N.E. 2d 754 (1955).

230 161 A. 2d 69 N.J. (1960).

231 *Henningsen v Bloomfield Motors Inc* 161 2d 69 N.J. (1960).

232 366 U.S. 731, 81 S.Ct 1603 (1961).

233 361 U.S. 459 498 (1960).

234 *Lewis v Benedict Coal Corp* 361 U.S. 459, 498 (1960). See also *Riley v National Federation of the Blind of North California* 487 U.S. 781 (1988) concerning fund raising contracts.

The courts, in applying the equitable principles, have also adopted and applied the reasonable expectations test. In this regard, the issue is not what the promisor willed, but rather, what the promisee reasonably expected. The test has been used extensively to the detriment of insurance companies. In *Gerhardt v Continental Insurance Company et al,* [235] the court held that reasonable expectation is dependent upon the good faith of the company and its representatives and they, in turn, are under a correspondingly heavy responsibility to the employees.

With the advent of the *Uniform Commercial Code,* the rules of good faith and fair dealings have transformed the contractual relationship between the contracting parties. The notion of good faith has impacted upon contracts from the negotiation stage, to the formation stage and through to the performance and termination stage, where applicable. The Supreme Court of New Jersey, in *Krigler v Romain,* [236] recognized that the standard of conduct contemplated by the provision of the *Uniform Commercial Code,* authorized courts to decline to enforce unconscionable contracts, contrary to good faith. Honesty in fact, and observance of fair dealing became important criteria.

The demand for good faith in the performance of an agreement, under the Uniform Commercial Code, was also recognized in *Feld v Henry S. Levy and Sons Inc*. [237] The commercial rule embodied in this act, according to the court, is founded upon the principle that impliedly, even when not expressed, the contracting parties bind themselves to use reasonable diligence, as well as good faith, in their performance of the contract. Therefore, in terms of the *Uniform Commercial Code,* [238] every contract of this type imposes an obligation of good faith in its performance. [239]

Good faith, as a requirement in a security agreement involving an acceleration clause, forms the basis of the court's reasoning in the case of *Brown et al v Avemco Investments Corporation*. [240] In this case the court, in relying on the *Uniform Commercial Code,* held:
"Section 1-203 of the U.C.C. imposes an obligation of good faith on the performance or enforcement of every

235 48 N.J. 291, 225 A.2d 328 (1966).

236 58 N.J. 522, 279 A.2d 640 (1971).

237 37 N.Y. 2d 466, 335 N.E. 2d 320, 373 N.Y.S. 2d 102 (1975).

238 S2-306 of the *Uniform Commercial Code.*

239 603 F.2d 1367 (1979).

240 *Brown et al v Avemco Investments Corporation* 603 F.2d 1367 (1979).

contract or duty within the Code. Section 1.208 further defines and applies the good faith obligation to options to accelerate at will and requires that the accelerating party "in good faith believes that the prospect of payment or performance is impaired." [241]

An implied covenant of good faith and fair dealing was also recognized in *K.M.C. Co, Inc v Irvine Trust Company,* [242] which concerned a financial agreement in which it was alleged that one of the contractants was in breach of the said agreement. The court, when considering the affect of the *Uniform Commercial Code on Contract*, concluded:

"The application of principles of good faith and sound commercial practice normally calls for such notification of the termination of a going contract relationship as will give the other party reasonable time to seek a substitute arrangement." [243]

In *Darner Motor Sales Inc v Universal Underwriting Insurance Company* [244] the court also enunciated the reasonable expectations test as formulated by the Second Restatement. [245] But the court held:

"Although customers typically adhere to standardized agreements and are bound by them without even appearing to know the standard terms in detail, they are not bound to unknown terms which are beyond the range of reasonable expectations." [246]

Reasonable expectation, so the court held, is founded upon the trust and good faith the parties have for each other.

The Supreme Court of the United States in *Carnival Cruise Lines Inc v Shute,* [247] also recognized the need for a "fundamental fairness" inquiry when courts are tasked to review clauses in standard form contracts offered, on a '*take-or-leave'* basis, by a party with stronger bargaining power to a party with weaker power. In *White et al v Continental Insurance Company,* [248] following the dictum in *McCullough v Golden Rule Ins Co* 789 P.2d 855 WYO (1990), the court concluded that:

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241 S1-203 of the *Uniform Commercial Code.*

242 757 F. 2d 752 (1985).

243 *K.M.C. Co, Inc v Irvine Trust Company* 757 F. 2d 752 (1985).

244 140 Ariz. 383, 682 F.2d 388 (1984).

245 S211 of the *Second Restatement.*

246 *Darner Motor Sales Inc v Universal Underwritings Insurance Company* 140 Ariz. 383, 682 P.2d 388 (1984).

247 499 U.S. 585 (1991); See also *Brormmer v Abortion Services of Phoenix* 840 P.2d 1013, 1015 Ariz. (1992).

248 831 F.Supp 1545 (1993).

"..... The duty of good faith and fair dealing was an implied term of all insurance contracts because of the special relationship between the parties to this type of contract."

More recently, in the case of *Cantrell-Waind and Associates Inc v Guilluame Motorsports Inc,* [249] the court, with regard to implied duty of good faith and fair dealing, held:

"A party has an implied obligation not to do anything that would prevent, hinder, or delay performance .... We hold that the circuit court erred in failing to recognize that a duty of good faith and fair dealing was included in the contract." [250]

10.2.1.3.3 Legal Opinion

The United States of America, by adopting principles of equity in contract, has been deeply influenced by the English legal system, commencing with the role of the Chancellor in the Equity Courts. [251]

The degree of bargaining power, often resulting in an imbalance between the contracting parties, had as a consequence unreasonable and unfair results. For that reason, the American legal writers and the courts alike identified equitable principles as means to address unfairness and unreasonableness in contract. One way of dealing with this aspect was to seek a solution beyond the common law defence of, inter alia, fraud, misrepresentation, public policy etc. In so doing, unconscionability and good faith were identified as interventions to stem the tide against the increase of unfair contracts or contractual terms, leading to unreasonable hardship. [252] Good faith, in itself, was seen as a "*safety valve*", employed by the judges to ensure a minimum level of fairness in contract. [253]

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249 *White et al v Continental General Insurance Company* 831 F.Supp 1545 (1993).

250 *Cantrell-Wained and Associates Inc v Guillaume Motorsports Inc* 62 Ark App 66, 968 S.W. 2d 72 (1998).

251 Hillman *The Richness of Contract Law* (1997) 130-131. For the recognition of the role of the Chancellor see *Cobb et al v Whitney et al* 124 Okla. 188, 255 P.566, 1013 (1926).

252 Dimatteo *Equitable law of Contracts: Standards and Principles* (2001) 153-155; Hunter *Modern Law of Contracts* (1999-2000) 10-16ff; For case law see *Railroad Company v Lockwood* 84 U.S. 327 (1873) who as far back as 1873 strived to attain fairness and reasonableness in contract. See also *Wood v Lucy, Lady Duff-Gordon* 222 N.Y. 88, 118 N.R. 214 (1917); *Jacob and Youngs Inc v Kent* 230 N.T. 239, 129 N.E. 889 (1921).

253 Summers "The General duty of Good Faith - Its recognition and conceptualization" 67 *Cornell L. Rev* 810, 812 (1982) quoted in Hillman (1997) 143, 144. For case law see *Henningsen v Bloomfield Motors Inc* 161 A. 2d 69 N.J. (1960); *International Ladies' Garment Workers' Union AFL-Cio v National Labour Relations Board et al* 366 U.S. 731, 81, S.Ct. 1603 (1961); *Lewis v Benedict Coal Corp* 361 U.S. 459, 498 (1960).

The doctrine of good faith was said to include the following namely: *"The determining of the reasonable expectations of the contracting parties in affecting their performance decisions"* [254] and *"the demand for justice based upon the feelings of what is fair and unfair."* [255] The motivating factors for the latter include the lack of sophistication, the negative influence of the contracting parties and the imprudent judgement, usually, by the weaker party. It has often been suggested that public welfare demands that courts come to the rescue of the weaker party. [256]

In order to satisfy the public conception of justice in contract, legislative intervention was introduced in 1979, when the American Law Institute promulgated Section 205 of the *Restatement (Second) of Contracts,* which set forth an obligation of good faith performance in every contract. [257] The type of conduct expected during good faith performance, is measured against community standards of fairness or reasonableness. [258]

The legislative intervention has been widely welcomed by the legal writers, as well as the judiciary. [259]

The *Uniform Commercial Code* also previously intervened, by guiding the courts to decline to enforce unconscionable contracts and observe good faith, honesty and fair dealing. [260]

With legislative intervention, it is believed that there has been a loosening of the grip which formalism has always enjoyed. Courts can thus interfere with contracts and contractual provisions which are unfair, unreasonable or unconscionable. The classical theory's fundamental principles of freedom of contract and the sanctity of contract have been

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254 Dimatteo *Equitable law of Contracts: Standards and Principles* (2001) 153-155; Hunter *Modern Law of Contracts* (1999-2000) 10-16ff; For case law see *Gerhardt v Continental Insurance Company et al* 48 N.J. 291, 225 A.2d 328 (1966); *Darner Motor Sales Inc v Universal Underwriters Insurance Company* 140 Ariz. 383, 682 P.2d 388 (1984).

255 Dimatteo *Equitable law of Contracts: Standards and Principles* (2001) 153-155; Hunter *Modern Law of Contracts* (1999-2000) 10-16ff; for case law see *Kiegler v Romain* 58 N.J. 522, 279 A, 2d 640 (1971).

256 Dimatteo *Equitable Law of Contracts: Standards and Principles* (2001) 161.

257 S205 *Restatement (Second) of Contracts* (1979).

258 Dimatteo *Equitable Law of Contracts: Standards and Principles* (2001) 164.

259 S2-306 of the *Uniform Commercial Code.*

260 Commentary to S.205 *Restatement (Second) of Contracts* (1979).

substantially inhibited with the introduction of good faith. [261]

The effect of the introduction of good faith in contractual dealings has further resulted in a greater standard of fairness being observed in the dealings between contracting parties, which satisfies societal demands for greater justice, fairness and equity. [262]

10.2.2 The Doctrine of Unconscionable-ness

10.2.2.1 SOUTH AFRICA

10.2.2.2.1 Legal Writings

The doctrine of unconscionable-ness, despite having its roots in Roman law, and, despite South African contractual law being greatly influenced by Roman law, has never become an independent defence in the South African law of contract. [263]

Unconscionable-ness is, however, a concept used by the South African writers, in a number of ways. In this regard *Van der Merwe et al* [264] described it as a concept relative, mainly, to the conduct of one of the contracting parties. *Lubbe and Murray,* [265] on the other hand, describe it as 'unacceptable conduct in contracting' or an 'unfair act in attempting to enforce a contract', and the like. Aronstam described it as the abuse of disproportionate, or unequal, bargaining power. [266] But, whatever description is given by the legal writers, its application has been very limited in South Africa. What is certain, however, is its application focuses on the abuse of weaker bargaining power contracting parties, who are poor and ill educated who are in need of the goods and services, but, upon who, unfair terms and conditions are imposed. [267]

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261 Dimatteo *Equitable law of Contracts: Standards and Principles* (2001) 168. For case law see *Brown et al v Avwemco Investments Corporation* 603 F.2d 1367 (1979).

262 Section 1-2-3 of the *Uniform Commercial Code*. For case law acknowledging the criteria see *Brown et al v Avemco Investments Corporation* 603 F.2d 1367 (1979); *Feld v Henry S. Levy and Sons Inc* 37 N.Y. 2d 466 335 N.E. 2d 320, 373 N.Y.S. 2D 102 (1975); *K.M.C. Co Inc v Irving Trust Company* 757 F. 2d 752 (1985).

263 Aronstam "Unconscionable Contracts: The South African Solution?" (1979) (42) *THRHR* 26, Lubbe and Murray *Farlam and Hathaway Contract, Cases, Materials Commentary* (1988) 388.

264 *Contract: General Principles* (2003) 1117; Lubbe and Murray *Farlam and Hathaway Contract: Cases Materials Commentary* (1988).

265 *Farlam and Hathaway Contract: Cases, Materials and Commentary* (1988) 388.

266 Aronstam (1979) (42) *THRHR* 22.

267 Aronstam (1979) (42) *THRHR* 22.

Legislative intervention [268] has in the past assisted in providing relief where unconscionable terms and conditions have been put into a contract leading to harsh results. [269] Despite the protective attempts by parliament, the results have not been overwhelmingly positive, in that, the legislation passed did not provide for a general criterion of control. Furthermore, parliament did not give the courts a controlling power to strike down an unconscionable term in a contract, entered into in respect of any transaction, irrespective of its nature, content or subject-matter. [270]

In so far as the common law is concerned, *Aronstam* [271] holds the view that limited preventative measures have been instituted to prevent harm being done, through the exploitation of persons having weak bargaining power. Restrictive practises have been adopted by the courts inter alia, by applying certain rules of interpretation of contracts, to prevent such exploitation. Where a harsh term in a contract is ambiguous, the courts have applied the *contra proferentem* rule to relieve the weak party from its oppressive provisions. [272]

Aronstam [273] is particularly critical of what he terms *"a haphazard, random, fragmented approach which he believes will provide no solution to the present problem."*

Aronstam advocated then, that, because the South African courts are extremely reluctant to extend the principles of the common law to satisfy those who advocate a jurisdiction based on principles of equity, to deal with problems caused by unconscionable contractual conduct, the legislature should step in to create such jurisdiction for the courts. [274]

The *South African Law Commission,* [275] in 1998, recognised that there are contracts, in

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268 *Hire-Purchase Act* 1942, *The Limitation and Disclosure of Finance Charges Act* 1968, *The Sale of Land on Instalments Act* 1971, Regulations under the *Price Control Act* 1964, *The Rent Control Act* 1976, *The Conventional Penalties Act* 1962.

269 Aronstam (1979) (42) *THRHR* 26.

270 Aronstam (1979) (42) *THRHR* 26.

271 Aronstam (1979) (42) *THRHR* 26.

272 Aronstam (1979) (42) *THRHR* 26-27.

273 Aronstam (1979) (42) *THRHR* 27.

274 Aronstam (1979) (42) *THRHR* 42.

275 The South African Law Commission's report on *Unreasonable Stipulations in Contracts and the Modification of Contracts* 47 (1998) 58.

South Africa, which are unfair, unreasonable, unconscionable or oppressive and which may arise when the agreement is executed or when its terms are enforced. Consequently, the commission recommended that South Africa needed to enact legislation against contracts of unfairness, unreasonableness, unconscionable-ness or oppression.

Despite the commissions' recommendation, the position has not changed much in the South African Law of Contract. In fact, as recently as 2003, *Hawthorne* [276] pleads for the introduction of a doctrine of relief against unconscionable transactions.

10.2.2.2.2 Case Law

The South African courts, throughout the years, have generally adopted the view that the courts will not enquire into the conscionable-ness, or unconscionable-ness, of contractual terms, however harsh they may be. In fact, the courts have, on many occasions, refused to apply considerations of equity to deal with harsh and unconscionable contracts. The reasons thereof are enunciated in various dicta.

In one of the first South African decisions in which the court referred to it, the court neither was in favour, nor prepared to interfere with the fairness or unconscionable-ness of contractual terms. Innes CJ in *Wells v South African Alumenite Company* [277] commented as follows:

"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 ..... " [278]

In a later judgement, in the case of *Techni-Pak Sales (Pty) Ltd v Hall,* [279] Colman J viewed the principle with great scepticism when he stated:

"If the courts are to interfere (with contracts) on grounds of equity alone in contractual bargains, where does the process end? Some of the dicta seem to suggest that we have here the thin end of a wedge whose exact shape and full dimensions remain undefined. A few more taps, maybe, and the granite concept of sanctity of contract will be shattered." [280]

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276 "Public Policy and Micro Lending - Has the unruly horse died? 2003 (66) *THRHR* 116 118.

277 1927 AD 69, 73.

278 *Wells v South African Alumenite Company* 1927 AD 69, 73.

279 1968 (3) SA 231 (W) 238.

280 *Techni-Pak Sales (Pty) Ltd v Hall* 1968 (3) SA 231 (W) 238.

The freedom and sanctity of contract, at the expense of unconscionable-ness in contract, continued to roll from the lips of our judges, more particularly in the case *Oatorian Properties (Pty) Ltd v Maroun,* [281] in which Potgieter JA stated: *Once there is such a breach, the materiality of the breach is irrelevant and the court will not enquire into the conscionable-ness or unconscionable-ness thereof. (See Human v Rieseberg 1922 TPD 157 at P163).* " [282]

Sometime later, Jansen JA, in the case of *Paddock Motors (Pty) Ltd v Igesund,* [283] supported the principle enunciated in *Rashid v Durban City Council* 1975 (3) SA 920 (D) at 927 B-D, in which Fanwin J, stated the position to be: *"Mr Mendelow was able to refer me to no case in which it has been held that the exception doli can successful be pleaded merely because one part to a contract has exercised, as against the other party, a right conferred upon him by that contract. To do that would, in my opinion, be to exercise a jurisdiction to regulate contractual relationships merely on the ground that the court considered that one party has driven a hard, harsh bargain, and I do not think that our law confines any such jurisdiction upon our courts, whatever may be the position in other countries whose law is, in whole or in part, derived from the civil law.* " [284]

The Appellate Division, in 1982, in the case of *Tamarillo (Pty) Ltd v B.N. Aitken (Pty) Ltd,* [285] relied on the dictum of *McCullough and Whitehead and Co* 1914 AD 599 which provides: *"Now that the document was one-sided and harsh admits of no doubt; but I am not aware of an principle of our law by which, on that ground alone, an undertaking deliberately and knowingly entered into could be repudiated.* " [286]

Although the courts showed tendencies, at times, to protect contracting parties against unconscionable terms or agreements as a whole, particularly, in contracts containing restraint of trade clauses (*Basson v Chilwan* 1993 (3) SA 742 (A) 762I-J 763A-B) and

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281 1973 (3) SA 779 (A).

282 *Oatorian Properties (Pty) Ltd v Maroun* 1973 (3) SA 779 (A).

283 1976 (3) SA 16 (A) 28.

284 *Paddock Motors (Pty) Ltd v Ingesund* 1976 (3) SA 16 (A) 28.

285 1982 (1) SA 398 (A) 439.

286 *Tamarillo (Pty) Ltd v B.N. Aitken (Pty) Ltd* 1982 (1) SA 398 (A) 435.

unemployment contracts (*New United Yeast Distributors (Pty) Ltd v Brooks* 1935 WLD 75 83; *Van de Pol v Silberman* 1952 SA 561 (A) 571E-572A; *Wahlman v Baron* 1970 (2) SA 760 (C) 764; *Malan v Van Jaarsveld* 1972 (2) SA 243 (C) 246A-247F) in which the courts favoured the position of the inferior party, the courts have, however, never given outright recognition to unconscionable-ness as an independent defence, alternatively, as an open norm of public policy and *boni mores*.

This seems to have been the message given by Cameron JA, in a more recent judgement of the Supreme Court of Appeal, in the case of *Brisley v Drotsky,* [287] in which Cameron JA remarked:

"I share the misgivings the joint judgement expresses about over-hasty or ineffective importation into the field of contract law of the concept of boni mores. What is evident is that neither the Constitution nor the value system it embodies give the courts a general justification to invalidate contracts on the basis of judicially perceived notions of unjustness or to determine their enforceability on the basis of imprecise notions of good faith." [288]

It is further respectfully submitted that, not only did the Supreme Court of Appeal lose the opportunity to bring about much needed law reform in the *Brisley case*, the micro-lending case of *De Beer v Keyser and Others* 2002 (1) SA 827 (SCA) and the hospital exclusionary clause case of *Afrox Health Care Bpk v Strydom* 2002 (6) 21 (A) met with the same fate. It is respectfully submitted that the Supreme Court of Appeal had the opportunity to apply, *inter alia,* our Constitutional values, to the law of contract, and authoritively decide the debate on the issue of whether the courts should be, empowered with the necessary jurisdiction, based on principles of equity, to deal with problems caused by unconscionable contractual conduct, leading to undue hardship; instead the court squandered the opportunity.

Likewise, the Constitutional Court, in the most recent judgement in the case of *Barkhuizen v Napier* [289] and the Supreme Court of Appeal in the case of *Napier v Barkhuizen,* [290] also

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287 2002 (4) SA 1 (SCA) 35 C-E.

288 *Brisley v Drotsky* 2002 (4) SA 1 (SCA) 35 C-E; See however, the criticism launched by Hawthorne "Public Policy and Micro-Lending - Has the unruly horse died?" 2003 (66) *THRHR* 116 188 to the Cameron J remarks in *Brisley v Drostky* that *"the Constitution does not give the courts a general jurisdiction to invalidate contracts on the basis of judiciary perceived notions of unjustness or to determine their enforceability on the basis of imprecise notions of good faith."* The author is particularly critical that the Supreme Court of Appeals still clings to the hands-off approach by the courts to the doctrine of freedom of contract and sanctity of contract in 2003.

289 2007 (5) SA 323 (CC).

290 2006 (4) SA 1 (SCA); 2006 (9) BCLR 1011 (SCA); *Barkhuizen v Napier* 2007 (5) SA 323 (CC).

lost the opportunity to pronounce on the acceptability of unconscionable-ness as a fully-fledged defence, in the law of contract in South Africa. Instead, the only reference made thereto is in the dissenting and minority judgement of Sachs J, when he states:

"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 values of an open and democratic society that promotes human dignity, equality and freedom."

10.2.2.2.3 Legal Opinion

The doctrine of unconscionable-ness, despite its rich Roman law connection, has never become an independent defence in the South African law of contract. [291]

The concept unconscionable-ness is, however, not foreign in the South African contractual sphere. The description of the concept often differs amongst the legal writers. Nonetheless, the meaning attached to unconscionable-ness generally centres on the unacceptable and unfair abuse of disproportionate or unequal bargaining power, especially of the poor and illiterate, who are often in need of goods and services but, upon who, unfair terms and conditions are imposed. This often has harsh or oppressive consequences for the weak. [292]

In the past, legislative intervention was introduced, albeit in individual pieces of legislation, [293] in an attempt to provide relief where unconscionable terms and conditions had been included in contracts, pertaining to the subject matter regulated by that specific act. But, despite the attempt by Parliament to protect the poor and vulnerable, in the absence of a general criterion of control, the South African courts were left without the necessary jurisdiction to strike down an unconscionable term in a contract. [294]

In so far as the common law is concerned, the courts have also not shown great prowess in preventing harm being done through the exploitation of persons having weak bargaining

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291 Aronstam "Unconscionable contracts" The South African Solution? (1979) (42) *THRHR* 26; Lubbe and Murray *Farlam Hathaway Contract: Cases, Materials and Commentary* (1988) 388.

292 Van der Merwe *Contract: General Principles* (2003) 117; Lubbe and Murray *Farlam and Hathaway Contract: Cases, Materials and Commentary* (1988); Aronstam "Unconscionable Contracts: The South African Solution" (1979) (42) *THRHR* 26.

293 *Hire-Purchase Act* 1942, *The Limitation and Disclosure of Finance Charges Act* 1968, *The Sale of Land on Instalments Act* 1971, *Regulations under the Price Control Act* 1964, *The Rent Control Act* 1976, *And The Conventional Penalties Act* 1962.

294 Aronstam "Unconscionable contracts" The South African Solution? (1979) (42) *THRHR* 26.

power. The restrictive practises applied by the South African courts *inter alia* applying certain rules of interpretation of contractual terms against harsh results, i.e., the *contra proferentem* rule, has also not helped to impose the situation. [295]

In fact, the South African Courts throughout the years have, generally, adopted the view that the courts will not enquire into the conscionable-ness or unconscionable-ness of contractual terms, however harsh they may be. The courts have on occasions refused to apply considerations of equity to deal with harsh and unconscionable contracts. [296]

There have, however, been occasions when the South African courts showed tendencies to protect contracting parties against unconscionable terms or agreements as a whole, more particularly, in contracts containing restraint of trade clauses [297] and employment contracts. [298]

The South African court in *Brisley v Drotsky,* [299] referring to the South African Constitutional influence on the law of contract, reconfirmed the court's general approach to conscionable-ness or unconscionable-ness of contractual terms, namely; courts do not have a general jurisdiction to invalidate contracts because of inequity or unjustness.

The cases of *De Beer v Keyser and Others*, [300] *Afrox Health Care Bpk v Strydom*, [301] *Napier v Barkhuizen*; [302] *Barkhuizen v Napier*, [303] caused the same fate for any chance of bringing about law reform in South Africa. What is needed, it is submitted, is the revival of the

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295 Aronstam "Unconscionable contracts" The South African Solution? (1979) (42) *THRHR* 26-27, 42.

296 *Wells v South African Alumenite Company* 1927 (AD) 69, 73; *Techni-Pak Sales (Pty) Ltd v Hall* 1968 (3) SA 231 (W) 238; *Oatorian Properties (Pty) Ltd v Maroun* 1973 (3) SA 779 (a); *Paddock Motors (Pty) Ltd v Igesund* 1976 (3) SA 16 (A) 28; *Tamarillo (Pty) Ltd v B.N. Aitken (Pty) Ltd* 1982 (1) SA 398 (A) 439.

297 *Basson v Chilwan* 1993 (3) SA 742 (A) 762I-J, 763A-B.

298 *Van der Pol v Silberman* 1952 SA 561 (A) 571E-572A; *Wahlman v Baron* 1970 (2) SA 760 (C) 764; *Malan v Van Jaarsveld* 1972 (2) SA 243 (C) 246A-247F.

299 2002 (4) SA 1 SCA 35 C-E.

300 2002 (1) SA 827 (SCA).

301 2002 (6) SA 21 (A).

302 2006 (4) SA 1 (SCA); 2006 (9) BCLR 101 (SCA).

303 2007 (5) SA 323 (CC).

South African Law Commission's recommendations [304] that legislation should be enacted against contractual unfairness, unreasonableness, unconscionable-ness or oppressiveness.

10.2.2.2 ENGLAND

10.2.2.2.1 Legal Writings

The origin of the common law doctrine of unconscionable-ness is found in both the Greek and Roman concepts of justice. [305]

The common law doctrine of unconscionable-ness is based upon certain elements of justice, such as fair dealings and not taking advantage of a weaker party. [306] The history of unconscionable contracts is also said to provide a useful focus for tracing the general development of contract theory, and, in particular, the ongoing conflict between freedom of contract and the desire for fairness. [307]

The doctrine of unconscionable-ness found its way into English law in the second half of the seventeenth century. It appears to be closely related to policing transactions which offended against the usury laws, i.e., the Bill against Usury Hen VIII C9 (1545) and to the Action of Family Estates. [308]

The court of Chancery was often approached to grant equitable relief. In so doing, the court made use of a balancing technique which involved a balance between competing sets of values. *Waddams* [309] suggests that on the one end of the scale:

"Freedom of contract emphasises the need for stability, certainty, and predictability. But, important as these values are, they are not absolute, and there comes a point where they "face a serious challenge". On the other end of the scale against them must be set the value of protecting the weak, the foolish, and the thoughtless from imposition and oppression. Naturally, at a particular time, one set of values tends to be emphasised at the expense of the other." [310]

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304 Report on *Unreasonable Stipulations in Contracts and the Rectification of Contracts*, Project 47 (1998) 58.

305 Peden *The Law of Unjust Contracts including the Contracts Review Act* 1980 (NSW) (1982) 3.

306 Peden 1980 (NSW) (1982) 3.

307 Peden 1980 (NSW) (1982) 9.

308 Peden 1980 (NSW) (1982) 18.

309 "Unconscionability in Contracts" *The Modern Law Review* Vol. 38(4) July (1976) 369.

310 Waddams (July 1976) 369. See also Peden 1980 (NSW) (1982) 9; Standing Committee - Unfair Contract Terms Working Party Unfair Contract Terms (January 2004).

The earliest example of equitable relief granted by the Court of Chancery was against forfeitures of various kinds *inter alia* attempts of mortgagees to draft their documents in such a way as to achieve the result they wanted namely, forfeiture of the land on the mortgagor's default. [311]

In other cases the agreements struck down were described as "unreasonable" and "unconscionable". The early principle that certain transactions ought to be struck down because of unconscionable-ness was applied *inter alia* in transactions of "unfair bargain". Areas in which the principle was applied included forfeiture clauses in mortgage transactions, as well as rental agreements involving penalty clauses. [312]

It also included relief for equitable fraud, namely; unconscientiously using of power in making a hard bargain or misrepresentation. [313] Besides heirs and expectants, general relief was also granted, during this period, to others, where they had entered into provident bargaining. The onus would then be upon the aggrieved party to prove that there was an inequality between the parties, of which the stronger party was aware and from which, he gained an unfair advantage. [314]

One of the underlying reasons advanced for justifying judicial control was that in a civilised system of law one could not accept the implied terms of absolute sanctity of contractual obligations. [315]

The nature of these types of clauses is said to be founded on the premise that the transaction is so unfair that it is unconscionable without there being an overbearing of the will by duress, nor any presumption of undue influence raised by a recognised relationship between the parties. Whereas the other defences such as mistake, duress or undue influence are based upon the absence of genuine consent, an unconscionable contract is one arising from the willing but foolish acceptance of oppressive terms, or where the stronger party has exercised his rights under the contract in a harsh, unfair, inequitable or

311 Waddams July (1976) 369 at 370. See also Peden 1980 (NSW) (1982) 20.

312 Waddams (1976) 369 at 370-375. See also Peden 1980 (NSW) (1982) 20.

313 Peden 1980 (NSW) (1982) 18.

314 Peden 1980 (NSW) (1982) 20.

315 Waddams (1976) 369 at 370.

unconscientious manner. [316]

The key ingredients for the doctrine of unconscionable-ness, according to *Poole*, [317] are the concept of inequality of bargaining power and taking advantage of that position. The author also suggests that inequality of bargaining on its own is not sufficient; there must also be an element of abuse.

Unconscionable-ness is, therefore, a principle aimed at seeking relief from the courts on behalf of a contracting party, in instances where the contracting party feels aggrieved by the abuse of the unequal bargaining power of the other contracting party resulting in unfair advantage being gained by the latter often resulting in the former suffering prejudice. [318]

A corollary of this important conceptual distinction is found in the form of relief. In the case of defence based upon absence of consent, the appropriate remedy is to void the contract altogether; however, an unconscionable contract may be set aside or kept alive for the benefit of the weaker party but valid so as to avoid the unconscionable elements. [319]

Unconscionable-ness has been encouraged, especially, by the widespread use of exception clauses and standard form contracts. [320] Unlike with duress and undue influence, wherein, English law is primarily more concerned with procedural fairness rather than substantive fairness, with unconscionability, the focus is more on substantive fairness, in that it is the nature of the contract itself, rather than the events which led to it being formed, which is being investigated. [321]

Although the doctrine of unconscionable-ness has been widely applied, by the English courts, throughout the centuries and is still sometimes referred to in the modern days, it was never become a fully fledged defence in English Law. The application of the doctrine

316 Peden 1980 (NSW) (1982) 17-18; Chin Nyuk-Yin *Excluding liability in contracts* (1985) 134; McKendrick *Contract Law Text, Cases and Materials* (2003) 755-757; Treitel (2003) 420-421; Beatson (2002) 296-297.

317 *Textbook on Contract Law* (2004) 375.

318 Chin Nyuk-Yin *Excluding Liability in Contracts* (1985) 132-133; Stone (1998) 225; Stone (2002) 338-339; Treitel (2003) 420-422; Beatson (2002) 296-299; McKendrick (2003) 755-757.

319 Peden 1980 (NSW) (1982) 17-18.

320 Chin Nyuk-Yin (1985) 136.

321 Stone (1998) 225; Beatson (2002) 297; Treitel (2003) 421.

has also not escaped criticism. It has been stated before that the rules pertaining to the application of the rules in relation to these areas of the law became too rigid during the end of the nineteenth century, often, resulting in unjust results. An example of this can be found in the rule against a mortgagee stipulating for any collateral advantage enabled a borrower to avoid liability *"although the transaction was a fair bargain between men and business without any trace or suspicion of oppression, surprise or circumvention."* [322]

For that reason, it is said that the English courts in the twentieth century were less willing to grant relief in this type of case. [323]

Against the background must be seen however, the substantial legislative developments and other common law restrictions which have made considerable inroads upon freedom of contract especially, in consumer and employment contracts, which academic writers believe have reached the need for relief against unconscionable bargains. [324]

Waddams, [325] a proponent of the doctrine of unconscionable-ness, has, however, suggested that an open recognition of the court's power to interfere with unconscionable contracts would strengthen the principle of freedom of contract. He suggests in the long term and when the criteria of unconscionable-ness become reasonably clear, the contracting parties will retain their freedom to contract, provided, they reason within the guidelines of fairness.

Support for a codification technique, as means to reform the doctrine of unconscionable-ness, is also advocated by *Sayton* [326] who advocates that the development of a modern doctrine of unconscionable-ness is a necessity.
The development of the doctrine of unconscionable-ness has also resulted in a clear

322 Peden 1980 (NSW) (1982) 17-18.

323 Peden 1980 (NSW) (1982) 20; Waddams (1976) 369 at 371; Treitel (2003) 421; Chin Nyuk-Yin (1985) 133; Stone (1998) 225-226; Stone (2002) 338; McKendrick (2003) 759; Beatson (2002) 297; Beale "Unfair Contract Terms Act 1977" *British Journal of Law and Society* Vol. 5, No 1 (Summer 1978) remarks that although the American courts have struck down quite frequently contracts that are unconscionable under the *Uniform Commercial Code* S.2-302 on the ground of substantive unfairness, English courts however, have been loath to follow suit as they may not feel the same freedom. See also the comments of Collins *The Law of Contract* 3rd ed (1997) 251 who stated that: *"A system of contract law committed to freedom of contract must reject controls over the fairness of contracts."*

324 Peden 1980 (NSW) (1982) 21.

325 Waddams *The Law of Contracts* (1977) 316.

326 "The Unequal Bargain Doctrine: Lord Denning in *Lloyds Bank v Bundy*" (1976) 22 McGill LJ 94 at 108.

distinction being drawn between procedural unconscionable-ness and substantive unconscionable-ness.

Procedural unconscionable-ness means unfairness in the bargaining process and the method of making the contract. It includes factors such as, absence of meaningful choice, superiority of bargaining power, the contract being an adhesion contract, unfair surprise, sharp practices or deception. Substantive unconscionable-ness, on the other hand, refers to unfair substantive terms of the contract and the overall unjust results of the transaction. [327]

Factors which could influence substantive unconscionable-ness include relationship between price and consideration received, whether onerous terms bear a reasonable relationship to business risks, and the relative fiscal positions of the parties. [328]

10.2.2.2.2 Case Law

The origin of the doctrine of unconscionable-ness in case law can be traced back to the English courts, as far back as 1663 and 1705 respectively. In two English decisions, namely *James v Morgan* [329] and *Thornborough v Whitacre*, [330] though the courts did not actually mention the term unconscionable-ness, the two cases, nevertheless, served as the forerunner of the doctrine itself, because the courts dealt directly with the unfairness element in the transactions. Both cases involved the exploitation of fairness arising from an unequal bargaining situation.

The first traces of the Courts of Chancery interfering with the general principle of freedom of contract, and granting equitable relief in mortgage cases, can be found as far back as the 1680's. In some of the cases the relief granted was founded upon equitable jurisdiction. [331]
In the case of *Howard v Harris* [332] the court stated:
"The law itself will control that express agreement of the party; and by the same reason equity will let a man loose

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327 Peden 1980 (NSW) (1982) 23.

328 Peden 1980 (NSW) (1982) 23.

329 1 LEV. 111, 83 E.R. 323 (1663).

330 2 LD. RAYM. 1164, 92 E.R. 270 (K.B. 1705).

331 (1683) 1 Vern 191, 192; See also *Pawlett v Pleydell* (1679) 79 Seldon Society 737; *Baity v Lloyd* (1682) 1 Vern 141; 23 ER 374. In these cases relief was often granted due to the unconscientious use of power in making a hard bargain. But courts would not relieve a contracting party against "voluntary foolish bargains".

332 (1683) 1 Vern. 191.

from his agreement, and will against his agreement permit him to redeem a mortgage." [333]

In a further English decision during this period, the court in the case of *Earl of Chesterfield v Janssen*, [334] placed a definition to an unconscionable contract as a transaction *"such as no man in his senses and not under delusion cold make on the one hand, and no honest and fair man would accept on the other, which are inequitable and unconscientious bargains; and of such even the common law has taken notice."* [335]

The reason for this interference was also suggested in *Vernon v Bethell*: [336]

"The court, as a court of conscience, is very jealous of persons taking securities for a loan, and converting such securities into purchases." [337]

In other cases agreements were struck down and the relief granted was founded upon "unreasonableness" [338] and "unconscionability". [339]

One of the first cases in which the English courts stressed the ills that `restraining the exercises of a legal right' can bring, occurred in the case of *Sanders v Pope* [340] in which Lord Erskine expressed the following view:

"There is no branch of the jurisdiction of this court more delicate than that, which goes to restrain the exercise of a legal right. That jurisdiction rests only upon this principle; that one party is taking advantage of a forfeiture; and as a rigid exercise of the legal right would produce a hardship, a great loss and injury on the one hand arising from going to the full extent of the right, while on the other the party may have the full benefit of the contract as originally framed, the court will interfere; where a clear mode of compensation can be discovered. In that case

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333 *Howard v Harris* (1683) 1 Vern 191, 192.

334 2 Ves Sen. 125, 28 E.R. 82 (1750).

335 *Earl of Chesterfield v Janssen* 2 Ves. Sen 125, 28 E.R. 82 (1790).

336 (1762) 2 EDEN 110, 113.

337 *Vernon v Bethell* (1762) 2 EDEN 110 113.

338 *Talpot v Braddill* (1683) 1 Vern 183 and 394. It was held in this matter that to allow a person to sit with excessive profits obtained by a special bargain in the agreement between the parties would be unreasonable.

339 *Jennings v Ward* (1705) 2 Vern 520. The court in this case ruled that a man shall not have interest for his money on a mortgage and a collateral advantage besides for the loan on it; or clog the redemption with any by-agreement. If he does it would be unconscionable.

340 (1806) 12 Ves 282.

equity is in the constant course of relieving the tenant ....." [341]

Moreover, the court's jurisdiction to give relief was also founded in cases of `unconscionable bargains'. In this regard, the courts of equity had long been willing to intervene to protect expectant heirs, who sold away their future rights to receive an inheritance, in exchange for a derisory sum. Lord Selbourne LC justified this principle in the case of *Earl of Aylesford v Morris,* [342] in wonderfully graphic terms when he explained the need for protection based upon equity as follows:

"He comes in the dark, and in fetters, without either the will or the power to take care of himself, and with nobody else to take care of him, 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." [343]

He continues to look at the nature of unconscionable transactions and refers to the well-known dictum of Lord Hardwicke in *Earl of Chesterfield v Janssen* [344] when Lord Selborne states:

"Those cases, which, according to the language of Lord Hardwicke, `raise from the circumstances or conditions of the parties contracting - weakness on one side, usury on the other, or extortion, or advantage taken of that weakness', a presumption of fraud. Fraud does not here mean deceit or circumvention; it means an unconscientiously 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." [345]

The same considerations were found in *Fry v Lane*. [346] In this case two brothers, both manual workers, had reversionary interests in a deceased's estate (meaning that they would inherit their shares when someone else's life interest had run out). Both sold their rights for significant under-value, receiving unsatisfactory legal advice before doing so from an inexperienced solicitor who was also acting for the purchaser. Kay J reviewed the expectant heir cases and other analogous decisions, concluding that they represent a

341 *Sanders v Pope* (1806) Ves 282.

342 (1873) LR 8 CH APP 484 at 490.

343 *Earl of Aylesford v Morris* (1873) LR 8 CH APP 484 at 490.

344 (1751) 2 Ves Sen 125 at 157; 28 E.R. 82 at 101.

345 *Earl of Aylesford v Morris* (1873) LR 8 CH 484 at 490-1.

346 (1888) 40 CHD 312.

general principle:

"that where a purchase is made from a poor and ignorant man at a considerable undervalue, the vendor having no independent advice, the Court of Equity will set aside the transaction." [347]

Both cases, it is submitted, set the tone of the modern case law, with their emphasis on the weak position of one of the parties, the unfair advantage taken by the other party of that weakness, and the disadvantageous terms of the resulting transaction.

At the beginning of the twentieth century, similar concerns were raised, and are evident, in a well established line of cases in which the court considered equitable principles in exercising its authority to interfere in, for example, mortgage transactions. So in *Knights Bridge Trust Estate v Byrne*, [348] although the Court of Appeal declined the exercise its equitable jurisdiction in relation to a disputed mortgage, it nevertheless held that *"equity does not reform mortgage transactions because they are unreasonable, but only if the essential requirements of a mortgage are not observed and where there are oppressive or unconscionable terms."* [349]

This principle was adopted by Goff J in *Cityland and Property Holdings Ltd v Dabrah* [350] in that *"wholly disproportionate, draconian provisions in a mortgage were unconscionable and consequently unenforceable."* [351]

What is clear from these cases is that the jurisdiction of the court is not concerned with the unreasonableness of the terms of the mortgage, but, from the facts it must be evident that provisions of the contract must be unconscionable.

This was demonstrated in the case of *Multiservice Bookbinding Ltd v Marden,* [352] in which the court held that the intervention is not justified because the terms are unreasonable, but only where the conduct of the mortgagee in imposing such terms, was `morally reprehensible'. Nevertheless, the court, per Browne-Wilkinson J, was prepared to lay down

347 *Fry v Lane* (1888) 40 CHD 312.

348 (1933).

349 *Knights Bridge Trust Estate v Byrne* (1933).

350 (1968).

351 *Cityland and Property Holdings Ltd v Dabrah* (1968).

352 (1979) CH 84.

certain guidelines as to when the courts are more likely to interfere, more particularly: *"The classic example of an unconscionable bargain is where advantage has been taken of a young, inexperienced or ignorant person to introduce a term which no sensible well-advised person or party would have accepted. But I do not think the categories of unconscionable bargains are limited: the court can and should intervene where a bargain has been procured by unfair means."* [353]

Whether it is desirable for the courts to develop a general doctrine of unconscionable-ness and how they should proceed, has been a contentious issue in English Law for a considerable period. Commencing with the case of *Fry v Lane* [354] the English courts, in a string of *dicta,* were prepared to recognise the principle of unconscionable-ness.

In *Fry v Lane* [355] as more fully discussed *supra*, the doctrine derives from a right of equity to set aside transactions at a considerable undervalue and without independent advice, against the `poor and ignorant'.

Many years later, in the important dictum of Lord Denning in *Lloyds Bank Ltd v Bundy,* [356] when the learned Judge suggests that it is possible to deduce a common theme which unifies the cases, he stated:

"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 or infirmity, coupled with undue influences or pressures brought to bear on him by or for the benefit of the other."

Lord Denning continues: *"One who is in extreme need may knowingly consent to a most improvident bargain, solely to relieve the straits in which he finds himself."* [357]
This principle has gradually been extended in its scope. In *Cresswell v Potter* [358] the court held that `poor and ignorant' is a matter of negative perspective and old age appears to come within its ambit.

353 Multiservice Bookbinding Ltd v Marden (1979) CH84.

354 (1988) 40 CHD 312.

355 (1888) 40 CHD 312.

356 (1975) QB 326.

357 *Lloyds Bank Ltd v Bundy* (1975) QB 326 at 339.

358 (1978) 1 WLR 255.

In this case, the plaintiff (a telephonist) and her husband were divorcing. As part of a financial settlement, the plaintiff conveyed her share in the matrimonial home to the husband and, in return, he indemnified her against any liability on the mortgage, but gave no other consideration. This was a very bad deal for her, because the house was worth considerably more than the outstanding mortgage debt and so she lost the surplus value of her share. Megarry J granted the plaintiff's application to set the transaction aside, but struggled to fit the facts into the *Fry v Lane* straitjacket when he stated:

"I think that the plaintiff may fairly be described as falling within whatever is the modern equivalent of "poor and ignorant". [359]

The court found that the word "poor" is not necessarily concentrated on the lower income group nor is the word "ignorant" concentrated on the less highly educated. The court found that, although the work of a telephonist requires considerable alertness and skill, a telephonist can properly be described as `ignorant' in the context of property transactions. [360]

Although the court refused to set the transaction aside and ruled against the plaintiff, the Privy Council, in the case of *Hart v O'Connor* [361] considered the following facts: The vendor, an elderly farmer, held farm land as sole trustee under a testamentary trust for the benefit of himself and his siblings, and had, for many years, farmed the land in partnership with two of his brothers. When the brothers were too old to continue farming successfully, the vendor (without consulting his brothers) sold the land to the defendant (on terms that the vendor and his two brothers had the right to continue residing in their houses on the farm land during their lifetime). One of the vendor's brothers sought to set the transaction aside on the basis that it was an unconscionable bargain (he also argued that the vendor was of unsound mind and lacked contractual capacity at the time of the sale). He conceded that the defendant had acted with complete innocence throughout; attempting to argue that relief should be available for objectively unfair transactions without the need for proof of unconscionable conduct by the stronger party.
The Privy Council disagreed and refused to set the transaction aside, because the defendant had not acted unconscionably. As Lord Brightman explained:

359 *Cresswell v Potter* (1978) 1 WLR 255.

360 *Cresswell v Potter* (1978) 1 WLR 255.

361 (1985) AC 1000 PC.

"There was no equitable fraud, no victimisation, no taking advantage, and no overreaching or other description of unconscionable doings which might have justified the intervention of equity ....." [362]

In the same year, in the case of *Alex Lobb (Garages) Ltd v Total Oil (Great Britain) Ltd,* [363] there were limited signs that the courts might be prepared to recognise a general right of intervention to prevent a weaker party from being exploited by a stronger party. The court however stressed that there must be some impropriety, both in the conduct of the stronger party and in the terms of the transaction itself.

The question of whether a transaction involving the renewal of a lease agreement was unconscionable or not, also formed the subject matter for decision in the case of *Boustany v Pigott*. [364] The facts in this case briefly stated were:

Miss Pigott was an elderly lady who leased one of her properties for five years, in 1976, to Mrs Boustany and her husband. Miss Pigott was becoming `quite slow' because of senile dementia and so, in 1977, her cousin, George Piggott, took over responsibility for the management of her properties. In 1980, while George Pigott was away on business, Mrs Boustany invited Miss Pigott to tea to meet a bishop and generally lavished attention and flattery on her. Mrs Boustany then took Miss Pigott to the office of Mrs Boustany's solicitor, where she produced a new draft, 10 year lease of the property to replace the existing lease (which still had over a year to run). The terms of the new lease were extremely favourable to Mrs Boustany and the solicitor `forcibly' pointed this out, while Mr and Mrs Boustany said nothing, but Miss Pigott insisted on signing. Later George Pigott (acting on behalf of Miss Pigott) sought to have the lease set aside. The Privy Council agreed that the lease should be set aside, concluding that:

"Mrs Boustany must have taken advantage of Miss Pigott before, during and after the interview with [the solicitor] and with full knowledge before the 1980 lease was settled that her conduct was unconscionable." [365]

In this case the Privy Council's opinion (delivered by Lord Templeman) expressed general agreement with five submissions, together with supporting authorities, which had been put

362 *Hart v O'Connor* (1985) AC 1000 PC.

363 (1985) 1 WLR 173.

364 (1993) 69 P and CR 298.

365 *Boustany v Pigott* (1993) 69 PandCR 298.

forward by Mrs Boustany's counsel purporting to summarise the unconscionable bargain jurisdiction, as follows:

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: *Multiservice Bookbinding v Marden*.

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. *Alex Lobb (Garages) Ltd v Total Oil (Great Britain) Ltd*.

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 should be allowed to push the weak to the wall". Alec Lobb (Garages) Ltd v Total Oil (Great Britain) Ltd*. (??)

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*.

5. In situations of this kind, it is necessary for the plaintiff, who seeks relief, to establish unconscionable conduct, namely, that unconscientious advantage has been taken of his disabling condition or circumstances. Per Mason J in *Commercial Bank of Australia Ltd v Amadia*.

In *Credit Lyonnais Bank v Burch* [366] per Millet LJ recognised the doctrine of unconscionable-ness but laid down certain requirements before it could be accepted that the terms of a transaction, or the conduct of the parties in concluding the transaction, manifest unconscionability, in that, "*some impropriety, both in the conduct of the stronger party and in the terms of the transaction itself"* has to be present

366 (1997) 1 ALL ER 144.

In an unreported decision in the case of *Kalsep Ltd v X-Flow,* [367] it was stressed that a party seeking to set aside an agreement, as an unconscionable bargain, had to show more than just improvidence. Pumfrey J stated that although it would be difficult, *"[I]t is necessary to prove impropriety, and that is to say not merely harshness but impropriety, both in the terms of the agreement and in the manner in which the agreement was arrived at. On the facts there was no evidence of any coercion or other improper pressure, although the judge accepted that it was an `exceptionally improvident agreement, ignorantly and foolishly entered into'*. It seems therefore, that to succeed in a claim based on unconscionable-ness, there must be procedural and substantive `impropriety' which extends beyond mere unfairness.

In *Portman Building Society v Dusangh* [368] the Court of Appeal also refused to grant relief, based on an argument of unconscionable-ness of the bargain, where the defendant was aged seventy-two. He was illiterate in English and spoke the language poorly. The claimant building society granted him a mortgage, guaranteed by his son, covering 75 per cent of the value of his property, over twenty-five years, in order to release the equity in the property. The money was given to the defendant's son to enable him to purchase a supermarket. The son was later declared bankrupt so the guarantee was worthless. The building society sought to enforce their security, but the defendant claimed that, because of the nature of the agreement, it could be set aside as an unconscionable bargain, both in respect of unconscionable conduct by the son exploiting his father's weakness which affected the building society, and in respect of unconscionable conduct by the building society itself, based on the principle in *Fry v Lane*.

The Court of Appeal rejected the argument based on the son's unconscionable conduct, (distinguishing Credit Lyonnais Bank) because the building society had not exploited the situation and had not acted in a `morally reprehensible manner' (per Simon Brown LJ). The father had merely sought to assist his son in what he hoped would be a profitable venture. Ward LJ stated that *`it may be that the son gained all the advantage and the father took all the risk, but this cannot be stigmatized as impropriety. There was no exploitation of father by son such as would prick the conscience and tell the son that in all honour it was morally wrong and reprehensible'.*

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367 *The Times* 3 May 2001.

368 (2000) 2 ALL ER 221.

More recently, in the case of *Royal Bank of Scotland P/C v Etrider (No 2),* [369] the House of Lords, as per Simon Brown LJ, also refused to declare a transaction unconscionable and stated that building societies were not required to police transactions to ensure the wisdom of parents' actions in seeking to assist their children.

Whether the courts should develop a general doctrine of unconscionable-ness, did not find favour in the case of *Bridge v Campbell Discount Co Ltd* [370] in which Lord Radcliffe expressed some reservations when he stated:

"`Unconscionable' must not be taken to be a panacea for adjusting any contract between competent persons. Since the courts of equity never undertook to serve as a general adjuster of men's bargains, it was inevitable that they should in course of time evolve definite rules as to the circumstances in which, and the conditions under which, relief would be given, and I do not think that it would be at all an easy task, and I am not certain that it would be a desirable achievement to try to reconcile all the rules under some simple general formula." [371]

10.2.2.2.3 Legal Opinion

The Common Law doctrine of unconscionable-ness has, as its foundation, both the Greek and Roman concepts of justice. The elements of justice comprise fair dealings and not taking advantage of a weaker party. [372]

Since the introduction of the doctrine of unconscionable-ness there has been an ongoing conflict between freedom of contract and the desire for fairness. [373] This is evident in the judgements delivered by the Court of Chancery, which was introduced with the specific aim of policing transactions which offended against, especially, the Usury Laws or mortgage agreements. [374] One of the other particular aims and objectives of the doctrine of unconscionable-ness, during this period, was to protect the weak, the foolish and the

369 (2002) UKHL 44 (2002) 2 AC 773.

370 (1962) AC 600 at 626.

371 *Bridge v Campbell Discount Co Ltd* (1962) AC 600 at 626.

372 Peden *The Law of Unjust Contracts including the Contracts Review Act* 1980 (NSW) (1982) 3.

373 Peden *The Law of Unjust Contracts including the Contracts Review Act* 1980 (NSW) (1982) 9.

374 Peden *The Law of Unjust Contracts including the Contracts Review Act* 1980 (NSW) (1982) 9, 18. For the first traces of the courts utilizing their equitable jurisdictions see *Pawlett v Pleytell* (1679) 79 Seldon Society 737; *Baity v Lloyd* (1682) 1 Vern 141; 23 ER 374. *Howard v Harris* (1683) 1 Vern. 191, 192; *Vernon v Bethell* (1762) 2 Eden 110, 113. In these cases relief was often granted due to the unconscientious use of power in making a hard bargain. In other cases agreements was struck down and relief granted due to unreasonableness and unconscionable-ness. See *Talpot v Braddill* (1683) 1 Vern. 183; *Jennings v Ward* (1705) 2 Vern. 820.

thoughtless from harsh results and oppression. [375]

During this period the onus was upon the aggrieved party to prove that there was an inequality between the parties and that the stronger party was aware, but notwithstanding, the stronger party was prepared to take unfair advantage. [376]

Although the common law had available defences, inter alia, mistake, duress, undue influence etc, the said defences were available where there was an absence of genuine consent.

The doctrine of unconscionable-ness on the other hand, was available where the transaction was so unfair that the result was inequitable. The unconnscionable-ness of the contract arises from the willing but foolish acceptance of oppressive terms or the abuse of the stronger party in a harsh, unfair, inequitable or unconscientious manner without duress or undue influence being present. [377]

Therefore, the key ingredients in modern day practise to show the presence of unconscionable-ness, is to show that there has been an inequality of bargaining power and the stronger party has abused the position of strength he occupied. [378]
But, despite the continued recognition by the English courts and legal writers of the concept of unconscionable-ness, it remains a very contentious issue in England whether it would be desirable to develop a general doctrine of unconscionable-ness. There are two streams amongst the legal writers and the courts. On the one end, it is argued that the introduction of unconscionable-ness as a fully fledged defence if too rigidly applied, would lead to unjust

375 Waddams "Unconscionability in Contracts" *The Modern Law Review* Vol. 39(4) (July 1976) 369; See also Peden *The Law of Unjust Contracts including the Contracts Review Act* 1980 (NSW) (1982) 9; Standing Committee - *Unfair Contract Terms Working Party Unfair Contract Terms* (January 2004).

376 Peden *The Law of Unjust Contracts including the Contracts Review Act* 1980 (NSW) (1982) 3.

377 Peden *The Law of Unjust Contracts including the Contracts Review Act* 1980 (NSW) (1982) 17-18; Chin Nyuk-Yin *Excluding Liability in Contracts* (1985) 134; Treitel *The Law of Contract* 11th ed (2003) 755-757; Beatson *Anson's Law of Contract* 18th ed (2002) 296-297; McKendrick *Contract Law Text, Cases and Materials* (2003) 755-757. For the first traces of cases in English law see *Sanders v Pope* (1896) Ves 282; *Earl of Aylesford v Morewa* (1873) LR 8 CA App 484 at 490; *Fry v Lyne* (1888); *City Land and Property Holdings Ltd v Dabrah* (1968).

378 Pool *Textbook on Contract Law* (2004) 375; for case law see *Multiservice Bookbinding Ltd v Maroun* (1979) CH 84 (Concerning young, inexperienced or ignorant people in respect of whom unconscionable bargains have been procured by unfair means).

results as it would unduly interfere with contractual freedom. [379]

On the other hand, *Waddams*, [380] a proponent of the doctrine of unconscionable-ness advocates that the open recognition of the court's power to interfere with unconscionable contracts would rather strengthen the principle of freedom of contract provided the contracting parties reason within the guidelines of freedom.

10.2.2.3 UNITED STATES OF AMERICA

10.2.2.3.1 Legal Writings

Unconscionable-ness is a concept widely known in the United States of America Contract Law. The concept, as was discussed earlier, can be traced to the Chancery Court of England and has its foundations in equity, ethics and fairness in law. [381] The concept was recognised in American law as early as the 1912's when Chief Justice Stone remarked that the concept of unconscionability underlie "*practically the whole content of the law of equity.*" [382]

It was especially with the introduction of standard and the so-called adhesion contracts in the 1930's, that legal writers recognized the unfairness inherent in some standardized contracts. [383] Some of the main criticism lodged against standard and adhesion contracts included the fact that generically, they facilitated commerce, but, tended to be unfair because they were drafted by the party with the stronger bargaining power, often to the detriment of the weaker party, who is forced to assent to often unfair terms. One of the

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379 Peden *The Law of Unjust Contracts including the Contracts Review Act* 1980 (NSW) (1982) 21, 44 For English case law see *Royal Bank of Scotland P/C v Etridge (No 2)* (2002) UKHL 44 (2002) 2 AC 771; *Bridge v Campbell Discount Co Ltd* (1962) AC 600 at 626; *Alex Lobb (Garages) Ltd v Total Oil (Great Britain) Ltd* (1985) WLR 173.

380 Atiyah *The Law of Contracts* (1977) 316. See also Sayton "The Unequal Bargaining Doctrine": Lord Denning in Lloyds Bank v Bundy (1976) 22 *MCGILL LJ* 94 at 108 who supports a codified technique involving the doctrine of unconscionable-ness. For case law in support of the development of unconscionable-ness see *Fry v Lane* (1988) 40 CHD 312. For the most prolific support for the doctrine see the important dictum of Lord Denning in *Lloyds Bank Ltd v Bundy* (1975) QB 326 supported in its scope in *Creswell v Potter* (1978) 1 WLR 255; *Hart v O'Conner* (1985) AC 1000; *PC Boustany v Pigott* (1993) 69 PandCOR 298; *Credit Lyonnais Bank v Burch* (1997) 1 ALL ER 144; *Kalsep Ltd v X-Flow* The Times 3 May 2001 (Unreported).

381 Hillman *The Richness of Contract Law* (1997) 129-130; Calamari and Perillo *Contracts* (1987) 399-400; Williston *Williston on Contracts* (1957) Par 1632; Summers and Hillman *Contract and Related Obligation. The Doctrine and Practice* (1987) 565; Deutsch *Unfair Contracts - The Doctrine of Unconscionability* (1977) 43.

382 Calamari and Perillo (1987) 399.

383 Prausnitz, The Standardization of Commercial Contracts in *English and Continental Law* (1937) discussed in the Harvard Book Review, 52 *Harv. L. Rev*. 700 (1938-39); Williston *A Treatise on the Law of Contract* (1957) Para 1763A.

most common abuses also identified in standardized contracts, was the unfair use of disclaimers of warranties and limitation of remedies. [384] The terms of those contracts have often been viewed by the American legal writers as harsh and grossly one-sided in favour of the company, alternatively, the weaker party has to adhere to unfair and unreasonable terms. [385] Consequently, the American legal writers encouraged contractual reform to counter the deficiencies of standardized contracts.

Subsequently, in the pre-*Uniform Commercial Code* (to which we shall return infra) era, despite no well-defined doctrines being present, the traditional doctrines *inter alia* the common law and equity doctrines, nevertheless served as protective measures to counter deficiencies of standardized contracts. The traditional doctrines, according to *Deutsch*, [386] included, concepts such as lack of mutual assent (fine print), lack of mutuality, failure of consideration, defects in formation of the contract, public policy, fraud, duress, interpretation and constriction, etc.

Before the recognition of the doctrine of unconscionable-ness, it was especially public policy which was used to invalidate unfair clauses in standard and adhesion contracts. [387] But in time, the doctrine of unconscionable-ness was founded as a means of directly attacking unfair contracts. Its use was, however, limited and it dealt predominantly with non-standardized contracts. [388]

The origin of the doctrine of unconscionable-ness is encapsulated in the definition of an unconscionable contract as a transaction *"such as no man in his senses and not under delusion could make on the one hand, and no honest and fair man would accept on the other; which are inequitable and unconscientious bargains, and of such even the common law has taken notice."* [389]

Although the doctrine aimed to prevent the enforcement of unfair contracts, or contractual

384 Deutsch (1977) 1-4; Williston (1957) Para 1763A.

385 Deutsch (1977) 10; Williston (1957) Para 1763A.

386 Deutsch (1977) 11.

387 Deutsch (1977) 13.

388 Deutsch (1977) 43.

389 The definition founded in common law and equity has been cited by several legal writers including Deutsch (1977) 43; Bolgar "The Contract of Adhesion: A Comparison of Theory and Practice" 20 *AM J. COMP*. L.53, 58 (1972).

provisions, on grounds of unconscionable-ness, because the application thereof was restricted to individual cases, this resulted in a lack of consistency shown by the courts. The application of the doctrine by the courts was highly unreliable and unpredictable. [390]

This eventually resulted in the legislature stepping in, enacting section 2-302(1) of the *Uniform Commercial Code* to prevent, *inter alia,* the abuse of the weaker party to the contract by the stronger. [391]

Llewellyn [392] the principal architect of the *Uniform Commercial Code* highlights that the code provision on unconscionable-ness is designed to do two things namely:

"(1) encourage courts to openly strike down provisions of the type which had previously been denied enforcement at law largely through covert means;
(2) achieve a substantive merger of equity doctrine into law." [393]

In this regard section 2-302 of the *Uniform Commercial Code* reads as follows:

(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 determination." [394]

The legislative intervention of Section 2-302 of the *Uniform Commercial Code* is said to reflect the moral sense of the community into the law of commercial transactions. [395] The effect thereof is that section 2-302 of the code authorizes the court to find, as a matter of law, that a contract or a clause of a contract was *"unconscionable at the time it was*

390 Calamari and Perillo (1987) 401; Deutsch (1977) 49.

391 Hillman (1997) 131-132; Calamari and Perillo (1987) 402; Williston (1957) Para 1632 A; Summers and Hillman (1987) 565; Deutsch (1977) 41.

392 *The Common Law Tradition* (1960) 675.

393 Llewellyn *The Common Law Tradition* (1960) 675.

394 The Code came into operation in the District of Columbia on January 1, 1965.

395 Summers and Hillman (1987) 577.

made", and upon so finding the court may refuse to enforce the contract, excise the objectionable clause or limit the application of the clause to avoid an unconscionable result.

It also permits a court to accomplish directly what before the legislative intervention would have been accomplished by constriction of language, manipulations of fluid rules of contract law and the application of public policy. [396] In other words, the unconscionable-ness provision of the Code affords Judges great power to police agreements or clauses and to identify those contracts or clauses which they find to be unconscionable and to strike down the offensive agreement or provision. [397]

Although the Code does not define the term "unconscionable", several factors have been identified which influence the courts in deciding whether contracts, or provisions of the contract, are unconscionable. They include the gross disparity in the values exchanged, which includes defects in the bargaining process. Gross inequality of bargaining power; together with terms unreasonably favourable to the stronger party often influence the courts. [398] The aforementioned contain both procedural and substantive unconscionable-ness. [399]

The legislative intervention has, however, not escaped some form of criticism, in that, especially, *Deutsch* [400] has expressed the opinion that Section 2-302 has failed to establish clear guidelines for applying the actual doctrine of unconscionable-ness. The uncertainty which the writer identified has raised concern amongst other writers as well. In this regard the wish has been expressed that *"..... The doctrine would be clarified under die case law and that the courts would establish the necessary rules and procedures for application."*

10.2.2.3.2 Case Law

The American courts, with regard to the doctrine of unconscionable-ness, were deeply influenced by English law. It was especially the dictum of Lord Hardoniche in *Earl of Chesterfield v Janssen* 2 VES SEN. 125, 28 E.R. 82 (1750) which influenced the two early American cases involving the doctrine of unconscionable-ness. Both cases involved reduced

396 Summers and Hillman (1987) 577; Hillman (1997) 132-134.

397 Hillman (1997) 132-135; Summers and Hillman (1987) 506; Calamari and Perillo (1987) 398; Williston (1957) Par 1578A.

398 Fuller and Eisenberg *Basic Contract Law* (1981) 61; Deutsch (1977) 126-129.

399 Summers and Hillman (1987) 572; Deutsch (1977) 122-140.

400 *Unfair Contracts - The Doctrine of Unconscionability* (1977) 111.

payments resultant from duress. The Massachusetts court, in the cases of *Cutler v How* [401] and *Baxter v Wales* [402] used the doctrine of unconscionable-ness to invalidate the agreements. Subsequently the doctrine of unconscionable-ness received further momentum when the Supreme Court of Utah, in the case of *Carlson v Hamilton,* [403] enunciated the equitable principle that courts do not have to enforce some agreements when, in its sound discretion, the agreements are deemed to be unconscionable:

"People should be entitled to contract on their own terms without the indulgence of paternalism by courts in the alleviation of one side or another from the effects of a bad bargain. Also, they should be permitted to enter into contracts that actually may be unreasonable or which may lead to hardship on one side. It is only where it turns out that one side or the other is to be penalized by the enforcement of the terms of a contract so unconscionable that no decent, fair-minded person would view the ensuing result without being possessed of a profound sense of injustice, that equity will deny the use of its good offices in the enforcement of such unconscionability." [404]

Further progress was made in recognizing the common law doctrine of unconscionable-ness with two decisions handed down by the Supreme Court in the latter part of the nineteenth century. In the first case of *Scott v United States* [405] the court strongly motivated for the existence of unconscionable-ness as a defence when it stated:

"If a contract be unreasonable and unconscionable, but not void for fraud, a court of law will give the party who sues for its breach damages, not according to its letter, but only such as he is equitably entitled to." [406]

In a subsequent decision, the Supreme Court in the case of *Hume v United States* [407] again dealt with the issue of unconscionable-ness. This case involved a United States official ordering a quantity of shucks and mistakenly promising to pay 60 cents per pound, although the market value was only 1 3/4 cents per pound. It was clear that there had been an enormous error in the price, an error which did not, however, qualify as a legal mistake.

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401 8 MASS.257 (1811).

402 12 MASS. 365 (1815).

403 8 UTAH 2d 272, 332 P2d 989.

404 *Carlson v Hamilton* 8 UTAH 2d 272, 332 P8 2d 989. Leading cases in which this view was affirmed included *Mississippi R. Co v Cromwell*, 91 US 643, 23 L Ed 367; *Hume v United States*, 137 US 406, 33 L Ed 393, 10 S Ct 134; *Randolph's Ex'r v Quidnick Co* 135 US 457, 34 L Ed 200, 10 S Ct 655; *Dalzell v Dueber Watch Case Mfg. Co* 149 US 315, 37 L Ed 749, 13 S Ct 886; *Deweese v Reinhard* 165 US 385, 41 L Ed 757, 17 S Ct 340.

405 79 U.S. (12 WALL) 443, 445 (1870).

406 *Scott v United States* 79 U.S. (12 WALL) 443, 445 (1870).

407 132 U.S. 406 (1889).

Chief Justice Fuller, relying on the case of *Earl of Chesterfield v Janssen* 2 VES SR 125, 28 ENG.REP 82, decided to give the plaintiff only the market price value because the price promised was unconscionable. The court subsequently held that:

"If a contract be unreasonable and unconscionable, but not void for fraud, a court of law will give to the party who sues for its breach damages, not according to its letter but only what he is equitably entitled to." [408]

The cases cited above dealt basically with one type of unfairness, namely, gross inadequacy of consideration. In most of these cases the dicta focused on the unfairness of enforcing the contracts rather than the unfair process of contracting.

One of the first cases in which an attempt was made in breaking through the very limited recognition of unconscionable-ness in Common Law was that of *United States v Bethlehem Steel Corp*. [409] In this case, the attorney for the United States claimed that excessive profits were promised to the appellee due to the inequality of bargaining power between the parties. At the time of the contract (World War I, in 1917) the United States was at war with Germany, and Bethlehem was then the largest shipbuilding company in the world. Mr Justice Frankfurter, dissenting, attempted to lay down a general rationale for the doctrine of unconscionable-ness when he stated:

"These principles are not foreign to the law of contracts. Fraud and physical duress are not the only grounds upon which courts refuse to enforce contracts. The law is not so primitive that it sanctions every injustice except brute force and downright fraud. More specifically, the courts generally refuse to lend themselves to the enforcement of a "bargain" in which on party has unjustly taken advantage of the economic necessities of the other."

After citing a number of dicta Frankfurter J added:

"Strikingly analogous to the case at bar are the decisions that a salvor who takes advantage of the helplessness of the ship in distress to drive an unconscionable bargain will not be aided by the courts in his attempts to enforce the bargain. In Post v Jones ..... it was said that the courts `will not tolerate the doctrine that a salvor can take the advantage of his situation, and avail himself of the calamities of others to drive a bargain; nor will they permit the performance of a public duty to be turned into a traffic of profit.' These cases are not unlike the familiar example of the drowning man who agrees to pay an exorbitant sum to a rescuer who would, otherwise permit him to drown. No court would enforce a contract made under such circumstances." [410]

The views of Frankfurter J are similar to those expressed in *Frederick L Morehead v New*

408 *Hume v United States* 132 U.W. 406 (1889).

409 315 U.W. 289, 312 (1942).

410 *United States v Bethlehem Steel Corp* 315 U.S. 289, 312 (1942).

York ex re Joseph Tipaldo, [411] by Hughes CJ, who stated:

"We have on frequent occasion to consider the limitations of liberty of contract. While it is highly important to preserve that liberty from arbitrary and capricious interference, it is also necessary to prevent its abuse, as otherwise if could be used to override all public interests and thus in the end destroy the very freedom of opportunity which it is designed to safeguard.

We have repeatedly said that liberty of contract is a qualified and not an absolute right. `There is no absolute freedom to do as one wills or to contract as one chooses ..... Liberty implies the absence of arbitrary restraint, not immunity from reasonable regulations and prohibitions imposed in the interests of the community'." [412]

The principle enunciated in the dissenting judgement amounted to this: When an unfair contract has been achieved through oppression resulting from the superiority of the bargaining power of one party and the lack of choice of the other, the contract should be declared unconscionable and therefore unenforceable.

Just prior to the *Uniform Commercial Code* coming into effect, certain cases adopted the principle of unconscionable-ness embodied in the Code. The first of these significant cases was that of *Campbell Soup Co v Wentz*. [413] This case involved a farmer who had undertaken to sell his carrot crop to the plaintiff soup company. The contract price ranged from $23 to $30 per ton depending on the time of delivery. When the market price rose to $90 per ton, the farmer notified the soup company that he would not deliver the carrots at the agreed price. The contract was in the form of an adhesion contract which made provision for liquidated damages.

The court noted that the contract was characterized as *"being too hard a bargain and too one-sided an agreement"* to entitle the plaintiff soup company the required relief sought. In this regard the court stated that *"..... The sum total of its provisions drives too hard a bargain for a court of conscience to assist."* [414] Thus the court found that a court was empowered to find that a contract is unconscionable, it being sufficient to set aside the contract.

In the case of *Henningsen v Bloomfield Motors, Inc* [415] the plaintiff brought an action for

411 298 US 587 (1935).

412 *Frederick L. Morehead v New York ex rel Joseph Tipaldo* 298 U.S. 587 at 627-628 (1939).

413 172 F 2d 80 (CA3) 1948.

414 *Cambell Soup Co v Wentz* 172 F 2d 80 (CA3) 1948.

415 75 ALR 2d 1 (1960) 24.

breach of warranty for personal injuries sustained when an automobile's steering mechanism failed and the car veered off the highway. The court, holding that the manufacturer's disclaimer of warranties was invalid as against public policy, cited the unconscionable-ness as an important factor.

Francis J, who delivered the judgement of the court, recognized the fact that, although the "traditional contract" resulted from the free bargaining of persons who met with one another on an equal footing, in present-day commercial life, the use of the standardized mass contract had almost completely destroyed any semblance of bargaining equality. He went on to say:

"The gross inequality of bargaining position occupied by the consumer in the automobile industry is thus apparent. There is no competition among car makers in the area of the express warranty. Where can the buyer go to negotiate for better protection? 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 of 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."

Francis J continued that it was the task of the judiciary to administer the spirit, as well as the letter of the law, and that in cases such as the one before the court; it was the court's duty to protect the ordinary man against the loss of important rights caused by the unilateral acts of another. He concluded:

"The lawmakers did not authorize the automobile manufacturer to use its grossly disproportionate bargaining power to relieve itself from liability and to impose on the ordinary buyer, who in effect has no real freedom of choice, the grave danger of injury to himself and others that attends the sale of such a dangerous instrumentality as a defectively made automobile. In the framework of this case, illuminated as it is by the facts ..... we are of the opinion that Chrysler's attempted disclaimer of an implied warranty of merchantability and of the obligations arising there from is so inimical to the public good as to compel an adjudication of its invalidity." [416]

Relying on the *Henningsen v Bloomfield Motors, Inc* dictum, the court in a later decision of *Ellsworth Dobbs, Inc v Johnson*: [417]

"Courts and legislatures have grown increasingly sensitive to imposition, conscious or otherwise, on members of the public by persons with whom they deal, who through experience, specialization, licensure, economic strength or position, or membership in associations created for their mutual benefit and education, have acquired such

416 *Henningsen v Bloomfield Motors, Inc* 75 ALR 2d 1 (1960) 31-32.

417 50 NJ 528, 553-554, 236 A. 2d 856-857 (1967).

expertise or monopolistic or practical control in the business transaction involved as to give them an undue advantage. Henningsen v Bloomfield Motors, Inc 32 N.J. 358 pp 388-391, 161 A. 2d 69 (1960)."

The court continued to state:

"Grossly unfair contractual obligations resulting from the use of such expertise or control by the one possessing it, which result in assumption by the other contracting party of a burden which is at odds with the common understanding of the ordinary and untrained member of the public, are considered unconscionable and therefore unenforceable. The perimeter of public policy is an ever increasing one. Although courts continue to recognise that persons should not be unnecessarily restricted in their freedom to contract, there is an increasing willingness to invalidate unconscionable contractual provisions which clearly tend to injure the public in some way. (Citing cases)" [418]

The court in the case of *Williams v Walker - Thomas Furniture Co* [419] also decided that there was no substantive law in the District of Columbia which would object to the rule that a court of law would not enforce an unconscionable bargain.

The meaning of unconscionable-ness is described by the court as:

"..... has generally been recognized to include an absence of meaningful choice on the part of one of the parties together with contract terms which are unreasonably favourable to the other party. Whether a meaningful choice is present in a particular case can only be determined by consideration of all the circumstances surrounding the transaction. In many cases the meaningfulness of the choice is negated by a gross inequality of bargaining power. The manner in which the contract was entered is also relevant to this consideration.

Did each party to the contract, considering his obvious education or lack of it, have a reasonable opportunity to understand the terms of the contract, or were the important terms hidden in a maze of fine print and minimized by deceptive sales practices?"

Consequently the court suggested the following approach ought to be adopted namely:

"Ordinarily, one who signs an agreement without full knowledge of its terms might be held to assume the risk that he has entered a one-sided bargain.

But when a party of little bargaining power, and hence little real choice, signs a commercially unreasonable contract with little or no knowledge of its terms, it is hardly likely that his consent, or even an objective manifestation of his consent, was ever given to all the terms. In such a case the usual role that the terms of the agreement are not to be questioned should be abandoned and the court should consider whether the terms of the contract are so unfair that enforcement should be withheld." [420]

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418 *Ellsworth Dobbs, Inc v Johnson* 50 N.J. 528, 553-554, 236A 2d 843, 856-857 (1967).

419 121 APP DC 315, 35 F 2d 445, 18 ALR 3d 1.

420 *Williams v Walker - Thomas Furniture Co* 121 APP DC 315, 350 F 2d 445, 18 ALR 3d 1.

The application of Section 2-302 of the *Uniform Commercial Code* has formed the subject matter of a number of cases during the post-incorporation era. Often, the question the courts need to decide upon is whether the transaction and the resulting contract could be considered unconscionable within the meaning of Section 2-302 of the *Uniform Commercial Code*?

This, in fact, formed the basis for decision-making in the case of *Jones v Star Credit Group* [421] in which the Supreme Court of New York considered the rationale of the Code. The court first looked at the traditional common law position and remarked:

"There was a time when the shield of "caveat exemptor" would protect the most unscrupulous in the marketplace - a time when the law, in granting parties unbridled latitude to make their own contracts, allowed exploitive and callous practices which shocked the conscience of both legislative bodies and the courts."

The court then continued to rationalize the shift in the American contract law thinking when it stated:

"The effort to eliminate these practises has continued to pose a difficult problem. On the one hand it is necessary to recognise the importance of preserving the integrity of agreements and the fundamental right of parties to deal, trade, bargain, and contract. On the other hand there is the concern for the uneducated and often illiterate individual who is the victim of gross inequality of bargaining power, usually the poorest members of the community."

But, remarked the court:

"The law is beginning to fight back against those who once took advantage of the poor and illiterate without risk of either exposure or interference. From the common law doctrine of intrinsic fraud we have, over the years, developed common and statutory law which tells not only the buyer but also the seller to beware. This body of laws recognizes the importance of a free enterprise system but at the same time will provide the legal armour to protect and safeguard the prospective victim from the harshness of an unconscionable contract."

Consequently, the court assessed the value of Section 2-302 of the Code when it discerned:

"Section 2-302 of the Uniform Commercial Code enacts the moral sense of the community into the law of commercial transactions. It authorizes the court to find, as a matter of law, that a contract or a clause of a contract was "unconscionable at the time it was made", and upon so finding the court may refuse to enforce the contract, excise the objectionable clause or limit the application of the clause to avoid an unconscionable result. "The principle", states the Official Comment to this section "is one of the prevention of oppression and unfair

421 59 MISC. 2d 189, 298 N.Y.S. 2d 264.

surprise". It permits a court to accomplish directly what heretofore was often accomplished by construction of language, manipulations of fluid rules of contract law and determinations based upon a presumed public policy."

Moreover, the court then pronounced on the effect of the provision, in that:

"..... the statutory language itself makes it clear that not only a clause of the contract, but the contract in toto, may be found unconscionable as a matter of law." [422]

The effect of Section 2-302 of the Code on disclaimers of express and implied warranties in the lease of industrial equipment, also received the attention of the New York Supreme Court of Appeals in the case of *Industrialised Automated and Scientific Equipment Corp v R.M.E. Enterprises, Inc*. [423] The court, in holding that the disclaimer of warranties was unconscionable, looked at the official comment to Section 2-302 which states that it:

" ..... is intended to allow the court to pass directly on the unconscionability of the contract or particular clause therein and to make a conclusion of law as to its unconscionability", and that "[t]he basic test is whether, in the light of the general commercial background and the commercial needs of the particular trade or case, the clauses involved are so one-sided as to be unconscionable under the circumstances existing at the time of the making of the contract."

The court then restated the test laid down by the American Courts in determining unconscionable-ness, namely:

"to include an absence of meaningful choice on the part of one of the parties together with contract terms which are unreasonably favourable to the other party", and characterized "by a gross inequality of bargaining power" (Williams v Walker-Thomas Furniture Co 121 U.S. App D.C. 315, 350 F.2d 445, 449)"

Although, the court recognized that *"parties to a contract are given broad latitude within which to fashion their own remedies for breach of contract", t*he court nevertheless, identified that under the *Uniform Commercial Code "the obligations of good faith, diligence, reasonableness and care prescribed by this Act may not be disclaimed."*

Applying the facts of the case the court concluded:

"In this case, the evidence plainly establishes that the equipment did not work at all, that it achieved none of the

422 *Jones v Star Credit Corp* 59 MISC. 2d 189, 298 N.Y.S. 2d 164 (1969); See also the cases of *Lefkowitz v ITM, Inc*, 52 Misc 2d 39, 275 N.Y.S. 2d 303; *Frostifresh Corp v Reynoso*, 52 Misc 2d 26, 274 N.Y.S. 2d 757, revd. 54 Misc 2d 119, 281 N.Y.S. 2d 964; *American Home Improvement, Inc. v MacIver*, 105 N.H. 435, 201 A.2d 886, 14 A.L.R. 3d 324.

423 58 A.D. 2d 482, 396 N.Y.S. 2d 427.

purposes of the parties. This is a result so "one-sided", in the words of the authors of the Official Comment to the UCC, that the disclaimer in good conscience should not be enforced. In effect, the equipment was worthiness."

Consequently the court held:

"We therefore hold that the disclaimer of warranties is unconscionable under the circumstances and may not be enforced." [424]

But, the American Courts have also cautioned that the statutory provision in terms of the *Uniform Commercial Code* should not be exploited by contracting parties. In the case of *Toker v Westerman* [425] the court stated:

"It is apparent that the court should not allow the statutory provision in question to be used as a manipulative tool to allow a purchaser to avoid the consequences of a bargain which he later finds to be unfavourable. Suffice it to say that in the instant case the court finds as shocking, and therefore unconscionable, the sale of goods for approximately 2 1/2 times their reasonable retail value. This is particularly so where, as here, the sale was made by a door-to-door salesman for a dealer who therefore would have less overhead expense than a dealer maintaining a store or showroom. In addition, it appeared that defendants during the course of the payments they made to plaintiff were obliged to seek welfare assistance." [426]

10.2.2.3.3 Legal Opinion

The concept unconscionable-ness in the American Law of Contract, was received into the United States of America from English Law, and was first recognised as early as the 1800's. Following the dictum of Lord Hardwicke in *Earl of Chesterfield v Janssen* 2 Ver. Sen 127 28 E.R. 82 (1750) the Massachusetts court in *Cutler v Hon* [427] and *Baxter v Wales* [428] used the doctrine of unconscionable-ness to invalidate the agreements. After that the Supreme Court of Utah, in the case of *Carlson v Hamilton,* [429] also enunciated the

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424 *Industralease Automated and Scientific Equipment Corp v R.M.E. Enterprises, Inc* 58 A.D. 2d 482, 396 N.Y.S. 2d 427 (1977).

425 113 N.J. Super 452, 274 A. 2d 78 (1970).

426 *Toker v Westerman* 113 N.J. Super 452, 274 A. 2d 78 (1970).

427 8 MASS. 257 (1811).

428 12 MASS 365 (1815).

429 8 Utah 2d 272, 332 P.2d 989. Other leading cases in which this view was affirmed include *Mississippi R. Co v Cromwell* 91 US 643, 23 L Ed 367; *Hume v United States* 132, US 406, 33 L Ed 393, 10 S Ct 134; *Randolph's Ex'r v Quidnick Co* 135 US 457, 34 L Ed 200, 10 S Ct 655; *Dalzell v Dueber Watch Case Mfg. Co* 149 US 315, 37 L Ed 749, 13 S Ct 886; *Deweese v Reinhard* 165 US 385, 41 L Ed 757, 17 S Ct 340; *Scott v United States* 79 U.S. (12 WALL) 443, 445 (1870).

equitable principle that courts do not have to enforce some agreements which, upon the court's discretion, are deemed to be unconscionable.

Apart from the courts pronouncing on the recognition of the concept of unconscionable-ness, as early as the 1912's the Chief Justice of the United States of America, Stone CJ remarked that the concept of unconscionable-ness underlie *"practically the whole content of the law of equity."* [430]

It was especially with the introduction and the enormous expansion of standardized contracts in the 1930's, that writers began to sense the unfairness and inequity inherent in some of the standardized contracts. The underlying reason for the unfairness, it was thought, started with the fact that the standardized contracts were drafted by the party with the stronger bargaining power, often to the detriment of the weaker party. The latter is often forced to accept unfair and unreasonable terms. The weaker contracting party has no choice but to accept harsh and often one-sided contracts, to their prejudice. [431]

Sensing the unreasonable and unfair results these types of contracts bring with them, the American courts and legal writers started advocating contractual reform. It was felt, at the time, that the traditional common law doctrines, including, lack of mutual assent, lack of mutuality, public policy, fraud, and duress, as well as the equity doctrines, was not sufficient protective measures to curb the deficiencies of standardized contracts. [432]

What was sought was the uniform application by the courts of unconscionable-ness as means to attack unfair contracts. The definition of the doctrine of unconscionable-ness namely:

"such as no man in his senses and not under delusion could make on the one hand, and no honest and fair man would accept on the other; which are inequitable and unconscientious bargains, and of such even the common law has taken notice"

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430 His Honourable Chief Justice Stone Book Review, 12 Colum L. Rev 756 (1912); the concept has subsequently been recognized by other legal writers as well. See Hillman *The Riches of Contract Law* (1997) 129-130; Calamari and Perillo *Contracts* (1987) 399-400; Williston *Williston on Contracts* (1957) Par 1632; Summers and Hillman *Contract and Related Obligation. The Doctrine and Practice* (1987) 565; Deutsch *Unfair Contracts - The Doctrine of Unconscionability* (1977) 43.

431 Prausnitz *The Standardization of Commercial Contracts in English and Continental Law* (1937) discussed in the Harvard Book Review 52 *Harv. L. Rev* 700 (1938-39; Williston *A Treatise on the Law of Contract* (1957) Para 1763A; Deutsch *Unfair Contracts - The Doctrine of Unconscionability* (1977) 1-4.

432 The definition founded in common law and equity has been cited by several legal writers including Deutsch (1977) 43; Bolgar "The Contract of Adhesion: A Comparison of Theory and Practise" 20 *AM J. COMP L*.53 (1972).

has found the attention by many legal writers.

But what was felt to be lacking was the restrictive approach by the courts, which restricted the application of unconscionable-ness to individual cases. This resulted in a lack of consistency shown by the courts, resulting in an unreliable and unprotected application of the doctrine. [433]

One of the leading cases, however, in which the court attempted to break though the limited recognition of unconscionable-ness in common law, was that of *United States v Bethlehem Steel Corp*. [434] In this case Mr Justice Frankfurter with regard to the common law defences *inter alia* fraud and physical duress, stated they were not the only grounds and added that courts generally refuse to enforce bargains unjustly obtained through taking advantage of the weak, as it would be unconscionable. The principle enunciated at the time amounted to this:

> *When an unfair contract has been achieved through oppression resulting from the superiority of the bargaining power of one party and the lack of choice of the other, the contract should be declared unconscionable and therefore unenforceable.* [435]

The efforts by the legal writers and the courts alike in their efforts to bring about contractual reform, was assisted greatly with the legislative intervention in enacting Section 2-302(1) of the *Uniform Commercial Code.* It is especially; in the case of *Campbell Soup Co v Wentz* [436] that the court was prepared to set aside the contract as a result of unconscionable-ness. In the case of *Henningsen v Bloomfield Motors Inc,* [437] the court also invokes unconscionable-ness as an important factor in setting aside a manufacturer's disclaimer of warranties. Francis J picked upon the gross inequality of bargaining power, public welfare, and lack of competition among the motor vehicle manufacturers and the

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433 Calamari and Perillo *Contacts* (1987) 401; Deutsch *Unfair Contracts - The Doctrine of Unconscionability* (1977) 49.

434 315 U.W. 289, 312 (1942); See also *Frederick and Morehead v New York Ex Rec Joseph Tipaldo* 288 US 587 (1935) in which similar views were expressed per Hughes CJ.

435 *United States v Bethlehem Steel Corp* 315 U.W. 289, 312 (1942); *Frederick L. Morhead v New York ex rec Joseph Tipaldo* 288 US 587 (1935).

436 172 F.2d 86 (CA3) 1948.

437 75 A.L.R. 2d 1 (1960) 24; See also *Ellsworth Dobbs Inc v Johnson* 50 N.J. 528, 553-554, 236A 2d 856-857 (1967).

protection of the ordinary man against the loss of important rights, as factors to the public good in compelling an adjudication of its invalidity.

A similar approach was adopted in the case of *Williams v Walker-Thomas Furniture Co,* [438] in which the court relied upon the following factors, namely; absence of meaningful choice, unreasonably favourable contract terms to one of the contracting parties, lack of education, the one-sided bargain of one of the contracting parties, to determine that a court of law would not enforce an unconscionable bargain.

The efforts by the legal writers and the courts alike, in bringing about legal reform, by having unconscionable-ness elevated to a fully fledged defence, paid dividends when, in 1969, Section 2-302 of the *Uniform Commercial Code* [439] was promulgated. In the main, Sec 2-302 of the Code provides that a court, as a matter of law, may refuse to enforce a contract should the court find that the contract, or a clause of the contract, was unconscionable at the time it was made.
The legislative intervention is said to reflect the moral sense of the community to avoid an unconscionable result. [440] It also affords judges greater power to police agreements or clauses which they find to be unconscionable and to strike down the offensive agreement or provision. [441]

Although the Code does not define the term "unconscionable", several factors have been identified which influence the courts in deciding whether contracts, or provisions of the contract, are unconscionable. They include the gross disparity in the values exchanged, gross inequality of bargaining power, terms unreasonably favourable to the stronger contracting party. [442]
The value of Section 2-302 of the *Uniform Commercial Code* has also received the attention of the American Courts.

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438 121 App. A.C. 305, 35 F.2d 445, 18 ACR 3d 1.

439 The Section of the Code came into operation in the District of Columbia on January 1, 1965.

440 Summers and Hillman *Contract and related obligations. The doctrine and practise* (1987) 577.

441 Hillman *The Richness of Contract Law* (1997) 132-135; Summers and Hillman *Contract and related obligations. The doctrine and practise* (1987) 506; Calamari and Perillo *Contracts* (1987) 398.

442 Fuhler and Eisenberg *Basic Contract Law* (1981) 61; Deutsch *Unfair contracts - The doctrine of unconscionability* (1977) 126-129.

Commencing with *Jones v Star Credit Group,* [443] the court held that the value of Section 2-302 of the Code is founded in the fact that it reflects the moral sense of the community and it aims, to avoid an unconscionable result in contract. It also curbs oppression and unfair surprise in contracts.

In a subsequent case, *Industria Lease Automated and Scientific Equipment Corp v R.M.E. Enterprises Inc,* [444] the New York Supreme Court of Appeals identified that, under the Code, the obligations of good faith, diligence, reasonableness and care prescribed by the Act, may not be disclaimed. Consequently, the court held that a disclaimer of warranties is unconscionable under the circumstances and may not be enforced.

But, the American courts have also contended that such statutory provisions as contained in the Code should not be abused by contractants. In *Toker v Westerman,* [445] it was stated by the court, that the statutory provision should not be used as a manipulative tool to allow a purchaser to avoid the consequences of a bargain which he later finds to be unfavourable.

10.2.3 Agreements contrary to public policy

10.2.3.1 SOUTH **AFRICA**

10.2.3.1.1 Legal Writers

Owing to the great influence Roman law [446] had on the South African Law of Contract, it is

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443 59 Misc 2d 189, 278 N.Y.S. 2d 264.

444 58 AD 2d 4812, 396 N.Y.S. 2d 427 (1977).

445 113 N.J. Super 452, 274, A.2d 78 (1970).

446 See Wessels (1951) Volume I 148 ff. The author refers to the wealth of Roman law authorities which influenced the South African Law of Contract. It was especially the rules governing estates regulated by the edicts of the emperors which made provision for certain clauses to be declared invalid. Any condition in a will which was immoral was regarded as *pro non scripto*, although the rest of the will was considered to be valid with the heir taking the inheritance or legatee as if the condition did not exist. Where however, a contract depended upon an illegal or immoral condition, the whole of the contract was considered void and unenforceable. Not only did Roman law provide governing conditions or contracts which were against public policy, Roman law also concerned itself with unconscionable agreements. It was Papinian who wrote about unconscionable agreements when he remarked *"Nam quae facta laedunt pietatem, existimationem, vere cundim nostram et ut generaliter dixerim contra bonos mores sunt se facere nos posse credendum est" (D.28.7.15)*
Translated:
For those acts which offend against our sense of what is right (conscience), our honour (good name), our modesty and which generally speaking are contra bonos mores and regarded as incapable of performance cf. 582 and see also Otto: 2442, and D 28.7.14 "Conditions in a will contrary to the edics of or the laws or what has the force of law, or which are contra bonos mores or ridiculous (derisoriae), or such as the parties have disapproved of, are regarded as pro non scripto. Roman law writers defined contracts against public policy as *"acts which are contrary to the interest of the community are said to be acts contrary to public policy."* See Wessels (1951) 157.

today widely recognised, by our legal writers, that agreements contrary to law, morality or public policy are unenforceable or void. [447]

Public policy has been identified by the legal writers as a doctrine which places a limitation on contractual freedom, also known as contractual autonomy, as well as the enforcement of contractual agreements once entered into, namely; the doctrine of *pacta sunt servanda*. [448]

The rationale for the existence of public policy, in modern times, lies in the broader concept of paternalism, in which the courts protect the weaker party in the law of contract and, by the same token, determine what is or is not a matter of public interest and whether public policy demands that a contract offending against the public interest be struck down and declared invalid. [449]

But, caution the legal writers, the power to declare a contract, or a term in a contract, contrary to public policy and therefore unenforceable, should be exercised sparingly and only in the clearest of cases. [450] No exhaustive list exists of all contracts that would be either immoral or against public policy. [451]

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447 See Wessels (1951) Par 463-480ff; Van der Merwe et al (2003) 176-178; Joubert (1987) 132-151; De Wet and van Wyk (1978) 89-92; Kerr (1998) 177-189; Christie *Bill of Rights Compendium* (2002) 3H-9-3H-12; 3H-20-3H-21; Hutchinson et al (1991) 431; Joubert et al *LAWSA* Volume 5 Part 1 (1994) 214-216; Kahn (1988) 32; Christie (2001) 398ff; Hawthorne (2003) 15 *SA Merc LJ* 277; Jordaan "The Constitution's impact on the law of contract in perspective" 2004 *De Jure* 59ff; Hopkins *TSAR* 2003-1 159; Hawthorne 2004 67 (2) *THRHR* 295 ff; Hawthorne 1995 (58) *THRHR* 173; Van Aswegen 1994 (59) *THRHR* 453.

448 See Wessels (1951) Par 463-480 ff; See also Jordaan (2004) *De Jure* 59-60; Christie *Bill of Rights Compendium* (2002) 3H-20; Van der Merwe et al (2003) 15; See also Kahn (1988) 32. The author expresses the view that: *"Our common law has in a sense encroached on the freedom and sanctity of contract by its condemnation of contracts against public policy."* See further Hutchinson et al (1991) 431 who identifies the need for the exception to the general rule of freedom of contract in the form of public policy as *"the necessity for doing simple justice between man and man."* Joubert *LAWSA* Volume 5 Part 2 (1994) 215.

449 See Hawthorne 1995 (58) *THRHR* 167 173; Christie *Bill of Rights Compendium* (2002) 3H-20-3H-21 suggests that it is especially in cases of inequality of bargaining power that public policy play a satisfactory role; See further Joubert (1987) 133; Hawthorne 2004 67 (2) *THRHR* 294 at 298.

450 See Hawthorne 2004 67 (2) *THRHR* 299; See also Christie *Bill of Rights Compendium* (2002) 3H-10; Hutchinson et al (1991) 431; Joubert *LAWSA* Volume 5 Part I (1994) 215. The author endorses the principle that the power to declare a contract contrary to public policy should be exercised sparingly *".... only when the impropriety of the contract and the element of public harm are manifest"*; Jordaan 2004 *De Jure* 61 identifies the criterion to prove that a contractual provision is *contra* public policy namely when *"substantially incontestable harm to the interests of the public will be caused";* See further Pretorius 2004 69 (2) *THRHR* 298-299.

451 See Joubert *LAWSA* Volume 5 Part I (1994) 215; De Wet and Van Wyk (1992) 89; Hawthorne 1995 (58) *THRHR* 173-174 is of the view that not many criteria to guide a court in its function of weighing conflicting issues of public interests have been identified. In this regard no serious examination of issues of conflicting values and

Due to the ever-changing context and texture of society, [452] what has, however, emerged are various factors influencing judicial thinking in considering whether a contract, or a term in a contract, is contrary to public policy and therefore unenforceable. [453]

As public policy is a question of fact and not a question of law, public policy, holistically assessed, is influenced by the general sense of justice of the community, the *boni mores* manifested in public policy opinion. [454]

But, cautions *Christie,* [455] regard must not be had to superficial public opinion, which can swing like a weathercock, but, rather, the seriously considered public opinion on the general sense of justice and good morals of the community.

The reason advanced there-for is that it causes the maintenance of stability in the law of contract by ensuring that contracts are not at the mercy of future public opinion.

Although there are no numerous clauses, the factors alluded to above which have influenced judicial thinking include: (1) Agreements with alien enemies; (2) Agreements tending to injure the public service; (3) Agreements impending or obstructing or preventing the administration of justice; (4) Agreements for the future separation of husband and wife; (5) Contracts which unreasonably restrain trade; (6) wagering contracts etc. [456]

Other factors include: (6) Agreements in which the vital interests of minor children are traded by a parent for money; (7) Agreements in breach of statutory provisions; (8) Agreements to escape liability for fraud; (9) Agreements to deprive a person of his right to defend himself in legal proceedings brought against him etc. [457]

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customs inherent in any society, composed of people of various beliefs, identities or cultures have been made, of which, a court may take judicial notice. Nor are there guidelines as to what type of evidence must be lead relevant to an assessment of the requirements of public interests; See also Christie *Bill of Rights Compendium* (2002) 3H-10-3H-11; Hawthorne (2003) 15 *SA MERC LJ* 277.

452 Christie (2001) 400, 403; See also Joubert (1987) 133; Christie *Bill of Rights Compendium* (2002) 3H-11.

453 Christie (2001) 400, 403; Wessels (1951) 157.

454 Christie (2001) 400, 403.

455 Christie *The Law of Contract in South Africa* (2001) 400, 403.

456 Wessels (1951) 157; Van Heerden Aquillius "Immorality and Illegality to Contract" 1941 (58) *SALJ* 346.

457 See also Kerr (1998) 177-196ff. The author apart from repeating several factors mentioned by Wessels includes

Joubert [458] holds the view that in the case of statutory enactments, the courts may consider the policy of the legislature in enacting the statute in order to determine the validity of the statutory provision or provisions.

Good faith has, in the past, been considered by our courts in determining whether public policy forbids the enforcement of the contract. [459] *Hefer* [460] advocates that the courts' hands ought to be strengthened to attain, in public interest, a greater degree of fairness in contract. *Van Aswegen,* [461] with regard to overcoming the problems which the inequalities between contracting parties brings, suggests that the *bona fides* of the contracting parties, which requires honesty and which prohibits the unreasonable promotion of one's own interests, ought to be used to determine whether public policy dictates that a contract should be invalidated. Another factor which has featured very prominently in determining whether an agreement, or the provisions of an agreement, is contrary to public policy, it has been suggested, that one commences from the premises that public policy favours the utmost freedom of contract. Contracts or provisions of a contract will, therefore, only be declared contrary to law or morality, or runs counter to social or economic experience, or are plainly improper and unconscionable, or unduly harsh or oppressive [462] if against public policy.

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the afore stated.

458 (1987) 153.

459 Christie (2001) 19.

460 "Billikheid in the Kontrakte Reg volgens die Suid-Afrikaanse Regskommissie" *TSAR* 2001-1 142 at 153-154; See also Hawthorne 1995 (58) *THRHR* 157 at 171-172, Hawthorne 2004 67 (2) *THRHR* 294.

461 "The Future of South African Contract Law" 1994 (57) *THRHR* 448 at 456ff; See also Van der Walt 1993 (56) *THRHR* 157 at 66 who believes good faith would fit the ethical requirement set by public policy in the contractual field; *Contra* Neels 1999 *TSAR* 684; Glover "Good faith and procedural unfairness in contract" 1998 (61) *THRHR* 328.

462 As this was discussed at great length *supra* a further in depth discussion is unwarranted. See however the legal writings of Christie (2001) 17 400; Van der Merwe et al (2003) 10-11; Christie *Bill of Rights Compendium* (2002) 3H-6-3H-12; Kerr (1998) 8-9; Wessels (1951) 572; Hutchinson et al (1991) 431ff; Joubert Volume 5 Part 1 (1994) Par 165; Kahn (1988) 32ff; Christie (2001) 17-18 400ff; Van der Walt *THRHR* (1991) 367ff; Hahlo (1981); *SALJ* 70ff; De Wet and Van Wyk (1992) 6ff; Pretorius 2004 (67) *THRHR* 179 183 185; Lotz (1979) 1; Eiselen 1989 *THRHR* 518-519 532-533; Lubbe 1990 *Stell LR* 7 16; Van der Walt 1991 *THRHR* 367 368; Van Aswegen 1994 *THRHR* 448 456; Lubbe and Murray (1988) 20-21; Van der Merwe et al (2003) 10; Hawthorne (2003) 15 *SA MERC LJ* 271 274; Jordaan "The Constitution's impact on the law of contract in perspective" 2004 *De Jure* 58 59-60; Hefer *TSAR* 2000 1 142ff; Grove 2003 *De Jure* 134ff; Hopkins *TSAR* 2003 1 150 152 155; Hawthorne 2004 67 (2) *THRHR* 294ff; Hawthorne 1995 (62) *THRHR* 596-597; Hawthorne 1995 (58) *THRHR* 157 162-63; 166-162; SA Law Commission Report (1998) 17ff.

The principles of equity, fairness and reasonableness are seen, by many of the South African legal writers, as a determining factor in deciding whether an agreement, or the terms of an agreement, should be upheld or denounced because of their unfairness, unreasonableness, harshness or oppressiveness.

This arises, especially, from the detrimental results that the harsh and oppressive provisions, often contained in standard-form contracts, bring with them. [463] It is especially with the adoption of the constitutional dispensation in South Africa, that legal writers hold the view that the natural law values in the form of fairness and reasonableness, should impact on the judicial decision-making process. It is suggested that instead of judges merely following judicial precedent and so embrace the freedom of contract or sanctity of contract, they ought to use public policy dictates to influence them. To this end, freedom of contract can never serve as a justification for enforcing a private agreement that has the purpose and effect of limiting the other party's fundamental rights. [464]

Although unconscionable-ness is a concept known to the South African law of contract, it is a term which has not been accepted by the South African legal writers as an independent, free floating defence. It is a concept, as seen previously, which relates mainly to the conduct of one of the parties and which encompasses unfair terms, unfairness in attempting to enforce a contract, and the like. [465]

The aim for some form of intervention is seen as serving the interests of the public, especially, the weak and vulnerable who stands in an unequal bargaining position with the stronger party in standard term contracts, which ultimately has harsh and oppressive results for the former. For that reason, the *South African Law Commission,* [466] in 1998 recommended that South Africa needed to enact legislation against unfairness, unreasonableness, unconscionable-ness or oppressiveness as it serves the public interests.

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463 Van der Merwe et al (2003) 200-201; Lubbe and Murray (1988) 386; Lubbe (1999) *Stell. L.R.* 22; Kerr (1998) 8-9; Christie (2001) 14 16-17; Christie *Bill of Rights Compendium* (2001) 3H-1-0; 3H-20 to 3H22; Jordaan 2004 *De Jure* 58 at 63; Hefer *TSAR* 2001-1 142 at 154; Hopkins *TSAR* 2003 1 150 at 154ff.

464 Hopkins *TSAR* (2003) 1 150 at 154ff; Hawthorne 1995 (58) *THRHR* 157 at 174; Van Aswegen 1994 (57) *THRHR* 448 at 450; Grove 1998 (61) *THRHR* 687 695; Neels *TSAR* (1999) 4 684 705.

465 Van der Merwe et al (2003) 117; Lubbe and Murray (1988) 386ff; Kahn (1998) 35ff; Hawthorne 1995 (58) *THRHR* 157 167.

466 The South African Law Commission's Report on *Unreasonable Stipulations in Contracts and the Rectification of Contracts*, Project 47 (1998) 58.

The South African legal writers have, over decades, grappled with the issues of morality and ethics in contract. More particularly, uncertainty still exists when to apply these concepts in determining whether public policy dictates that their presence should lead to the enforcement of agreements, or certain terms of agreements, or not. In this regard, *Joubert* [467] suggests the basis for deciding when contracts or provisions of an agreement are against good morals and public interests is not filled with certainty and that opinions on matters of good morals and public interest can differ from society to society, both in place and in time.

It has, however, been suggested by *Mr Justice van den Heever,* [468] as far back as 1941:

"The legal rules relating to contracts do not actively enforce morality, but merely discourage immorality. This must not be taken to mean that legal rules do not sometimes positively promote proper conduct, e.g. by requiring good faith between contractants." [469]

But *Hutchinson et al* [470] suggest that agreements are said to be against good morals if *"this offend our conscience, or sense of what is right, or modesty."* [471]

Van der Merwe et al, [472] on the other hand, in a very balanced opinion, suggest:

"the principle of morality (an extension of the values of society) or socio-economic expediency will in many circumstances support a policy favouring the exact enforcement of contracts freely entered into by consenting parties, but may, in particular circumstances, require that less weight be attached to the ideals of individual autonomy and freedom of action." [473]

But, caution *Van der Merwe et al*: [474] *"Agreements will only be said to be contrary to good morals if the illegality is founded in law. In this regard the law does not enforce morals*

467 *The Law of South Africa* Volume 8 (1987) 132-133.

468 Aquillius "Immorality and Illegality in Contract" (1941) (58) *SALJ* 337-354 at 346.

469 Aquilius "Immorality and Illegality in Contract" (1941) (58) *SALJ* 337-354 at 346.

470 *Wille's Principles of South African Law* (1991) 435; See also Wessels (1951) 421, 582.

471 Hutchinson et al (1991) 435.

472 *Contract: General Principles* (2003) 11.

473 Van der Merwe *Contract: General Principles* (2003) 11.

474 Van der Merwe *Contract: General Principles* (2003) 11.

simply because they are morals, but only when the moral content has been transformed into legal doctrine and specific rules."

In so far as ethical considerations are concerned and their influence on public policy, the South African legal writers have most certainly found a place for ethics in contracts. To this end, *Zimmerman* [475] highlights the impact Christian teachings, as well as Stoic moral philosophy have had on the formation of the law of contract in general, in that, *".... they demand the infusion of ethics and of humanities into the law".* The rationale there-for according to Zimmerman is to render aid to the weak, from exploitation by the so-called "urban capitalists". [476]

Hawthorne [477] recognises the value of ethical consideration in the law of contract, especially in promoting the principle of good faith in contract, has suggested *"good faith should become an underlying ethical value"*. [478]

More recently, it is especially, the writers *Carstens and Kok* [479] who opine that under the influence of a value-driven Constitution, the influence of normative medical ethics and medical law principles should not be ignored in deciding the unenforceability of contracts or contractual provisions. The authors justify their argument in favour of the influence of normative medical ethics by using, as their basis, the power which medical ethics and other instruments *inter alia* the *Hippocratic Oath*, the *Declaration of Geneva* (1968), *International Code of Medical Ethics*; the *Declaration of Helsinki* (as revised in 2000) have exerted over the medical profession for decades.

The writers persuasively argue that; as ethical codes and other instruments have as their foundation, a human rights culture, the ethical practise of medicine has, as its primary aim, the protection of human rights within a medical context. In this regard *Carstens and Kok* express the view that a medical practitioner *"by accepting and treating a patient, the practitioner is first and foremost required `to do no harm' and to act in the best interest of*

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475 *The Law of Obligations* (1992) 265ff.

476 Zimmerman *The Law of Obligations* (1992) 246ff.

477 "The End of *bona fides*" (2003) 15 *SA Merc LJ* 271, 274.

478 Hawthorne "The end of *bona fides*" (2003) 15 *SA Merc LJ* 271, 274; See also Van der Walt (1993) (56) *THRHR* 65, 69; Neethling et al (2001) 400.

479 "An Assessment of the use of Disclaimers in South African hospitals in view of Constitutional demands, foreign law and medico-legal considerations (2003) 18 *SAPR/SAPL* 430 at 449-452.

the patient."

For that reason, they argue, although patients, to a certain extent, determine their own destiny, bearing in mind the doctrine of informed consent, nevertheless, in certain instances, patients ought to be protected against conduct which may result in harm. In this regard the writers persuasively argue *" ..... disclaimers against medical negligence in hospital contracts would amount to an unreasonable/unfair/unethical acceptance on the part of a patient to contract to the possibility of harm (in the form of personal injury/death resulting from medical malpractice) by an attending medical practitioner (albeit in the hospital setting) who is ethically bound not to do harm."* The writers continue *".... this obvious contradiction is possibly the reason why certain jurisdictions have rules that disclaimers against medical negligence are against public policy, thereby giving legal effect to existing medical ethical rules."* [480]

One, it is submitted, has to associate oneself with the views expressed by *Carstens and Kok*. Not only does it follow international trends, the ethical codes record standards of behaviour against which practitioners conduct can be measured. It is submitted that the purpose of codes of ethical conduct is to ensure the maintenance of a sound system of medicine and medical standards and the patient's welfare.

In addition, it is submitted, they also create duties in respect of the medical profession and the public at large. Since ethical and legal duties overlap to a large extent, it is submitted that the legal convictions of the community dictate that a breach of an ethical duty, for example, causing harm to the patient and not to act in the best interest of the patient, would amount to the failure to exercise care towards the patient. Hence it would amount to a breach of a legal duty.

Although foreign law is not automatically considered as an influencing factor as means of balancing conflicting interests, nonetheless, it is persuasive authority at times in which legal thinking is influenced. *Neethling et al* [481] hold the view that the balancing of conflicting interests in South Africa does involve the convictions of the South African community and not that of foreign countries for example the United States of America, Europe and England.

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480 Carstens and Kok (2003) 18 *SAPR/SAPL* 430 at 449-452. For a discussion of ethical and legal duties albeit in a legal context see Midgley "Ethics and Legal Duties" *De Rebus*, August 1990 525-528. See also Dada and McQuoid-Mason *Introduction to Medico-legal Practices* (2001) 35-45.

481 *The Law of Delict* (2001) 19-20, 40-41.

Nonetheless, the authors do also hold the view that this principle does not preclude the investigation of foreign legal systems for comparative purposes. After all, it is submitted, Section 39 of Chapter 2 of the Bill of Rights of the Constitution Act 108 of 1996 provides that courts have discretion to consider comparable foreign decisions. *Dugard* [482] describes the South African legal position with regard to foreign law as follows: *"South Africa's new constitutional order, which requires courts to interpret all legislation and particularly the Bill of Rights to accord with international law, and the nations commitment to the rule of law and human rights, sets the scene of renaissance of international law both in South Africa's foreign policy and in the jurisprudence of its courts."* [483]

Since South Africa became a Constitutional state, with the introduction of the Interim Constitution in 1992 and the Final Constitution in 1996, legal writers, in numbers, have begun to attach greater significance to the effects of the Constitution and the values derived there-from. Many legal writers have, since, written extensively on the effects of the Constitution and the values derived there-from. [484]

Van der Merwe et al [485] state that when considering the enforceability of certain contracts or provisions of a contract, the courts, in interpreting the contract or terms of the agreement, must ensure the common law is not incongruent with the Constitution. The authors opine that when a court balances the interests of parties in determining the illegality of a specific agreement, it must consider the Constitution of the Republic of South Africa and the values which it possesses.

As to the value of Constitution to public policy *Christie* states: [486]
"By accepting the Constitution as a reliable statement of public policy, a court would have no difficulty in declaring a contract which infringed a provision of the Bill of Rights to be contrary to public policy and therefore

482 *International Law* (2000)25.

483 Dugard *International Law* (2000) 25; See also Van der Merwe et al (2003) 121-76; Christie *Bill of Rights Compendium* (2002) 3H-7 to 3H-8; Hawthorne (2003) 15 *SA Merc LJ* 271; Grove (2003) *De Jure* 134 141; Hopkins *TSAR* 2003 1 150 157; The South African Law Commission in their report Project 47 (1998) relied heavily on foreign law in order to come to their findings and recommendations.

484 Dugard (2000) 25; See also Van der Merwe et al (2003) 121-76; Christie *Bill of Rights Compendium* (2002) 3H-7 to 3H-8; Hawthorne (2003) 15 *SA Merc LJ* 271; Grove (2003) *De Jure* 134 141; Hopkins *TSAR* 2003 1 150 157.

485 *Contract: General Principles* (2003) 14, 82.

486 Christie *Bill of Rights Compendium* (2002) 3H-6J; See also Hawthorne (2003) 15 *SA Merc LJ* 271 who suggests the courts are encouraged to give a purposive interpretation to contracts which must be consonant with the spirit and values contained in the Bill of Rights.

unenforceable." [487]

Hopkins, [488] in assessing the value of the New Constitution, suggests the New Constitutional dispensation with regard to contract include: *"All law in South Africa (including the common law that regulates the enforcement of contracts - and standard-form contract by implication) must promote the values that underlie the Bill of Rights."* These values according to Hopkins include openness, dignity, equality, and freedom. The writer describe the influence of the Constitution as: *"The Constitution instructs lawyers to develop the common law where it is non-compliant with these values because of the duty to `promote the spirit, purport and objects of the Bill of Rights" (s39 (2) of the Constitution."*

He goes on to caution that: *"The old (pre-constitutional) idea of private law justice cannot stand aloof from these developments. It is my submission that whereas the common last sanctity of contract rule once epitomised contractual justice, it must now also be constitutionally scrutinised against the values that animate the Constitution."* [489]

In weighing up the doctrine of human rights and natural justice with the sanctity of contract, Hopkins highlights the potential abuse of power by the strong over the weak. In this way the latter is either forced to consent to the infringement of a fundamental right or else forced to waive a fundamental right altogether.

Strydom [490] in this regard hold the view that:

"No matter how highly we value the sanctity of contract rule, the freedom to contract can never serve as a justification for enforcing a private agreement that has the purpose and effect of limiting the other party's fundamental rights." [491]

Finally, *Christie,* [492] with regard to the Constitutional values as aid for shaping public policy,

487 Christie *Bill of Rights Compendium* (2002) 3H-6J.

488 "Standard form contracts and the evolving idea of private law justice: A case of democratic capitalist justice v natural justice" (2003) 1 *TSAR* 150, 157.

489 Hopkins "Standard form contracts and the evolving idea of private law justice: A case of democratic capitalist justice v natural justice" (2003) 1 *TSAR* 150, 157.

490 "The Private domain and the Bill of Rights (1995) *SA Public Law* 52.

491 Strydom "The Private domain and the Bill of Rights (1995) *SA Public Law* 52; See also the writings of Hawthorne 2004 67 (2) *THRHR* 294ff; Van Aswegen 1994 (57) *THRHR* 448, 450-451.

492 *The Bill of Rights Compendium* (2001) 3h-8 to 3H-12. For support see Grove (2003) *De Jure* 134, 140.

suggests that it is especially in the law of contract and specifically where a contract is considered to be unenforceable and against public policy, that a court may have regard to Section 8(3) (a) and 8(3) (b) to limit a right.

10.2.3.1.2 Case Law

It has long been recognised ever since the dictum of Innes CJ in *Eastwood v Shepstone* [493] that the South African courts will not enforce a contract that is against public policy or *contra bonos mores* even if it means restricting a person's liberty, or freedom to act. In this regard, Innes CJ 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 no good morals. It is a power not to be hastily or rashly exercised but 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 at is the tendency of the proposed transaction, not its actually proved result." [494]

The Appellate Division, in *Morrison v Angelo Deep Gold Mines Ltd,* [495] recognised that it was against public policy to allow a man to contract out of liability for injury done to persons by those in his employment, when the court stated per Mason J:

"It may be fairly argued that it is against public policy to allow a man to contract out of liability for injury done to persons by those in his employment and that argument, so far as I understand it, raises two grounds: first, that the permission to contract out may make employers careless of the safety of their servants so that such permission is against public interest, and the second is the ground given in the American decision quoted during the argument that it would fill the land with disabled and impoverished workmen. The latter argument is expressed in theoretical language, but appears to me in substance to be embraced within the first ground. Now in our law it is a principle that agreements contra bonos mores will not be enforced, and that is in reality the same as the English maxim as to contracts against public policy." [496]

In *Jajbhay v Cassim* [497] the Appellate Division, recognising the principle of public policy, held: *"..... [P]ublic policy should properly take into account the doing of simple justice between man and man..... "* [498]

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493 1902 TS 294.

494 *Eastwood v Shepstone* 1902 TS 294.

495 1905 (AD) 775.

496 *Morrison v Anglo Deep Goldmines Ltd* 1905 (AD) 775 at 784.

497 1939 AD 537.

498 *Jajbhay v Cassim* 1939 (AD) 537.

In what may be regarded as the commencement of modern law of illegality or unenforceability of contracts due to public policy and those *contra bonos mores*, Smalberger JA in *Sasfin (Pty) Ltd v Beukes* [499] set the tone by declaring:

"No court should therefore shrink from the duty of declaring a contract contrary to public policy when the occasion so demands. The powers 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."

The court then quotes with approval the words of Lord Atkin in *Fender v St John-Mildway* 1938 AC 1 (HL) at 12:

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

The court then cautions against relaxing the doctrine *pacta sunt servanda* when stating:

"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 cancelled by restrictions on that freedom." [500]

A few months later the Appellate Division, in the case of *Botha (now Griessel) v Finanscredit (Pty) Ltd,* [501] was again confronted with what Smalberger in Sasfin has called *"this often difficult problems"* in having to decide when a contract or provisions of an agreement run counter to public policy or is said to be *contra bonos mores*. Hoexter JA after considering the principles laid down in the Sasfin case, adopted the principles laid down in Sasfin and restated further principles from Sasfin when he stated:

"I proceed to consider whether the provisions of clause 7 are, in the language of the majority judgement to the Sasfin case (at 8C-D0.
` ..... clearly inimical to the interests of the community, whether they are contrary to law or morality, or run counter to social or economic expedience ..... 'And accordingly, unenforceable on the grounds of public policy. In such an investigation (see the remarks of Smalberger JA at 9A-G of the Sasfin case) there must be borne in mind: (a) that while public policy generally favours the utmost freedom of contract, it nevertheless properly takes into account the necessity for doing simple justice between man and man; and (b) that a court's power to declare contracts contrary to public policy should be exercised sparingly and only in cases in which the impropriety of the transactions and the element of public harm are manifest. So approaching the inquiry in the instant matter I am

499 1989 (1) SA 1 (A).

500 *Sasfin (Pty) Ltd v Beukes* 1989 1 SA 1 (A) at 9ff.

501 1989 (3) SA 773 (A).

not persuaded that the provisions of clause 7 of the suretyships are plainly improper and unconscionable. While at first blush the provisions of clause 7 may seem somewhat rigorous they cannot, I think, having regard to the particular circumstances of the present case, fittingly be described as unduly harsh or oppressive. The enquiry is directed to ` ..... The tendency of the proposed transaction, not it's actually proved result. (Per Innes CJ in Eastwood v Shepstone 1902 TS 294 at 302, the Sasfin case supra at 81-9A:14f)." [502]

In more recent times, during the post-constitutional era, our Supreme Court of Appeal was again confronted with the often difficult problem of deciding when to exercise its power to declare a provision in a contract against public policy. In the case of *De Beer v Keyser and Others,* [503] the court was asked to pronounce upon the validity of a franchise agreement and more particularly, whether the franchise agreement was contrary to public policy. The franchise agreement, itself, was a micro-lending agreement, stipulating that the lender surrender his cash card and disclose his personal identification number to the lender (franchisee). On appeal, the Appellants, in addition to the vagueness of the agreement, also argued that the agreements were unenforceable because the technique used to recover the debt was contrary to public policy. According to the Respondents, the form of technique used was a *parate executie* i.e. an agreement granting a creditor the right to sell the debtor's property in satisfaction of the debt. The Supreme Court of Appeal consequently upheld the appeal.

The court, per Nugent AJA, recognised that there are instances when agreements are to be regarded as contrary to public policy when he stated:

"[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." [504]

But, relying on the *Sasfin* case, the court concluded:
"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 9B-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 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-Midmay 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,

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502 *Botha (now Griessel) v Finanscredit (Pty) Ltd* 1989 (3) SA 773 (A) at 782I-783C.

503 2002 (1) SA 827 (SCA).

504 *De Beer v Keyser and Others* 2002 (1) SA 827 (SCA) at 837.

and does not depend 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." [505]

The court consequently held that *"..... The use of the technique is in any event not contrary to public policy."* The court continues *" ... once it is accepted that the borrower is obliged to repay the debt, in my view it is not objectionable for the borrower to furnish a ready means for its collection."* [506]

The dicta in the De Beer case have not escaped criticism. *Hawthorne,* [507] in particular, is of the view that, although public policy has been recognised as one of the open norms that determine the character of contract law, [508] nonetheless, the limited interpretation, by the Supreme Court of Appeal, in the application of this norm to the micro-lending industry *"begs the question whether public policy is still available to inject equitable principles into unconscionable contracts by way of interpretation."*

I respectfully associate myself with the additional comments by *Hawthorne*, when he suggests that the *"obvious route is to develop the open norm of the South African Common Law, such as bona fides, public policy, and boni mores in accordance with the constitutional mandate."* [509]

If the above principles, it is submitted, are adopted and applied by the courts, the result will

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505 *De Beer v Keyser and Others* 2002 (1) SA 823 (SCA) at 837.

506 *De Beer v Keyser and Others* 2002 (1) SA 823 (SCA) at 839.

507 "The end of bona fides" (2003) 15 *SA MERC LJ* 271 at 276-278.

508 See also the following cases in which the courts in restraint of trade matters as well as employment contracts have emphasized the doctrine of public policy: *Basson v Chilwan* 1993 (3) SA 742 (A) at 762I-J and 763A-B; *New United Yeast Distributors (Pty) Ltd v Brooks* 1935 WLD 75 at 83; *Van de Pol v Silberman and Another* 1952 (2) SA 561 (A) at 571-572; *Wohlman v Buron* 1970 (2) SA 760 (C) at 764; *Malan en andere v Van Jaarsveld en 'n ander* 1972 (2) SA 243 (C) at 246-247.

509 Hawthorne "The end of *bona fides*" (2003) 15 *SA MERC LJ* 271 at 276-278.

ensure, as suggested by *Hawthorne*, [510] that *"pacta sunt servanda will not be placed on a pedestal at the expense of unconscionable terms or contracts thus effectively eliminating equality."*

In a case concerning the eviction of a lessee, the Supreme Court of Appeal, in the case of *Brisley v Drotsky* ,[511] was tasked to decide whether the enforcement of a non-variation clause in a lease agreement would be fair and enforceable, alternatively, whether such a clause would be unenforceable. The facts of this case may briefly be stated as follows:
The appellant (the lessee) concluded a lease with the respondent (the lessee). The rent was payable in advance on the first of each month. The contract provided that if the rent was not paid on time, the lessor could cancel the agreement immediately. The contract also contained a `Shifren clause' - no alteration, variation, or cancellation of any of the terms or conditions of the lease would be of any force or effect unless it was recorded in writing and signed by the parties. The appellant failed to pay the first month's rent on time. The respondent terminated the lease and gave the appellant two weeks to vacate the premises. On appeal, the lessee raised several arguments against the eviction order.

The court considered, *inter alia,* the principles governing the application of public policy when enforcing agreements between contractants. In this regard, the court, in the majority judgement of Harms JA, Streicher JA and Brand JA, emphasized that it is in public interests that agreements entered into between consenting adults be enforced. The court relied upon the case of *Magna Alloys and Research (SA) (Pty) Ltd v Ellis* 1984 (4) SA 874 (A), in which it was held:

"..... dit in die openbare belang is dat persone hulle moet hou aan ooreenkomste wat hulle aangegaan het. In laasgenoemde verband het Steyn HR in SA Sentrale Ko-op Graanmaatskappy Bpk v Shifren en Andere 1964(4) SA 760(A) op 767A, gewag gemaak van:

"die elementêre en grondliggende algemene beginsel dat kontrakte wat vrylik en in alle erns deur bevoegde partye aangegaan is, in die openbare belang afgedwing word." [512]

The court recognises that, in certain circumstances, restrictions may be placed on contractual freedom and relied, in this regard on the dictum of Botha J, in the case of

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510 "Closing of the open norms in the law of contract" 2004 67 (2) *THRHR* 294; See also Hawthorne "Public policy and micro-lending - Has the unruly horse died?" 2003 *THRHR* 116.

511 2002 (2) SA 1 (SCA).

512 *Brisley v Drotsky* 2002 (4) SA 1 (SCA) at 15.

National Chemsearch SA (Pty) Ltd v Borrowman and Another 1979 (3) SA 1092 (T) at 1107C-H, in which it was stated:

"At first sight it might be thought strange that a contract can be void at one point of time and valid at another. But that, I believe, is not the right way of looking at a situation where the decisive question is whether the court should decline to enforce a contract in restraint of trade because of considerations of public policy. In an article in 1941 SALJ 335 at 346 Aquillus gives the following definition of a contract against public policy."

`A contract against public policy is one stipulating a performance which is not per se illegal or immoral, but which the courts, on grounds of expedience, will not enforce, because performance will detrimentally affect the interests of the community." [513]

The court then formulates certain ground rules which ought to be applied with regard to agreements in restraint of trade namely:

"(My italics). With regard to agreements in restraint of trade, it seems to me that the court's concern is to assess the effect of an order enforcing the agreement in the light of the dictates of public policy, and that the proper time for making that assessment is the time when the court is asked to make the order, taking into account the relevant circumstances existing at that time. Public policy does not require the court to penalise the party seeking to enforce the agreement, by declining to do so, because at the time when it was entered into it was so worded that it would not be accurately forecast whether it would be reasonable or not to enforce it when the occasion for its enforcement should arise." [514]

Commenting on the ever-present dicta of Smalberger JA in *Sasfin (Pty) Ltd v Beukes* 1989 (1) SA 1 (A) at 9B-E:

"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. 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."

The court held:

"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 the commercial transactions should not be unduly trammelled by the restrictions on that freedom." [515]

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513 *Brisley v Drotsky* 2002 (4) SA 1 (SCA) at 15.

514 *Brisley v Drotsky* 2002 (4) SA 1 (SCA) at 17.

515 *Brisley v Drostsky* 2002 (4) SA 1 (SCA) at 18.

Cameron JA, in the same judgement, concentrates, *inter alia,* on the effect of the constitution on public policy. He remarks then as follows:

"[91] The jurisprudence of this Court has already established that, in addition to the fraud exception, there may 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. 30 Public policy in any event nullifies agreements offensive in them - a doctrine of very considerable antiquity. 31 in its modern guise, `public policy' are now rooted in our Constitution and the fundamental values it enshrines.

There include human dignity, the achievement of equality and the advancement of human rights and freedoms, non-racialism and non-sexism. 32

[92] It is not difficult to envisage situations in which contracts that offend these fundamentals of our new social compact will be struck down as offensive to public policy. They will be struck down because the Constitution requires it, and the values it enshrines will guide the courts in doing so. The decisions of this Court that proclaim that the limits of contractual sanctity are at the borders of public policy will therefore receive enhanced force and clarity in the light of the Constitution and the values embodied in the Bill of Rights." [516]

Cameron JA, however, warns against over-hasty or unreflective importation of the concept of `*boni mores*' when he remarks:

"[93] I share the misgivings the joint judgement expresses about over-hasty or unreflective importation into the field of contract law of the concept of `boni mores'. The `legal convictions of the community' - a concept open to misinterpretation and misapplication - is better replaced, as the Constitutional Court itself has suggested, by the `appropriate norms of the objective value system embodied in the Constitution'. 33 What is evident is that neither the Constitution nor the value system it embodies give the courts a general jurisdiction to invalidate contracts on the basis of judicially perceived notions of unjustness or to determine their enforceability on the basis of imprecise notions of good faith. 34" [517]

[94] The court adds, on the contrary, the Constitution's value of dignity and equality and freedom require that the courts approach their task of striking down contracts or declining to enforce them with perceptive restraint. 35 One of the reasons, as Davis J has pointed out, 36 is that contractual autonomy is part of freedom. Shorn of its obscene excesses, 37 contractual autonomy informs also the constitutional value of dignity." [518]

Cameron JA then concludes:

"[95] The Constitution requires that its values be employed to achieve a careful balance between the unacceptable excesses of contractual `freedom', and securing a framework within which the ability to contract enhances rather than diminishes our self-respect and dignity. The issues in the present appeal do not imperil that balance." [519]

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516 *Brisley v Drotsky* 2002 (4) SA 1 (SCA) at 34.

517 *Brisley v Drotsky* 2002 (4) SA 1 (SCA) 35.

518 *Brisley v Drotsky* 2002 (4) SA 1 (SCA) 35.

519 *Brisley v Drotsky* 2002 (4) SA 1 (SCA) at 36.

The case of Brisley was also not spared the rod by our writers. It is especially *Hawthorne,* [520] who is very critical of Cameron JA's comments in Brisley v Drotsky 2002 (4) SA 1 (SCA) 35ff, where the learned judge explains that *"although the common law of contract is subject to the Supreme Law of the Constitution (35G-H) the Constitution enshrines the fundamental values of human dignity, the achievement of equality and the advancement of human rights and freedoms, non-racialism and non-sexism (37A) and requires a balance between contractual freedom and "securing a framework within which the ability to contract enhances rather than diminishes our self-respect and dignity."* [521]

Hawthorne, in dealing with the issue at hand, has the following comment to make, namely:

"Although Cameron JA held in Brisley 35B that it is not difficult to envisage situations in which contracts which offend the fundamentals of our new social compact, will be struck down as being offensive to public policy, it will be argued that this is a myth. Cameron JA admits so much by holding, virtually in the same breath (35D-E), that neither the Constitution nor the value system it embodies gives the courts a general jurisdiction to invalidate contracts on the basis of unjustness or to determine their enforceability on the basis of imprecise notions of good faith." [522]

It is submitted that *Hawthorne* correctly points out that:

"The obvious reason for the above restraint and the underlying interpretation of the effect of the constitutional values in the law of contract is the much vaunted freedom of contract." [523]

But, points out *Hawthorne "..... open norms like public policy, boni fides, boni mores, etc create the possibility to curb excesses, so sparing our courts the shame of complete passivity in respect of patent inequality between the parties."* [524]
Whether an admission document, signed by the respondent during his admission to the hospital which included an exemption clause, absolving the respondent the hospital and/or its employees and/or agents from all liability and indemnifying them from *"any claim instituted by any person (including a dependant of the patient) for damages or loss of whatever nature ....."* formed the subject matter for adjudication in a medical negligence

520 "Closing of the open norms in the Law of Contract" 2004 69 (2) *THRHR* 294.

521 *Brisley v Drotsky* 2002 (4) SA 1 (SCA) 35-36.

522 Hawthorne "Closing of the open norms in the Law of Contract" 2004 67 (2) *THRHR* 294.

523 Hawthorne "Closing of the open norms in the law of contract" 2004 67 (2) *THRHR* 294.

524 Hawthorne "Closing of the open norms in the Law of Contract" 2004 67 (2) *THRHR* 294.

case of *Afrox Healthcare Bpk v Strydom*. [525] The facts of the case and a more comprehensive discussion of the dictum will be covered in Chapter 13 of this thesis. Save for briefly discussing the relevant facts in so far as they relate to public policy or public interest, a more comprehensive discussion at this stage would be superfluous. The respondent advanced several reasons why the provisions of the exclusion clause could not operate against him.

The respondent contended, *inter alia,* that the relevant clause was contrary to the public interest, etc. The grounds upon which the respondent based his reliance on the public interest were the alleged unequal bargaining positions of the parties at the conclusion of the contract, as well as the nature and ambit of the conduct of the hospital personnel for which liability on the part of the appellant was excluded and the fact that the appellant was the provider of medical services. The respondent alleged that, while it was the appellant's duty as a hospital to provide medical treatment in a professional and caring manner, the relevant clause went so far as to protect the appellant from even gross negligence on the part of its nursing staff. This was contrary to the public interest.

The court, in assessing the validity or invalidity of exclusionary clauses in the South African Law of Contract, considered, *inter alia,* the doctrine of public policy and sets out the legal position as follows:

"[8] 'n Kontraksbepaling wat dermate onbillik is dat dit met die openbare belang, in stryd is, is regters onafdwingbaar. Hierdie beginsel is onder meer deur hierdie Hof in Sasfin (Pty) Ltd v Beukes 1989 (1) SA 1 (A) en Botha (now Griessel) and another v Finanscredit (Pty) Ltd 1989 (3) SA 773 (A) erken en toegepas. In die Sasfin saak (op 9B-F) rig Smalberger AR egter die volgende woorde van waarskuwing:

"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. 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." [526]

525 2002 (6) SA 21 (SCA).

526 *Afrox Healthcare Bpk v Strydom* 2002 (6) SA 21 (AD) 33-34.

Brand JA, delivering the judgement, held that, although, as a general rule, exclusionary clauses in contract are enforceable. It does not however, necessarily follow that in certain circumstances certain exclusionary clauses contrary to public policy may be regarded by our courts that such clauses are void and unenforceable. In this regard 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." [527]

The court consequently held that the yardstick used in measuring whether exclusionary clauses are unenforceable as against public policy are exactly the same as measuring contractual provisions which are, as a result of public policy, unenforceable. The question always remains whether the enforcement of the particular exclusionary clause or other contractual provision would, as result of extreme unfairness or as a result of other policy convictions, be contrary to the interests of the community.

The Supreme Court of Appeal, after considering the three grounds relied upon by the respondent to prove that the disclaimer offended public policy, namely:

(1) The unequal bargaining position between the parties;
(2) The nature and extent of the acts of the hospital staff against which the appellant was indemnified;
(3) The fact that the appellant is the provider of healthcare services rejected all of these grounds.

As to the unequal bargaining power, the court held that, on its own, it is not enough to conclude that the impugned clause offends public policy. The court, consequently, held that unequal bargaining power is a factor to be considered together with all other factors in deciding whether public policy was offended. But, the court held that, in this case, the respondent provided no evidence whatsoever that indicated a weaker bargaining position.

As to the second ground, it was argued on behalf of the respondent that the disclaimer excluded even gross negligence and that this is against public policy. The court however, rejected this argument, *inter alia* because the respondent relied on negligence *per se* in his

527 *Afrox Healthcare Bpk v Strydom* 2002 (6) SA 21 (AD) 33-34.

pleadings and not on gross negligence.

The court also held that contractual autonomy, as encapsulated in the common law maxim of *pacta sunt servanda,* forms part of the value of freedom and is thus protected in the Constitution.

It is respectfully submitted that, for the dicta in the *Afrox case,* Mr Justice Brandt deserves no accolades whatsoever. I believe here was a golden opportunity for the court to embrace morality rather than capitalistic business principles. Instead, the Supreme Court of Appeal chose to ignore normative medical ethics and values, which *Carstens and Kok* [528] define as *`to do no harm'* and *`to act in the best interest of the patient."*

Instead of going with the mainstream of foreign jurisdictions, *inter alia,* the United Kingdom, United States of America and the Federal Republic of Germany, in which disclaimer clauses against liability for medical negligence are viewed as an infringement of the *boni mores* or against public policy, Brandt JA, with his reasoning, kept the South African legal position in a swamp in which morality has no place, but business considerations, such as savings in regard to insurance premiums and competition remains the order of the day (34E-F of the dicta) [529]

More recently the Supreme Court of Appeals, in two dicta, discussed the role of public policy in the South African law of contract. In the case of *Napier v Barkhuizen,* [530] the court, in an appeal, dealt with the decision of the Pretoria High Court which upheld a challenge that a clause in an insurance contract barring Barkhuizen from claiming because he had not instituted legal action within 90 days as required by the contract. The court consequently held that the clause relied on by the insurance company was violative of Section 34 of the Bill of Rights, which guarantee the right to approach a court for redress, as well as public policy which also protected this right.

On appeal to the Supreme Court of Appeal, the Supreme Court of Appeal reversed the decision of the High Court. It held that Section 34 does not prohibit time limitation clauses. In addition, the Supreme Court of Appeal held that there was no evidence that Barkhuizen

528 "An Assessment of the use of Disclaimers by South African Hospitals in view of Constitutional demands, Foreign Law and Medico-legal considerations" (2003) 18 *SAPR/PL* at 430 .

529 See further Hawthorne 2004 67 (2) *THRHR* 294 at 301-302.

530 2006 (4) SA 1 (SCA); 2006 (9) BCLR 1011 (SCA).

did not freely and voluntarily conclude the insurance contract. The court, as a general rule, accepted that contractual claims are subject to the constitution. It also accepted that a contractual term that is contrary to public policy is unenforceable. Save for the established common law factors influencing public policy, the court held that 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."*

The Supreme Court of Appeal, relying heavily on the *pacta sunt servanda* rule, cautioned that the fact that a term in a contract is unfair or may operate harshly, does not, by itself, lead to the conclusion that it offends the values of the Constitution. Here, the court emphasized the principles of dignity and autonomy which, according to the court, *"finds expression in the liberty to regulate one's life by freely engaging in contractual arrangements."* The court then suggests that the Constitution requires of the courts that they *"employ its values to achieve a balance that strikes down the unacceptable excesses of `freedom of contract', while seeking to permit individuals the dignity and autonomy of regulating their own lives."* [531]

The court however warns: *"that intruding on apparently voluntarily concluded arrangements is a step that Judges should countenance with care, particularly when it requires them to impose their individual conceptions of fairness and justice on parties' individual arrangements."*

The court consequently held that the evidence placed before it by way of a stated case was `extremely slim' for it to determine whether these constitutional values have been impeached. In the case of *Bafana Finance Mabopane v Makwekwa and Another* [532] a matter concerned a clause in a money lending contract whereby the debtor purports to undertake not to apply for an order placing his/her estate under administration in terms of S74 (1) of the Magistrate's Court Act 32 of 1944 and to agree that the loan debt will not form part of an administration order for which he/she might apply was held to be unenforceable as being inimical to public policy.

The Supreme Court of Appeal, per Cachalia AJA, relying on public interests, set out the common law position as follows:

"An agreement whereby a party purports to waive the benefits conferred upon him or her by statute will be contra bonos mores and therefore not enforced if it can be shown that such agreement would deprive the party of protection which the legislature considered should as a matter of policy be afforded by law. An agreement is contrary to public policy according to Wells `if it is opposed to the interests of the State or of justice of the

531 *Napier v Barkhuizen* 2006 (4) SA 1 (SCA); 2006 (9) BCLR 1011 (SCA) Paras 12 and 13.

532 2006 (4) SA 581 (SCA).

public'."

Besides the chief classes of agreements regarded as contrary to public policy as quoted in *Sasfin (Pty) Ltd v Beukes* 1989 (1) SA 1 (A) which included: *" ..... those which tend to (i) injure the State or the public service (ii) defeat or obstruct the administration of justice; or (iii) interfere with the free exercise by persons of their rights"* the court found that public policy is *"anchored in founding Constitutional values which include human dignity, the achievement in equality and the advancement of human rights and freedoms."*

Consequently, the court considered the law applicable to the restriction or prevention of rights. The court, with reference to the dictum of Kotze JA in *Schierhout v Minister of Justice,* [533] in which it was held:

"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."

And *Standard Bank of SA Ltd v Essop* [534] in which it was decided:

"In my opinion, the applicant's conduct in having purported to stipulate for these rights was, and remains, unconscionable. It has purported to empower itself, in the event of any relevant default by the respondent to deprive him of his status as a solvent person, and inevitably to subject him to all the onerous obligations and extensive restrictions which bind an insolvent in terms of the Act ..... without his being in any event able to defend himself. This conduct offends my, and in my opinion would offend any reasonable person's sense of justice."

Held that:

"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 the public interest. When this is done to a poor person in the circumstances of the respondent, as the appellant attempted to do in the present matter, it is even more so."

The Constitutional Court have also, subsequent to the Supreme Court of Appeals *dicta* discussed hereinbefore, in the case of *Barkhuizen v Napier* [535] discussed the nature and effect of public policy in contract. The majority judgement, per Ngcobo J, held that public policy represents the legal convictions of the community which represents those values that

533 1925 AD 417.

534 1997 (4) SA 569 (A).

535 2007 (5) SA 323 (CC).

are held most dear by society. The court expressed the view that determining the content of public policy was once fraught with difficulties. The court states that since the introduction of the Constitution, in this new legal order, this is no longer the position, as public policy is now rooted in our Constitution and the values which underlie it. The values, according to the court, include the values of human dignity, the achievement of equality and the advancement of human rights and freedoms and the rule of law.

Therefore, what public policy is and whether a term in a contract is contrary to public policy, the court suggested, must now be determined by reference *"..... to the values that underlie our constitutional democracy as given expression by the provisions of the Bill of Rights. Thus a term in a contract that is inimical to the values enshrined in our Constitution is contrary to public policy and is, therefore, unenforceable."*

The court held that courts are entitled to decline to enforce contractual terms that are in conflict with the Constitutional values, even though the parties may have consented to them. The court consequently considered public policy and the right of access to court in the light of Sec 34 of the Constitution. Turning to Section 34 the Constitutional Court held that: *"..... Section 34 gives expression to this foundational value by guaranteeing to everyone the right to seek the assistance of a court."*

And further:

"..... Section 34 therefore not only reflects the foundational values that underlie our constitutional order, it also constitutes public policy."

Turning to the common law approach Ncgobo J held:

"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 cites as an example the case of *Schierhout v Minister of Justice,* [536] in which the Appellate Division, as the Supreme Court of Appeal was then known, held that:

"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." [537]

536 1925 AD 417.

537 *Schierhout v Minister of Justice* 1925 AD 417 at 424. See also *Nino Bonino v De Lange* 1906 TS 120 at 123-4.

The court cites a host of cases [538] in which the South African courts have considered terms in a contract, denying a contracting party the right to seek the assistance of a court, to be contrary to public policy and therefore contrary to common law.

As to the new legal order, the court held *"all law derives its force from the Constitution and is thus subject to Constitutional control."* The court continues to hold that, no law is immune from Constitutional control, nor is the common law of contract. Consequently, the court held that our courts have a constitutional obligation to develop common law, including the principles of the law of contract, so as to bring it in line with the values underlying our Constitution.

The court then formulates the proper approach to determine whether a claim is inimical to the values that underlie our constitutional democracy, namely: whether the term limitation clause is contrary to public policy as evidenced by constitutional values regard must be had to factors such as reasonableness and fairness and doing simple justice between individuals. The court states that public policy is founded upon the concept of Ubuntu.

Consequently the court held:

"It would be contrary to public policy to enforce a time limitation clause that does not afford the person bound by it an adequate and fair opportunity to seek judicial redress."

The court also held that the first inquiry in these types of matters would be directed at the objective terms of the contract. Consequently, the court suggests:

"If it is found that the objective terms are not inconsistent with public policy on their face, the further question will then arise which is whether the terms are contrary to public policy in the light of the relative situation of the contracting parties."

The court consequently accept that the unequal bargaining power between the contracting party together with other factors with reference to the case of *Afrox Healthcare Bpk v Strydom* 2002 (6) SA 21 (SCA); (2002) 4 ALL SA 125 (SCA) at Para 18, plays a role in the consideration of public policy. The rationale for the acceptance of this factor is founded according to the court on *"..... the potential injustice that may be caused by inequality*

538 *Administration, Transvaal and Others v Traub and Others* 1989 (4) SA 729 (A) at 764E; *Avex Air (Pty) Ltd v Borough of Vryheid* 1973 (1) SA 617 AD at 621F-G; *Stokes v Fish Hoek Municipality* 1966 (4) SA 421 (C) at 423H-424C; *Gibbons v Cape Divisional Council* 1928 CPD 198 at 200; *Benning v Union Government (Minister of Finance)* 1914 AD 29 at 31.

of bargaining power." The court found as well is important in a society "unequal as ours". The court also found that:

"..... Many people in this country conclude contracts without any bargaining power and without understanding what they are agreeing to. That will often be a relevant consideration in determining fairness ....."

But, holds the court in the case *in casu*, there is no admissible evidence that the contract was not freely concluded and that there was unequal bargaining power between the parties.
Recognizing that public policy imports the notions of fairness, justice and reasonableness and those agreements which are immoral and violative of public policy, the court however, found that the 90 days allowed to him to sue was not inadequate or unfair.

In a dissenting judgement, Sachs J found that terms contained in small print in standard form contracts, which bear harshly on contracting parties and which do not form part of the actual terms on which reliance was placed by the parties when the agreement was reached, do not comply with the standards of contractual freedom required by public policy in South Africa. Sachs J, relying on the guidance of international practise and the official proposals for statutory reform in South Africa on consumer protection, found that what public policy seeks to achieve *"..... Is a 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."* Sachs J, with regard to the legal convictions of the community in relation to consumer protection generally and the status of one-sided terms in standard form contracts, found that considerations of public policy, as animated by the Constitution, dictated that the time-bar clause, which limited access to courts, should not be enforced as it offends to comply with standards of notice and fairness, which the contemporary notion of consumer protection required in open and democratic societies.

A number of factors have over several decades been identified by the South African courts as means to determine whether in a contractual setting, a contractants conduct has violated public policy or put differently, is *contra bones mores*. One of the factor's which have received extensive judicial attention, albeit with much controversy, is that of good faith. Prior to the Appellate Division's case of *Bank of Lisbon South African Ltd v Ornelas* [539] which seem to have sealed the fate of good faith, as an independent defence, the

[539] 1988 (3) SA 580 (A).

Appellate Division in *Tuckers Land and Development Corp (Pty) Ltd v Hoves* [540] and *Mutual and Federal Insurance Co Ltd v Oudtshoorn Municipality* [541] did recognise that the concept good faith does assist in determining whether public policy forbids the enforcement of a contract or not. Although the Supreme Court of Appeals (previously the Appellate Division), in the cases of *Brisley v Drotsky* [542] and *Afrox Healthcare Bpk v Strydom,* [543] does appear to continue to support the non revival of good faith in South African law, our courts do from time to time show the worth of good faith, if not a revival of the concept. The recognition of the concept is viewed by some courts as a principle which requires ordinary business decency. [544]

Van Zyl J in the case of *Janse van Rensburg v Grieve Trust CC* [545] found justification for an application of good faith in the fact that such an interpretation was consonant with the spirit and values contained in the Bill of Rights.

The court emphasizes, especially, the right to equality in contract. In this case, Van Zyl J held that, in a trade-in agreement, it would be unjust, inequitable, and unreasonable for a seller to be liable for latent defects in a vehicle sold by him, and misrepresentations relating to it, if no similar liability were to attach to the purchaser in respect of the vehicle traded-in by him (at 325H). A purchaser would effectively be able to deliver a defective trade-in vehicle knowing full well that the seller would not be able to raise the aedilitian actions against him.

In a subsequent judgement, also in the Cape Provincial Division, per Ntsebeza AJ, in the case of *Miller and Another NNO v Dannecker,* [546] the court, relying on the minority decision of Olivier JA in *Eerste Nasionale Bank van Suidelike Afrika Bpk v Saayman NO* 1997 (4) SA 302 SCA at 318, held that a court can refuse to enforce an entrenchment clause where such enforcement would breach the principle of good faith.

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540 1980 (1) SA 645 (A) 561 C 562 6.

541 1985 (1) SA 419 (A).

542 2002 (4) SA 1 (SCA) 1.

543 2002 (6) SA 21 (SCA).

544 *Standard Bank of South Africa Ltd v Prinsloo (Prinsloo Intervening)* 2000 3 SA 576 (C) 585; *Shoprite Checkers v Bumpers Schwarmas CC* (2002) 2 ALL SA 588 (C) 600.

545 2000 (1) SA 315 (C) 326.

546 2001 (1) SA 928 (C).

The concept of contractual freedom and sanctity of contract has also, through decades, been recognized by the South African courts as an aid to determine whether public policy demands that a contract or contractual provision should be denounced as unreasonable or unfair. [547]

The principles of equity, fairness and unreasonableness have also received the attention of the South African courts over many decades. Although the courts have been reluctant, on occasions, to release a contracting party from the consequences of an agreement merely because that agreement appears to be unreasonable or unfair, [548] there have been a number of judgements wherein the South African courts have decided not to enforce contracts that are unreasonable or unfair for a number of reasons. [549]

Although the South African courts have, on occasions, protected contracting parties against unconscionable terms or agreements as a whole, more particularly, in contracts containing restraint of trade clauses and employment contracts, [550] in which the courts have favoured the position of the inferior contracting party, nevertheless, the courts have never, outright,

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547 *Afrox Healthcare Bpk v Strydom* 2002 (6) SA 21 (SCA); *Brisley v Drotsky* 2002 (4) SA 1; *Eastwood v Shepstone* 1902 RS 294; *Osry v Hirsch Loubser and CO Ltd* 1922 CPD 531; *Morrison v Anglo Deep Gold Mines Ltd* 1905 TS 775; *South African Railways and Harbours v Constable* (2) (AD) 132; *Conradie v Rossouw* 1919 AD 279; *Paiges v Van Ryn Gold Mines Estates Ltd* 1920 AD 600; *Wells v South African Alumenite Company* 192 AD 69; *George v Fairmead* 1958 (2) SA 465 (A); *SA Sentrale Ko-op Graan Maatskappy Bpk v Shifren* 1904 (4) SA 760 (A); *Filmer and Another v Van Straaten* 1965 (2) SA 575 (W); *New United Yeast Distributors (Pty) Limited v Brooks* 1935 W.L.D. 75; *Magna Alloys and Research SA (Pty) Ltd v Ellis* 1984 (4) SA 874 (A); *Olsen v Standaloft* 1983 (2) SA 668 (ZS); *Oatorean Properties (Pty) Ltd v Maroun* 1983 (2) SA 668 AD; *Tamarillo (Pty) Ltd v BN Atken (Pty) Ltd* 1982 (1) SA 398 (AD); *Sasfin (Pty) Ltd v Beukes* 1989 (1) SA 1 (AD); *Brummer v Gorfil Brothers Investments (Pty) Ltd en Andere* 1999 (3) SA 1989 (SCA) 420; *De Beer v Keyser and Others* 2002 (1) SA 829 (SCA); *Napier v Barkhuizen* 2006 (4) SA 1 (SCA); 2006 (9) BCLR 1011 (SCA); *Barkhuizen v Napier* 2007 (5) SA 323 (CC).

548 *Burger v Central South African Railways* 1903 TS 531 576; *Techni-Pak Sales (Pty) Ltd v Hall* 1968 (3) SA 231 (W) 238, *Weinerlein v Goch Buildings Ltd* 1925 (AD) 282.

549 *Zuurbekom Ltd v Union Corporation Ltd* 1947 (1) SA 514 (A); *Paddock Motors (Pty) Ltd v Ingesund* 1975 (3) SA 294 (D); *Louw and Co (Pty) Ltd v Richter* 1987 (2) SA 237 (W). Didcott J in this case delivered the following dictum:*" From the judgements that were delivered one learns the following, all of which is now clear. Covenants in restraint of trade are valid. Like all other contractual stipulations, however, they are unenforceable when, and to the extent that, their enforcement would be contrary to public policy. It is against public policy to enforce a covenant which is unreasonable, one which unreasonably restricts the covenanter's freedom to trade or to work."* See also *Sunshine Records (Pty) Ltd v Frohling* 1990 (4) SA 782 (A) 794 B-F; *Basson v Chilwan* 1993 SA 742 (A) 767 E-Z, *Sasfin (Pty) Ltd v Beukes* 1989 (1) SA 1 (AD).

550 For restraint of trade see *Basson v Chilwan* 1993 3 SA 742 (A) 762-J 763-B and for employment contracts see *New United Yeast Distributors (Pty) Ltd v Brooks* 1935 WLD 75 83. *Van de Pol v Silberman* 1952 SA 561 (A) 571E-572A; *Wahlman v Baron* 1970 2 SA 760 (C) 764; *Malan v Van Jaarsveld* 1972 2 SA 243 (C) 246A-247F.

declared unconscionable-ness as an independent defence, alternatively, an open norm of public policy and *boni mores*. [551]

The question of morality and ethical considerations has received the attention of our courts from time to time. In so far as the aspect of morality is concerned, as early as 1905, the case of *Dodd v Hadley* [552] recognised that an illegal contract may be declared unenforceable. In the case of *Silke v Goode,* [553] Wessels J stated the law as follows:

"I take our law to be this: That a contract cannot be enforced by our courts of law to be this: That a contract cannot be enforced by our courts of law if the object of the contract is illegal, or if it is for an immoral purpose." [554]

Morality and ethics continued to be factors which weighed heavily with the courts in the eighties and nineties and continues to be the position today. This was the position adopted in *Ailas Organic Fertilizers (Pty) Ltd v Pikkewyn (Pty) Ltd and Others* 1981 (2) SA 173 T at 188 and quoted with authority in the case of *Lorimar Productions Inc and Others v Sterling Clothing Manufacturers (Pty) Ltd; Lorimar Productions Inc and Others v OK Hyperama Ltd and Others; Lorimar Productions Inc and Others v Dallas Restaurant*. [555]

In weighing up the interests of the competing parties, besides bearing in mind also the interests of society, the court will also consider *"…. the business ethics of the section of the community where the norm is to be applied."* In the Lorimar case, Van Dijkhorst J, turning to the present case stated:

"In applying the norm of public policy in the present case, the following factors seem to me to be relevant; the protection already afforded by statutes and by established remedies, like passing off, under the common law, the morals of the market place, thereby I mean the ethics of the business community concerned; an inherent sense of fairplay and honesty, the importance of a free market and strong competition in our economic system; the question whether the parties concerned are competitors; conventions with other countries, like the Convention of Paris." [556]

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551 *Wells v South African Alumenite Company* 1827 (AD) 69, 73; *Oatorian Properties (Pty) Ltd v Maroun* 1976 (3) SA 16 (A) 28; *Brisley v Drotsky* 2002 (4) SA 1 SCA 35 C-E.

552 1905 T.S. 439, 442. See also *Blackett v South African Turf Club* 1909, 26 SC 45; *South African Tattersalls v Meyer Bros* 1905 TS 722.

553 1911 (TPD) 989, 994.

554 *Silke v Goode* 1911 (TPD) 989, 994. See also *Estate Wege v Strauss* 1932 (AD) 76; *Joseph v Hein* (3) SA 175 (W).

555 1981 (3) SA 1139 (T).

556 *Lorimar Productions Inc and Others v Sterling Clothing Manufacturers (Pty) Ltd; Lorimar Productions Inc and Others v OK Hyperama Ltd and Others; Lorimar Productions Inc and Others v Dallas Restaurant* 1981 (3) SA 1139

In the case of *Ismail v Ismail* [557] the Appellate Division (as it was known then) quoted, with approval, the dicta that crystallized from *Hurwitz v Taylor* 1926 TPD at 86, 91, which dealt with the criteria which are to be considered when determining whether a contact is against public policy. 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." [558]

the liability of contracts contrary to public policy is that of *Sasfin (Pty) Ltd v Beukes* The *locus classicus* on, [559] in which Smalberger JA sets out the position enunciated by our academic writers, namely with regard to illegal or immoral contracts:

"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."

Smalberger JA then sets out the courts view namely:

"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." [560]

In so far as ethical considerations are concerned, save for cases decided in a medical

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557 1983 (1) SA 1006 (A) 1006.

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

559 1989 (1) SA 1 (A) 8-9.

560 *Sasfin (Pty) Ltd v Beukes* 1989 (1) SA 1 (A) 8-9; See also *Standard Bank of SA Ltd v Wilkinson* 1993 (3) SA 822 (C) 837.

context, [561] in which the best interest of the patient reigns supreme, there are no other cases which turn on ethics being fundamental to determining public policy.

Until the case of *Carmichell v Minister of Safety and Security and another (Centre for applied legal studies intervening*), [562] the South African courts treated foreign law with mixed reactions in determining public policy.

It has generally been stated, by the South African courts, that foreign law should be followed with great circumspection, as our courts are not obliged to have regard to comparable foreign case law. [563]

The Constitutional Court, per Kriegler J, in *Bernstein v Bester,* [564] took a robust approach in discouraging the reception of foreign authorities in our dicta when he stated:

"I wish to discourage the frequent and, I suspect, often facile, resort to foreign `authorities'. Far too often one sees citation by counsel of, for instance, an American judgement in support of a proposition.... The prescripts of section 35(1) of the (interim) Constitution are also clear; where applicable, public international law in the field of human rights must be considered, and regard may be had to comparable foreign case law. But that is a far cry from blithe adoption of alien concepts or inapposite precedents." [565]

But, there are cases in which the courts have shown a more progressive approach in being more receptive in considering foreign law. In the Ciskei High Court decision of *Matinkinca and Another v Council of State, Ciskei and Another* [566] the court encouraged a *"fundamental humanistic constitutional philosophy"* interpretation which accords inter alia with *".... the values emerging in the `civilized international community'."* [567]

561 *Stoffberg v Elliott* 1923 (CPD) 148; *Ex parte Dixie* 1950 (4) SA 748; *Esterhuizen v Administrator, Transvaal* 1953 (C) 837.

562 2001 (4) SA 938 (CC).

563 *Qozeleni v Minister of Law and Order and Another* 1994 (2) SALR 340 (E); *Berg v Prokureur-Generaal van Gauteng* 1995 (11) BCLR 1441 1446; *Potgieter en 'n Ander v Killian* 1995 (11) BCLR 1498 (N); *Park-Ross and Another v The Director of the Office of Serious Economic Offences* 1995 (2) BCLR 198 (C) 208-209; *Nortje and Another v Attorney-General of the Cape and Another* 1995 (2) BCLR 236(c) 247; *Shabalala v Attorney-General of Transvaal* 1995 (1) SA 608 (TPD) 640-41.

564 1996 (4) BCLR 449 (CC); 1996 (2) SA 751 (CC) Par 133.

565 *Bernstein v Bester* 1996 (4) BCLR 449 (CC); 1996 (2) SA 751 CC Par 133; See also *Ferreira v Leven; Vryenhoek v Powell* 1996 (1) BCLR 1 (CC), 1996 (1) SA 984 (CC) Par 190.

566 1994 (1) BCLR 17 (CK).

567 *Matinkinca and another v Council of State, Ciskei and Another* 1994 (1) BCLR 17 (CK).

The following guidelines were laid down by Chaskalson P in *S v Makwanyane*, [568] with regard to the following of international and foreign law: *"In dealing with comparative law, we must bear in mind that we are required to construe the South African Constitution, and not an international instrument or the constitution of some foreign country, and that his has to be done with due regard to our legal system, our history and circumstances, and the structure and language of our own Constitution. We can derive assistance from public international law and foreign law case law, but we are in no way bound to follow it."* [569]

The Constitutional Court also laid down certain guidelines in the case of *S v Mamabolo* [570] wherein the court remarked as follows with regard to the use of foreign precedents namely:

"(B)efore one could subscribe to a wholesale importation of a foreign product one needs to be persuaded, not only that it is significantly preferable in principle, but also that its perceived promise is likely to be substantiated in practice in our legal system and in the society it has been developed to serve. More pertinently, it would have to be established that (the importation) was consonant with our South African Constitutional value system." [571]

The winds of change are, however, observed in the case of *Carmichell v Minister of Safety and Security and Another (Centre for Applied Legal Studies Intervening*), [572] in which the Constitutional Court relied heavily on English law and, noteworthy, on the decision of *Osman v United Kingdom* 29 EHHR 245 and two judgements of the European Court of Human Rights, in deciding *"a public interest immunity excusing the respondents from liability that they might otherwise have in the circumstances of the present case, would be inconsistent with our constitution and its values."* In coming to its finding the court also relied on *"the constitution being the supreme law",* the effect whereof is that *"Section 8(1) of the Constitution makes the Bill of Rights binding on the judiciary, as well as on the legislature and executive"* whereas *"Section 39(1) of the Constitution encourages courts to consider international law and foreign law."* Section 39(2) of the Constitution on the other hand provides that *"when developing the common law, every court must promote the spirit, purport and objects of the Bill of Rights".* Consequently, the court held, *"where the common law deviates from the spirit, purport and objects of the Bill of Rights the courts*

568 1995 6 BCLR 665 (CC) 1995 (3) SA 391 (CC) Par 37 2001 5 BCLR 449 (CC) 2001 (3) SA 409 (CC) Par 32.

569 *S v Makwanyane* 1995 6 BCLR 665 (CC); 1995 (3) SA 391 (CC).

570 2001 5 BCLR 449 (CC); 2001 (3) SA 409 (CC) Par 43.

571 *S v Mamabolo* 2001 5 BCLR 449 (CC); 2001 (3) SA 409 (CC) Par 32.

572 2001 (4) SA 938 (CC).

have an obligation to develop it by removing that deviation." [573]

Another factor which, since the adoption of the South African interim Constitution and the final Constitution, has played a vital role in influencing public policy is that of the values underlying the Constitution and the Bill of Rights. [574]

Most recently the Constitutional Court, per Ngcobo J, in the case of *Barkhuizen v Napier,* [575] again emphasized that *"public policy is now deeply rooted in our Constitution and the value which underlie it."* The court adds *"..... Our Constitutional democracy is founded on, amongst other values, the values of human dignity, the achievement of equality and the advancement of human rights and freedoms and the rule of law."*

And further:

"What public policy is and whether a term in a contract is contrary to public policy must now be determined by reference to the values that underlie our constitutional democracy as given expression by the provisions of the Bill of Rights. Thus a term in a contract that is inimical to the values enshrined in our Constitution is contrary to public policy and is, therefore, unenforceable."

10.2.3.1.3 Legal Opinion

Public policy, as with misrepresentation, duress, undue influence etc is a defence fully recognized in the South African law of contract. It is a concept which was firmly entrenched in Roman law, which ultimately, greatly influenced South African contract law, in that, agreements contrary to law, morality or public policy are unenforceable or void. [576]

The rationale for the existence of public policy, in modern times, lies in the broader concept of paternalism in which the courts protect the weaker party in the law of contract. In addition, whether public policy demands that a contract offending against public interest

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573 *Carmichell v Minister of Safety and Security and another (Centre for Applied Legal Studies Intervening)* 2001(4) SA 938 (CC); *Barkhuizen v Napier* 2007 (5) SA 323 (CC).

574 *Carmichell v Minister of Safety and Security and Another (Centre for Applied Legal Studies Intervening)* 2001 (4) SA 938 (CC); 2001 (10) BCLR 995 (CC) at Paras 54-6; *Price Waterhouse Coopers Inc and Others v National Patato Co-operative Ltd* 2004 (6) SA 66 (SCA); 2004 (9) BCLR 930 (SCA) at Para 24; *Afrox Healthcare Bpk v Strydom* 2002 (6) SA 21 (SCA); (2002) 4 ALL SA 125 (SCA) at Para 18; *Brisley v Drotsky* 2002 (4) SA 1 (SCA); 2002 (12) BCLR 1229 (SCA) at Para 91; and *Bafana Finance Mabopane v Makwakwa and Another* 2006 (4) SA 581 (SCA); (2006) 4 ALL SA 1 (SCA) at Para 11.

575 2007 (5) SA 323 (CC).

576 Wessels *The Law of Contract in South Africa* (1951) Volume 1 148ff.

may be struck down and declared invalid. [577] In this regard, public policy has been identified as a doctrine which places a limitation on contractual freedom or contractual autonomy, as well as, the enforcement of contractual agreements with the aid of the doctrine of *pacta sunt servanda*. [578]

In order to assess whether or not an agreement or the terms of an agreement are contrary to public policy or *contra bonos mores*, various factors have been identified by the South African legal writers and the courts alike without an exhausting list been identified. [579]

The various factors influencing judicial thinking in this regard are very much affected by the ever changing context and texture of society. [580]

As public policy is a question of fact and not a question of law public policy, holistically assessed, is influenced by the general sense of justice of the community, the *boni mores*

577 See Wessels *The Law of Contract in South Africa* (1951) Par 463-480ff; Van der Merwe et al *Contracts: General Principles* (2003) 176-178; Joubert *General Principles of the Law of Contract* (1987) 132-151; De Wet and Van Wyk *Kontraktereg and Handelsreg* 5ed Volume 1 (1998) 89-92; Kerr *The Principles of the Law of Contract* (1998) 177-189; Christie The Law of Contract and the Bill of Rights *Bill of Rights Compendium* (2002) 3H-9-3H-12; 3H-2--3H-21; Hutchinson et al *Wille's Principles of South African Law* (1991) 431; Joubert et al *LAWSA* Volume 5 Part 1 (1994) 214-216; Kahn *Contract and Mercantile Law* (1988) 32; Christie *The Law of Contract in South Africa* (2001) 398ff; Hawthorne "The End of bona fides" (2003) 15 *SA Merc LJ* 277; Jordaan "The Constitution's impact on the law of contract in perspective" 2004 *De Jure* 59ff; Hopkins "Standard-form contracts and the evolving idea of private law justice: A case of democratic capitalist justice versus natural justice" *TSAR* 2003-1 159; Hawthorne "Closing of the open norms in the law of contract" 2004 67 (2) *THRHR* 295ff; Hawthorne "The principle of equality in the law of contract" 1995 (58) *THRHR* 173; Van Aswegen "The future of South African contract law" 1994 (59) *THRHR* 453. For the earlier cases see *Eastwood v Shepstone* 1902 (TS) 294; *Morrison v Angelo Deep Gold Mines Ltd* 1905 (AD) 775, 784; *Sasfin (Pty) Ltd v Beukes* 1989 (1) SA 1 (A); *Botha (now Griesel) v Finanscredit (Pty) Ltd* 1989 (3) SA 773 (A). For the more recent cases see *De Beer v Keyser and Others* 2002 (1) SA 827 (SCA) 837; *Brisley v Drotsky* 2002 (2) SA 1 (SCA) 15; *Afrox Healthcare Bpk v Strydom* 2002 (6) SA 21 (SCA); *Napier v Barkhuizen* 2006 (4) SA 1 (SCA); 2006 (9) BCLR 1011 (SCA); *Barkhuizen v Napier* 2007 (5) SA 373.

578 See Hawthorne "The Principles of Equality in the Law of Contract" 1995 (58) *THRHR* 167 173; Christie *The Law of Contract and the Bill of Rights Bill of Rights Compendium* (2002) 3H-20-3H-21. See further Joubert *General Principles of the Law of Contract* (1987) 133; Hawthorne "Closing the open norms in the law of contract" 2004 67 (2) *THRHR* 294 at 298.

579 See Wessels *The Law of Contract in South Africa* (1951) Par 463-480ff; See also Jordaan "The Constitution's impact on the law of contract in perspective (2004 De Jure 59-60; Christie *The Law of Contract and the Bill of Rights Bill of Rights Compendium* (2002) 3H-2-; Van der Merwe et al *Contracts: General Principles* (2003) 15; See also Kahn *Contract and Mercantile Law* (1988) 32; Hutchinson et al *Wille's Principles of South African Law* (1991) 431; Joubert *LAWSA* Volume 5 Part 2 (1994) 215.

580 See Joubert *LAWSA* Volume 5 Part 1 (1994) 215; De Wet and Van Wyk *Kontraktereg en Handelsreg* (1992) 89; Hawthorne "The Principle of Equality in the Law of Contract" 1995 (58) *THRHR* 173-174; Christie *"The Law of Contract and the Bill of Rights" Bill of Rights Compendium* (2003) 3H-10-3H-11; Hawthorne "The End of Bona Fides" (2003) 15 *SA Merc LJ* 277".

manifested in public opinion. [581]

Although various factors have crystallized throughout the years to determine whether a contract or a term of a contract is contrary to public policy and therefore unenforceable, that notwithstanding, the South African writers and the courts have on numerous occasions cautioned that the power to declare a contract or a term in a contract to be contrary to public policy and therefore, should be exercised sparingly and only in the clearest of cases. [582]

It is especially, *Christie* [583] who cautions that regard must not be had to superficial public opinion, which can swing like a weathercock, but, rather the seriously considered public opinion on the general sense of justice and good morals of the community.

The reason advanced there-for is that it causes the maintenance of stability in the law of contract by ensuring that contracts are not at the mercy of future public opinion. [584]
Several factors have throughout the years crystallized, be that through legal writers, be that through judicial dicta. The factors which most prominently featured throughout the years include the following, namely:

(1) In the case of statutory enactments, the courts may consider the policy of the legislature in enacting the statute in order to determine the validity of the statutory provision or provisions. [585]

(2) Good faith has in the past been considered by our legal writers and courts in

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581 Christie *The Law of Contract in South Africa* (2001) 400, 403; Wessels *The Law of Contract in South Africa* (1951) 157.

582 See Hawthorne "Closing of the open norms in the Law of Contract" 2004 67 (2) *THRHR* 299; Christie The Law of Contract and the Bill of Rights *Bill of Rights Compendium* (2002) 3H-10; Hutchinson et al *Wille's Principles of South African Law* (1991) 431; Joubert *LAWSA* Volume 5 Part 1 (1994) 215. Jordaan "The Constitution's impact on the Law of Contract in Perspective" 2004 *De Jure* 61; Pretorius "The Basis of Contractual Liability in South African Law (1)" 2004 69 (2) *THRHR* 298-299. For relevant case law in which the South African courts have advocated a cautious approach see *Eastwood v Shepstone* 1902 (TS) 294; *Sasfin (Pty) Ltd v Beukes* 1989 (1) SA 1 (A); *Botha (now Griesel v Finanscredit (Pty) Ltd* 1984 (3) SA 773 (A); *Olsen v Standaloft* 1983 (2) SA 668 (ZS) 673E; *De Beer v Keyser and Others* 2002 (1) SA 827 (SCA); *Brisley v Drotsky* 2002 (2) SA 1 (SCA); *Afrox Healthcare Bpk v Strydom* 2002 (6) SA 21 (SCA); *Napier v Barkhuizen* 2006 (4) SA 1 (SCA); 2006 (9) BCLR 1011 (SCA); *Barkhuizen v Napier* 2007 (5) SA 323 (CC); *Bafana Finance Mabepane v Makwakwa and Another* 2006 (4) SA 58.

583 Christie *The Law of Contract in South Africa* (2001) 400, 403.

584 Christie *The Law of Contract in South Africa* (2001) 400, 403.

585 Joubert *LAWSA* (1987) 153.

determining whether public policy forbids the enforcement of the contract. [586]

(3) Freedom of Contract in itself has been viewed by the South African legal writers and the courts as a factor in considering whether an agreement is contrary to public policy. It has then been premised that public policy favours the utmost freedom to contract. [587]

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586 Hefer "Billikheid in die Kontraktreg volgens die Suid-Afrikaanse Regskommissie" *TSAR* 2001-1 142 at 153-154 advocates that the court's hands ought to be strengthened to attain in public interest a greater degree of fairness in contract. See also Hawthorne "The Principle of Equality in the Law of Contract" 1995 (58) *THRHR* 157 at 171-172; Hawthorne "Closing of the norms in the Law of Contract" 2004 67 (2) *THRHR* 234; Van Aswegen "The Future of South African Law" 1994 (57) *THRHR* 448 at 456ff with regard to overcoming the problems which the inequalities between contracting parties brings suggests that the *bona fides* of the contracting parties, which requires honesty and which prohibits the unreasonable promotion of one's own interests, ought to be used to determine whether public policy dictates that a contract should be invalidated. See also Van der Walt "Aangepaste voorstelle vir 'n stelsel van voorkomende beheer oor kontrakteervryheid in die Suid-Afrikaanse Reg" 1993 (56) *THRHR* 65 at 66 who believes good faith would fit the ethical requirement set by public policy in the contractual field; *Contra* however Neels "Die Aanvullende en Beperkende werking van Redelikheid en Billikheid in die Kontraktereg" 1998 (61) *THRHR*. For case law on our court's *"topsy turvy"* approach in recognizing good faith as a defence see the cases of *Judd v Fourie* (1881) 2 EDC 41 (76); *Nengebvauer and Co v Herman* 1923 AD 564 at 573; *Meskin No v Anglo American Corporation of SA Ltd and Another* 1968(4) SA 793 (W) at 802 (A); *Savage and Lovemore Mining (Pty) Ltd v International Shipping Co (Pty) Ltd* 1987 (2) SA 147 (W); *Paddock Motors (Pty) Ltd v Igesund* 1976 (3) SA 16 A at 27; *Tuckers Land Development Corporation (Pty) Ltd v Hoves* 1980 (1) SA 645 (A) at 652; *Mutual and Federal Insurance Co Ltd v Oudtshoorn Municipality* 1985 (1) SA 419 A; *Trustee, Estate Cresswell and Durbach v Coetzee* 1916 (AD) 14 at 19; *Rand Rietfontein Estates Ltd v Cohn* 1937 (AD) 317 at 330 in which good faith was required in all contracts failing which it would lead to an inequitable result. The latter principle was followed in especially *Weinerlein v Gooch Buildings Ltd* 1925 AD 282; *Zuurbekom Ltd v Union Corporation Ltd* 1947 1 SA 514 (A); *Paddock Motors (Pty) Ltd v Igesund* 1976 3 SA 16 (A); *Rand Bank Ltd v Rubenstein* 1981 2 SA 207 (W); *Arprint Ltd v Gerber Goldschmidt Group South Africa (Pty) Ltd* 1983 1 254 (A). But things changed with the decision of *Bank of Lisbon South African Ltd v Ornelas* 1988 (3) SA 580 (A) in which the Appellate Division (as it was then) gave the death knell to good faith as a defence by acknowledging "*requiescat in pace*". But, notwithstanding, the South African courts commencing with the minority judgement in *Eerste Nasionale Bank van Suidelike Afrika Bpk v Saayman* 1997 (4) SA 302 (A) per Olivier JA came out fighting for the re-instatement of good faith as a defence. It was especially, the Cape Provincial Division of the High Court in *Janse van Rensburg v Grieve Trust CC* 2000 (1) SA 315 (C); *Miller and another NNO v Donnecker* 2001 (1) SA 928 (C) *Mort NO v Henry Shields-Chiat* 2001 (1) SA 464 (C) which seem to rekindle some of a re-introduction. But this was short lived as the Supreme Court of Appeal denounced the re-introduction in the cases of *Brisley v Drotsky* 2002 (4) SA 1 (SCA); *De Beer v Keyser and Others* 2002 (1) SA 827 (SCA); *Afrox Healthcare Bpk v Strydom* 2002 (6) SA 27 (A); *Napier v Barkhuizen* 2006 (4) SA 1 (SCA); 2006 (9) BCLR 1011 (SCA); *Barkhuizen v Napier* 2007 (5) SA 323 (CC).

587 As this was discussed at great length *supra* a further in depth discussion is unwarranted. See however the legal writings of Christie *The Law of Contract in South Africa* (2001) 17 400; Van der Merwe et al *Contract: General Principles* (2003) 10-11; Christie *The Law of Contract and the Bill of Rights Bill of Rights Compendium* (2002) 3H-6-3H-12; Kerr *The Principles of the Law of Contract* (1998) 8-9; Wessels *The Law of Contract in South Africa* (1951) 572; Hutchinson et al *Wille's Principles of South African Law* (1991) 431ff; Joubert *LAWSA* Volume 5 Part 1 (1994) Par 165; Kahn *Contract and Mercantile Law* (1988) 32ff; Christie *The Law of Contract in South Africa* (2001) 17-18 400ff; Hahlo "Unfair contract terms in civil law systems" (1981) *SALJ* 70ff; De Wet and Van Wyk *Kontraktereg en Handelsreg* (1992) 6ff; Pretorius "The Basis of Contractual Liability in South African Law (1)" 2004 (67) *THRHR* 179 183 185; Lotz "Die billikheid in die Suid-Afrikaanse reg" Unpublished inaugural lecture University of South Africa (1979) 1; Lubbe "Bona fides, billikheid en die openbare belang in die Suid-Afrikaanse kontraktereg" 1990 *Stell LR* 7 16, "Estoppel, vertrouensbeskerming en die struktuur van die Suid-Afrikaanse privaatreg" 1991 *TSAR* 1 13-14; Van der Walt "Kontrakte en beheer oor kontrakteervryheid in 'n nuwe Suid-Afrika" 1991 *THRHR* 367 368; Van Aswegen "The future of South African contract law" 1994 *THRHR* 448 456;

(4) Equity, fairness and reasonableness, especially, as a result of the inclusion of harsh and oppressive provisions in standard-form contracts which, in modern day, including South Africa, have become the order of the day in the international economic arena, are factors which the legal writers, as well as the courts, recognise as influencing public policy. Often these factors are used to determine whether a contract, or the provisions of a contract, ought to be upheld or denounced because of their unfairness, unreasonableness, harshness or oppressiveness. [588]

Kleyn 1995 THRHR 16; Lubbe and Murray *Farlam and Hathaway Contract: Cases, Materials and Commentary* (1988) 20-21; Van der Merwe et al *Contract: General Principles* 10; Hawthorne "The end of bona fides" (2003) 15 *SA MERC LJ* 271 274; Jordaan "The Constitution's impact on the law of contract in perspective" 2004 *De Jure* 58 59-60; Hefer "Billikheid en die kontraktereg volgens die Suid-Afrikaanse regskommissie" *TSAR* 2000 1 142ff; Grove "Die kontraktereg, altriüsme, keusevryheid en die Grondwet" 2003 *De Jure* 134ff; Hopkins "Standard-form contracts and the evolving idea of private law justice: A case of democratic capitalist justice versus natural justice" *TSAR* 2003 1 150 152 155; Hawthorne "Closing of the open norms in the law of contract" 2004 67 (2) *THRHR* 294ff; Hawthorne "The principle equality impacts on the classical law of contract" 1999 (62) *THRHR* 596-597; Hawthorne "The principle of equality in the law of contract" 1995 (58) *THRHR* 157 162-63; 166-162; SA Law Commission Report (1998) 17ff. For case law see *Eastwood v Shepstone* 1902 TS 294, 302; *Morrison v Anglo Deep Gold Mines Ltd* 1905 TS 775; *South African Railways and Harbours v Conradie* 1921 (AD) 132 147-148; *Conradie v Rossouw* 1919 AD 279, 288, 320; *Osry v Hirsch* 1922 CPD 531 546; *Paiges v Van Ryn Gold Mines Estates Ltd* 1920 AD 600; *Wells v South African Alumenite Company* 1927 AD 69; *George v Fairmead (Pty) Ltd* 1958 (2) SA 465 (A); *SA Sentrale Ko-op Graan Maatskappy Bpk v Shifren* 1964 (2) SA 343 (0) 346; *Filmer and Another v Van Straaten* 1965 (2) SA 575 (W); *Magna Alloys and Research SA (Pty) Ltd v Ellis* 1984 (4) SA 874 (A) 892-893; *Olsen v Standaloft* 1983 SA 668 (2) 673; *Tamarello (Pty) Ltd v B.N. Aitken (Pty) Ltd* 1982 (1) SA 398 (AD) 439. Cases in which courts were prepared to interfere with freedom of contract but only when expressed sparingly see *Sasfin (Pty) Ltd v Beukes* 1989 (1) SA 1 AD 9 b-f; *Brisley v Drotsky* 2002 (4) SA 1 SCA; *Brummer v Gorfil Brothers Investments (Pty) Ltd en Andere* 1999 (3) SA 389 (SCA) at 420 F; *De Beer v Keyser and Others* 2002 (1) SA 827 (SCA) at 837 C-E; *Afrox Healthcare Bpk v Strydom* 2002 (6) SA 21 (SCA) at 33 I-J, 34 A-B; *Napier v Barkhuizen* 2006 (4) SA 1 (SCA); 2006 (9) BCLR 1011 (SCA); *Barkhuizen v Napier* 2007 (5) SA 323 (CC); *Bafana Finance Mabepane v Makwakwa and Another* 2006 (4) SA 58.

588 Van der Merwe et al *Contract: General Principles* (2003) 200-201; Lubbe and Murray *Farlam and Hathaway: Cases, Materials and Commentary* (1988) 386; Lubbe "Bona Fides, Billikheid en die Openbare Belang in die Suid-Afrikaanse Kontraktereg" (1990) *Stell. L.R*. 22; Kerr *The Principles of the Law of Contract* (1998) 8; Christie *The Principles of the Law of Contract* (2001) 14 16-17; Christie *The Law of Contract and the Bill of Rights Bill of Rights Compendium* (2001) 3H-10; 3H-20 to 3H-22; Jordaan "The Constitution's impact on the Law of Contract in Perspective" 2004 *De Jure* 58 at 63; Hefer "Billikheid en die Kontraktuele volgens die Suid-Afrikaanse Regskommissie" *TSAR* 2001-1 142 at 154; Hopkins "Standard-form contract and the evolving idea of private law justice: A case of democratic capitalist justice versus natural justice" *TSAR* 2003 1 150 at 154ff. For case law see the general remark by Innes CJ in *Burger v Central South African Railways* 1903 TS 571, 576 in which Innes CJ stated: *"our law does not recognize the right of a court to release a contracting party from the consequences of an agreement duly entered into by him merely because that agreement appears to be unreasonable."* See also *Rashid v Durban City Council* 1975 3 SA 920 (D) 927B-D; *Paddock Motors (Pty) Ltd v Igesund* 1976 3 SA 16 (A) 28; *Neuhoff v York Timbers Ltd* 1981 4 SA 666 (T) 673D-E; *Artprint Ltd v Gerber Goldschmidt Group South Africa (Pty) Ltd* 1983 1 SA 254 (A) 263; But the above approach seem to have been whittled away by the common law especially in restraint of trade cases in which the courts have indicated they will not enforce a contract that is unreasonable. See *Magna Alloys and Research (SA) (Pty) Ltd v Ellis* 1984 (4) SA 874 (A); *J Louw and Co (Pty) Ltd v Richter* 1987 (2) SA 237 (N) 243B-D in which Didcott J stated: *"It is against public policy to enforce a covenant which is unreasonable, one which unreasonably restricts the covenant's freedom to trade or to work."* See the comments by Sachs J in the minority judgement of *Barkhuizen v Napier* 2007 (5) SA 323.

Our newly acquired constitutional dispensation, in the 1990's in South Africa, also influenced academic thinking in that it is advocated that the natural law values, in the form of fairness and reasonableness, should impact on the judicial- making process, so much so, that, instead of judges merely following judicial precedent which strongly emphasized contractual freedom and the sanctity of contract, they ought to consider the principles of fairness, equity and reasonableness first.

But it is persuasively argued that, in terms of the new Constitution, public policy dictates that freedom of contract can never serve as a justification for enforcing a private agreement that has the purpose and effect of limiting the other party's fundamental rights. [589]

(5) Although the concept unconscionable-ness is known to the South African legal writers and the courts, it has never been accepted as an independent free floating defence. It has, however, been used, mainly, to assess the conduct of one of the parties or in establishing unfair terms, unfairness in attempting to enforce a contract. [590] It is seen as a much-needed intervention in public interests to protect

589 Hopkins "Standard-form contracts and the evolving idea of private law justice: A case of democratic capitalist justice versus natural justice" *TSAR* (2003) 1 150 at 154ff; Hawthorne "The Principle of Equality in the Law of Contract" 1995 (58) *THRHR* 157 at 174; Van Aswegen "The Future of South African Law" 1994 (57) *THRHR* 448 at 456; Neels "Die Aanvullende en Beperkende Werking van Redelikheid en Billikheid in die Kontraktereg" *TSAR* (1999) 4 684 705; *Ismail v Ismail* 1983 (1) SA 1006. The court saw the interim 1993 Constitution as a repository of modern public policy. See also *Amod v Multilateral Motor Vehicle Accidents Fund* 199 (4) SA 1319 (A). In *Qozoleni v Minister of Law and Order* 1994 1 BCLR 75 (C) 80 Kroon and Froneman JJ put the position *"because the Constitution is the supreme law of the land against which all law and conduct is to be tested, it must be exercised with a view to extracting from it those principles or values against which such law or conduct can be measured."* In *Brisley v Drotsky* 2002 (12) BCLR 1229 (A) (94) the court also relied on the Constitutional values in assessing whether to strike down a contract when Cameron JA stated: *"The Constitution's values of dignity and equality and freedom require that the courts approach their task of striking down contracts or declining to enforce them with perceptive restraint. One of the reasons is that contractual autonomy is part of freedom. Shorn of its obscene excesses, contractual autonomy informs also the constitutional value of dignity.... The Constitution requires that its values be employed to achieve a careful balance between the unacceptable excesses of contractual "freedom", and securing a framework within which the ability to contract enhances rather than diminishes our self-respect."* See also *Afrox Healthcare Bpk v Strydom* (2002) 4 ALL SA 125 (A) 133; *Napier v Barkhuizen* 2006 (4) SA 1 (SCA); 2006 (9) BCLR 1011 (SCA); *Barkhuizen v Napier* 2007 (5) SA 323; *Bafana Finance Mabepane v Makwakwa and Another* 2006 (4) SA 58.

590 Van der Merwe et al *Contract: General Principles* (2003) 200-201; Lubbe and Murray *Farlam and Hathaway: Cases, Materials and Commentary* (1988) 386; Lubbe "Bona Fides, Billikheid en die Openbare Belang in die Suid-Afrikaanse Kontraktereg" (1990) *Stell. L.R.* 22; Kerr *The Principles of the Law of Contract* (1998) 8; Christie *The Principles of the Law of Contract* (2001) 14 16-17; Christie *The Law of Contract and the Bill of Rights Bill of Rights Compendium* (2001) 3H-10; 3H-20 to 3H-22; Jordaan "The Constitution's impact on the Law of Contract in Perspective" 2004 *De Jure* 58 at 63; Hefer "Billikheid en die Kontraktuele volgens die Suid-Afrikaanse Regskommissie" *TSAR* 2001-1 142 at 154; Hopkins "Standard-form contract and the evolving idea of private law justice: A case of democratic capitalist justice versus natural justice" *TSAR* 2003 1 150 at 154ff. For case law see the general remark by Innes CJ in *Burger v Central South African Railways* 1903 TS 571, 576 in which Innes CJ stated: *"our law does not recognize the right of a court to release a contracting party from the consequences of an agreement duly entered into by him merely because that agreement appears to be unreasonable."* See also

the weak and vulnerable contracting party, who stands in an unequal bargaining position to the stronger party, which ultimately leads to harsh and oppressive results for the former. [591]

(6) Both the legal writers and the courts do recognise that morality and ethics in contract, do play a role in determining when public policy dictates that agreements or terms of agreements are enforceable or not. [592]

In this regard, *Van der Merwe et al* [593] state that agreements will only be said to be contrary to good morals if the illegality is founded in law. In this regard the law does not enforce morals simply because they are morals, but only when the moral content has been transformed into legal doctrine and specific rules.

In so far as ethical considerations are concerned and their influence on public policy, the

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Rashid v Durban City Council 1975 3 SA 920 (D) 927B-D; *Paddock Motors (Pty) Ltd v Igesund* 1976 3 SA 16 (A) 28; *Neuhoff v York Timbers Ltd* 1981 4 SA 666 (T) 673D-E; *Artprint Ltd v Gerber Goldschmidt Group South Africa (Pty) Ltd* 1983 1 SA 254 (A) 263; But the above approach seem to have been whittled away by the common law especially in restraint of trade cases in which the courts have indicated they will not enforce a contract that is unreasonable. See *Magna Alloys and Research (SA) (Pty) Ltd v Ellis* 1984 (4) SA 874 (A); *J Louw and Co (Pty) Ltd v Richter* 1987 (2) SA 237 (N) 243B-D in which Didcott J stated: *"It is against public policy to enforce a covenant which is unreasonable, one which unreasonably restricts the covenant's freedom to trade or to work."* See the comments by Sachs J in the minority judgement of *Barkhuizen v Napier* 2007 (5) SA 323.

591 The South African Law Commissioner's Report on *Unreasonable Stipulations in Contracts and the Rectification of Contracts*, Project 47 (1998) 58; See also *Barkhuizen v Napier* 2007 (5) SA 323 (CC).

592 Joubert *The Law of South Africa Volume* 8 (1987) 132-133; Mr Justice van den Heever Aquilius "Immorality and Illegality in Contract" (1941) (58) *SALJ* 337-354 at 346; Hutchinson et al *Wille's Principles of South African Law* (1991) 435 suggests that agreements are said to be against good morals if "this offend our conscience or sense of what is right, or modesty." See also Wessels *The Law of Contract in South Africa* (1951) 451, 582; Van der Merwe et al *Contract: General Principles* (2003) 11 a very balanced opinion suggests *"the principles of morality (an extension of the values of society) or socio-economic expediency will in many circumstances support a policy favouring the exact enforcement of contracts freely entered into by consenting parties, but may, in particular circumstances, require that less weight be attached to the ideals of individual autonomy and freedom of action." In so far as case law is concerned, the South African courts have before dealt with the issue of morality in a number of cases. See Dodd v Hadley 1905 TS439, 442 recognizing the illegality of contract as early as 190. See also Silke v Goode 1911 (TPD) 989, 994 in which it was decided "that a contract cannot be enforced by our courts of law if the object of the contract is illegal, or if it is for an immoral purpose."* In *Ailas Organic Fertilizers (Pty) Ltd v Pikkewyn (Pty) Ltd and Others* 1981 (2) SA 173 T at 188 and quoted with authority in the case of *Lorimar Productions Inc and Others v Sterling Clothing Manufacturers (Pty) Ltd; Lorimar Productions Inc and Others v OK Hyperama Ltd and Others; Lorimar Productions Inc and Others v Dallas Restaurant* 1981 (3) SA 1129 (T). The court considered the business ethics and the morals of the market place as well as an inherent sense of fair-play and honesty when considering the enforceability of a certain contract.

593 *Contract: General Principles* (2003) 200ff.

South African legal writers have most certainly found a place for ethics in contracts. [594]

(7) Foreign law, as influencing factor in balancing conflicting interests, is acknowledged by both the legal writers as well as the courts. Foreign law, although not automatically considered as persuasive authority, nonetheless, influences legal thinking, as well as judicial thinking, at times. [595]

(8) Since South Africa became a Constitutional State in 1996, the Constitution itself and the values derived there-from represent a reliable statement of public policy.

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[594] Zimmerman *The Law of Obligations* (1992) 26ff highlights the impact which Christianity as well as stoic moral philosophy had on the formation of the law of contract in general. To this end he remarked: *"... they demanded the infusion of ethics and of humanities into the law".* The rationale therefore according to Zimmerman is to render aid to the weak from exploitation by the so-called *"urban capitalists"*. Hawthorne "The end of *bona fides"* (2003) 15 *SA Merc LJ* 271, 274 emphasizing the roll of good faith in contract suggests "*good faith should become an underlying ethical value"*. But, it is especially, the legal writers Carstens and Kok "An Assessment of Disclaimers in South African Hospitals in view of Constitutional demands, Foreign Law and Medico-Legal Considerations" (2003) 18 *SAPR/PL* 430, 441,450, 449-452, 455 who critically and persuasively argue that under the influence of a value-driven Constitution the influence of medical ethics and medical law principles should not be ignored in deciding the unenforceability of contracts or contractual provisions. To this end the authors argues: *" .... disclaimers against medical negligence in hospital contracts would amount to an unreasonable/unfair/unethical acceptance on the part of a patient to contract to the possibility of harm (in the form of personal injury /death resulting from medical malpractice) by an attending medical practitioner (albeit in the hospital setting) who is ethically bound not to do harm."* The writers continue: *"..... this obvious contradiction is possibly the reason why certain jurisdictions have rules that disclaimers against medical negligence are against public policy, thereby giving legal effect to existing medical ethical rules."*

[595] Neethling et al *The Law of Delict* (2001) 19-20, 40-41, 67; Dugard *International Law* (2000). The writer states the South African position as follows: *"South Africa's new constitutional order, that requires courts to interpret all legislation and particularly the Bill of Rights to accord with international law, and the nations commitment to the rule of law and human rights, sets the scene of renaissance of international law both in South Africa's foreign policy and in the jurisprudence of its courts."* See also Van der Merwe et al (2003) 121-76; Christie *The Law of Contract and the Bill of Rights Bill of Rights Compendium* (2002) 3H-7 to 3H-8; Hawthorne "The end of bona fides" (2003) 15 *SA Merc L.J*. 271; Grove "Die Kontraktereg, Altruisme, Keusevryheid en die Grondwet" (2003) *De Jure* 134 141; Hopkins "Standard-form contracts and the evolving idea of private law justice: A case of democratic capitalist justice versus natural justice" *TSAR* 2003 1 150 157. The *South African Law Commission* in their report Project 47 (1998) relied heavily on foreign law in order to come to their findings and recommendations. For case law see the mixed reaction by the South African courts ranging from the courts stating foreign law should be followed with great circumspection as courts are not obliged to have regard to comparable foreign law. See *Qozeleni v Minister of Law and Order and Another* 1994 (2) SALR; *Berg v Prokureur-Generaal van Gauteng* 1995 (11) BCLR 1441 1446; *Potgieter en 'n Ander v Killian* 1995 (11) BCLR 1498 (N); *Park-Ross and Another v The Director of the Office of Serious Economic Offences* 1995 (2) BCLR 198 (C) 208-209; *Nortje and Another v Attorney-General of the Cape and Another* 1995 (2) BCLR 236 (C) 247; *Shabalala v Attorney-General of Transvaal* 1995 (1) SA 608 (TPD) 640-41. In *Bernstein v Bester* 1996 (4) BCLR 449 (CC); 1996 (2) SA 751 (CC) Par 133 Kriegler J warns against the too frequent reception of foreign law. But the courts have shown encouraging signs in adopting foreign law. See *Matinkinca and Another v Council of State, Ciskei and Another* 1994 (1) BCLR (CK); *S v Makwanyane* 199 (6) BCLR 66 (CC) 1995 (3) SA 381 (CC) Par 37; *S v Mambolo* 2001 (%) BCLR 449 (CC); *Carmichell v Minister of Safety and Security and another (Centre for applied legal studies intervening)* 2001 (4) SA 938 (CC). In this case the court stated that foreign law should be adopted in appropriate circumstances in terms of Section 39(1) of the Constitution.

[596] When considering the enforceability of certain contracts or provisions of a contract, the courts must ensure that the common law is not incongruent with the Constitution. Where the contract, or provisions of the contract, infringes a provision of the Bill of Rights it will be contrary to public policy and therefore unenforceable. [597]

10.2.3.2 ENGLAND

10.2.3.2.1 Legal Writings

The doctrine of public policy commenced its development as long ago as the Elizabethan times, [598] but its foundations were not cemented until the eighteenth century. [599]

During this period, judges were at great pains to emphasize that they would not tolerate any contract that, in their view, was injurious to society. For that reason no contract would be enforced that was `contrary to the general policy of the law' or against public good' or `contra bonos mores' or which had arisen *ex turpi causa*. [600] Because of the imprecise nature of its application [601] judicial views differed as to when the doctrine would be applied i.e. when a contract would be immoral or subversive of the common good or against public good. [602] Because of the flexibility of its application and the likelihood that judges may misuse the doctrine by invalidating any contract which he may dislike, some judges and writers, in the early 1800's, criticised the public policy maxim. It has even been described

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596 Van der Merwe *Contract: General Principles* (2003) 14, 82; Christie *The Law of Contract and the Bill of Rights Bill of Rights Compendium* (2002) 3H-7 to 3H-8; See also Hawthorne "The end of bona fides" 155 *SA Merc. L.J.* 271 who suggests the courts are encouraged to give a purposive interpretation to contracts which must be consonant with the spirit and values contained in the Bill of Rights.

597 Christie *The Law of Contract and the Bill of Rights Bill of Rights Compendium* (2002) 3h-7 to 3H-8; Hopkins "Standard form contracts and the Revolving idea of principles in Justice. A case of democratic capitalist justice v natural justice (2001) 1 *TSAR* 150, 157. For case law see *Napier v Barkhuizen* 2006 (4) SA 1 (SCA); 2006 (9) BCLR 1011 (SCA); *Barkhuizen v Napier* 2007 (5) SA 323 (CC); *Bafana Finance Mabepane v Makwakwa and Another* 2006 (4) SA 58.

598 Pollock *The Principles of Contract* (1950) 317ff; Furmston *Law of Contract* (1986) 341.

599 Furmston (1986) 341.

600 Furmston (1986) 342.

601 Furmston (1986) 342; Treitel *The Law of Contract* (2003) 477 describes public policy as a *"variable notion, depending on changing manners, morals and economic conditions"*; See also O'Sullivan and Hilliard *The Law of Contract* (2004) 413-414; Stone *The Modern Law of Contract* (2003) 349.

602 Furmston (1986) 342; Treitel (2003) 478; O'Sullivan and Hilliard (2004) 413.

as the so-called `unruly horse' in some quarters. [603] It is for that reason, why public policy in English law, is said to, possibly, be applied sparingly. Some writers argue that the categories of common law public policy have been stated to be closed, so that the courts will not apply this approach to a type of contract to which it has not been applied previously. [604] Two fundamental reasons are advanced for this thinking, namely; the need for certainty and because parliament and its delegates have become more active in this field. [605]

There is, however, academic opinion which promotes the notion that in exceptional circumstances, judicial intervention in invalidating contracts as a result of public policy, even though these contracts are of a kind to which the public policy has not been applied before should be denounced. Examples thereof, include, money lending contracts where they impose quasi-service obligations on the borrower; an attempt to contract out of certain statutory provisions etc or certain exclusion clauses. [606]

Although notions of public policy and its substance change over time, the principles as seen in the categories of related cases, have, according to the legal writers, remained remarkably consistent. They include immorality, the administration of justice and restraint of trade. [607] As this represents a whole field of study, I shall restrict my writing to the salient issues only.

In so far as morality is concerned, English courts have, over the years, invalidated certain types of contracts inter alia those contracts which are regarded as threatening to the institution of marriage; others include, contracts promoting sexual immorality; contracts to oust the jurisdiction of the courts; wagering contracts and contracts in restraint of trade. They have all being invalidated even most recently. [608] Other contracts which have also been declared illegal as it affect public interests, or, public policy, include, contracts promoting the commission of a crime or a civil wrong. This is discussed more

603 Treitel (2003) 478; Von Hippel "The Control of Exemption Clauses: A Comparative Study" *International and Comparative Law Quarterly* Vol. 16 (July 1967) 597; O'Sullivan and Hilliard (2004) 413.

604 Stone (2003) 359; O'Sullivan and Hilliard (2004) 414; Treitel (2003) 478.

605 Treitel (2003) 478; Stone (2003) 359.

606 Treitel (2003) 478-480.

607 O'Sullivan and Hilliard (2004) 416ff.

608 Stone (2003) 360-368ff; O'Sullivan and Hilliard (2004) 416-430ff.

comprehensively, under the head illegality. [609]

10.2.3.2.2 Case Law

The English courts have, for more than two centuries, recognised the fact that public policy impacts on the law of contract and depending upon the circumstances of the case, such a contract could be declared wholly unenforceable. The policy of the law in England was summed up in 1775, by Lord Mansfield, in the case of *Holman v Johnson,* [610] as follows:

> *"No Court will lend its aid to a man who founds his cause of action upon an immoral or illegal act. If from the plaintiff's own stating or otherwise, the cause of action appears to arise ex turpi causa, or the transgression of a positive law of this country, there the Court says he has no right to be assisted. It is upon this ground that the court goes; not for the sake of the defendant, but because they will not lend their aid to such a plaintiff."* [611]

But, it is important to note that the doctrine of public policy was not applied in all cases. In fact, the courts became rather inflexible in applying the doctrine to invalidate some contracts, to such an extent that certain judges criticised the application of the doctrine. A noteworthy judgement in this regard is that of Burroughs J, in the case of *Richardson v Mellish,* [612] in which he described 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."* [613]

The dictum has been repeated in numerous dicta over many years. In fact, as recently as 2000 in *McFarlane v Tayside Health Board*, [614] Lord Clyde, after quoting the long recognized passage of Burrough J in *Richardson v Mellish* (1824) 2 BING 225, highlighted the fact that it was not always easy to decide on matters of public policy, quoting Pearson *JIN Publick Health Trust v Brown* (1980) 388 So 2d 1048 at 1086 stated:

> *"I am confident that the majority recognises that any decision based upon notions of public policy is one about which reasonable persons may disagree".*

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609 O'Sullivan and Hilliard (2004) 414-415; Furmston (1986) 342.

610 (1775) 1 COWP. 341.

611 *Holman v Johnson* (1775) 1 CONP 341 at 343.

612 (1824) 2 BING 229.

613 *Richardson v Mellish* (1824) 2 BING 229 at 252.

614 (2000) 2 A.C. 59 at 100-101.

And Cave J, in *In re Mirams* (1891) 1 QB 594 at P595, observed that judges should be trusted (more) as interpreters of the law than as expounders of what is called public policy."

Lord Clyde however, laid down certain criteria for determining considerations of public policy when he stated:

"What are referred to as policy considerations, include, elements of what may be seen as ethical or moral considerations." [615]

The restrictive application of the maxim was also emphasized in *Janson v Driefontein Consolidated Mines Ltd* [616] in which Lord Halbury denied that any court could *"invent a new head of public policy."* His reasoning for such a view is encapsulated when he states:

"A rule of law, once established, ought to remain the same till it be annulled by the Legislature, which alone has the power to decide on the policy or expedience of repealing laws, or suffering them to remain in force."

To allow otherwise 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."* [617]

On the other hand, there is sufficient authority in English case law that law does adapt itself to changes in economical, social and moral conditions. This is especially imputed from the development of the rules as to contracts in restraint of trade.
Judicial expression per Lord Haldane in *Rodriquez v Speyer Bros* [618] entailed the following:

"What the law recognises as contrary to public policy turns out to vary greatly from time to time." [619]

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615 *McFarlane v Tayside Health Board* (2000) 2 A.C. 59 at 100-101.

616 (1902) A.C. 484 Cf. *Texaco Ltd v Mulberry Filling Station Ltd* (1972) 1 WLR 814 at 827; G*eismar v Sun Alliance and London Insurance* (1978) Q.B. 383 at 389; *Nickerson v Barraclough* (1981) Ch. 426; *Deutsch Schachybau- and Tiefbokgesellsschaft mbH v Ras AL Khaima National Oil Co* (1990) 1 A.C. 295 at 316 (reversed on other grounds ibid at 329 et seq.).

617 *Jansen v Driefontein Consolidated Mines Ltd* (1902) A.C. 484 at 491.

618 (1919) A.C. 59.

619 *Rodriquez v Speyer Bros* (1919) A.C. 59 at 79.

More recently, and in a similar view, Lord Denning in *Enderby Town Football Club Ltd v The Football Association Ltd,* [620] in regard to an unruly horse and public policy expressed himself as follows:

" ..... 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 fictions and come down on the side of justice." [621]

But weighing the attitude of the English courts, it appears that the judiciary strikes a balance between the flexibility inherent in the notion of public policy, on the one hand and the need for certainty in commercial affairs, on the other. The courts will therefore, in the interests of certainty, in general refuse to apply the doctrine of public policy to contracts of a kind to which the doctrine has never been applied before.

Commencing with the case of *Printing and Numerical Registering Co v Sampson* [622] for instance, an inventor assigned a patent to a company and also agreed to assign to the company any patent of a like nature thereafter to be acquired by him. He argued that this agreement was contrary to public policy as it tended to discourage inventors. In rejecting the argument, Jessel M.R. stated:

"You are not to extend arbitrarily those rules which say that a given contract is void as being against public policy." [623]

English courts have also expressed the view that as parliament and its delegates have become more active in the field of contract, courts are less ready to apply the doctrine of public policy to new classes of contract. This found favour in the dicta pronounced in the cases of:

In *D. Respondent v National Society for the Prevention of Cruelty to Children Appellants* [624] the court suggested the practise of self-restraint when a court was approached to rule on public policy issues, when it stated:

620 (1971) CH 591.

621 *Enderby Town Football Club Ltd v The Football Association* (1971) Ch 491 at 606.

622 (1875) L.R. 19 EQ 462.

623 *Printing and Numerical Registering Co v Sampson* (1875) C.R. 19 Eq. 462 at 465.

624 (1978) A.C. 171.

"Their duty is to expound, and not to expand, such policy. That does not mean that they are precluded from applying an existing principle of public policy to a new set of circumstances, where such circumstances are clearly within the scope of the policy." [625]

In *Johnson v Moreton* [626] the court considered whether a duty not to renounce a privilege may fall under a recognised head of public policy. Consequently the court first considered the policy and presumption of English and other systems of law that there should be freedom of contract, and endorsed the principle that contracts freely entered into should be enforceable. The Latin phrase *`pactum sunt servanda',* according to the court, has been embellished with authority, inter alia, the maxim exemplifies Maines famous observation, expressed in (Ancient Law (1861) 1st ed (Chapter 5)) namely, the progression in societies towards contractual freedom and the observance of peculiar rights and obligations which the law prescribes.

The court further stated that the dominant ideology of freedom and sanctity of contract have tended to be considered as pre-eminent legal values. Consequently the court quoted, as authority, the famous dictum of Jessel M.R.'s representative pronouncement in *Printing and Numerical Registering Co v Sampson* (1875) L.R. 19 Eq. 462, 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."

But, cautions the court, courts should not be oblivious to the challenges the ideology had been besotted with, and commented as follows on the attack supporters of welfarism had brought with them, namely:

"Even the ideology of Maine and Jessel "which lay behind their juristic views, was questioned. By some it was directly attacked; society's objective should be not wealth but welfare (with the implication that the pursuit and achievement of wealth were destructive of welfare), which was best promoted by the direct intervention of the organs of the state and could not be left to the bargain of the marketplace." The intervention advocated is stated by the court *"to counteract rigging of the market by monopolies or oligopolies and to redress inequalities of bargaining power, and consonantly, even in the 19th century, the law began to back-pedal."*

Turning to the authorities outlawing waiver of rights in instances where public interests are affected (*Graham v Ingleby* (1848) 1 Exch. 651, per Pollock C.B. at p. 655 per Parke B. at

625 *D. Respondent v National Society for the Prevention of Cruelty to Children Appellants* (1978) A.C. 171 at 235.

626 (1980) A.C. 37.

pp 656-657, per Alderson B. at p 657:

"An individual cannot waive a matter in which the public have an interest," Platt B. concurring: and see also Halesowen Presswork and Assemblies Ltd v National Westminster Bank Ltd (1972) A.C. 785, 808): it was apparently no longer accepted by the law that freedom and sanctity of contract were conclusive of the public interest."

Paying attention to the introduction of legislation and its influence on unfair contractual terms, the court commented as follows:

"The movement from status to contract was largely a creature of the common law. The reverse movement has been largely a creature of legislation. As a result lawyers sometimes tend to regard freedom and sanctity of contract as still of special and supervening juristic value. But freedom of contract and its consequences are quite likely to be "mischiefs" as that word is used in statutory construction." [627]

Then, in *Cheall v Apex,* [628] Donaldson L.J. accepted the principle laid down in the case of *Blathwayt v Baron Cawley* (1976) A.C. 397, in which Lord Wilberforce stated at P. 426 that: *"conceptions of public policy should move with the times and that widely accepted treaties and statutes may point the direction in which such conceptions, as applied by the courts, ought to move."*

But, cautions the Judge, in following the view of Lord Atkin in *Fender v St John-Mildmay* (1938) A.C. 1, 12, that the doctrine of public policy *"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 weighing up statutory interventions with the ability of judges to create public policy the court states:

"Whether judges are better or less able than others to assess the merits and demerits of political policies is beside the point, because that is not their function. On the other hand, "public policy" in the true sense is a part of the law and it is wholly within the province and capacity of the judges to declare it."

But the court renders the following advice:
"However, they must be satisfied that any reasonable person would agree that the enforcement of the provision under consideration would be "a harmful thing" to use Lord Atkin's homely phrase in Fender v St John-Mildmay

627 *Johnson v Moreton* (1980) A.C. 37 at 67.

628 (1980) 2 A.C. 180.

(1938) A.C. 1, 12." [629]

In *Johnstone v Bloomsbury Health Authority,* [630] the court was tasked to decide whether a provision in the contract of employment regulating the number of working hours including overtime, was contrary to public policy. Stuart-Smith L.J. handing down judgement commented as follows:

"I have no doubt that it is a matter of grave public concern that junior doctors should be required to work such long hours without proper rest that not only their own health may be put at risk but that of their patients as well. That is the allegation in this case and it seems to me that for the purpose of a striking out application it must be assumed to be true."

Declining to find on that fact alone that clause 4(b) of this contract is contrary to public policy, the court also cautioned:

*"The courts should be wary of extending the scope of the doctrine beyond the well recognized categories: See Fender v St John-Mildmay (1938) A.C. 1, 11-12, per Lord Atkin. They should be even more reluctant to embark upon a *347 wide-ranging inquiry into matters of public debate where it is plain that there are two views bona fide and firmly held, and where complex considerations of capacity of the National Health Service and public funding are involved."* [631]

In *Lancashire County Council v Municipal Mutual Insurance Ltd* [632] the Court of Appeal considered whether indemnity against exemplary damages was contrary to public policy and unenforceable. Considering the rules relating to the application of public policy, the court again cautioned against the danger of a limitless application of public policy when he stated:

"In my judgement there is nothing either in the authorities or in logic to justify extending this principle of public policy so as to deny insurance cover to those whose sole liability is one which arises vicariously, whether as employers or, as here, under an equivalent statutory provision."

The court continued:

"Contracts should only be held unenforceable on public policy grounds in very plain cases. The courts should be

629 *Cheall v Appex* (1980) A.C. 180 at 191.

630 (1992) QB 333.

631 *Johnstone v Bloomsbury Health Authorities* (1992) QB 333 at 347, 349.

632 (1997) QB 897.

wary of minting new rules of public policy when the legislature has not done so." [633]

On the other hand, there are some cases where judicial intervention, as a last resort, is regarded as desirable. This formed the subject matter in *Monkland v Jack Barclay Ltd*. [634] In this case the court acknowledged that there are classes of contracts which are contrary to public policy, when it stated:

"Certain specific classes of contracts have been ruled by authority to be contrary to the policy of the law, which is, of course, not the same thing as the policy of the government, whatever its complexion - for example, marriage brokerage contracts, contracts for the sale of honours, contracts in unreasonable restraint of trade and so on. But cautions the court: "The courts have again and again said that, where a contract does not fit into one or other of these pigeon holes, but lies outside this charmed circle, the courts should use extreme reserve in holding such a contract to be void as against public policy, and should only do so when the contract is incontestably and on any view inimical to the public interest: see, for example, the language of the House of Lords in Fender v St. John-Mildmay (FN14)."

In *D. Respondent v National Society for the Prevention of Cruelty to Children Appellants* [635] Lord Edmund-Davies, whilst agreeing in part with Lord Hailsham of St Mary Le Bon, acknowledges, as well, that judicial intervention is sometimes indicated where there would be a breach of some ethical or social value and a failure to use public policy, would result in serious injustice.

There are also cases where judicial intervention is possible, notwithstanding the fact that the case in question, is not a kind to which the doctrine of public policy has applied before. These novel applications of the doctrine of public policy include the following decisions namely:

In *Horwood v Millar's Timber and Trading Co* [636] the court was confronted with the principle issue whether a contract may be illegal if it so severely restricts the liberty of an individual as to reduce him to a quasi-service condition. The facts briefly stated include: A clerk borrowed money from a moneylender and agreed that he would not, without the lender's written consent, leave his job, borrow money, dispose of his property or move house. The

633 *Lancashire County Council v Municipal Mutual Insurance Ltd* (1997) QB 897 at 909. See also *Multiservice Bookbinding Ltd v Marden* (1979) 84 (Swiss franc uplift clause in mortgage); *Nationwide BS v Registry of Friendly Societies* (1983) 1 W.I.R. 1226 (index linked mortgage).

634 (1951) 2 KB 252.

635 (1978) A.C. 171.

636 (1917) 3 K.B. 305.

contract was held to be illegal by the court as if unduly restricted the liberty of the borrower.

In this regard the court held that:

"The contract was entire and indivisible, and was bas as being contrary to public policy in as much as it unduly and improperly fettered the mortgagor's liberty of action and the free disposal of his property." [637]

There are also instances in which the courts have held that an attempt to contract out of certain statutory provisions is contrary to public policy. In *British Eagle International Airlines Ltd v Ciecorpagnie National Air France* [638] the court held that: Contracting out of the provisions of Section 302 of the *Companies Act* 1948 was contrary to public policy.

In *Giles v Thompson* [639] though the court recognised the principle that courts may in appropriate circumstances invalidate a contract even though it is of a kind to which the doctrine of public policy has not been applied before in formulating a new kind of public policy, it nevertheless, refused to invalidate the agreement in question *"as it did not in fact have any injurious tendency."*

10.2.3.2.3 Legal Opinion

The doctrine of public policy has a long history in the English law of contract, commencing with the Elizabethan times, but really cementing its foundation in the eighteenth century. [640]

Judges, during this period, were at great pains not to enforce contracts which in their view were injurious to society, against public good, *contra bonos mores* or had arisen *ex turpi causa*. [641] But, because of the imprecise nature of the application of the doctrine of public policy, judicial views differed as to exactly when the doctrine would be applied. It was also felt that some of the judges misused the doctrine by invalidating any contract which he may dislike. [642]

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637 *Horwood v Millar's* (1917) 3 K.B. 305.

638 (1975) 1 W.L.R. 758.

639 (1994) 1 A.C. 142.

640 Pollock *Principles of Contract* (1950) 312ff; Furmston *Law of Contract* (1986) 341.

641 Furmston *Law of Contract* (1986) 342.

642 Furmston *Law of Contract* (1986) 342; Treitel *The Law of Contract* (2003) 478 describes public policy as a "variable notion, depending on changing manners, morals and economic conditions"; See also O'Sullivan and

For that reason, legal writers in particular, started looking at the doctrine very critically. In some quarters the doctrine of public policy was viewed as an `*unruly horse*'. [643]

Two schools of thought emerged, namely:

Besides advocating that the application of public policy should be applied sparingly, this school of thought believed that the doctrine ought not to be applied to contracts to which the doctrine had not been previously applied. The fundamental reason advanced there-for was the need for certainty. It was also felt that the legislature had taken a keen interest in these issues hence no dominant involvement of the judiciary was indicated. [644]

The other school of thought promoted the notion that, in exceptional circumstances, judicial intervention in invalidating contracts was necessary as a result of public policy, notwithstanding, the fact that the contract or contracts were not from a class to which public policy had not been applied before. Examples given involve *inter alia* money lending contracts, an attempt to contract out of certain statutory provisions etc or certain exclusion clauses. [645]

What has emerged in applying public policy in certain types of contracts is the fact that uniformity in the application of the doctrine in invalidating certain types of contracts has emerged. Take for example, wagering contracts; contracts in restraint of trade; contracts promoting the commission of a crime or civil wrong, in England. [646]

In so far as judicial thinking was concerned, the courts, during the 1700's, were particularly severe on contracts which were immoral or illegal and which appeared to arise *ex turpi*

Hilliard *The Law of Contract* (2004) 413-414; Stone *The Modern Law of Contract* (2003) 349.

643 Furmston *Law of Contract* (1986) 342; Treitel *The Law of Contract* (2003) 478; O'Sullivan and Hilliard *The Law of Contract* (2004) 413; Von Hippel "The Control of Exemption Clauses: A Comparative Study" *International and Comparative Law Quarterly* Vol. 16 (July 1967) 597.

644 Stone *The Modern Law of Contract* (2003) 359; O'Sullivan and Hilliard *The Law of Contract* (2004) 414, 416; Treitel *The Law of Contract* (2003) 478. In the case of *D (Respondent) v National Society for the Prevention of Cruelty to Children (Appellant)* the court stated with parliamentary involvement courts are less likely to apply the doctrine of public policy.

645 Stone *The Modern Law of Contract* (2003) 360-368ff; O'Sulivan and Hilliard *The Law of Contract* (2004) 414-430ff.

646 Stone *Modern Law of Contract* (2003) 360-368ff; O'Sullivan and Killian *The Law of Contract* (2004) 414-230; Furmston *Law of Contract* (1986) 342.

causa. In this regard the courts would not come to the rescue of a party involved in such an agreement. [647]

The doctrine of public policy was not applied in all the cases. In fact, some judges criticised the application of the doctrine, in particular Burroughs J, in *Richardson v Mellogh* [648] described the doctrine 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." [649]

The English judiciary, in general, was not keen to expand the influence of public policy. In this regard Cave J, in 1891, in the case of *In re Miranis* [650] stated:

"Judges should be `trusted (more) as interpreters of the law than as expounders of what is called public policy." [651]

This restrictive approach was also emphasized in *Janson v Driefontein Consolidated Mines Ltd* [652] in which Lord Halbury sets out the rationale for not inventing, too frequently, a new head of public policy, which amounted to this, a rule of law, once established, ought to remain unchanged and can only be annulled by the legislature. To allow judges the full liberty to expound public policy at will, will lead to inconsistency which ultimately would lead to uncertainty.

But, the English courts have recognized that due to the changes in economical, social and moral conditions the courts are sometimes obliged to consider public policy in certain

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647 *Holman v Johnson* (1775) 1 Conp. 341, 343.

648 (1824) 2 Big 229; See also *Printing and Numerical Registering Co v Sampson* (1875) L.R. 19 Eq. 462, 465 wherein the court stated that courts ought not extend arbitrarily rules which say that a given contract is void as against public policy.

649 *Richardson v Mellish* (1824) 2 Big 229. This dictum was repeated extensively in a number of cases more recently - *McFarlane v Tayside Health Board* (2000) 2 A.C. 59 at 100-101.

650 (1851) 1 QB 594.

651 *In re Miranis* (1981) 1 QB 594.

652 1902 A.C. 484. The principles laid down in this case were followed in a number of other cases. *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 Barresclough* (1981) Ch. 426; *Deutsch Schachybauand Tiefbokgesellsschaft mbH v Ras AL Khaima National Oil Co* (1990) 1 A.C. 295 at 316 (reversed on other grounds ibid at 329 et seq).

matters. [653]

Lord Denning in *Enderby Town Football Club Ltd v The Football Association Ltd,* [654] in overcoming previously expressed judicial constraints, expressed himself as follows with regard to the unruly horse concept, namely:

" ..... 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 fictions and come down on the side of justice." [655]

Although public policy is said to vary greatly from time to time, English courts have laid down certain criteria for determining considerations of public policy which include, *inter alia,* ethical and moral considerations. [656] Freedom of contract has also been endorsed by the courts as a consideration in determining what influenced public policy in a contractual context. For that reason contractual freedom and the sanctity of contract have been considered as pre-eminent legal values. [657]

Although the English courts, have accepted the principle that the conceptions of public policy, should move with the times, [658] nonetheless, English courts have applied this principle with the utmost caution. In the leading case of *Fender v St. John-Mildmay,* [659] Lord Atkin, with regard to the application of the doctrine of public policy, stated the position as follows:

" ..... The doctrine of public policy 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."

The court continued to lay down the following test when the doctrine should be applied by the judiciary, namely:

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653 *Rodriquez v Spyer BNS* (1919) A.C. 59; *McFarlane v Tayside Health Board* (2000) 2 A.C. 59, 100-101.

654 (1971) CH 491 1606.

655 *Enderby Town Football Club Ltd v The Football Association Ltd* (1971) CH 491, 606.

656 *McFarlane v Tayside Health Board* (2000) 2 A.L. 59, 100-101.

657 *Printing and Numerical Registering Co v Sampson* (1875) L.R. 19 Eq. 462, 465. The dictum in this case with regard to this consideration has been quoted extensively in numerous English cases. *Inter alia Johnson v Moreton* (1980) A.C. 37. But cautions the court that freedom of contract and sanctity of contract cannot apply unrestrictively because of the principle of welfare-ism and public interests.

658 *Blathways v Barencawley* (1976) A.L. 397; Cheall v Apex (1980) 2 A.C. 180.

659 (1938) A.C. 1, 12.

"They must be satisfied that any reasonable person would agree that the enforcement of the provision under consideration would be "a harmful thing"." [660]

English courts have, over the years, applied public policy in not enforcing contracts or contractual provisions. [661]

10.2.3.3 UNITED STATES OF AMERICA

10.2.3.3.1 Legal Writings

From previous discussions herein it was observed that the American legal writers and the courts, place great emphasis to the doctrines of freedom of contract and the sanctity of contract. The legal writers, as well as the courts, as previously stated, do recognise that there are exceptions to these doctrines, one of which is contracts contrary to public policy do not necessarily have to be enforced.

Generally then, contracts contrary to public policy, that is, those which tend to be injurious to the public or against the public good, and are illegal and void, even though actual injury does not result there-from. [662]

The rationale for recognizing public policy limitations is based on the philosophy that even fully voluntary and informed agreements between competent adults might, nonetheless, be socially undesirable because they might create negative externalities, the most important of which includes the threat to the reduction of total social welfare. Others include the prohibition of harm to others, be that public health, public safety, public welfare and the like. [663]

Although the term "public policy" is said to be defined with great difficulty, and is comprehended by some, as a term of vague and uncertain meaning, nonetheless, attempts

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660 *Fender v St. John-Midmay* 1938 A.C. 1, 11-12 followed with approval in C*heall v Apex* (1980) A.C. 180 at 191.

661 *Lancashire Council v Municipal Mutual Insurance Ltd* (1987) QB 897 (Indemnity clause in an insurance contract); *Monkland v Jack Barcly Ltd* (1951) 2 KB 252 (Contract in Restraint of Trade); *D (Respondent) v National Society for the Prevention of Cruelty to Children (Appellants)* (1978) A.C. 171; *Horwood v Millar's Timber and Trading Co* (1917) 3 K.B. 305 (Restrictions of Mortgagor's Liberty of Action); *British Eagle International Airlines Ltd v Compagnie National Air France* (1975) 1 W.L.R. 758 (Contracting out of statutory provision).

662 Corpus Juris Secundum Volume (17A) (1999) 165; Williston *A Treatise on the Law of Contracts* (Vol. 18) (1978) Para 1629; Scott and Krauss *Contract Law and Theory* (2002) 517.

663 Scott and Krause (2002) 519; Jaeger (1953) 502; American College of Legal Medicine *Legal Medicine* (1991) 50; Corpus Juris Secundum Volume (17A) (1999) 165; Williston (Vol. 18) (1978) Para 1629.

have been made to put meaning to it in substance namely:

Jaeger [664] defines public policy as *"the common condition sense and common conscience, extended and applied throughout the state to matters of public morals, public health, public safety, public welfare and the like. It is that general and well settled public opinion relating to man's plain, palpable duty to his fellow men, having due regard to all the circumstances of such particular relation and situation."* [665]

On the other hand in the *Corpus Juris Secundum* [666] public policy is defined as *"that principle of law which holds that no person can lawfully do that which has a tendency to be injurious to the public or against the public good, which may be designated, as it sometimes has been, the policy of the law or public policy in relation to the administration of the law.* [667]

The nature and scope of public policy in America is greatly influenced by contemporary factors. In time it is the present that counts. The social customs, economic needs and moral aspirations of the people are, in turn, influenced by changing habits, opinions and wants of the people, as well as, the local conditions in the state wherein the case arises. [668]

In America, public policy, in the case of a particular state, must be viewed in the light of the legislative acts and judicial pronouncements of that state. [669] For that reason, courts will often view negative externalities, including illegal and immoral activities, against the legislative acts and judicial pronouncements. [670]

There is no magic formula in American law to determine whether a contract is contrary to public policy. Hence, it is said, there is no absolute rule by which to determine what

664 Jaeger (1953) 502.

665 Jaeger (1953) 502.

666 Corpus Juris Secundum Volume (17A) (1999) 165.

667 Corpus Juris Secundum Volume (17A) (1999) 165.

668 Corpus Juris Secundum Volume (17A) (1999) 168; Williston (Vol 18) (1978) Para 1629.

669 Corpus Juris Secundum Volume (17A) (1999) 168.

670 Scott and Krause (2002) 519. The Corpus Juris Secundum Volume (17A) (1999) 166-167 while acknowledging the other two sources of information for determining public policy, they include constitutional provisions as well.

contracts are repugnant to the public policy of the state. [671]

In determining whether a contract is against public policy, the courts will look at all the facts and circumstances of each case. In addition, the courts may consider the purposes of the contract and the situation of the parties when the contract was concluded, as well as, the language of the contract itself. [672]

The courts also start from the premise that courts are there to enforce and to maintain contracts rather than to enable parties to escape their obligations on the pretext of public policy. For that reason the courts have been loathe to extend the rules which hold a contract void as against public policy. [673]

The misgivings in the judicial adoption of non-public policy are often echoed when legal writers quote the well-known dictum of *Richardson v Mellish* 2 Bing (England) 229:

"It is a very unruly horse, and when you once get astride it you never know where it will carry you." [674]

Nonetheless, with or without the misgivings, legal writers are shared in their view that the courts have tended to heed the axiom that *"whatever is injurious to the interests of the public is void, on the grounds of public policy."* On this basis, a wide variety of agreements have been found illegal and unenforceable, wholly on grounds of "public policy". [675]

A superimposing factor in American law, influencing the courts in deciding whether a contract is against public policy, is the right of individuals to enter into contracts, i.e. private autonomy and that persons should not be unreasonably restricted in their freedom to make their own contracts, i.e. freedom to contract. [676]

The power to declare a contract void as contrary to public policy is not open ended. It has

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671 Corpus Juris Secundum Volume (17A) (1999) 169.

672 Corpus Juris Secundum Volume (17A) (1999) 169.

673 Corpus Juris Secundum Volume (17A) (1999) 169.

674 Williston (Vol. 18) (1978) Para 1629; Corpus Juries Seconded Volume (17A) (1999) 169-170.

675 Williston (Vol. 18) (1978) Para 1629; Corpus Juris Secundum Volume (17A) (1999) 171.

676 Corpus Juris Secundum Volume (17A) (1999) 169; Williston (Vol. 18) (1978) Para 1630.

been stated that courts should do so rarely and with great caution. It has also been suggested that contracts should only be held to be void as being contrary to public policy, in instances where it is clearly and unmistakably so. [677]

Further requirements for contracts to be declared void as against public policy include, firstly, the contract must be invalid on the basis of recognized legal principles, secondly, the enforcement of the contract will be followed by injurious results which are against the public good, or contravene some established interest of society, or are inconsistent with sound policy and good morals, or tend to undermine the security of individual rights. [678]

Although the mere harshness of terms to one of the parties will not render the contract void as against public policy, the courts should, however, not hesitate to declare void as against public policy contractual provisions which clearly tend to injure the public in some way. [679]

The following illustrations have been identified in America as injurious to the public interests, hence, void as against public policy namely:

The contravention of established interests of society, or as against good morals, or tend to interfere with public welfare, health and safety, or tend to cause an injustice or oppression, restraint of liberty, or restraint of legal right, require an illegal act or lead to corrupt results. [680]

Insofar as contracts limiting or relieving a party from liability are concerned, the position in America may be stated as follows: while contracts relieving a party from liability are not favoured, and exculpatory clauses are strictly construed against those seeking their benefits, there is however, no public policy in favour of denying parties to a contract the right to limit their liability under American law. [681]

But, it is especially with regard to contracts containing exculpatory or indemnity clauses which aim is to exempt one of the contracting parties from liability for negligence and

677 Corpus Juris Secundum Volume (17A) (1999) 169; Williston (Vol. 18) (1978) Para 1630.

678 Corpus Juris Secundum Volume (17A) (1999) 170-171; Williston Vol. 18 (1978) Para 1630A.

679 Corpus Juris Secundum Volume (17A) (1999) 170-171; Williston Vol. 18 (1978) Para 1630A.

680 Corpus Juris Secundum Volume (17A) (1999) 170-171; Williston Vol. 18 (1978) Para 1630A.

681 Corpus Juris Secundum Volume (17A) (1999) 172; Williston Vol. 18 (1978) Para 1630.

which is violative of law or contrary to some rule of public policy, that legal writers, have been critical of their validity. Otherwise, generally, contracts releasing parties from liability for injuries caused by negligent acts are enforceable. [682] But notwithstanding, these type of contracts are not favoured and are subject to close judicial scrutiny. Often they are strictly construed against the party relying on them. [683]

Moreover, an exemption provision is void where it is prohibited by statute or governmental regulation. [684] The rationale for the rule against the enforcement of release from negligence is said to be that, wrongdoers should not escape liability for their negligent acts which cause damages in the process. This is especially applicable, in instances where those contracting parties drive hard bargains. [685]

Whether or not such a contract is enforceable depends on the following factors, namely; the nature and subject matter of the agreement, the relations of the parties, the presence or absence of equality of bargaining power, and other circumstances, *inter alia,* the presence or absence of some statutory prohibition, where a public duty is owed or where public interest requires the performance thereof. [686]

It is especially in contracts where one of the parties enjoys a bargaining power superior to that of the other party to the contract, and where the effect of the contract is to put the other party at the mercy of such party's negligence, that it is felt that these types of contractual provisions should not be sustained. [687]

As will be seen *infra,* it is particularly exculpatory provisions in medical agreements, which have come under a lot of criticism, in American law, over a number of years.

10.2.3.3.2 Case Law

Even though public policy has been recognized by the American Courts as a means to

682 Corpus Juris Secundum Volume (17A) (1999) 268; Williston Vol. 18 (1978) Para 1630.

683 Corpus Juris Secundum Volume (17A) (1999) 269; Williston Vol. 18 (1978) Para 1630.

684 Corpus Juris Secundum Volume (17A) (1999) 269; Williston Vol. 18 (1978) Para 1630.

685 Corpus Juris Secundum Volume (17A) (1999) 270.

686 Corpus Juris Secundum Volume (17A) (1999) 271; Williston Vol. 18 (1978) Para 1751.

687 Corpus Juris. Secundum Volume (17A) (1999) 271; Williston Vol. 18 (1978) Para 1751.

interfere, only in appropriate cases, with the freedom of contract and the sanctity of contracts, ever since the judgement of *Printing and Numerical Registering Co v Sampson,* [688] in which the court laid down the following strict, dichotomous guideline, namely:

> "It must not be forgotten that you are not to extend arbitrarily those rules which say that a given contract is void as being against public policy, because 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. Therefore, you have this paramount public policy to consider, that you are not lightly to interfere with this freedom of contract." [689]

The American courts have been loath to declare contracts void as against public policy. [690]

For that reason, it has been stated before, by the American courts, that the principle that contracts contravening public policy are unenforceable *"should be applied with caution and only in cases plainly within persons on which doctrine rests."* [691]
What the courts have also warned against is that, before courts pronounce contracts to be contravening public policy *" ..... it should be satisfied that the advantage to accrue to the public for so holding is certain and substantial, not theoretical or problematical."* [692]

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688 19 LR Eq. 462, 465 (1879).

689 *Printing and Numerical Registering Co v Sampson* 19 L.R. Eq. 462, 465 (1875).

690 *Cohen Insurance Trust et al v Stern et al* 297 Ill.App 3d 220 696 N.E. 2d 743, 231 Ill Dec 447; *Hoyt v Hoyt* 213 Tenn. 157, 372 S.W. 2d 300 (1963); *Zeitz v Foley* 264 S.W. 2d 267 (1954); *Smit v Simon et al* 224 So. 2d 565 (1969); *Home Beneficial Association v White* 180 Tenn. 585, 177 S.W. 2d 545 (1944); *Martin v Alianze Life Insurance Company of North America* 573 N.W. 2d 823 (1998); *Walker v America Family Mutual Insurance Company* 340 N.W. 2d 599 (1983); *Twin City Pipe Line Co et al v Harding Glass Co* 283 U.S. 353, 51 S.Ct 476 (1931); *Diamond Match Co v Roeber* 106 N.Y. 473, 13 N.E. 419 (1887) quoting *Printing Co v Sampson* L.R. 19 Eq. 462; *Smith v Simon et al* 224 So. 2d 565 (1969); *Oregan and Navigation Co v Duras* (C.C.A.) 181 F. 781 quoted in *Ingalls v Perkins* 763 P. 761 (1928); *Anderson et al v Blair* 80 So. 31 (1918); *Mitchell v Jones* 104 Colo 62, 88 P. 2d 557 (1939); *Wilson v Builders Transport Inc et al* 330 S.C. 287, 498 S.E. 2d 674 (1998); *Eichelman v Nationwide Insurance Company* 551, Pa 558, 711 A. 2d 1006 (1998); *Liccardi et al v Stolt Terminals Inc et al* 178 Ill 2d 540, 687 N.E. 2d 968 227 Ill. Dec 486 (1997); *Perkins v Hegg* 212 Minn. 377, 3 N.W. 2d 671 (1942); *Heaton Distribution Co, Inc v Union Tank CAR Company* 387 F.2d 477 (1967); *Cornelleir v American Casualty Company* 389 F.2d 641 (1968); *Evans v General Insurance Company of America* 390 S.W. 2d 818 (1965); *Trotter v Nelson* 684 N.E. 2d 1150 (1997).

691 *Hoyt v Hoyt* 213 Tenn. 177, 372 S.W. 2d 300 (1963); *Zeitz v Foley* 264 S.W. 2d 267 (1954); *Home Beneficial Association v White* 180 Tenn. 585, 177 S.W. 2d 545 (1944); *Martin v Alianze Life Insurance Company of North America* 573 N.W. 2d 823 (1998); *Walker v America Family Mutual Insurance Company* 340 N.W. 2d 599 (1983); *Twin City Pipe Line Co et al v Harding Glass Co* 283 U.S. 353, 51 S.Ct 476 (1931); *Diamond Match Co v Rieber* 106 N.Y. 473, 13 N.E. 419 (1887); *Ingalls v Perkins* 763 P. 761 (1928); *Eichelman v Nationwide Insurance Company* 551, Pa 558, 711 A. 2d 1006 (1998); *Perkins v Hegg* 212 Minn. 377, 3 N.W. 2d 671 (1942); *Cornellier v American Casualty Company* 389 F.2d 641 (1968); *Trotter v Nelson* 684 N.E. 2d 1150 (1997).

692 *Kellogg v Larkin* 3 Penn. Wis. 123, 56 A.M. Dec. 164 quoted wit approval in *Mitchell v Jones* 104 Colo 62, 88 P.

The rationale there-for is founded in the courts attitude namely *"..... It is to the interests of the public that persons should not be unnecessarily restricted in their freedom to make their own contracts..... "* [693] Or, as it has always been stated:*" ..... the freedom of individuals to contract is not taken lightly ..... "* [694]

Public policy is also a term not clearly defined by the courts and it has often been suggested by the courts that, in order to determine whether a contract violates public policy depends upon *"the peculiar facts and circumstances of each case",* as well as, *"the language of the contract itself."* [695] It has also been suggested, by the courts, that courts should have regard to *"..... the situation of the parties at the time the contract was made and the purposes of the contract."* [696]

But, it has been frequently held by the American courts, in following the decision of the case of *Oregon R.R. and Navigation Co v Dumas:*
"A Court should declare a contract void as against public policy only when the case is clear and free from doubt, and the injury to the public is substantial and not theoretical or problematical." [697]

But, notwithstanding, the American courts have, throughout the years, identified several

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2d 557 (1939).

693 *Cohen Insurance Trust et al v Stern et al* 297 Ill. App. 3d 220, 696 N.E. 2d 743, 231 Ill. Dec 447 (1998); *Schuman-Heinz v Folsom* 328 Ill. 321, 330, 159 N.E. 2d 599 (1983); *Diamond Match Co v Roeber* 106 N.Y. 473, 13 N.E. 419 (1887); *Zeitz v Foley* 264 S.W. 267 (1954); *Ingalls v Perkins* 263 P. 761 (1928); *Anderson et al v Blair* 80 So. 31 (1918); *Liccardi et al v Stolt Terminals Inc et al* 178 Ill 2d 540, 687 N.E. 2d 968, 227 Ill. Dec. 486 (1997); *Perkins v Hegg* 212 Minn 377, 3 N.W. 2d 671 (1942); *Trotter v Nelson* 684 N.E. 2d 1150 (1997).

694 *Skyline Harvestone Systems v Centennial Insurance Co* 331, N.W. 2d at 109 quoted in *Walker v American Family Mutual Insurance Company* 340 N.W. 599 (1983).

695 *Hoyt v Hoyt* 213 Tenn. 117, 372 S.W. 2d 300 (1963). In the case of *Styles v Lyon* 86 A. 564 (1913) the court emphasized legal consideration and reasonableness to be the criteria. See also *Cook v Johnson* 47 Conn. 175, 36 AM Rep 64; *Cornellier v American Casualty Company* 389 F. 2d 641 (1968); *Himrich et al v Carpenter et al* 569 N.W. 2d 568, 1997 SA 116 (1997).

696 *Smith v Idaho Hospital Services Inc d/b/a Blue Cross of Idaho* 89 Idaho 499, 406 P. 2d 696 (1965); *Cohen Insurance Trust v Stern et al* 297 Ill App. 3d 220, 696 N.E. 2d 743, 231 Ill Dec 447 (1998); *Home Beneficial Association v White* 106 N.Y. 473, 13 N.E. 419 (1887); *Anderson et al Blair* 80 So. 31 (1918); *Twin City Pipe Line Co et al v Harding Glass Co* 283 U.W. 353, 51 S.Ct 476 (1931); *Eichelman v Nationwide Insurance Company* 551 Pa. 558, 711 A. 2d 1006 (1998); *Liccardi et al v Stolt Terminals Inc et al* 178 Ill. 2d 540, 687 N.E. 2d 968, 227 Ill. Dec 486 (1997); *Trotter v Nelson* 684 N.E. 2d 1150 (1997).

697 *Oregon R.R. and Navigation Co v Dumas* (C.C.A.) 181 F. 781 followed in *Ingalls v Perkins* 263 P. 761 (1928); *Mitchell v Jones* 104 Colo. 62, 88 P. 2d 557 (1939).

factors which the courts ought to consider in declaring a contract void as against public policy. Although there are no *numerus clausus*, the courts have identified the following factors in the main, as being void against public policy. Public interest, have been identified as one of the uttermost factors that plays a significant role in deciding when to declare a contract void as against public policy. The courts have made it abundantly clear that this arises when agreements are contrary *"to what the constitution, the statutes or the decisions of the courts have declared"* or *"they are manifestly injurious to the public welfare or public good or violative to public interest."* [698]

It has also been held that before contracts may be held to be void and unenforceable against public policy, the contract must be *"inimical to the public interest"* [699] or *"tend injuriously to affect the public service."*

It is especially in contracts containing exculpatory or exclusionary clauses, in which attempts are made to exonerate contractants from liability, notwithstanding their negligent conduct and the serious consequences that flow there-from, that the courts have stepped in to protect the innocent by invoking public policy.

The rationale for the afforded protection was formulated, as far back as 1921, when Mr Justice Cardozo, in *Messersmith v American Fidelity Co,* [700] held that *"no one shall be permitted to take advantage of his own wrong."* [701] [702]

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698 *Cohen Insurance Trust et al v Stern et al* 297 Ill.App 39 220 696 N.E. 2d 743, 231 Ill Dec 447; *Hoyt v Hoyt* 213 Tenn. 177, 372 S.W. 2d 300 (1963); *Zeitz v Foley* 264 S.W. 2d 267 (1954); *Smith v Simon et al* 224 So. 2d 565 (1969); *Home Beneficial Association v White* 180 Tenn. 585, 177 S.W. 2d 545 (1944); *Martin v Alianz Life Insurance Company of North America* 593 N.W. 2d 823 (1998); *Walker v America Family Mutual Insurance Company* 340 N.W. 2d 599 (1983); *Twin City Pipe Line Co et al v Harding Glass Co* 283 U.S. 353, 51 S.Ct 476 (1931); *Diamond Match Co v Rieber* 106 N.Y. 473, 13 N.E. 419 (1887) quoting *Printing Co v Sampson* L.R. 19 Eq 462; *Smith v Simon et al* 224 So. 2d 565 (1969); *Zeitz v Foley* 264 S.W. 2d 267 (1954); *Ingalls v Perkins* 263 P. 761 (1928); *Anderson et al v Blair* 80 So. 31 (1918); *Styles v Lyon* 86 A. 564 (1913); *Lazenby v Universal Underwriters Insurance Company* 214 Tenn. 639, 383 S.W. 2d 1 (1964); *Eichelman v Nationwide Insurance Company* 551, Pa 558, 711 A. 2d 1066 (1998); *Perkins v Hegg* 212 Minn. 377, 3 N.W. 2d 571 (1942); *Canal Insurance Company v Ashmore* 126 F. 3d 1083 (1997); *Trotter v Nelson* 684 N.E. 2d 1150 (1997); *Owens v Henderson Brewnig Co et al* 215 S.W. 90 (1919); *Neiman v Galloway* 704 So. 2d 1131 (1998).

699 *Ingalls v Perkins* 263 P. 761 (1928); *Styles v Lyon* 86 A. 564 (1913); *Mitchell v Jones* 104 Colo. 62, 88 P. 2d 557; *Home Beneficial Association v White* 180 Tenn. 585, 177 S.W. 2d 545 (1944).

700 *Anderson et al v Blair* 80 So. 31 (1918); *Home Beneficial Association v White* 180 Tenn. 585, 177 S.W. 2d 545 (1944); *Himrich et al v Carpenter* 569 N.W. 2d 568, 1997 So 116 (1997).

701 232 N.Y. 161, 133 N.E. 432, 19 A.L.R. 876 (1921).

702 *Messresmith v American Fedility Co* 232 N.Y. 161, 133 N.E. 432, 19 A.L.R. 876; *Sproul v Cuddy and Williams* 131 Cal. App. 2d 85, 280 P. 2d 158 (1955); *Neiman v Galloway* 704 So. 2d A 31 (1998).

For a more in depth discussion see Chapter 13.

10.2.3.3.3 Legal Opinion

Public policy is generally regarded as an antipode to the emphasis which maxims such as freedom of contract and the sanctity of contract, have received in the United States of America. Although contracts or provisions of contracts are not easily interfered with, nonetheless, contracts or provisions of contracts which tend to be injurious to the public or against the public good will be declared against public policy and unenforceable. [703]

The rationale for the recognition of public policy is based on social welfarism as well as the prohibition of harm to others, be that, public health, be that, public safety, be that, public welfare and the like. [704]

Despite its recognition, the meaning of public policy is still vague and uncertain and its definition not uniform. What is certain, however, is that the following elements have received common recognition; it concerns the community, common sense and common conscience with regard to matters of public morals, public health, public safety, public welfare and the like. [705]

It has also been generally accepted that the nature and scope of public policy in the United States of America is influenced by contemporary factors, including, social custom, economic needs and moral aspirations of society. In turn, the contemporary factors are influenced by changing habits, opinions, wants and the needs of the people. [706]

What further influenced the determination of public policy were illegal and immoral activities often prohibited by legislative acts and judicial pronouncements. [707]

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703 Corpus Juris Secundum Volume (17A) (1999) 165; Williston *A Treatise on the Law of Contracts* (Vol 18) (1978) Para 1629; Scott and Krauss *Contract Law and Theory* (2002) 517.

704 Scott and Krause *Contract Law and Theory* (2002) 519; Jaeger *Law of Contracts* (1953) 502; American College of Legal Medicine *Legal Medicine* (1991) 50; Corpus Juries Seconded Volume (17A) (1999) 165; Williston *A Treatise on the Law of Contracts* (Vol. 18) (1978) Para 1629.

705 Jaeger *the Law of Contracts* (1953) 502; Corpus Juries Seconded Volume (17A) (1999) 165.

706 Corpus Juries Seconded Volume (17A) (1999) 168; Williston *A Treatise on the Law of Contracts* (Vol. 18) (1978) Para 1629.

707 Scott and Krause *Contract Law and Theory* (2002) 519; Corpus Juris Secundum Volume (17A) (1999) 166-167 while acknowledging the other two sources of information for determining public policy, they include constitutional

Despite its recognition, there is no magic formula in American law to determine whether a contract is contrary to public policy or not. It has, then, also been acknowledged that there is no absolute rule by which to determine what contracts are repugnant to public policy. In this regard the courts will look at all the facts and circumstances of each case. In addition the courts may consider the purpose of the contract and the situation of the parties. [708]

10.2.4 Summary and Conclusions

It is evident from the scope of this Chapter that the impact of the doctrines of freedom of contract and the sanctity of contract, despite some factors such as the principle of fairness, the doctrine of unconscionable-ness and agreements contrary to public policy impacting on the said doctrines, contractual autonomy and *pacta sunt servanda* remains far-reaching and profound. What emerged from the discussion in this Chapter is that contractual freedom and the sanctity of contract are not without limits. In some instances the interference by the courts in contractual autonomy is warranted. The rationale for empowering the courts to interfere with the enforcement of contracts, or contractual provisions, rests on many principles: The most general motivating reasons, which have emerged throughout the years, include; courts will not turn a blind eye to the fraudulent conduct of one of the parties to the contract nor would courts ignore the influence which one of the contracting parties brings to bear upon the other contracting party, through undue influence or duress, often to the detriment of the other contracting party. Besides misrepresentation, fraud, duress and undue influence, the traditional defence to contractual freedom also includes mistake and illegality. Besides the traditional factors, what have also been recognized as factors influencing the validity and enforceability of contracts or contractual provisions, include: the harshness or unreasonableness which flow from the unequal bargaining position of contracting parties, the fairness of contract, unconscionability of certain contracts or contractual provisions as well as public policy and its effect on invalidating contracts and contractual provisions.

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provisions as well.

708 Corpus Juris Secundum Volume (17A) (1999) 169; Hoyt v Hoyt 213 Tenn. 177, 372 S.W. 2d 300 (1963); In the case of *Styles v Lyon* 86 A. 564 (1913) the court emphasized legal consideration and reasonableness to be the criteria. See also *Cook v Johnson* 47 Conn. 175, 36 AM Rep 64; *Cornellier v American Casualty Company* 389 F.2d 641 (1968); *Himrich et al v Carpenter et al* 569 N.W. 2d 568, 1997 SA 116 (1997); *Smith v Idaho Hospital Services Inc d/b/a Blue Cross of Idaho* 89 Idaho 499, 406 P. 2d 696 (1965); *Cohen Insurance Trust v Stern et al* 297 Ill App. 3d 220, 696 N.E. 2d 743, 231 Ill Dec 447 (1998); *Home Beneficial Association v White* 106 N.Y. 473, 13 N.E. 419 (1887); *Anderson et al Blair* 80 So. 31 (1918); *Twin City Pipe Line Co et al v Harding Glass Co* 283 U.W. 353, 51 S.Ct 476 (1931); *Eichelman v Nationwide Insurance Company* 551 Pa. 558, 711 A. 2d 1006 (1998); *Liccardi et al v Stolt Terminals Inc et al* 178 Ill. 2d 540, 687 N.E. 2d 968, 227 Ill. Dec 486 (1997); *Trotter v Nelson* 684 N.E. 2d 1150 (1997).

The question of the recognition and the nature and scope of the principles of fairness, the doctrine of unconscionable-ness and the doctrine of public policy, as they impact on contractual freedom, was explored in some depth in this Chapter. Whilst it is clear that the principle of fairness, or good faith, is recognized and given effect to in the jurisdictions of English contract law and American law, the same cannot be said to the position in South Africa. The recognition afforded the principle of fairness in both England and the United States of America is founded upon public interests and public welfare, wherein the weaker contracting party is protected against exploitation by the stronger party to the contract. The philosophical principles of ethics and fairness have influenced the American judges, in deciding to declare contracts contrary to public policy. The philosophy, in turn, is founded upon community-based standards, derived from societal norms and values. The principle of fairness serves as a safety valve for the protection of, especially, the unsophisticated contracting parties against such exploitation. In so doing, it caused a paradigm shift in America, from extreme individualism to fairness and reasonableness in contract. English law introduced legislation, the aim of which was to bring about fairness in contract. This became particularly the practise which involved exemption clauses excluding liability. To this end, the courts exercise their discretion in declaring these clauses ineffective on the grounds of unfairness in contrast. Although some South African legal writers and the courts, in the minor divisions, have favoured the return of the application of the principle of good faith in the South African Law of Contract, the Supreme Court of Appeals resisted all attempts to re-introduce this principle. Despite the resistance put up against the re-introduction, the South African Law Commission introduced concept legislation to adopt the principle of fairness in South African Law, to deal with unreasonable and oppressive contracts.

Considerations of the doctrine of unconscionable-ness reveal that the concept is not foreign to the South African, English and American jurisdictions. It is a method of providing equitable relief to protect the weak, the foolish and the thoughtless, especially in transactions of unfair bargain. The doctrine of unconscionable-ness was particularly enforced with the usage of standardized contracts, where the contract itself, or the contract provisions, result in harsh or unreasonable consequences in South Africa. Its application is very limited where the weak is exploited resulting in oppressive consequences. But, in both South Africa and in England, the doctrine of unconscionable-ness) has never become a free- floating, independent defence. The American law of contract, prior to the legislative intervention in the form of *Uniform Commercial Code* in 1965, recognized the doctrine, but, the American courts did not consistently apply the

doctrine. This led to the enactment of S2-302(1) of the *Uniform Commercial Code*. The effect thereof was that the American courts were encouraged to openly strike down provisions harmful to a contracting party and which were unconscionable when the contract was concluded. Judges were thus, since the enactment, given greater power to police agreements and strike down unconscionable agreements.

Public policy, as seen by the discourse in this Chapter, is seen as possibly the factor which impacts most heavily on contractual freedom. In all three jurisdictions, South Africa, England and the United States of America, no other factor impacting on contractual freedom is given as much prominence, by the legal writers and the courts, as public policy in addressing the invalidity of contracts. It follows, therefore, that in the jurisdictions in question the courts are frequently asked to pronounce on the validity of contracts against the background of public policy. The rationale for the recognition of public policy as a defence lies in the fact that public interests regard that the courts protect the weaker contracting party and, in so doing, the courts are empowered to strike down and declare invalid contracts which are against public policy or *contra bonos mores*. There is, however, no hard and fast rule as to exactly when this head may successfully be used to invalidate contracts or contractual provisions. It has been suggested, in all three jurisdictions, however, that the power of the courts to declare contracts or contractual provisions to be invalid should be used sparingly and only in the clearest of cases. It has been suggested that although courts are empowered with this competency, public policy often dictates that contracts, once entered into, should be enforced because of the principles of freedom and contract and *pacta sunt servanda*.

The South African courts, as was seen in this Chapter, have demonstrated their conservatism in not sticking out their necks to nullify agreements merely because they appear to be unreasonable or unfair. This appeared to be the position even where a hospital contract containing an exclusionary clause, excluding the hospital and staff from liability, was not nullified by the Supreme Court of Appeal, despite normative ethics and medical standards being compromised. This will form the core discussion in Chapter 13.

It needs to be said however, at this stage, the Supreme Court of Appeal have, unlike other jurisdictions, including England and the United States of America, refused to follow the paradigm shift experienced in other jurisdictions in this regard.

English law, although more progressive in their handling of contracts against public policy, have also created much uncertainty as to when to nullify contracts or contractual provisions based on public policy. But then, English law have allowed legislative intervention to stem

the effect of standardized contracts, especially where they are injurious to public interests of the public welfare.

Despite the United State of America's ardent following of the principles of freedom of contract and the sanctity of contract, the American courts appear to be less likely to turn their backs and to allow contracting parties to suffer hardship and prejudice where public interests, good morals and public welfare are adversely affected. It is especially in the sphere of exclusionary, or indemnity contracts, exonerating contracting parties from liability, notwithstanding their often negligent conduct that the courts have played a greater protecting role.

All in all, one gains the impression that the South African courts play a less paternalistic role in protecting contracting parties, even in circumstances where contractual provisions are in conflict with public interests, public welfare and good morals. The South African courts' attitude even finds prominence in exclusionary, or indemnity clauses, wherein a contracting party exonerates himself from liability to the detriment of the other contracting party. Consequently, in the Chapter that follows, the status and effect of exclusionary clauses, or exculpatory clauses, in general will be considered. This will give one a greater insight into the acceptability of these types of clauses in the commercial sphere. It will also direct one into getting a better understanding as to when the courts will step in and interfere with contractual freedom, despite contracts, containing these types of clauses, being entered into.

Finally, a greater understanding of the recognition of exclusionary clauses in general and the protection of the public against the abuses which some of these type of clauses bring with them, will lay a sound foundation for the research to be pursued in Chapter 14, which forms the focal point of this thesis.

Chapter 11

The influence of exclusionary clauses on the Law of Contract in general

11.1 Introduction

Exclusionary clauses in contract are not a new concept. It has its roots firmly embedded in the Roman law period. There were informal *pacta,* which operated as phenomenal bars to litigation. Other *pacta* also provided a defence to a debtor if sued by a creditor. In all, it had an affect on contract during this period, as exclusionary clauses limited, excluded certain rights, duties and rights of the contravening contracting parties. [1]

Exclusionary clauses were incorporated in standard form contracts, in English law, as early as the seventeenth century. In the so-called `common carrier' cases, attempts were made to exonerate the skipper from his duties.

The foundation upon which exclusionary clauses are built is said to be the principle of the freedom to contract i.e., as Grotius argued, `man's right to contract'. With its explosive use during the industrial revolution it became to be known as standard form contracts and were very much influenced by the philosophy of *laissez-faire*, which meant that the law should interfere with people as little as possible. Influenced then by this ethos, judges were very reluctant during this time to interfere with contractual agreements. [2]

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1 Van Dorsten "The Nature of a Contract and Exemption Clauses" 1986 (49) *THRHR* 189 at 196 highlights from the *Digest* the exemption clauses which in Roman times effected the naturally of agreements *inter alia* the limitations or exclusion of liability for evictions and latent defects. Likewise, the *pasta de non pretend* was an agreement not to sue.

2 According to Alidah *An Introduction to the Law of Contract* (1995) 15ff the judges saw their main task as that of an umpire who assisted contracting parties where the rules of the game had been broken. For the non-interference

During the twentieth century the use of standard contracts reached gigantic proportions. The usage of standardized contracts found its way into the commercial field, most noticeably in transport, insurance, banking etc. Its use was then also extended to medical agreements involving especially, hospitals.

It is significant to note that these types of contracts found universal favour, including the jurisdictions of South Africa, England and the United States of America. What is of further significance is the fact that as competition became fiercer amongst especially, the industrial giants, exclusionary clauses became a mighty tool for the exploitation of economic power. What emerged as well is the fact that the weaker contracting party who stood in an unequal bargaining position was often exploited by the stronger contracting party, especially, bigger business enterprises and often, monopolies. The prevailing situation at the time led to the forming of consumer bodies, the aim of which was to protect consumers who were being exploited. The era of consumerism brought about new thinking and legal jurisprudence. [3] The ethos that contracts were there to honour and enforce was being challenged by the moral principle that one should not take advantage of an unfair contract. Despite efforts being made to prevent the abuse of consumers, standardized contracts remained and continue to remain the order of the day.

Exemption clauses in South Africa have found their way into virtually every conceivable contract. [4] Their effectiveness is said to be twofold. In the first instance, it is contended that it controls the consequences of most contracts. Secondly, these types of agreements it is contended, assist in reducing the uncertainties management faces in controlling the consequences that flow from the concluding of contracts. It brings about better planning and risk management as well as costing.

But, the application of exclusionary clauses in contract in South Africa has not been without criticism. [5] Moreover, because of the undesirable and unreasonable affect

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of the courts in the law of contract see the much quoted dictum of Sir George Jesse in *Printing and Numerical Registering Co v Sampson* (1875) L.R. E.Q at 465.

3 The legal jurisprudence according to Alidah (1995) 11 was founded on morality in that `man must respect man and not take advantage of his weakness'.

4 The use of exemption clauses in contract is identified by both academic writers and the courts alike.

5 It is especially the writers Van der Merwe et al *Contract - General Principles* (2003) 214-216; Deport "Exemption Clauses: The English Solution" *De Rebus* December (1979) 641ff; Van Loggerenberg "Unfair Exclusion Clauses in Contracts: A Plea for Law Reform" *Inaugural Address University of Port Elizabeth* (1987) 1-5 who are very critical of the use of exemption clauses in certain forms and in certain contracts. The use of standard contracts with exclusionary clauses aimed at exploiting traps for the weak or the general exploitation by the stronger contracting

exemption clauses have in certain instances over contracting parties, especially, the weak, the legislature have stepped in controlling certain exemption clauses in contracts. [6] The South African legal writers and the courts at common law have also identified several factors that impact upon the free use of exemption clauses in contract. [7] Although some factors are mentioned in this Chapter, the factors impacting on exclusionary clauses in their application will be discussed comprehensively in Chapter 14. The South African courts have also adopted certain methods in curbing or curtailing exemption clauses deemed to be undesirable and unreasonable often with harsh and oppressive results. The two mainstream methods include, denouncing these clauses when warranted to be contrary to public policy, public interests or the public welfare. Most recently, the Constitutional Court, albeit the dissenting and minority judgement of *Barkhuizen v Napier*, [8] held that considerations of public policy, as animated by the Constitution, dictated that a time-bar clause, which limited access to courts, should not be enforced. The court in a refreshing judgement viewed adversely the effects of small print contained in standard-form documents that often did not form part of the actual terms on which the parties placed reliance when the agreement was reached. This the court held failed to comply with standards of notice and fairness which contemporary notions of consumer protection required in open and democratic societies. Moseneke DCJ in another dissenting judgement held that the stipulation in the time-bar clause clashed with public norms and is so unreasonable as to offend public policy.

Prior to this judgement, the Supreme Court of Appeals in the case of *Bafana Finance*

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parties, over the weaker contracting parties have lead to much criticism. See also Kahn "Standard-form contracts" *Businessman's Law* (1971) 50ff; Turpin "Contract and Imposed Terms" *SALJ* (1956) 144ff.

6 The legislature in South Africa has provided consumer protection with the enactment of the *Credit Agreement Act* 75 of 1980, the *Alienation of Land Act of South Africa* 66 of 1981 and the *Insurance Act* 27 of 1943. In the past the *South African Law Commission* under Project 47 has also made recommendations to regulate unfair contractual provisions, which, if implemented through an enactment of the Draft Bill would have had far reaching consequences. See the *Draft Legislation*, the *Unfair Contractual Terms Bill* 1998. More recently a commission of enquiry under the auspices of the Department of Trade and Industry, published for comment the *Consumer Protection Bill*. (Government Gazette 28629 GN R489, 15 March 2006). As will be seen from the preamble and the contents of the Bill, it is a clear attempt to promote the ethos of consumer welfarism. As will be seen further its primary aim is to promote and protect the rights of historically disadvantaged consumers; to find adequate redress for consumers who have been abused or exploited in the market place and to give effect to the internationally recognized consumer rights. Special attention is also given to exemption from liability clauses and their unfair or unreasonable, often harsh and oppressive results. The Bill further aims to curb such conduct.

7 The factors identified by our legal writers include *inter alia* the lack of consensus between the contracting parties often been influenced by fraud, the status and bargaining power of the contracting parties; those clauses which violates public interests and statutory duty and those which are contrary to public policy.

8 2007 (5) SA 323 (CC) Para 183.

Mabopane v Makwakwa and Another [9] also held that a micro-lending agreement whereby the debtor purports to undertake not to apply for an order placing his/her estate under administration, in terms of S74 (1) of the *Magistrate's Court Act* 32 of 1944, and to agree that the loan debt will not form part of an administration order for which he/she might apply, is unenforceable as being inimical to public policy. In this case, the court relied heavily on public interest to denounce these types of clauses. The court also emphasized the fact that, especially where a contracting party is of poor standing, the court in public interest needs to afford protection.

The other method involves the interpreting exemption clauses narrowly. This method is especially used in instances where clauses do not set out legal grounds from which contracting parties are exempted for liability owing to them signing an agreement incorporating the exemption clause. [10] So strong was the movement against the troublesome feature of standard form contracts, namely, the presence of exclusionary clauses with all its accompanying unreasonable and unfair results that various pressure groups lobbied enough support which resulted ultimately in commissions of enquiries being appointed to investigate the legal effect of these types of clauses. Extensive investigations were carried out in jurisdictions *inter alia* South Africa, the United Kingdom and the United States of America as means to find answers to growing criticism expressed against the use of exclusionary clauses. Moreover, despite the entrenched use of exclusionary clauses in, especially, the commercial field, recommendations from law commissions and other institutions in the jurisdictions aforementioned, halted, to a certain extent, the unlimited and unrestricted use of exclusionary clauses in contracts. In this regard the South African Law Commission in 1998 published their findings in the *Unreasonable Stipulations in Contracts and the Rectification of Contracts* as well as draft legislation in the form of the *Unfair Contractual Terms Bill*. This was a significant attempt to regulate unfair contractual provisions that are unfair, unreasonable or unconscionable.

Exclusionary clauses, from the early days, have very much been part of the English Law of Contract as these types of clauses were widely used in contracts involving the carriage of goods and in other commercial contracts. In these contracts for example, the carrier would restrict its liability for damages to the goods while they were been carried. Because of their frequent usage, these type of clauses strongly favoured in the commercial world in England.

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9 2006 (4) SA 581.

10 Christie *The Law of Contract in South Africa* (2003) 209ff; Lubbe and Murray *Farlam and Hathaway Contract Cases, Materials and Commentary* (1988) 340ff.

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But, the use of exemption clauses in England, has not escaped criticism. One of the reasons most fervently advanced is that although there is generally an assumption that contracting parties, when concluding a contract, stand on equal footing; this is not always the case. In standard form contracts in which the individual is not found to negotiate contractual terms, the position of the individual is merely one of adherence. The accepting party has very little choice in the matter, especially, with the inclusion of exemption clauses excluding liability that often lead to hardship. In the so-called `ticket cases' the consumer often has very little time to read the content. They are often clothed with clauses that are unfair or unnecessarily one-sided to the weaker party's detriment. This intolerant position caused pressure to be brought and groups to be formed who were out to curb exploitative practises.

The growth of consumer protection heralded in a new era in the law of contract; the ethos of individualism was displaced and a consumer-welfare ethos was driven, in which, the interests of consumers were taken more seriously. [12]

In view of the aforementioned the English courts adopted certain measures to alleviate the position of the weaker contracting parties. The English courts developed a number of rules, *inter alia,* firstly, the rule of incorporation in which the courts regarded a clause excluding liability, to be ineffective if it is not part of the contract. [13] Reasonable notice of the exclusionary clauses is therefore required. [14] Secondly, once it is established that the clause

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11 *The Standing Committee of Consumer Affairs* in Britain on unfair contract terms in a discussion paper (January 2004) at page 16 of the report describes the advantages to include *inter alia* good contractual planning, the reduction of transaction costs; cutting down on the preparation time in finalizing contracts etc. Judicial recognition of exclusion clauses has also been wide. It is especially cases such as *Parker v South Eastern Railway* (1877) 2 CPD 416, *Swisse Atlantique Societe D'Armenetmaritime SAN v Rotterdamsche Kolen Centrale* (1967) 1 A.C. 361, *Photo Production Ltd v Securicor Transport Ltd* (1980) A.C. 827, 848 which demonstrated the acceptance of exclusionary clauses.

12 It is especially Adams and Brownsword *Understanding of Contract Law* (2004) 39 who advocate that the tenets of consumer-welfarism are founded upon reasonableness and fairness. It is based upon good faith between the contracting parties in which no one should be mislead nor should the stronger party exploit the weaker party because of their unequal bargaining position. Further no contracting party should profit from their own wrong and no one should be able to dodge their responsibilities through the use of exclusionary clauses.

13 Nowhere in judicial thinking than in the cases of *Lloyds Bank Ltd v Bundy* 1975 QB 326 (CA); *Karsales (Harron) Ltd v Wallis* (1956) 2 ALL E.R. 866; *A Schroeder Music Publishing Co Ltd v Macaulay* (1974) 1 W.L.R. 1308 has it been more effectively demonstrated that exclusionary clauses are not always desirable often leading to unfair or unreasonable consequences.

14 The principle of "actual knowledge" was stressed by Lord Devlin in the case of *McCutheon v Davis MacBayne Ltd*

has been incorporated, the rule of construction or otherwise, the rule of interpretation is applied. In this regard, the *contra proferentem* principle is applied. The application of the principle operates as follows: if there is any ambiguity in a contract term, the ambiguity is to be resolved against the party relying upon the term. [15] The courts have also approached the situation that where there is doubt, it is inherently improbable that the innocent party would have agreed to the exclusion of negligence.

The legislature also stepped in by enacting both the *Unfair Contract Terms Act* 1977 as well as the *Unfair Terms in Consumer Contracts Regulations* 1994, as a measure to direct the courts to declare exclusionary clauses as void in certain circumstances.

One of the primary reasons why legislative intervention was deemed to be necessary in Britain was said to be the artificial construction given by the courts to exemption clauses, often leading to great hardship. A further factor included the inconsistency of the courts in denouncing these types of clauses and to declare them to be contrary to public policy.

This resulted in the English Law Commission and the Scottish Law Commission both investigating this issue and making recommendations based on their findings. Some of the findings made include:

"(1) notwithstanding the entrenched ethos of the freedom of contract, unlimited or unrestricted freedom is likely to operate unreasonably and in many instances operate against public interest;

(2) The ignorant often suffer at the hands of those who abuse their bargaining strength;

(3) The notion that there should be complete freedom to contract is not acceptable as contracting parties *often do not bargain from a position of equal strength. Contracts containing excluding clauses are often abused and misused;*

(4) Social policy dictates that exemption clauses should not take away rights or restricts rights;

(5) Judicial inconsistencies in handling exclusionary clauses are unacceptable;

(6) The right to contract out of liability for negligence is not desirable." [16]

(1969) 1 ALL ER.

[15] The acceptance of the *contra proferentem* rule, is clearly demonstrated in the English cases of *Lee (John) and Son (Grantham) Ltd v Railway Executive* (1949) 2 ALL E.R. 581, *Houghton v Trafalgar Insurance Co Ltd* (1954) 1 QB 247; *Morley v United Friendly Insurance PLC* (1993) 1 W.L.R. 996.

[16] See The Law Commission and the Scottish Law Commission report on *Exemption Clauses: Second Report* (1975)

The effect of the recommendations resulted in legislative interventions taking place with the passing of the *Unfair Contract Terms Act* 1977. Responding thereto, the English legal writers [17] found that the intervention gave the courts in England a general and direct means of controlling the use of exemption clauses. In this regard, the *Unfair Contract Terms Act* 1977 may render an exemption clause depending on the circumstances, either totally unenforceable or unenforceable, unless, reasonable. The enactment of the *Unfair Contract Terms Act* 1977 has also been widely accepted by the English courts. [18]

The use of standardized contracts in America, akin to the other jurisdictions, including, England and South Africa, has also been on a large scale. They are found there in all walks of life and are widely recognized in the commercial world. But, despite their general acceptance, [19] these types of contracts, especially, those containing exclusionary clauses have often been the subject of much criticism by the legal writers and the courts alike. [20]

One of the main strands of criticism against the use of exclusionary clauses incorporated in standardized contract is the fact that exclusionary clauses often exclude liability for negligence leaving the innocent without remedy. [21]
Prior to the enactment of the *Uniform Commercial Code* 1952, the American courts relied heavily on the traditional common law defences, including, the lack of mutual assent, and

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4ff. Their terms of reference included to investigate the effect of the bargaining position of the contracting parties especially, where the weaker party often lacks knowledge of the contract and understanding of the terms and the abuse that flow there from; to investigate further the abuse of power of the stronger party over the weaker party and the effect of the stronger party often adopting the `take it or leave it' approach; thirdly the commission was advised on the lack of restrictions by common law or statute on the overthrowing of the exercise of reasonable care and the general maintenance of high standard of performance.

17 See especially the writings of Poole *Textbook on Contract Law* (1986) 209ff.

18 For the courts' general acceptance see the remarks of Lord Denning Mr in *George Mitchell (Chesterhall) Ltd v Finney Lock Seeds Ltd* (1983) QB 284.

19 The advantages in the use of these type of contracts according to Summers and Hillman *Contract and Related Obligations: Theory, Doctrine and Practice* (1987) 584 and Deutsch *Unfair Contracts* (1977) 1-2 include controlling the risks in insurance contracts, providing consistency in contract, and saving in the drafting of individual contracts.

20 The main strands of criticism highlighted by Summers and Hillman (1987) 584 and Deutsch (1977) 1-5 include parties are not always on equal footing when concluding the contracts, often one of the parties is in a stronger bargaining position; the terms or provisions in the contracts do not form the subject of negotiations or bargaining; often unfair terms are imposed on the weaker contracting party over which the latter has no control; the unsophisticated and ignorant are often expected to sift through the maize of fine print often with obscure clauses which work to their detriment.

21 The writer Deutsch (1977) 9 is particularly sceptical of the exclusion of liability involving, personal injury.

lack of mutuality, fraud, duress and public policy to invalidate unfair standardized contracts. As was the case in England, the courts also adopted methods of interpretation and construction in contracts to invalidate or restrict unfair disclaimers. The lack of clear rules in when to apply public policy as well as other traditional defences, the inconsistency shown by the courts to overcome unfairness in these types of contracts, gave rise to greater impetus being placed on the evolution of the doctrine of unconscionable-ness. [22] This in turn, led to the enactment of the *Uniform Commercial Code* 1952 and the *Restatement of the Law of Contracts* 1981. Primarily, the legislative intervention was seen to exercise control over exemption clauses and empowering the courts to strike down unconscionable clauses.

Besides unconscionable-ness, other factors also influence the American courts in declaring contracts containing exclusionary clauses unenforceable. They include public policy, [23] public interest, [24] statutory provisions encompassing a public duty of care, [25] the inequality

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22 The inconsistency of the American courts' approach to exclusionary clauses and often conflicting judgements is highlighted, by the Supreme Court of Washington in the case of *McCutcheon v United Homes Corp* 79 Wash. 2d 443, 486 P.2d 1093 (1971). The same sentiments are expressed in the cases of *Henningsen v Bloomfield Motors Inc* 32 N.J. 358, 161 A 2d 768 (1960), *Levine et al v Shell Oil Company* 28 N.Y. 2d 205, 269 N.E. 2d 799 321 N.Y.S. 2d 81 (1971). This must be seen against the background of the courts' general acceptance of exclusionary clauses in commercial and business transactions as expressed in *Kuzmiak v Brookchester Inc* 33 N.J. Super 495 111A 2d 425 (1955); *Chazen v Trail Mobile* 215 Tenn 87, 384 S.W. 2d 1 (1964); *Chicago and North Western Railway Company v Rissler and McMurray Construction Co and Truck Insurance Exchange* 184 F. Supp 98 (1960); *Crawford v Buckner* 839 S.W. 2d 784 (1992). But some courts have also expressed their reservations of the enforcement of exclusionary clauses in a landlord-tenant relationship; See *Crawford v Buckner* 839 S.W. 2d 754 (1992); *Schlobohm et al v Spa Petite Inc* 326 N.W. 2d 920 (1982) concentrated on the Health Spa consumer relationship.

23 There are a number of cases in which the American courts expressed their willingness to declare contracts or provisions of contracts void as against public policy but only where they are *`clear and free from doubt and where the injury to the public is substantial ..... or ..... inimical to the public interests .....'* See *inter alia* the cases of *Twin Pipe Line Co et al v Harding Glass Co* 233 U.S. 353, 51, S.Ct 476; *Chicago Great Western Railway Company v Farmers Produce Company* 164 F.Supp 532 (1958); *Occidental Savings and Loan Association v Venco Partnership* 206 NEB 49, 293 N.W. 2d 843 (1980); *Banfield v Louis Cat Sports Inc* 589 So 2d 441 (1991); *Olson v Molzen* 558 S.W. 2d 429 Tenn (1977).

24 Public interests include "*inequitable harsh and oppressive terms, the loss of important rights; the transgression of public regulations or public service"*. Included in this are hospital contracts containing exculpatory provisions in respect of which the courts have frequently held they will not stand as they violate public interest. See in this regard the cases of *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 (1990); *Tatham v Hoke* 469 F. Supp 914 (1979); *Emory Univ v Porubiansky* 248 Ga. 391, 282 S.E. 2d 903 (1981); *Tunkl v Regents of University of California* 60 Cal. 2d, 98-101, 32 Cal, Rptr 33, 37-38, 383 P. 2d 441 (1963); *Cudnick v William Beaumont Hospital* 207 Mich. App 378, 525 N.W. 2d 891; *Leidy v Deseret Enterprises Inc* 252 Pa. Super 162, 381 A.2d 164 (1977).

25 The duty of care highlights that it is especially, hospital contracts containing exculpatory provisions, which are included in this category. The rationale for this is based on the philosophy that professional standards cannot be compromised as it violates statutory provisions. See the cases of *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

of bargaining power, etc. [26]

11.2 Historical overview of the development of exclusionary clauses

In order to have a greater understanding of the effect of exclusionary clauses in hospital contracts, which is the focal point of this thesis, it is of import to give consideration to the origin and development of exclusionary clauses in general.

The first traces of exclusionary clauses can be found in early Roman law during which period informal *pacta* operated as procedural bars to litigation. [27]

During the classical and later Roman law period a number of *pacta,* including, the *pacta adiecta* were recognised which had the procedural effect of providing a defence available to a debtor, if sued by the creditor on the original contract known as the *exceptio pacti conventi*. [28] Exemption clauses were also known to Roman law and they took the form of formal contractual stipulations. They also, had a substantial effect on contracts. [29]

During this period, exemption clauses could be agreed to at the time of concluding the agreement or after the conclusion of a contract. This had an affect on both the *naturalia* and the *essentialia* of specific contracts, thereby, limiting or excluding certain of the rights, duties and remedies of the contravening parties. [30]

(1990); *Tatham v Hoke* 469 F. Supp 914 (1979); *Emory Univ v Porubiansky* 248 Ga. 391, 282 S.E. 2d 903 (1981); *Tunkl v Regents of University of California* 60 Cal. 2d, 98-101, 32 Cal, Rptr 33, 37-38, 383 P. 2d 441 (1963); *Cudnick v William Beaumont Hospital* 207 Mich. App 378, 525 N.W. 2d 891; *Leidy v Deseret Enterprises Inc* 252 Pa. Super 162, 381 A.2d 164 (1977).

26 The inequality of bargaining power is a factor that in the modern era in America, are today frequently used to invalidate contracts or contractual provisions, incorporating exclusionary clauses, resulting in harsh or oppressive results. For case law see *Williams v Walker-Thomas Furniture Co* 350 F. 2d 445 D.C. Cir (1965); *Martin v Allianz Life Insurance Company of North America* 573 N.W. 2d 823 (1998); *Horner v Boston Edison Company* 45 Mass. App Ct 139, 695 N.E. 2d 1093 (1998); *Central Alarm of Tucson v Ganam* 116 Ariz 74, 567 P.2d 1203 (1977); *Allan v Snow Summit Inc* 51 Cal App 4th 1358, 59 Cal Rptr. 2d 813 (1996); *Weaver v American Oil Co* 257 Ind 458, 276 N.E. 2D 144 (1971); *Henningsen v Bloomfield Motors Co* N.J. 358 161 A.2d 69 (1960); *Mayfair Fabrics v Hanley* 48 N.J. 483, 26 A.2d 602 (1968); *Leidy v Desert Enterprises Inc o/b/a Body Health Spa* 252 P.A. Super 162, 381 A.2d 164 (1977).

27 Van Dorsten "The Nature of a Contract and Exemption Clauses" 1986 (49) *THRHR* 189 at 195.

28 Van Dorsten "The Nature of a Contract and Exemption Clauses" 1986 (49) *THRHR* 1986 (49) 189 at 195, Van Warmelo *An Introduction to the Principles of Roman Civil Law* (1976) Par 515-531.

29 Van Dorsten "The Nature of a Contract and Exemption Clauses" 1986 (49) *THRHR* 189 at 195; Van Warmelo (1976) Par 518.

30 Van Dorsten "The Nature of a Contract and Exemption Clauses" 1986 (49) *THRHR* 189 at 196; The *Digesta* recognised that in the following instances exemption clauses effected the *naturalia* of an agreement - "The

Roman Dutch law was less formalistic than Roman law. The informal *pacta* made way for a less strict approach in that all lawful agreements with *iusta causa* or `redelike oorsaak' were enforceable. [31] Roman Dutch Law also to a certain extent recognised exemption clauses more especially, when contracting parties wanted to vary contractual agreements by way of extending or exempting provisions of agreements. [32]

It can be argued that historically exclusionary clauses have its roots embedded in the freedom of contract. The concept of freedom of contract, on the other hand, is founded in the social, economical and political philosophies of the sixteenth and seventeenth centuries, which centred on basic human rights. Because of man's ability to reason, a belief evolved, that man possessed certain fundamental rights, including as Grotius argued, "man's right to contract". [33]

Inspired by the age of individualism and freedom to contract, the so-called `standard form contracts' first emerged as early as the fifteenth century, when these types of contracts were used in Europe in the form of standard insurance policies and introduced into England in the seventeenth century. [34]

It was during the seventeenth century when, especially in England, standard form contracts were already used on a large scale in charter agreements and Bill of Lading agreements. [35] It was during this period that first attempts were made in the so-called `common carrier' cases to exonerate the skipper from discharging his public functions and, more particularly,

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limitation or exclusion of the liability for eviction" (D19 1 11 18) and for "latent defects" (D 19 1 6 9) and (D21 1 14 9) in sale; In the following instances exemption clauses effected the essentialia of an agreement - rights and remedies could be qualified by *pacta de non petendo* (agreement not to sue) or by agreements not to rely on exceptions or defences available to the parties (C2 3 29). A *pactum de non pretendo* gave rise to a praetorian defence or *excepti pacti* against any contracting party who sued contrary to such an agreement. But it is important to note that the parties could not agree to exclude the remedies available to the injured party where fraud was concerned; the *pactum non dolus praestetur* was invalid as being *contra bonos mores* and against good faith. See generally the Digesta D2 14 7 7; D2 14 9 10; D2 14 2 7 3; D19 1 6 8; D19 1 11 5 8.

31 Van Dorsten "The Nature of a Contract and Exemption Clauses" (1986) (49) *THRHR* 189 at 197.

32 Van Dorsten "The Nature of a Contract and Exemption Clauses" (1986) (49) *THRHR* 189 at 197; The writer with reference to the work of Lee *Commentary on the Jurisprudence of Holland* by Hugo Grotius (1936) 1.3.1 holds the view that it was especially Grotius who advocated that agreement may be used to confirm or limit the normal incidents of a contract.

33 Aronstam *Consumer Protection, Freedom of Contract and The Law* (1979) 1.

34 Holdsworth *History of English Law* (1923) 290-295; Aronstam (1979) 16-17.

35 Aronstam (1979) 16-17.

his extraordinary duties. There was a rule in place at the time in relation to the carriage of goods, that the public carrier is absolutely liable for all loss not due to an act of God or the public enemy. [36]

But it was not until, in particular, during, the *laissez-faire* era of the early nineteenth century that exclusionary clauses came to the fore. The incorporation of exclusionary clauses in contract was encouraged under the doctrine of freedom of contract. [37]

The demands of the industrial revolution, during the middle years of the nineteenth century, within an atmosphere of mass production of limitless numbers of standard articles and the expanding use of mass transportation, encouraged standardised mass-produced contracts in which mass-produced exclusionary clauses were incorporated. They were then often referred to as "standard form contracts" or "contracts of adhesion". [38]

The rationale for the utilization of standard form contracts amount to this, once the business had formulated its contents; it was likely to be used in every contract concerning the same product or service with every new client or customer. [39]

The judges, who were largely responsible for the creation of the law of contract during this period, were, greatly influenced by the philosophy of *liassez-faire*, which meant that the law should interfere with people as little as possible. The judges were very reluctant, at the time, to interfere with contractual arrangements and to limit the contractual powers of contracting parties. They saw their task as an umpire and, merely, to assist one of the contracting parties where the other party to the contract had broken the rules of the game. [40]

The position was then, accordingly, summed up by Sir George Jessel, an eminent judge at

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36 McClarin "Contractual Limitation of Liability for Negligence" *Harvard Law Review* (1914-1915) 550.

37 Atiyah (1995) 15-16; Aronstam (1979) 16-17; Yates *Exclusion Clauses in Contracts* (1982) 1' Jaeger *Law of Contracts* (1953) Par 1-010; Von Hippel "The Control of Exemption Clauses - *A Comparative Study International and Comparative Law Quarterly* (1967) 592-593.

38 Deutsch (1977) 2; Atiyah (1995) 15-16; Lenhoff "Contracts of Adhesion and the Freedom of Contract: A Comparative study in the light of American and Foreign Law" *Tulane Law Review* (1962) Vol. XXXVI 482; Yates (1982) 1-2.

39 Yates (1982) 1-2; Lenhoff (1962) Vol. XXXVI 481; Deutsch (1977) 1.

40 Atiyah (1995) 3.

the time, in the case of Printing and Numerical *Registering Co v Sampson*: [41] as follows :

"(I)f 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." [42]

It was particularly in the twentieth century, that the use of standardized mass contracts reached gigantic proportions. Moreover, standardized contracts were most notably used in commercial agreements concerning transport; insurance and banking, large scale business such as national and international trade, consumer sales and credit agreements. [43] Its usage has subsequently extended to medical agreements involving especially hospitals. [44]

In time, since standard contracts were first introduced, and notwithstanding the advantages gained by business people *inter se*, market factors dictated that businesses become more consumer orientated. The introduction of fierce competition amongst the industrial giants also resulted in exclusionary clauses in business contracts becoming a mighty tool for the exploitation of economic power. [45]

Part of the reasoning why standardized contracts or contracts of adhesion have received adverse publicity and come under scrutiny is from its very name namely "contract of adhesion". It is indicated that the legal transaction is not formulated as a result of the give-and-take of bargaining where the desires of one party are balanced by those desires of the other. When entering into the legal transaction, it is the customer who has to "adhere" to the terms prescribed by the business enterprise in which the customer has no bargaining power [46] alternatively unequal bargaining power [47] in which the customer is often abused by

41 (1875), L.R. 19 EQ at 465.

42 *Printing and Numerical Registering Co v Sampson* (1875), L.R. 19 EQ at 465.

43 Yates (1982) 2; Slawson "Standard form contracts and Democratic Control of Lawmaking power" *Harvard Law Review* 84 (1971) 529 believes that in modern day, ninety-nine percent of all contracts appear in the form of standard contracts. See also Lenhoff Vol. XXVI (1962) 481; Turpin "Contracts and Imposed Terms" *SALJ* (1956) 144.

44 Swarthout "Validity and Construction of Contract exempting hospital or doctor from liability for negligence to patient" *Annotations* 6 ALR 3d 704-707; Robinson "Rethinking the allegation of medical malpractice risks between patients and practitioners" *Law and Contempory Problems* Vol. 49: No 2 (1986) 173 at 184-188.

45 Yates (1982) 4.

46 Lenhoff (1982) 482; Aronstam (1979) 18 refers to these type of contracts as the *"take it or leave it"* contracts. See also Yates (1982) 2.

the stronger, namely the business enterprise. [48]

One extremely common and often troublesome feature of standard form contracts was the presence of "exemption clauses", which often provided that the business enterprise was not to be liable in virtually any circumstances whatsoever. [49] What followed however was the emergence of the era of consumerism, which, in turn, led to major changes in the law of contract, as well as, legal jurisprudence. [50]

In the first place there was a virtual eclipse of the doctrine of *laissez-faire* as a political force. People's attitude that contracts were there merely to honour and enforce no longer held sway. The moral principle that one should abide by one's agreement and fulfil one's promises was being met with another moral principle, namely; that one should not take advantage of an unfair contract. [51]

Although, especially during the twentieth century, consumer organisations engaged in an attempt to prevent the abuse of consumers, particularly where standard contracts with exclusionary clauses were used by enterprises with strong bargaining power, nevertheless, all this was not to say that standard form contracts were necessarily evil. These types of contracts, with exemption clauses embodied in them, remained a force to contend with and were used internationally in, especially, the fields of transport, insurance, banking, national and international trade, consumer sales and credit agreements. That seems to be the position in the modern business world. These types of contracts, besides their usage in the commercial field, also found their way into other fields, including the medical field. These types of contracts have been adopted in medical contracts, the validity whereof, forms the focal point of this thesis.

Their value in the commercial field is said to centre on commercial conscience and commercial certainty, in that, enterprises who deal with many customers, or supplies or

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47 Aronstam "Unconscionable contracts: The South African Solution?" (1979) 42 *THRHR* 18-19; Aronstam (1979) 23; Kötz "Controlling Unfair Contract Terms: Opinions for Legislative Reform" *SALJ* (1986) 405 at 413; Yates (1982) 2; Deutch (1977) 3.

48 Aronstam (1979) 18-19; Atiyah (1995) 12.

49 Atiyah (1995) 12; Borrie "Legislative and Administrative Controls over Standard Forms of Contract in England" (1995) 317 at 321; Deutsch (1977) 4.

50 Atiyah (1995) 11; Yeates (1982) 4-5.

51 Atiyah (1995) 11.

clients, are absolved from negotiating and formulating contracts individually. [52] In addition, they also have the advantage that a legal decision in one case will very likely provide a guide to other cases where similar disputed problems arise. [53]

In the light of the fore stated and the important and valuable role exclusionary clauses played in regulating and containing risk, it became difficult into determining when they perform a legitimate function and when they do not. For that reason, a movement started in the jurisdictions of England, the United States of America and South Africa, to regulate and not outlaw these types of contracts. [54]

The nature of this regulation, as will be seen from more comprehensive discussions that follow, has differed from jurisdiction to jurisdiction and has changed over time.

Two distinct mainstream regulatory measures were founded in an attempt to regulate exclusionary clauses, namely, legislation [55] on the one hand, and the courts [56] on the other.

Having given a short résumé of the origin and development of exclusionary clauses as they frequently appear in standardized contracts today, I shall consequently investigate the status exclusionary clauses occupy in these types of contracts today.

11.3 Recognition of exclusionary clauses in different jurisdictions

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52 Yates (1982) 2-3; Atiyah (1995) 13.

53 Atiyah (1995) 13.

54 McKendrick *Contract Law Text, Cases and Materials* (2003) 438; Yates and Hawkins *Standard Business Contracts: Exclusion and Related Devices* (1986) 4; Deutsch *Unfair Contracts* (1977) 8-9; Kötz "Controlling Unfair Contract Terms: Opinions for Legislative Reform" *SALJ* (1986) 405 at 413-415; Von Hippel "The Control of Exemption Clauses - A Comparative Study" *International and Comparative Law Quarterly* (1967) 591 at 592-593; Van Loggenberg *Unfair Exclusion Clauses in Contracts: A Plea for Law Reform Inaugural Lecture University of Port Elizabeth* (1987) 6; Yates (1982) 4-5; Tallon "Damages, Exemption clauses and Penalties" *The American Journal of Comparative Law* (1992) 675 at 680; Lenhoff (1962) 481 at 483.

55 McKendrick (2003) 438; *Unfair Contracts Terms Act* 1977 Yates and Hawkens (1986) 4; *Uniform Commercial Code* (1954); Kötz (1986) 405 at 407; Von Hippel (1967) 591 at 594; Van Loggenberg (1987) 6-9; Yates (1982) 7-11, 73-81; Tallon (1992) 675 at 680; Lenhoff (1962) 481 at 485; Borrie (1995) 317-321; Aronstam (1979) 9.

56 McKendrick (2003) 438; Deutsch (1977) 4-5 11-15; Pitt "Contractual Limitation of Liability for Negligence" *Harvard Law Review* (1914-1915) 550 at 554-555; Kötz (1986) 405 at 408-411; Von Hippel (1967) 591 at 595-600; Van Loggenberg (1987) 6-8; Yates (1982) 5-7, 269; Tallon (1992) 675 at 680; Lenhoff (1963) 481 at 483-484.

11.3.1 SOUTH AFRICA

11.3.1.1 Legal Writings

Exemption clauses, also known as exception clauses in South African Law, have, despite the scathing judicial indignation they received from legal writers from time to time, never lost their application in, especially, standard form contracts. [57]

Exemption clauses in modern times, have found favour in almost all economic activities, ranging from mortgage bonds, insurance policies, bills of lading, credit sales agreements, surety- ships, sales and leases of motor vehicles, dry-cleaning contracts, building contracts and the so-called "ticket cases". [58]

Their major advantages in the business world are said to control not only the legal consequences of the particular contract, but also the consequences of all or most contracts of that type entered into by the contracts. These types of agreements also assist in reducing the uncertainties management faces and the extent of risk with regard to the company's legal liability to customers. [59]

Our legal writers have defined an exemption clause in a number of ways. *Claassen* defines it as *"is one inserted expressly or by implication in a contract with the object of exempting a party from liability in certain circumstances"*. [60]
Van der Merwe et al give the following definition to exemption clauses, namely: *"..... are terms which exclude or limit the liability of a contractant, such as liability for mis-representation, liability to appose by the naturalia of a specific contract, or liability for*

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57 Van der Merwe et al (2003) 214-216, 225-226; Kerr (1998) 400; Christie (1996) 204-205; Delport "Exemption Clauses: The English Solution" *De Rebus* (December 1979) 641; Kahn (1988) 33-34; Lubbe and Murray (1988) 34; O'Brien "The Legality of Contractual terms exempting a contracting party from liability arising from his own or his servant's gross negligence or dolus" *TSAR* (2001) 3 597; Turpin "Contract and Imposed Terms" SALJ (1956) 144; Ramsden "The Meaning of Mutual Mistake and Exemption Clauses" *SALJ* (1975) 139; Lotz "Caveat Subscriptor: Striking down exemption clauses" *SALJ* (1974) 421-424; Van Loggerenberg *Unfair Exclusion Clauses in Contracts: A Plea for Law Reform Inaugural Lecture University of Port Elizabeth* (1987) 1-5; Kahn "Standard-form Contracts" *Businessman's Law* (November 1971) 49-50; Wille and Millen *Mercantile Law of South Africa* (1984) 34; Van Dorsten "The Burden of Proof and Exemption Clauses" 1984 (47) *THRHR* 36.

58 Kahn (1988) 33-34; Kahn "Imposed terms in tickets and notices" *Businessman's Law* (May 1974) 159; Boberg "A Chapter of Accidents" *Businessman's Law* (June 1976) 183-184; O'Brien *TSAR* (2001) 3 597; Kahn "Standard form Contracts" *Businessman's Law* (November 1971) 49; Van Dorsten (1984) (47) *THRHR* 36.

59 Van der Merwe et al (2003) 225; Christie (2006) 204; Delport (1979) 641; Kahn (1988) 34; Van Loggerenberg (1987) 2-3; Van Dorsten 1984 (47) THRHR 36.

60 Claassen *Dictionary of Legal Words and Phrases* Vol. 2 D-I (2003).

breach of contract." [61]

Delport attaches the following definition to an exemption clause, namely: *"an exemption clause in a contract is a clause whereby the contractual and/or delictual liability of one party is either totally excluded or partially restricted."* [62]

The use of exemption clauses in standard form contracts in which the one contracting party is virtually capable of exempting himself/herself/itself, unilaterally, from liability to the detriment of the other contracting party, has often been the subject of much criticism by our legal writers. [63]

It is especially due to the circumstances which have so often been created, in which, enterprises with stronger bargaining power exploited the weaker party by making use of standard contracts with exclusionary clauses contained therein, that legal writers came out in force, voicing their opinion against the allowance of such traps to be operated unchecked. In turn the legal writers also sought protection for the public against the abuses of exemption clauses by advocating limits for their operations and by interpreting exemption clauses narrowly. [64]

The South African Common Law has recognized various factors and scenario when exemption clauses in standard form contracts are generally regarded as undesirable and unreasonable. The courts and the legislature have also developed a number of methods of limiting its effect or even striking it down. [65]
The factors include lack of consensus between the parties to the contract; where consensus have been obtained in an improper manner; the exemption clause is framed so widely that the undertaking lacks the necessary certainty; the exemption clause is contrary

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61 Van der Merwe et al (2003) 214.

62 Delport *De Rebus* (1979) 641.

63 Delport *De Rebus* (1979) 641; Van der Merwe et al (2003) 214; Kerr (1998) 400; Christie (1996) 204; Kahn (1988) 34; Lubbe and Murray (1988) 340; Van Loggerenberg (1987) 30-4.

64 Christie (1996) 204; Van der Merwe et al (2003) 214; Kerr (1998) 404-406; Delport (1979) 641; Kahn (1988) 34; Lubbe and Murray (1988) 340; Aronstam (1979) 33-36; Turpin (1956) 73 SALJ 144; Van Loggerenberg (1987) 4-5.

65 Van der Merwe et al (2003) 214-216; Christie (1996) 204-211; Delport (1979) 641; Kahn (1988) 34; Farlam and Hathaway (1988) 340; Turpin (1956) 145; Van Loggerenberg (1987) 6-7; Kahn "Standard form contracts" *Businessman's Law* (1971) 50; Kahn "Imposed terms in tickets and notices" (1974) 159.

to public policy, etc. [66] These factors and other factors identified will be discussed comprehensively in the succeeding Chapter.

The first method by which the courts endeavour to confine exemption clauses within reasonable bounds is public policy. [67]

The second method by which the courts endeavour to confine exemption clauses within reasonable bounds is by interpreting them narrowly. This method is particularly applicable to clauses that do not specifically set out the legal grounds for liability, from which the exemption is granted. In interpreting such a clause, the court first considers the nature of the contract, in order to decide what legal grounds of liability would exist in the absence of the clause (for example strict liability, negligence, gross negligence) and 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 which involves the least degree of blameworthiness. [68]

In South Africa, legislative control over exemption clauses is restricted to consumer protection legislation, which includes the *Credit Agreement Act*, the *Alienation of Land Act*, and the *Insurance Act*. [69]

More recently the *Consumer Protection Bill* [70] published by the Department of Trade and Industry in a progressive piece of legislation, highlights the need to protect the historically disadvantages persons and to protect the interest of consumers. The Bill focuses especially, on the curtailment of clauses exempting contracting parties from liability. The Bill lays down criteria for the courts to consider before pronouncing that a term or the contract is unfair or unreasonable. The criteria include the bargaining strength of the parties relative to each other and whether sufficient notice was given to the contracting party who signs to his/her detriment.

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66 Van der Merwe et al (2003) 214-215.

67 Van der Merwe et al (2003) 204-205; Lubbe and Murray (1988) 340.

68 Christie (2003) 209; Lubbe and Murray (1988) 340.

69 S 6 (1)(c) and (d) of Act 75 of 1980 (which prohibits the inclusion in a credit agreement terms, exempting a grantor of credit from liability for acts, omissions or representations; S 15(1)(b) and (c) of Act 66 of 1981, S63 of Act 27 of 1943.

70 Government Gazette 28629 GN R489, 15 March 2006.

11.3.1.2 Case Law

The spirit of the South African contractual jurisprudence has very much been influenced by English Law in that, South African judges, have throughout the centuries often resorted to the doctrine of freedom of contract as a starting point. English Law principles have then often been relied upon and subsequently adopted by the South African Courts. [71]

There can be no doubt, in receiving standard form contracts with exclusionary clauses built in it, English Law rules and principles have been further entrenched in the South African Law of Contract. [72]

Today, in all spheres of life, including insurance contracts, contracts involving travelling, commercial contracts, especially, in the so-called "ticket cases" or "owners risk" cases involving motor vehicles, it is a common feature of written contracts or notices that the person drafting the document or placing stencilled warnings on the walls, will seek to absolve himself/herself/itself wholly, or in part, from liability under the contract or from liability for a delict connected with the contract. [73]

The rationale for such exemption clauses is they are said to reduce the uncertainties for which management will have to make allowances in its operations, planning and costing, by seeking to define, as closely as possible, the extent of the company's legal liability to customers.

Quite recently there appears to be some signs of change in South Africa when both, the Supreme Court of Appeal [74] and the Constitutional Court, [75] considered a micro-lending

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71 *Henderson v Hanekom* (1903) 20 SC 513 at 519; *Osry v Hirsch, Loubser and Co Ltd* 1922 CPD 53; *Wells v South African Allumenite Company* 1927 AD 69.

72 *Burger v Central South African Railways* 1903 TS 571; *Mathole v Mothle* 1951 (1) SA 456 (T).

73 In the so-called "owners risk" cases and "ticket" cases see *Weinberg v Olivier* 1943 AD 181; *Rosenthal v Marks* 1944 TPD 172; *Essa v Divaris* 1947 (1) SA 753 (AD); *King's Car Hire (Pty) Ltd v Wakeling* 1970 (4) SA 640 (N); *Kemsley v Car Spray Centre (Pty) Ltd* 1976 (1) SA 121 (SEC); *George v Fairmead (Pty) Ltd* 1958 (2) SA 465 (A); *Central South African Railways v McLaren* 1903 TS 727; *Bristow v Lycett* 1971 (4) SA 223 RA; *Durban's Water Wonderland (Pty) Ltd v Botha and Another* 1999 (1) SA 982 (SCA); *Cape Group Construction (Pty) Ltd t/a Forbes Waterproofing v Government of the United Kingdom* 2003 (5) SA 180 (SCA); *Mzobe v Prince Service Station* 1946 NPD 138; *Dlovo v Brian Porter Motors Ltd t/a Port Motors Newlands* 1994 (2) SA 518 (C); *Citrus Board v South African Railways and Harbours* 1957 (1) SA 198 (A); *Wijtenburg Holdings, trading as Flaming Dry Cleaners v Bobr* 1970 (4) SA 197; *Glenburn Hotels (POT) Ltd v England* 1972 (2) SA 660 (RA); *Booysen v Sun International (Bophutswana) Ltd Case* 96/3261 WLD (Unreported).

74 *Bafana Finance Mabopane v Makwakwa and Another* 2006 (4) SA 581 (SCA).

75 See the minority judgement of Sachs J in *Barkhuizen v Napier* 2007 (5) SA 323 (CC).

agreement and a time-bar limitation clause as means to establish whether, in nature and effect, these types of clauses are unenforceable as against public interests or public policy. In the *Bafana case* the Supreme Court of Appeal concluded that a clause in a money lending contract (in the present case a micro-lending agreement) whereby the debtor purports to undertake not to apply for an order placing his/her estate under administration, in terms of s74 (1) of the Magistrate's Courts Act 32 of 1944, and to agree that the loan debt will not form part of an administration order for which he/she might apply, is unenforceable as being inimical to public policy. [76] In this case the court relied upon public interest in deciding whether a micro-lending agreement was *contra bones mores*. Consequently the court held that an agreement whereby a party purports to waive the benefits conferred upon him or her by statute and which deprives the party of such protection in conflict with the statutory provisions to be contrary to public policy.

In the *Barkhuizen case* the court dealt with the constitutionality of a time limitation clause in a standard form contract. The issues to be decided were firstly whether clause 5.2.5 in this standard form contract was contrary to public policy because it violates the right of the appellant to seek judicial redress and secondly, whether clause 5.2.5 limits the rights guaranteed in section 34 which guarantees a person a constitutional right of access to court and whether such limitation is reasonable and justifiable under section 36(1) of the Constitution. Clause 5.2.5 of the insurance policy provides *inter alia* that the insurance company, once they rejected liability for any claim, they would be released from liability unless summons was served on them within 90 days of repudiation. In arriving at its decision that clause 5.2.5 did not constitute an unreasonable and unjustified limitation of the constitutional right of access to court, the majority of the court per Ngcobo J laid down foundational principles for the proper approach to constitutional challenges to contractual terms. The court found that as a starting point the question needs to be answered whether the disputed provision is contrary to public policy? The court reasons that public policy represents the legal convictions of the community; it represents those values that are held most dear by the society. The values in turn are the values that underlie the Constitution which include the values of human dignity, the acknowledgement of equality and the advancement of human rights and freedoms and the rule of law. What public policy is and whether a term in a contract is contrary to public policy, must now be determined by reference to the values that underlie our constitutional democracy by referring to the provisions of the Bill of Rights. A term in a contract which is immoral to the values enshrined in our Constitution is contrary to public policy and is, therefore, unenforceable.

76 Para 21 at 588Z-589B.

The court consequently weighed up whether the time bar clause 5.2.5 was inimical to the values enshrined in our Constitution and contrary to public policy. More in particular, the court considered the value espoused by the rule of law in terms of section 34 of the Constitution that guarantees the right to seek the assistance of the courts. This the court found to be fundamental to the stability of an orderly society. Consequently, the court found that section 34 not only reflects one of the fundamental values that underlie our constitutional order, it also constitutes public policy. The court found support for this principle in the South African Common Law. Moreover, in the cases of *Schierhout v Minister of Justice* 1925 AD 417 and *Nino Binino v De Lange* 1906 TS 120 at 123-124 the courts have held that a term in a contract which deprives a party of the right to seek judicial redress is contrary to public policy. The question to beg was therefore, whether clause 5.2.5 was inimical to the values that underlie our constitutional democracy, as given expression to in section 34 and thus contrary to public policy? The court consequently found that despite the argument that the clause limits the applicant's right to judicial redress in court and thus offends public policy, that the clause as such does not deny the applicant the right to seek judicial redress. Although the clause limits the right of the applicant to seek judicial redress, it simply requires him to seek judicial redress within the period it prescribes failing which the respondent is redressed from liability.

In order to answer the question whether public policy tolerates time limitation clauses in contracts, the court held that time limitations are a common feature both in our statutory and contractual terrain. The court consequently found that neither in logic, nor in principle, can it be conceived why public policy would not tolerate time limitation clauses in contracts, subject to considerations of reasonableness and fairness. It was found by the court that, in general, the enforcement of unreasonable or unfair time limitation clauses will be contrary to public policy. Consequently the court looked at the notions of fairness and justice and the concept of ubuntu, the principle of freedom of contract and the maxim of *pacta sunt servande. The court also recognizes the* unequal bargaining positions which contractual parties often find themselves in. The court found that while it is necessary to recognise the doctrine of *pacta sunt servanda*, equally, courts should be able to decline the enforcement of a time limitation clause if it would result in unfairness or would be unreasonable. The court consequently relied on the objective facts in concluding that the enforcement of clause 5.2.5 would not be unjust. The court found, *inter alia*, that Mr Barkhuizen had all the information that was necessary for him to sue the insurance company and there was no evidence that the contract was not freely concluded between persons with equal bargaining power, or that Mr Barkhuizen was not aware of the clause, and consequently, in the circumstances, the clause was not unfair or unreasonable as

against public policy.

Sachs J dissenting, however, took an opposite view in holding that considerations of public policy, as animated by the Constitution, dictated that the time-bar clause, which limited access to courts, should not be enforced. Sachs J relied on the small print, often obscurely buried in standard form documents, the lack of consensus between the contracting parties, standing in unequal bargaining positions, as failing to comply with standards of notice and fairness which contemporary notions of consumer protection required in open and democratic societies as factors invalidating agreements. [77]

11.3.1.3 Legal Opinion

Exclusionary clauses have found wide application in the law of contract in South Africa today, especially in the usage of standard form contracts. [78]

The advantages in the usage of exemption clauses are said to lie in the control in the legal consequences of the particular contract as well as the consequences of all or most types of contracts in that class. It also reduces uncertainties for management in regard to the company's legal liability to customers. [79]

The rationale for the recognition of exclusionary clauses in the South African Law of Contract is founded upon the influence of English law principles on the South African law of contract, more particularly, the doctrine of freedom of contract. [80]

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77 Para 181 at 91-96.

78 Van der Merwe et al *Contract: General Principles* (2003) 214-216,225-226; Kerr *The Principles of the Law of Contract* (1998) 400; Christie *The Law of Contact in South Africa* (1996) 204-205; Delport "Exemption Clauses: The English Solution" *De Rebus* (December 1979) 641; Kahn *Contract and Mercantile Law* (1988) 33-34; Lubbe and Murray *Farlam and Hathaway Contract Cases, Materials and Commentary* (1988) 34; 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) 3 597; Turpin "Contract and Imposed Terms" *SALJ* (1956) 144; Ramsden "The Meaning of Mutual Mistake and Exemption Clauses" *SALJ* (1975) 139; Lotz "Caveat Subscriptor: Striking down exemption clauses" *SALJ* (1974) 421 424; Van Loggerenberg *Unfair Exclusion Clauses in Contracts: A Plea for Law Reform Inaugural Lecture University of Port Elizabeth* (1987) 1-5; Kahn "Standard-form Contracts" *Businessman's Law* (November 1971) 49-50; WIlle and Millen *Mercantile Law of South Africa* (1984) 34; Van Dorsten "The Burden of Proof and Exemption Clauses" 1984 (47) *THRHR* 36.

79 Van der Merwe et al *Contract: General Principles* (2003) 225; Christie *The Law of Contract in South Africa* (1996) 204; Delport "Exemption Clauses: The English Solution" *De Rebus* (December 1979) 641; Kahn *Contract and Mercantile Law* (1988) 34; Van Loggerenberg *Unfair Exclusion Clauses in Contracts A Plea for Law Reform Inaugural Lecture University of Port Elizabeth* (1987) 2-3; Van Dorsten "The Burden of Proof and Exemption Clauses" 1984 (47) *THRHR* 36.

80 For case law see *Henderson v Hanekom* (1903) 20 SC 513 at 519; *Osry v Hirsch, Loubser and Co Ltd* 1922 CPD 53; *Wells v South African Allumenite Company* 1927 AD 69.

From the definitions given to exemption clauses, it is clear that the main aim and objective of exemption clauses, in general, is to exclude or limit a contracting party from contractual and/or delictual liability. [81]

Today, in all spheres of life, including insurance contracts, contracts involving travelling, commercial contracts, especially, in the so-called "ticket cases" or "owners risk" cases involving motor vehicles, it is a common feature of written contracts or notices that the person drafting the document or placing stencilled warnings on the walls, will seek to absolute himself/herself/itself wholly or in part from liability under the contract or from liability for a delict connected with the contract. [82]

The inclusion of exemption clauses in standard-form contracts has however not escaped criticism. [83] One of the primary levels of criticism is aimed at the exploitation of the

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81 Claassen *Dictionary of legal words and phrases* Vol. 1 D-2 (2003); Van der Merwe et al *Contract: General Principles* (2003) 214-216; Delport "Exemption Clauses: The English Solution" *De Rebus* (December 1979) 641.

82 Kahn *Contract and Mercantile Law* (1988) 33-34; Kahn "Imposed terms in tickets and notices" *Businessman's Law* (May 1974) 159; Boberg "A Chapter of Accidents" *Businessman's Law* (June 1976) 183-184; O'Brien "The Burden of Proof and Exemption Clauses" *TSAR* (2001) 3 597; Kahn "Standard form Contracts" *Businessman's Law* (November 1971) 49; Van Dorsten "The Liability of Contractual terms exempting a contract from liability arising from his own servant's gross negligence or dolus" (1984) (47) *THRHR* 36. In the so-called "owners risk" cases and "ticket" cases see *Weinberg v Olivier* 1943 AD 181; *Rosenthal v Marks* 1944 TPD 172; *Essa v Divaris* 1947 (1) SA 753 (AD); *King's Car Hire (Pty) Ltd v Wakeling* 1970 (4) SA 640 (N); *Kemsley v Car Spray Centre (Pty) Ltd* 1976 (1) SA 121 (SEC); *George v Fairmead (Pty) Ltd* 1958 (2) SA 465 (A); *Central South African Railways v McLaren* 1903 TS 727; *Bristow v Lycett* 1971 (4) SA 223 RA, *Durban's Water Wonderland (Pty) Ltd v Botha and Another* 1999 (1) SA 982 (SCA); *Cape Group Construction (Pty) Ltd t/a Forbes Waterproofing v Government of the United Kingdom* 2003 (5) SA 180 (SCA); *Mzobe v Prince Service Station* 1946 NPD 138; *Dlovo v Brian Porter Motors Ltd t/a Port Motors Newlands* 1994 (2) SA 518 (C); *Citrus Board v South African Railways and Harbours* 1957 (1) SA 198 (A); *Wijtenburg Holdings, trading as Flaming Dry Cleaners v Bobo* 1970 (4) SA 197; *Glenburn Hotels (POT) Ltd v England* 1972 (2) SA 660 (RA); *Booysen v Sun International (Bophutswana) Ltd* Case 96/3261 WLD (Unreported). In other type of cases in which exclusionary clauses are contained in written contracts see *Stocks and Stocks (Pty) Ltd v T.J. Daly and Sons (Pty) Ltd* 1979 (3) SA 754 (A); *Wells v South African Alumenite Co* 1927 D 69; *Government of the Republic of South Africa v Fibre Spinners and Weavers (Pty) Ltd* 1978 (2) SA 794 (A); *Essa v Devaris* 1947 (1) SA 795 (A); *South African Railways and Harbours v Lyle Shipping Co Ltd* 1958 (3) SA 416 (A); *First National Bank of South Africa Ltd v Rosenberg* Case no 392/99 1 June 2001 (SCA) (Unreported); *East London Municipality v South African Railways and Harbours* 1951 (4) SA 466 (E); *Huges v SA Fumigation Co (Pty) Limited* 1961 (4) SA 799 (C): *Micor Shipping (Pty) Ltd v Treger Gold and Sports (Pty) Ltd and Another* 1977 (1) SA 709 (W); *Bok Clothing Manufacturers (Pty) Ltd and Another v Ladylands (Pty) Ltd* 1982 (2) SA 565 (C); *Union Spinning Mills (Pty) Ltd v Paltex Dye House (Pty) Ltd and Another* 2002 (4) SA 408 (SCA); *African Solar (Pty) Ltd v Divwatt (Pty) Ltd* 2002 (4) SA 691 (SCA); *Galloon v Modern Burglar Alarms (Pty) Ltd* 1973 (3) SA 647 (C); *Morrison v Anglo Deep Gold Mines Ltd* 1905 TS 775 779; *Melfort Morts (PVT) Ltd v Finance Corp of Rhodesia Ltd* 1975 (3) SA 267 (RA); *Ornalas v Andrews Cafe* 1980 (1) SA 378 (W); *Booysen v Sun International (Bophuthatswana) Ltd* Case no 96/3261 WLD (Unreported); *Newman v East London Town Council* 1895 EC 61; *Agricultural Supply Association v Olivier* 1952 (2) SA 661 (T); *Goodman Brothers (Pty) Ltd v Rennies Group Ltd* 1997 (4) SA 91; *Van der Westhuizen v Arnold* 2002 (6) SA 453 (SCA); *Afrox Bpk v Strydom* 2002 (6) SA 21 (A).

83 Delport "Exemption Clauses: The English Solution" *De Rebus* (December 1979) 641; Van der Merwe et al *Contract: General Principles* (2003) 214; Kerr *The Principles of the Law of Contract* (1998) 400; Christie *The Law of Contract in South Africa* (2003) 204; Kahn "Standard-form Contracts" *Businessman's Law* (1988) 34; Lubbe

enterprises with strong bargaining power of the weaker party. More especially, the allowance, of such traps, to be operated, unchecked. [84]

In this regard the South African legal writers have sought protection for the public against the abuses of exemption clauses by advocating limits for their operations. The said limits include, *inter alia,* interpreting exemption clauses narrowly and endorsing the South African common law position, namely, in instances where exemption clauses in standard form contracts are undesirable and unreasonable, to limit its effect or even striking it down in the interest of public policy. [85]

Although the legislature has also assisted in limiting the operations of exemption clauses in standard form contracts by creating consumer protection legislation including the *Credit Agreement Act*, [86] the *Alienation Land Act*, [87] and the *Insurance Act*, [88] it was generally been felt by South African consumers and academic writers that not enough had been done to protect the general public against abuse of enterprises with superior bargaining power. For that reason legislative reform is widely advocated wherein specific legislation is directed at specific abuses *inter alia* unreasonable and unconscionable contractual provisions. [89]

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and Murray *Farlam and Hathaway Contract Cases, Materials and Commentary* (1988) 340; Van Loggerenberg *Unfair Exclusion Clauses in Contracts: A Plea for Law Reform Inaugural Lecture University of Port Elizabeth* (1987) 30-4.

84 Christie *The Law of Contract in South Africa* (1996) 204; Van der Merwe et al *Contract: General Principles* (2003) 214; Kerr *The Principles of the Law of Contract* (1998) 404-406; Delport "Exemption Clauses: The English Solution" *De Rebus* (December 1979) 641; Kahn *Contract and Mercantile Law* (1988) 34; Lubbe and Murray *Farlam and Hathaway Contract Cases, Materials and Commentary* (1988) 340; Aronstam *Consumer Protection: Freedom of Contract and The Law* (1979) 33-36; Turpin "Contract and Imposed Terms" *SALJ* (1956) 144; Van Loggerenberg *Unfair Exclusion Clauses in Contracts: A Plea for Law Reform Inaugural Lecture University of Port Elizabeth (1987) 4-5.*

85 Van der Merwe et al *Contract: General Principles* (2003) 204-205, 209, 214-216; Christie *The Law of Contract in South Africa* (2003) 204-211; Delport "Exemption Clauses: The English Solution" *De Rebus* (December 1979) 641; Kahn *Contract and Mercantile Law* (1988) 34; Lubbe and Murray *Farlam and Hathaway Contract Cases, Materials and Commentary* (1988) 340; Turpin "Contract and Imposed Terms" *SALJ* (1956) 145; Van Loggerenberg *Unfair Exclusion Clauses in Contracts: A Plea for Law Reform Inaugural Lecture University of Port Elizabeth* (1987) 6-7; Kahn "Standard form contracts" *Businessman's Law* (1971) 50; Kahn "Imposed terms in tickets and notices" *Businessman's Law* (May 1974) 159; Fletcher "The Role of Good Faith in the South African Law of Contract" *Responsa Meridiana* (1997) 10.

86 S6 (1) (c) and (d) of Act 75 of 1980.

87 S15 (1) (b) and (c) of Act 66 of 1981.

88 S63 of Act 27 of 1943.

89 Hahlo "Unfair Contract Terms in Civil Law Systems" *SALJ*; Van der Merwe et al *Contract: General Principles* (2003) 216; Christie *The Law of Contract in South Africa* (2003) 15-17; Carstens and Kok "An Assessment of the

The most significant attempt was made by the *South African Law Reform Commission* in drafting draft legislation in an endeavour to regulate unfair contractual provisions which are unfair, unreasonable or unconscionable. [90] The said attempt it is submitted was in response to the reluctance shown by the South African courts to create new and equitable rules and to find just solutions to problems experienced in respect of fairness, unreasonableness, unconscionable-ness and oppressiveness. [91] More recently, the legislature also introduced the *Consumer Protection Bill* [92] in an attempt to promote the ethos of consumer welfarism. The Bill of Legislation, it is submitted, is specifically aimed at curtailing the negative effects of exemption clauses which are often detrimental to the poor or previously disadvantaged consumers.

More recently, the South African courts have also shown a tendency to look more critically at limitation and/or exemption clauses. The Supreme Court of Appeal in the case of *Bafana Finance Mabopane v Makwakwa and Another* [93] relied heavily on public interest in denouncing a micro-lending agreement as being inimical to public policy where a provision in a contract aimed to violate a statute.

Although the Constitutional court, in the majority judgement per Ngcobo J, in the case of *Barkhuizen v Napier,* [94] seemed to follow the old trend of the Supreme Court of Appeal, [95] in which great emphasis is placed on contractual freedom and the doctrine of *pacta sunt*

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use of disclaimers by South African Hospitals in view of constitutional demand, foreign law and medico-legal considerations" (2003) 18 *SAPR/PL* 430 at 455; Van den Heever "Exemption of liability of private hospitals in South Africa" *De Rebus* (April 2003) 47 at 48; Strauss (1991) Doctor patient and the law: A selection of practical issues 305 Aronstam; "Unconscionable Contracts: The South African Solution?" *THRHR* (1979) 2 at 42; Fletcher "The Rule of Good Faith in the South African Law" *Responsa Meridiana* (1997) 1 at 12-13; Van der Walt "Aangepaste Voorstelle vir 'n stelsel van voorkomende beheer oor kontrakteervryheid in die Suid-Afrikaanse Reg" 1993 (56) *THRHR* 65 at 66; Van Aswegen "The Future of South African Contract Law" (1994) 67 *THRHR* 458-459; Hawthorne "The Principle of Equality in the Law of Contract" 1995 (58) *THRHR* 157 176.

90 See The South African Law Commission Project 47 on *Unreasonable Stipulations in Contracts and the Rectification of Contracts* (1998) 57-58. See also the draft legislation *Unfair Contractual Terms Bill.*

91 See especially the cases of *Brisley v Drotsky* 2002 (4) SA 1 (A); *De Beer v Keyser and Others* 2002 (1) SA 877 (SCA) and *Afrox Healthcare Bpk v Strydom* 2002 (6) SA 21 (A).

92 Government Gazette 28629 GN T489, 15 March 2006.

93 2006 (4) SA 581.

94 2007 (5) SA 323 (CC).

95 See especially the cases of *Brisley v Drotsky* 2002 (4) SA 1 (A); *De Beer v Keyser and Others* 2002 (1) SA 877 (SCA) and *Afrox Healthcare Bpk v Strydom* 2002 (6) SA 21 (A).

servanda, Sachs J and Moseneke DCJ in two separate dissenting judgements appear to place greater emphasis on reasonableness and fairness in contract.

The attempt to provide legislation, it is further submitted, is the correct approach. For as long as the South African courts religiously cling to contractual autonomy at the expense of reasonableness and equity and show inconsistencies, the South African Law of Contract will remain in this cauldron of uncertainty. What is further indicated, it is submitted, is a paradigm shift in which fairness and equity becomes the underlying ethical value or controlling principle.

11.3.2 ENGLAND

11.3.2.1 Legal Writings

English legal commentators have throughout the years, repeatedly held the view that generally, exclusionary clauses, are very much part of the English Law of Contract. [96]

Exemption clauses first began to appear with some frequency, in the 19th century, in especially commercial contracts pertaining to, *inter alia,* the carriage of goods, bills of lading, insurance policies of insurance etc. [97]

With the discovery of standard form contracts, exemption clauses eventually weaved themselves into the said standard form contracts. [98] The rationale for absorbing exemption clauses in standard form contracts during the classical period was said to be founded upon the doctrine of freedom of contract, namely: that every person was free to enter into a contract with any person they chose and to contract on any terms they wanted, as it was generally accepted that parties were able to negotiate on an equal footing, contracting parties having legal bargaining power. They were equally expected to look after their own interests as they had a full understanding of the consequences of their actions and the

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96 Stone *Principles of Contract Law* (1998) 145; Stone *The Modern Law of Contract* (2003) 163; Beatson *Anson's Law of Contract* (2002) 436-437; Poole *Textbook on Contract Law* (2004) 195; O'Sullivan and Hilliard *The Law of Contract* (2004) 243; Furmston et al *Furmston's Law of Contract* (1986) 149; Treitel The Law of Contract (2003) 216; Yates and Hawkins *Standard Business Contracts: Exclusions and Related Devices* (1986) 4-6; Coote *Exception Clauses* (1964) 137-138; Atiyah *An Introduction to the Law of Contract* (1995) 310ff; Chin Nyuk-Yin *Excluding Liability in Contracts* (1985) 125ff; Waddams "Unconscionability in Contracts" *The Modern Law Review* Vol. 39 (July 1976) No 4 378-379; *The Law Commission and the Scottish Law Exemption Clauses* Second Report (1976).

97 Cheshire et al *Law of Contract* (1986) 22; Stone (2003) 220; Stone (1998) 143; Treitel (2003) 215.

98 Stone (2003) 29-220; McKendrick (2003) 163ff; Stone (1998) 145.

terms of the contract. [99]

Consequently, during the classical period, the contracting parties were empowered to modify, as they saw fit, the nature of the liability created. The more common means of modifying the usual liability were, to exclude any obligation to pay compensation or to limit the amount of compensation payable. [100] What followed was not only the exclusion or limit of the amount of compensation payable, but also, the incorporation of exclusionary clauses by which the contracting parties sought to avoid the consequences of their failure to perform their contractual obligation. [101]

An area in which it became customary to exclude liability, or to have very restricted liability for damages, was that of contracts involving the carriage of goods, for example, it may have been argued that the owner should be responsible for insuring the goods while in transit. In so doing, the carrier would have very restrictive liability for damages to the goods while they were being carried. [102]

Although these types of contracts found favour in the commercial world in that they were viewed *inter alia* as the product of good contractual planning, [103] nevertheless, they did not escape academic and judicial criticism. Much of the censure is founded upon the classical law assumption that contracting parties moved on a terrain of equal bargaining position whilst, in reality, it was not so. Upon closer scrutiny it has been identified that the idea of an agreement freely negotiated between the parties has given way to one of adherence in that, with the broadening of the usage of standard forms of contract, [104] the individual is

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99 Stone (2003) 219-224; McKendrick (2003 163; Stone (1998) 146; Poole (2004) 197; Beatson and Friedmann *Good Faith and Fault in Contract Law* (1997) 7-8; Cheshire et al (1986) 21-22; Standing Committee of Officials of Consumer Affairs Unfair Contract Terms - *A Discussion paper* (January 2004) 15-16; O'Sullivan and Hilliard (2004) 3-5.

100 Poole (2004) 197.

101 Beatson (2002) 436.

102 Stone (2003) 218; Stone (1998) 145.

103 Standing Committee of Officials of Consumer Affairs Unfair Contract Terms - *A discussion paper* (January 2004) 16. Other advantages include the reduction of transaction costs; allowing for lengthy and detailed contracts to be finalized with the minimum of time and by lay persons who are only required to negotiate the specifics such as price, description of goods and services and delivery times; they also bring a certain amount of understanding of trading practice. See also McKendrick (2003) 163-164; Stone (1998) 145; Poole (2004) 197; Treitel (2003) 215.

104 Each time an individual travels by air, bus or train, buys a motor vehicle, takes clothes to the dry cleaners, buys household goods, takes the lease of a house or flat, a standard form contract devised by the supplier, will be provided which the individual is either expected to accept in toto or, theoretically, go without, should the individual

found not to negotiate, but merely adheres to the standard form contract containing standard terms and conditions, including exclusionary clauses. [105]

Often the accepting party has therefore little choice as to whether to accept or not which may give the party relying on them a very broad exemption from liability, both in tort and in contract. [106] This practise has often lead to hardship in that the imposition of such exemption clauses may be particularly harmful in consumer contract, where the disequilibrium between the bargaining positions of the parties may be substantial. The consumer is thus left with no alternative but to accept the standard form of contract often to his/her/its detriment. [107]

Moreover, standard form contracts with especially consumers, are often contained in some printed ticket or notice or receipt, which is brought to the attention of the consumer at the time the agreement is made, leaving the consumer, very little time, nor, the energy to read the contract. Besides, even if the consumer did make the effort to read the said agreement, it would be of little assistance for the consumer as he/she could not vary the terms in any way. It so happens that it is not until some dispute arises between the parties to the contract that the weaker of the parties often realise that the standard form contract, agreed to, contain clauses which are unfair or unnecessarily one-sided to his/her detriment. [108]
A commercial practise also developed during the classical period that the weaker contracting party was often exploited by a stronger or more powerful contracting party who could exempt itself from any liability towards the weaker contracting party. The so-called `bargaining at arm's length', although generally recognised as an acceptable commercial practise, did not escape criticism, especially, in those instances where the object of the use of standard items with exclusionary clauses contained therein, had been the exploitation or

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choose not to sign the standard form of contract. See McKendrick (2003) 163.

105 McKendrick (2003) 163; Poole (2004) 198.

106 Stone (2003) 219-220; Often the document may seek unfair exemption from certain common law liability, and may, seek to deprive the other party of the compensation which that person may reasonably expect to receive for any loss or injury or damage arising out of the transaction. See McKendrick (2003) 164; or as Poole (2004) 198 puts it: *"..... Standard form contracts may be used to impose an exclusion or limitation of liability which has not been negotiated, and for which the person whose normal contractual rights are diminished has received no alternative benefit.*

107 Poole (2004) 198; McKendrick (2003) 164; Stone (1998) 145.

108 McKendrick (2003) 164; Standing Committee of Officials of Consumer Affairs Unfair Contract Terms - *A discussion paper* (January 2004) 16; Stone (1998) 145; Treitel (2003) 25; Poole (2004) 198; Cheshire et al (1986) 21-22.

abuse of the superior bargaining power of commercial suppliers when contracting with such consumers. Often the weaker party is obliged to accept the standard printed terms offered by the superior contracting party on a `take it or leave it basis'. [109]

The advent and growth of monopolies and restrictive practises saw the introduction of protective measures designed to counter the operations of monopolies and restrictive practises as well as matters of inequality of bargaining powers. [110]

The rationale for the introduction of protective measures aimed at curbing exploitative practises is described by *Tillotson*: [111]

"..... Where there is, as is frequently the case a significant degree of imbalance between the bargaining strengths of the parties freedom of contract becomes freedom to exploit or oppress. Equal treatment of unequals by the law results in injustice ....." [112]

The growth of consumer protection, fanned by pressure groups and parliament, especially during the 20th century, heralded in a new era in the law of contract, in that they were responsible for the shift in the so-called `individualism ethos', in which the individualist ethic was that contracting parties were expected to look after their own interests and to allow the best possible bargain to be executed, towards a consumer-welfare ethos in which the interests of consumers are taken more seriously. [113] Consequently, to counter the unfair or unnecessarily one-sided and detrimentally prejudicial standard-form contracts (often containing exemption clauses), judicial and legislative measures were introduced.

In so far as judicial measures are concerned, besides developing the common law principles of illegality, incapacity, duress, undue influence, mistake, misrepresentation and deceit, the

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109 Treitel (2003) 215; Beatson (2002) 165; Atiyah (1995) 16-17; Beale "Unfair Contract terms Act 1977" *British Journal of Law and Society* Vol. 5 No 1 (1978) 114 at 115.

110 Atiyah (1995) 19; Tillotson *Contract Law in Perspective* (1995) 40.

111 *Contract Law in Perspective* (1995) 40.

112 Tillotson *Contract Law in Perspective* (1995) 40.

113 O'Sullivan and Hilliard (2004) 4-6; Tillotson (1995) 7, 44 put the change *"to moral, political and economic forces and a change from a `market-individualist' philosophy to `consumer-welfarism'."* Adams and Brownsword (2004) 39 advocate that the tenets of consumer-welfarism are found upon reasonableness and fairness. Consumer-welfarism also represent that contracting parties should not mislead one another. They should act in good faith; a stronger [party should not exploit the weakness of another's bargaining position. In addition thereto no party should profit from his own wrong or be unjustly enriched and contracting parties who are at fault should not be able to dodge their responsibilities. See also Atiyah (1995) 26; Cheshire et al (1986) 23.

English courts endeavoured to alleviate the position of the recipient of the standard form contract, by requiring certain standards of notice in respect of ordinary terms and by construing the document wherever possible in that person's favour. [114]

The aforementioned is a subject of its own, which under discussion, can result into voluminous discourse. For the purpose of this research, I shall constrain myself to a general discussion of the judicial and legislative measures introduced.

Before introducing the first measure, it is of import to note that, traditionally, the approach of the English courts, with regard to exclusion clauses, was not to assess them on their merits. In other words, the courts would not look at the contract and say `we think this clause is unreasonable in its scope or unfair in its operation and therefore we will not give effect to it'. The reason for this approach was not to run counter to the general terms of `freedom of contract' which doctrine was of particular importance to the courts of the 19th century. [115]

The courts, however, developed and adopted formal rules relating to the determination of the contents of the contract and the scope of the clauses contained in it, which were used to limit the scope of exclusion clauses. [116]

The main rules designed by the English courts are `incorporation' and `construction'.

In so far as incorporation is concerned, the rule is that a clause cannot be effective to exclude liability if it is not part of the contract. The first task of the courts is often therefore to determine whether that written term can be regarded as part of the contract. In order to protect consumers and to limit the effect of exclusion clauses, the courts adopted strict rules as to the incorporation of terms. One such rule is that a party must have had reasonable notice of the exclusion clause at the time of the contract in order for it to be effective. [117] To determine whether reasonable notice was given the courts distinguished

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114 McKendrick (2003) 164; Stone (2003) 220ff; Treitel (2003) 215ff; Stone (1998) 145ff; Beatson (2002) 438ff; Poole (2004) 198; O'Sullivan and Hilliard (2004) 243ff; Atiyah (1995) 20ff.

115 Stone (2003) 220; Stone (1998) 145; Poole (2004) 199; Beale 1977; *British Journal of Law and Society* Vol. 5, No 1 (Summer 1978) 114 at 115-116; Coote (1964) 137.

116 Stone (2003) 220; Stone (1998) 145-146; Treitel (2003) 216; O'Sullivan and Hilliard (2004) 243; Poole (2004) 198-199.

117 Stone (2003) 221; Stone (1998) 145-146; O'Sullivan and Hilliard (2004) 243; Poole (2004) 200.

between written signed contracts and written unsigned contracts. In the first instance, the basic rule is that, subject to exceptions, the *caveat subscriptor* rule applies, namely, the contracting party who signs is straightforwardly bound by the terms contained in that document.

In the latter instance, the terms will only be incorporated if the party relying on this, has taken reasonable steps to bring the terms to the other party's notice. [118]

In order to determine whether reasonable steps had been taken, an objective test is necessary. Factors such as prior dealings between the parties to the contract, the timing when notice is given, the type of document, how onerous is the terms etc will indicate whether reasonable notice had been given. [119]

Once it has been established by the courts that a clause had been incorporated into the contract, the next issue to be determined is whether the clauses incorporated in the contract is effective to exclude or limit the liability of one of the contracting parties. In this regard English law has adopted and developed measures used by the courts namely, the Rule of Construction or otherwise known as the Rule of Interpretation. [120]

The rationale for introducing the Rule of Construction is said to counter the disparity between the bargaining power of consumers and large enterprises, especially those in which terms have been imposed upon consumers which are unfair in their application, and which exempt the enterprises putting forward the standard form document, either wholly or in part, from its just liability under the contract. [121]
In the past the courts applied extremely restriction rules to the interpretation of exclusion and limitation clauses.
What the courts did was to apply the *contra proferentem* principle with particular venom to exclusion clauses. The *contra proferentem* principle is viewed by academic writers not to be

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118 O'Sullivan and Hilliard (2004) 243-246; Poole (2004) 200; Stone (2003) 221; Stone (1998) 146ff; Treitel (2003) 164ff; McKendrick (2003) 164ff.

119 Stone (2003) 226; Stone (1998) 169; Treitel (2003) 221; McKendrick (2003) 169; Beatson (2002) 439; Poole (2004) 200.

120 Stone (2003) 226; Stone (1998) 169; Treitel (2003) 221; McKendrick (2003) 169; Beatson (2002) 439; Poole (2004) 200.

121 McKendrick (2003) 169; Stone (2003) 226; Stone (1998) 169; Treitel (2003) 221; Beatson (2002) 439; Poole (2004) 200.

unreasonable. [122]

The *contra proferentem* principle provides that, in the event of there being ambiguity in a contract term, the ambiguity is to be resolved against the party relying upon the term.

The effect thereof is that an ambiguously drafted exclusion 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. [123]

The courts also approached clauses which are said to exclude such liability on the assumption that it is `inherently improbable' that the innocent party would have agreed to the exclusion of the contract-breakers negligence. To have any effect, the contractual term in question, must exclude liability for negligence clearly and unambiguously. Where it does, and a contracting party is so protected from the consequences of its negligence, it is not permissible for the other party to disregard the contract and to allege a wider liability in tort. [124]

The position as regards exclusion of liability for negligence was significantly affected by the *Unfair Contract Terms Act* 1977 [125] as well as the *Unfair Terms in Consumer Contracts Regulations* 1994. [126] This, it is suggested, may mean that at least as far as consumers are concerned, the afore-discussed rules will be of less significance. The effect of the introduction of the said legislative measures is said to influence the courts in this way namely, unless a clause purporting to exclude negligence comply with the requirements of reasonableness, the courts are obliged to declare clauses to the contrary, void. [127]
Although the English legal writers suggest that in the commercial sphere, the courts will still give effect to a clause containing language which expressly exempts the person, in whose

122 Beatson (2002) 439; McKendrick (2003) 169.

123 Beatson (2002) 439; Stone (2003) 226; McKendrick (2003) 169; Treitel (2003) 22; Stone (1998) 150; Poole (2004) 200-201.

124 McKendrick (2003) 171; Beatson (2002) 444; Stone (2003) 227; Stone (2003) 227; Treitel (2003) 222; Beatson (2002) 444; O"Sullivan and Hilliard (2004) 267ff; Poole (2004) 203.

125 *Unfair Contract Terms Act* 1977, 52.

126 *Unfair Terms in Consumer Contracts Regulations* 1994 (S1 1994/159).

127 Stone (2003) 229; McKendrick (2003) 185-186; Stone (1998) 151-152; Beatson (2002) 441-442; Poole (2004) 208; Beale "Unfair Contract Terms Act" 1977; *British Journal of Law and Society* Vol 5, No 1 (Summer 1978) 114, 117-119; O'Sullivan and Hilliard (2004) 270; Treitel (2003) 222.

favour it was made, from the consequence of the negligence of his own servants, and equally, to the situation where the defendant is potentially directly liable for negligence. Nevertheless, in the consumer context, the courts, it is suggested, may be reluctant to find that attempts to exclude liability for failing to take reasonable care in the performance of a contract are reasonable, even where the negligence is the fault of the defendant's employee rather than the defendant personally. [128]

The effect thereof was the rules of incorporation and construction discussed earlier did not have any necessary effect on such a clause. [129]

A further measure introduced by the English courts concerning exclusionary clauses was that of the principle of fundamental breach. The doctrine of fundamental breach entailed that some breaches were so serious that no exclusionary clauses can cover them. [130] The rationale for the existence of the doctrine is said to lie in the fact that there are certain terms within the contract, which are so fundamental that there cannot be exclusion for breach of them, i.e., the one party to the contract, in such a case, has departed so far from the basic contractual obligation, that some courts felt that it could not be justifiable to allow him to exclude liability.

The doctrine of fundamental breach did not survive without criticism and the last vestiges of the fundamental breach rule of law were demolished in 1980 with the case of *Photo Production Ltd v Securio Transport Ltd* [131] in which, as will be seen during a later discussion, the court, referring to the *Unfair Contract Terms Act* 1977, drew a distinction between commercial matters when parties are not of unequal bargaining power and when risks are borne by insurance and that of the consumer, who bargains in an unequal

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128 Stone (2003) 229; Stone (1998) 152 emphasizes the fact that in commercial contracts involving businesses, parties to the contract *"negotiating at arms length should be expected to look after themselves"* as *"if they enter into contracts containing exclusion clauses they must be prepared to know what they are doing."* See further Beale "Unfair Contract Terms Act" 1977 *British Journal of Law and Society* Vol. 5, No 1 (Summer 1978) 114, 117-119; O'Sullivan and Hilliard *The Law of Contract* (2004) 272ff.

129 Stone (2003) 230-231; Stone (1998) 152-153; McKendrick (2003) 174-175 opines that at the heart of this doctrine is the principle that *"a party could only claim the protection of an exemption clause where he is carrying out his contract, not when he is deviating from it or is guilty of a breach which goes to the root of it."* See also O'Sullivan and Hilliard (2004) 267; Poole (2004) 206; Beale "Unfair Contract Terms Act 1977" *British Journal of Law and Society* Vol. 5, No 1 (Summer 1978) 114, 116.

130 Stone (2003) 230-231; Stone (1998) 152-153; Tritely (2003) 225ff; McKendrick (2003) 174; O'Sullivan and Hilliard (2004) 265; Beatson (2002) 449-450; Poole (2004) 206; Beale "Unfair Contract Terms Act 1977" *British Journal of Law and Society* Vol. 5, No 1 (Summer 1978) 114, 116.

131 (1980) AC 827.

bargaining position. In the former instance, legislative intervention dictates that the courts will not interfere and parties will be free to apportion the risks as they feel free, whereas, in the latter instance, the contracting party in an unequal bargaining position will receive the protection of the courts. [132]

The legislative measures introduced included the enactment of the *Unfair Contract Terms Act* (UCTA) 1977, which proved to be a major addition to the mechanisms for controlling exemption clauses. [133] The background to the enactment of the said legislation is of particular significance for this field of study and especially, to find answers to the focal point of this thesis, one of which is to establish whether legislative intervention is not perhaps indicated in controlling exemption clauses, more especially, exclusionary clauses in hospital contracts exonerating the hospital and/or its staff from liability, notwithstanding their negligent acts.

Despite the common law measures introduced to curb the unfair consequences which exclusionary clauses brought sometimes in the law of contract, the courts were not always consistent in applying, especially, the rules of construction. Hence, the courts were sometimes criticised for *".....adopting, artificial constructions or to stray beyond merely seeking the ordinary meaning of the words used."* [134] Consequently, the British Government appointed the Law Commission to investigate the unfair consequences of exclusionary clauses.

Other factors which motivated the British Government to appoint the *Law Commission and the Scottish Law Commission,* in 1969, to investigate the possible control of exemption clauses in contract, included:

Firstly, to investigate the gap between the classical theory of contract law, in which the notion of freedom of contract is advocated, which influences the belief in individually negotiated agreements as a starting point and reality, which includes the ills modern standard-form contracts bring, i.e. a signature on a pre-printed document, drawn up in

132 Poole (2004) 207-208; Stone (1998) 155-156. See also Treitel (2003) 225.

133 Poole (2004).

134 Poole (2004) 208; O'Sullivan and Hilliard (2004) 264; Beale "Unfair Contract Terms Act" *British Journal of Law and Society* Vol. 5 No 1 (Summer 1978) 114, 115 opines that *"because of their adherence to the notion of freedom of contract the courts were sometimes obliged to uphold unfair clauses provided they have been incorporated in the contract"* Stone (1998) 151-152; Stone (2003) 229; *The Law Commission and The Scottish Law Commission Exemption Clause Second Report* (Report No 69 1976) 16.

advance by the other party, does not necessarily indicate knowledge of the contracts, let alone understanding of them. Often this form of contract can be abused as the party drawing up the contract may insert clauses especially restricting the others' rights, without the other contracting party realising, because he does not have the time to read or the skill to understand the document. [135]

Secondly, even if the standard form had been read and understood, some of the standard form contracts fits ill with the inequality of bargaining power, in that, the individual consumer or small businessman may well find that he is given no opportunity to negotiate the one-sided set of terms on which the other will contract, but that he must *"take it or leave it"*. This often leads to the stronger party choosing to dictate to the weaker, often resulting in the abuse of bargaining power. It is, then, often the case involving non-negotiable standard form contracts containing clauses limiting or excluding the liability of the party who has drawn up the form. [136]

Thirdly, there were, save for a number of statutory provisions dealing with special cases, no restriction, either by statute or at common law, on the freedom of a person to exclude or restrict a duty or obligation which he would otherwise owe to another to take reasonable care or to exercise reasonable skill. Such a lack of restriction and the resultant consequence, impacts negatively on the maintenance of high standards of performance. [137] The commission, after hearing submissions from a wide range of academics, members of the legal profession, the judiciary and other interested parties considered whether to recommend that a stricter form of control be instituted and, if so, what form should such measures take? The commission subsequently resolved that:

"44. The comments we have received leave us in no doubt that clauses or notices exempting from liability for negligence are in many cases a serious social evil and our review of the powers at present at the disposal of the court for dealing with such clauses shows that they are far from adequate. The case for some stricter form of control seems to us to be unanswerable." [138]

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135 Beale "Unfair Contract Terms Act 1977" *British Journal of Law and Society* Vol. 5 No 1 (Summer 1978) 114, 115; *the Law Commission and the Scottish Law Commission Exemption Clauses Second Report* (Report No 69 1975) 4.

136 Beale "Unfair Contract Terms Act 1977" *British Journal of Law and Society* Vol. 5 No 1 (Summer 1978) 114, 115; *the Law Commission and the Scottish Law Commission Exemption Clauses Second Report* (Report No 69 1975) 4.

137 *The Law Commission and the Scottish Law Commission Exemption Clauses Second Report* (Report No 69 1975) 4, 15.

138 *The Law Commission and The Scottish Law Commission Exemption Clauses Second Report* (Report No 69 1975) 19.

Some of the salient factors impacting upon the resolution taken by the law commissions include:

(1) Although the doctrine of freedom to contract has entrenched itself, in common commercial practise in England and Scotland, in which no restriction, either by statute or at common law, is placed on a contracting party to exclude or restrict a duty or obligation which he would otherwise owe to another to take reasonable care, or exercise reasonable skill, an unlimited or unrestricted freedom is likely to operate unreasonably and in many instances they operate against the public interest. [139]

(2) The unreasonableness which exclusionary clauses bring, stem from the fact that, all too often, they are introduced in ways which result in the party affected by them remaining ignorant of their presence or import until it is too late. But, notwithstanding the fact that, even if he knows of the exemption clause, he will often be unable to appreciate what he may lose by accepting it. Moreover, he may not have sufficient bargaining strength to accept it. [140]

(3) The notion that there should be complete freedom to contract is not an acceptable principle, as, in reality and especially in commercial contracts; parties are not negotiating from positions of mentally equal strength and not advised as to the legal consequences of the contract. Moreover, often one of the contracting parties may not have sufficient bargaining strength to refuse to accept it. In contracts containing exclusion clauses, the position is often abused and the misuse of these clauses is objectionable and sometimes unjustified. [141]

(4) Exemption clauses may both take away rights, which social policy requires that a party should have, and mislead him into thinking he has more rights than is actually the case, by restricting rights apparently conferred by other parts of the agreement. [142]

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139 *The Law Commission and the Scottish Law Commission Exemption Clauses Second Report* (Report No 69 1975) 4, 15.

140 *The Law Commission and the Scottish Law Commission Exemption Clauses Second Report* (Report No 69 1979) 4.

141 *The Law Commission and the Scottish Law Commission Exemption Clauses Second Report* (Report No 69 1975) 4, 15, 20.

142 *The Law Commission and the Scottish Law Commission Exemption Clauses Second Report* (Report No 69 1975)

(5) Although the courts have long recognized that exemption clauses may have unreasonable consequences, yet, because of the doctrine of freedom of contract, felt constrained to accept the parties' rights to agree to such provisions, the courts nevertheless developed a number of rules of construction which have had the affect of claimants recovering damages for negligence despite the presence of exemption clauses. At the time, in a long series of cases, the courts have recognized that exemption clauses will be effective to exclude liability for negligence where the meaning is clear and unambiguous. Where the clause is capable of more than one meaning, the courts have often applied the general rule of construction, *contra proferentem* and resolved against the party relying on the clause, which will, thus, be held not to exclude liability for negligence.

Despite the rules of construction being put in place, the difference of judicial opinion have led to inconsistencies which, in turn, showed up the lack of power possessed by the courts in dealing with exemption clauses which, at times, proved to be a serious social evil. [143]

(6) While the law recognises a general right to contract out of liability for negligence, the courts in England frequently refuses to give effect to an exemption clause where there has been a breach of the contract of which the clause forms part, if the breach is sufficiently serious to justify the application of the doctrine of "fundamental breach". [144]

The existence of the doctrine of "fundamental breach", as previously stated, did not escape criticism from the courts, academic writers and the Law Commission alike. The Law Commission found its application to be most unsatisfactory, in that, it was found to be an unacceptable paradox that a contractual clause, freely negotiated and commercially reasonable, which was clearly intended to cover an event, is to be deprived of effect when the event does happen. [145]

Paris 143-146; Beale "Unfair Contract Terms Act 1977" *British Journal of Law and Society* Vol. 5 No 1 (Summer 1978) 114, 115.

143 *The Law Commission and the Scottish Law Commission Exemption Clauses Second Report* (Report No 69 1975) Paras 38-39.

144 *The Law Commission and the Scottish Law Commission Exemption Clauses Second Report* (Report No 69 1975) Paras 38-39.

145 *The Law Commission and the Scottish Law Commission Exemption Clauses Second Report* (Report No 69 1975)

Having considered what form of control was desirable, the Commission concluded that a general scheme of control was needed and that it ought to take the form of a reasonableness test that would apply to exemptions from liability, in both consumer and commercial contracts.

The following circumstances are said to be fair and reasonable whilst the converse circumstances might perhaps indicate that it is not:

"(a) that the bargaining position of the person against whom the clause is invoked was stronger than that of the person invoking it;

(b) that it was reasonable in the circumstances to expect the person against whom the clause is invoked rather than the person invoking it to have insured against the loss that has occurred;

(c) that the person seeking to rely on the exemption clause had offered the other party an alternative contract without the exemption clause, at a fair, increased rate;

(d) where the exemption clause operates in the event of breach of contract, that the breach was due to a cause over which the party relying on the clause had no control;

(e) where the exemption clause operates in the event of negligence, that the party against whom it is invoked could be expected to be aware of the activities of the other which might give rise to a risk of negligence and of the possible consequences of such negligence;

(f) where the exemption clause takes the form of requiring the party again whom this invoked to comply with a time limit, that such a time limit is necessary to safeguard the position of the person seeking to rely on the clause;

(g) that the clause did not exclude liability but only imposed an upper limit." [146]

The Law Commission also resolved that, in some special cases however, there should be control in the form of a complete ban on such exemptions. [147]
In so far as commercial contracts are concerned, the commission resolved that there should be selective control over commercial contracts instead of outright control. The underlying reasons for the commissions were summarised by the commission as follows:

"(i) It encroaches upon the important principle of freedom of contract only in those areas where there is

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pares 41-43, 66 found that its application is *".... Uncertain and in some respects unsatisfactory in its operation".*

146 *The Law Commission and the Scottish Law Commission Exemption Clauses Second Report* (Report No 69 of 1975) Para 188.

147 *The Law Commission and the Scottish Law Commission Exemption Clauses Second Report* (Report No 69 of 1975) Para 45-46.

evidence of abuse of that freedom. Any interference with such a fundamental principle must be justified by cogent evidence of existing injustice or unfairness;

(ii) *It has the advantage that it allows all kinds of unfair contractual provisions, and not only exemption clauses, to be dealt with;*

(iii) *It is more effective than a ban on exemption clauses since that could be evaded by skilfully drawn provisions which so define and delineate the rights and obligations of the parties to the contract as to achieve the same result as an exemption clause;*

(iv) *there is already legislative control in certain areas where its practicability and efficiency have already been demonstrated."* [148]

With regard to consumer contracts, the commission resolved that a total ban is also not indicated, despite the argument that a private consumer is at a serious disadvantage in the matter of bargaining power and he has no alternative but to accept the terms and conditions of a standard form contract imposed on him by a monopolistic industry. The commission found that suppliers are not all monopolists and customers are sometimes given a choice between accepting the risk and leaving the risk with the supplier. [149]

The commission, consequently, proposed that general control for commercial and consumer contracts should be governed by the reasonableness test as it would allow for flexibility, enabling account to be taken of the great variety of situations. [150]

The commission also found that there are, however, certain situations where the reasonableness test would be inadequate and where a complete ban on exemption clauses is indicated. These situations included an outright ban on clauses totally excluding liability for death or personal injury due to negligence. The commission reached it's conclusion by contending that *"a civilised society should attach greater importance to human person than to property."* [151]

The commission also concluded:

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148 *The Law Commission and the Scottish Law Commission Exemption Clauses Second Report* (Report No 69 of 1975) Paras 48-50.

149 *The Law Commission and the Scottish Law Commission Exemption Clauses Second Report* (Report No 69 1975) Par 58-59.

150 *The Law Commission and the Scottish Law Commission Exemption Clauses Second Report* (Report No 69 1975) Paras 64-68.

151 *The Law Commission and the Scottish Law Commission Exemption Clauses Second Report* (Report No 69 1975) Par 72.

" ..... that to permit a person who owes such a duty to contract out of liability for the breach of it is tantamount to giving him a licence to behave carelessly. This, it may be said, is both unjust and socially inexpedient: unjust because it deprives the person to whom the duty is owed of a right he is legally and morally entitled to: socially inexpedient because it tends to reduce standards of care and competence." [152]

Subsequent to the commission's recommendations in 1975, the *Unfair Contract Terms Act* (UCTA) [153] was enacted in 1977.

For the purpose of the research undertaken and the restricted space available, it is impossible to do more than describe in very broad outline the salient features of the Act. The Act itself falls into the class of legislation which *Beadle* [154] describes as *"..... Increasing the private rights of parties by making some inalienable and by permitting exclusion of others only if reasonable It also abolishes the unsatisfactory substantive doctrine of fundamental breach."* [155]

The significance of the Act is that it was the first general regime giving judges the power to interfere with the terms of a contract because they are substantially unreasonable. [156]

It has also been said that, for the first time, the courts had a general and direct means of control of the use of exemption clauses, in that the application of the *Unfair Contract Terms Act* 1977 may render an exemption clause either totally unenforceable or unenforceable unless shown to be reasonable. [157] The *Unfair Contract Terms Act* 1977 does not provide a general power to strike out a term which the court considers to be unreasonable or unfair. The aim of the *Unfair Contract Terms Act* 1977 is to target exemption clauses. [158]

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152 *The Law Commission and the Scottish Law Commission Exemption Clauses Second Report* (Report No 69 1975) Par 54.

153 Unfair Contract Terms Act 1977.

154 "Unfair Contract Terms Act 1977" *British Journal of Law and Society* Vol. 5 No 1 (Summer 1978) 114, 117.

155 Beadle "Unfair Contract Terms Act 1977" *British Journal of Law and Society* Vol. 5 No 1 (Summer 1978) 114, 117.

156 O'Sullivan and Hilliard (2004) 270; Poole (2004) 208; McKendrick (2003) 185; Beatson (2002) 453; Chitty (1999) Par 1-018.

157 Poole (2004) 209.

158 Chitty (1999) Par 1 018.

For the purpose of this research, I shall highlight the salient provisions of the Act, only in so far as they are relevant to the research undertaken.

It is important to note, in terms of the Act, the legislature has introduced the reasonableness test. In applying the reasonableness test, the question to be decided by the court is whether the term is a fair and reasonable one to have been 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'. [159]

In order to assist the court in determining whether a term satisfies the requirements of reasonableness, the Act sets out certain `guidelines' of circumstances to be taken into account. [160] These include *inter alia*:

(1) the strength of the bargaining positions 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;

(2) 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;

(3) 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);

With regard to the exclusion of liability for negligent acts resulting in death or personal injury, the Act provides:

> *"S2(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 ..... "* [161]

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159 S11 (1) of the *Unfair Contract Terms Act* 1977; McKendrick (2003) 194.

160 The *Unfair Contract Terms Act* 1977 S11 (2) Sched. 2. For the guidelines under the *Unfair Terms in Consumer Contracts Regulations* 1999 (S.I. No 2083), see post, p.200.

161 Section 2(1) of the *Unfair Contract Terms Act* (1977).

The effect of the provisions are where the obligation to take care arose in the course of a business, or from the occupation of premises used for business purposes, any term or notice excluding or restricting liability is invalid. It also applies to claims in either contract or tort. [162]

It is important to note that `business' referred to in S1 (3), referred to above, is given a broad definition by the Act (UCTA) 1977 S14 which provides that:

> *"S14 `Business' includes a profession and the activities of any government department or local or public authority;"* [163]

More recently, the United Kingdom also received into their domestic law the *Human Rights Act* 1998, which widely impacts on its civil and criminal law. The *Human Rights Act,* 1998, received royal assent on November 9, 1998 and mostly came into force on October 2, 2000. The aim of the act was said to give effect, in the United Kingdom, to the rights contained in the European Convention on Human Rights. [164] The act makes available, in the United Kingdom courts, a remedy for breach of conventional right, without the need to go to the European Court of Human Rights in Strasbourg.

The *Human Rights Act* 1998 is also said to reflect very closely, good practises adopted in the field of medical law and ethics in Britain. Any decisions taken by doctors on the basis of current ethical standards must be compliant with the *Human Rights Act,* in which the best interest of the patient is pivotal. [165]

When someone believes their rights have been violated the person so affected has recourse to the courts and tribunals in the United Kingdom. The courts and tribunals, in turn, are required to interpret the issue against the *Human Rights Act,* to ensure that the development of the common law in the United Kingdom is compatible with the *European*

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162 Section 2(1) of the *Unfair Contract Terms Act* (1977).

163 Sec 14 of the *Unfair Contract Terms Act* 1977; See also Beatson (2002) 157; Stone (1998) 162; Stone (2003) 236.

164 See the discussion of Murray Hunt "The horizontal effect of the Human Rights Act retrieved from "http://ea.wikipedia.org/wiki/human rights act 1998".

165 See the discussion of the Committee on Medical Ethics: British Medical Association. The impact of the *Human Rights Act* 1998 on medical decision making. London: British Medical Association 2000.

Convention Rights. It has also been suggested that the *Human Rights Act,* 1998, akin to the European Convention, is a `living instrument' and the issue to be interpreted must be interpreted in the light of present day conditions reflecting the changing social attitudes. In this regard, where a patient's interests are affected, it is suggested that the interpretation of the issue must take the patient's expectations and ethical standards into consideration. [166]

The general approach, when decisions are taken by public authorities affecting the public, amounts to this, besides the range of questions considered traditionally, the following questions need to be asked namely:

(1) Are someone's human rights affected by the decision? And if so
(2) Is it legitimate to interfere with them? [167]

When an answer is sought from a medical perspective, it has been suggested that, when balancing conflicting rights, a careful assessment of the best interests of the patients need to be considered. [168]
Put differently, in assessing whether an interference of a right is legitimate, the competing interests must be carefully balanced.

11.3.2.2 Case Law

Judicial recognition of exclusion clauses in, especially, the infamous ticket cases, dates back to the late nineteenth and the early part of the twentieth century. The court, in the *Parker v South Eastern Railway,* [169] recognized the willingness of business enterprises to make use of sweeping exemption clauses in their dealing with consumers, which the court regarded as an acceptable practise. In this matter, a railway company sought to rely on an exclusionary clause after issuing a cloakroom ticket, at a railway station, containing conditions *inter alia* an exemption of liability. Deciding the matter on a question of law, the court of appeal found for the railway company.

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166 Committee on Medical Ethics Discussion on the *Human Rights Act* 1998 London: British Medical Association 2000.

167 See the discussion of Murray Hunt "The horizontal effect of the Human Rights Act retrieved from "http://ea.wikipedia.org/wiki/human rights act 1998".

168 See the impact of the *Human Rights Act* 1998 on medical decision making as discussed on the internet <http://www.hm90.gov.uk/acts/acts1998/19980042.htmhgopfs>.

169 (1877) 2 CPD 416.

During this period, the doctrine of freedom of contract played a major role in legal philosophy which, in turn, heavily influenced judicial thinking. This thinking, from a judicial view point, was influenced, especially, by the most celebrated dictum of Jessel M.R. in the case of *Printing and Numerical Registering Co v Sampson,* [170] in which the court held:

"If there is one thing which more than another public policy requires it is that man 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." [171]

Lord Bramwell, in the case of *Manchester, Sheffield and Lincolnshire Railway Company v HW Brown* [172] was just as adamant when he stated:

" ..... that an agreement between two people which has been voluntarily entered into by them cannot be unreasonable, but that the fact that it has been voluntarily entered into by them is the strongest possible proof that it is a reasonable agreement, and that I should require the strongest possible evidence, or something more even than a possibility, to show me that that was an unreasonable agreement." [173]

Nowhere can the attitude of the courts be seen more clearly in upholding clauses which attempted to limit or exclude liability in damages, not merely for breach of contract but also in tort, as far back as 1804 in the case of *Nicholson v William,* [174] in which Lord Ellenborough C.J. at 513, rejected the plaintiff's argument that the attempt of the defendant, a common carrier, to exclude his liability for the loss of goods carried beyond the value of $5 was "contrary to the policy of the common law, which has made common carriers responsible to an indefinite extent for losses not occasioned by ..... Act of God (or) the King's enemies." [175]

The legal philosophy, ranking the general principles of freedom of contract and the sanctity of contract as uppermost, still received considerable support in the modern judiciary in

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170 (1875), .R. 19 EQ 462 at 465.

171 *Printing and Numerical Registering Co v Sampson* (1875) L.R. 19 EQ 462 at 465; See also Lord Bramwill's dicta in *Manchester, Sheffield and Lincolnshire Ry v Brown* (1883) 8 APP CAS 703, 716-720; *Salt v Marquis of Northampton* (1892) A.C. 1, 18-19.

172 (1883) 8 App Cas 703.

173 *Manchester, Sheffield and Lincolnshire Railway Company v HW Brown* (1883) 8 App CAS 703 at 716; See also *Ranger v G.W. Ry Co* (1854) H.L.C. 72, 94-95, 118-119 in which the court showed its reluctance to deviate from upholding the doctrine of freedom to contract.

174 (1804) 5 East 507.

175 *Nicolson v Williams* (1804) 5 East 507.

England.

This was prevalent in the case of *Swisse Atlantique Societe D'armenent Maritime SA v N.V. Rotterdamsche Kolen Centrale* [176] in which Lord Reid rejected the dicta that the doctrine of fundamental breach was a substantial rule of law, negative any agreement to the contrary (and capable of being used to strike down an exemption clause) on the ground, inter alia, that this would restrict *"the general principle of English law that parties are free to contract as they may think fit."* [177]

In 1980, in the same context, the court per Lord Diplock, in the case of *Photo Production Ltd v Securicor Transport Ltd,* [178] observed that:

> *"(a) basic principle of the common law of contract ..... is that parties to a contract are free to determine for themselves what primary obligations they will accept."* [179]

But, it was the problems presented by big businesses, who systematically introduced exclusionary clauses in which they excluded liability towards consumers, which necessitated the courts to view exclusionary clauses in a different light and, where necessary, to introduce rules devised to limit the effectiveness where the said clauses would bring about unfair or unreasonable consequences. [180]

Nowhere was this more prominent in the United Kingdom in which the courts sought to formulate a general criteria or standard according to which the fairness of a contract or one of its terms may be judged than the case of *Lloyds Bank Ltd v Bundy*. [181] Lord Denning MR delivering the judgement commented:

> *"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 unfair or transfers property for a consideration which is*

176 (1967) 1 A.C. 361.

177 *Swisse Atlantique Societe D'armement Maritime SA v Rotterdamsche Kolen Centrale* (1967) 1 A.C. 361 at 399.

178 (1980) A.C. 827, 848.

179 *Photo Production Ltd v Securicor Transport Ltd* (1980) A.C. 827, 848.

180 *McCutheheon v David Macbrayne*, Ltd (1964) 1 ALL E.R. 437; *Thorton v Sherlane Parking Ltd* (1971) 1 ALL ER 686.

181 1975 QB 326 (CA).

grossly inadequate, when his bargaining power is grievously impaired by reason of his own needs or desires, or by his own ignorance or infirmity, coupled with undue influences or pressures brought to hear 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 upon 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 bring to the other. I have also avoided any inference to the will of 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 restraints in which he finds himself." [182]

In this way Lord Denning expressed late-twentieth century legal ideology.

Lord Denning, in *Karsales (Harron) Ltd v Wallis,* [183] also curbed the doctrine of freedom to contract and, more especially, in the usage of exemption clauses when he stated:

"Notwithstanding earlier cases which might suggest the contrary, it is now settled that exempting clauses of this kind no matter how widely they are expressed, only avail the party when he is carrying out his contract in its essential respects. He is not allowed to use them as a cover for misconduct or indifference or to enable him to turn a blind eye to his obligations. They do not avail him when he is guilty of a breach which goes to the root of the contract." [184]

In *A Schroeder Music Publishing Co Ltd v Macaulay,* [185] the House of Lords clearly recognised the distinction between freely negotiated contracts and those negotiated on a "take it or leave it" basis and suggested that the latter calls for vigilance on the part of the courts, when Lord Diplock adopted the following test namely: "Was the bargain fair?" and continued:

" ..... 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." [186]

The measures put in place by the courts included two main rules namely; `incorporation' and `construction'.

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182 *Lloyds Bank Ltd v Bundy* 1975 QB 326 (CA) at 339; See also the remark made by Lord Reid in *A Schroeder Music Publishing Co Ltd v Macaulay* 1874 (3) ALL ER 616 116 723 and Lord Denning in *British Crane Hire Corporation Ltd v Ipswich Plant Hire Ltd* 1975 (1) QB 303 (CA).

183 (1956) 2 ALL E.R. 866.

184 *Karsales (Harron) Ltd v Wallis* (1956) 2 ALL ER 866.

185 (1974) 1 W.L.R. 1308.

186 *A Schroeder Music Publishing Co Ltd v Macaulay* (1974) 1 W.L.R. 1308 at 1315-1316.

In so far as `incorporation' is concerned, the first aspect to be determined is whether a written term, *inter alia*, an exclusionary clause, can be regarded as part of the contract. The courts have generally been concerned to limit the effect of exclusionary clauses, especially in regard to consumers and have applied fairly strict rules as to the incorporation of terms. Moreover, the rules are based on the general principle that a party must have had reasonable notice of the exclusion clause, at the time of the contract, in order for it to be effective. If, however, the content containing the clause has been signed by the plaintiff, there will be little that the courts can do.

The test for reasonable notice was stated in the case of *Parker v South Eastern Railway* [187] in which Mellish CJ formulated the test as follows:

"I am of the opinion, therefore, that the proper direction to leave to the jury in these cases is that if the person receiving the ticket did not see or know there was any writing on the ticket, he is not bound by the conditions, that if he knew there was writing, and knew or believed that the writing contained conditions, then is he bound by the conditions, that if he knew there was writing on the ticket, but did not know or believe that the writing contained conditions, nevertheless he would be bound, if the delivering of the ticket to him in such a manner that he could see there was writing upon it, was in the opinion of the jury reasonable notice that the writing contained conditions." [188]

In this case the proprietor of a cafe bought an automatic cigarette vending machine. She signed, but did not read, a sales agreement which contained an exemption clause "in regrettably small print". It was held that she was bound by the clause, so that she could not rely on defects in the machine, either as a defence to a claim for part of the price, or as entitling her to damages.

This forced the subject matter in *L'Estrange v Graucob*, [189] a case involving a clause which was in small print and very difficult to read, but, because the contract had been signed, the clause was held to have been incorporated. Scrulton LJ made it clear that in such cases, questions of `notice' were irrelevant:

"In cases in which the contract is contained in a railway ticket or other unsigned document, it is necessary to prove that an alleged party was aware, or ought to have been aware, of its terms and conditions. These cases have no application when the document has been signed. When a document containing contractual terms is signed, then, in the absence of fraud, or, I will add, misrepresentation, the party signing it is bound, and it is

187 (1877) 2 CPD.

188 *Parker v South Eastern Railway* (1877) 2 CPD.

189 (1934) 2 KB 394.

wholly immaterial whether he has read the document or not ..... " [190]

The principle of reasonable notice of exclusionary clauses came under discussion in the case of *McChutheon v David MacBayne Ltd,* [191] a case involving a contract of carriage of goods which did not contain an express term absolving carriers from liability for negligence. The court found that the contract of carriage was an oral contract. The court also found that it was necessary to bring the terms of the conditions to the attention of the other contracting party. But, stresses the court, actual, as opposed to constructive, knowledge is necessary. Lord Devlin stated the position as follows:

"..... but at least by proving knowledge the essential bargaining is made. Without knowledge there is nothing." [192]

In a similar case concerning the incorporation of an exception clause in an automatic car park notice, at an entrance to a car park, the court was asked to decide whether the exception clause had been incorporated in a contract. Subsequently, after hearing arguments in an appeal matter in the case of *Thorton v Sheelane Parking Ltd,* [193] the court held that the defendants were not able to avoid liability by relying on the exempting condition because, in order to show that the plaintiff was bound by the condition, it was necessary to show either, that he knew of it or that, the defendants had done what was reasonably necessary to draw it to his attention.

The court continued to state that where the condition was exceptionally wide and destructive of the plaintiff's rights, or was one which was not shown to be usual in that class of contract, it was not sufficient to show that the plaintiff had been given notice that the ticket was issued subject into conditions, it must be shown that adequate steps had been taken to draw his attention, in the most explicit way, to the particular exempting condition relied on. Upholding the appeal, the court held that the defendants had failed to show that the plaintiff knew of the condition or that they had taken sufficient steps to draw his attention to it.

Other factors influencing the courts' decisions in establishing whether an exclusion clause

190 *L'Estrange v Graucob* (1934) 2 KB 394.

191 (1964) 1 ALL E.R.

192 *McChutheon v David MacBrayne Ltd* (1964) 1 ALL E.R.

193 (1971) 1 ALL E.R. 686.

had been incorporated include:

The clause must be put forward at the time the contract is signed. If it is not put forward until after the contract has been made, then it clearly cannot be incorporated. [194] This issue came up for decision in the case of *Olley v Marlborough Court Hotel*. [195] The facts, briefly stated, amounted to: the claimant booked a room in the defendant's hotel. She later saw a notice in her bedroom exempting the defendants from liability for articles lost or stolen unless handed to the management for safe custody. It was held that, as the contract had been made at the reception desk when the defendants agreed to accept the claimant as a guest and as the notice in the room was only afterwards seen, this came too late to be incorporated into the contract. [196]

Incorporation by a `course of dealings' was considered in the case of *Kendell (Henry) and Sons v Lillico (Williams) and Sons Ltd,* [197] which dealt with a contract between buyers and sellers of animal feed. They had regularly contracted with each other, on three or four occasions each month, over a period of years. On each occasion a `sold note' had been issued by the seller, which put responsibility for latent defects in the feed on the buyer. The buyer tried to argue that it did not know of the clause in the sold note. The House of Lords subsequently held that it was bound, as a reasonable seller would assume that the buyer, having received more than 100 of these notes containing the clause, and having raised no objection to it, was agreeing to contract on the basis that it was part of the contract.

This position was, however, distinguished in the case of *Hollier v Rambler Motors* [198] where there had only been three or four contracts over a period of five years. It was held that an exclusion clause contained in an invoice, given to the plaintiff after the conclusion of an oral contract for car repairs, was not incorporated into the contract.

A similar approach was adopted by the House of Lords in the case of *McCutheon v MacBrayne,* [199] in which the plaintiff's agent had regularly shipped goods on the

194 *Roscorla v Thomas* (1842) 3 QB 234.

195 (1949) 1 KB 532.

196 (1969) 2 AC 31.

197 (1992) 2 QB 71; (1972) 1 ALL ER 399.

198 (1964) 1 WLR 125.

199 (1964) 1 ALL E.R. 437.

defendant's ship. On some occasions he was required to sign a `risk note' containing an exclusive clause, on other occasions the contract was purely oral. The agent arranged for the carriage of the plaintiff's car, which was lost as a result of the negligent navigation of the ship. No risk note had been signed and the House of Lords refused to accept that the exclusion clause could be incorporated from the agent's previous dealings. There was no consistent course of conduct sufficient to allow such an argument to succeed.

Another factor previously considered by the English courts when determining whether an exclusionary clause had been incorporated is where the clause is unusual. In this regard the courts have adopted an approach which requires an assessment of the nature of the usage, alongside the amount of notice given, therefore, the more unusual or more onerous the exclusion clause, the greater the notice that will be expected to be given. This principle was adopted in the case of *Spurling v Bradshaw* [200] in which Lord Denning commented that:

"The more unreasonable the clause, the greater the notice, which must be given of it. Some exclusion clauses I have seen would need to be printed in red ink on the face of the document with a red hand pointing to it before the notice could be held to be sufficient." [201]

The aforementioned approach was applied in the case of *Thornton v Sherlane Parking Ltd* [202] so that a clause displayed on a notice inside a car park, containing extensive exclusions, was held not to be incorporated into a contract which was made by the purchase of a ticket from a machine.

The exclusion clause, in this case, was very widely drawn and purported to cover negligently caused personal injuries (which the plaintiff had in fact suffered). As a result the court felt that the defendant needed to take more specific action to bring it to the attention of customers.

In the view of Megaw L.J.:

"Before it can be said that a condition of that sort, restrictive of statutory rights (under the Occupier's Liability Act 1957) has been fairly excluded there must be some clear indication which would lead an ordinary sensible person to realise, at or before the time of making the contract, that a term of that sort, relating to personal injury was

200 (1956) 2 ALL ER 121.

201 *Spurling v Bradshaw* (1956) 2 ALL ER 121 at 125.

202 (1971) 2 QB 163; (1971) 1 ALL ER 686.

sought to be included." [203]

In order to be effectively incorporated, the exclusion clause must also, generally, be contained or referred to, in something which can be regarded as a contractual document. This formed the subject of decision-making in the case of *Chapelton v Barry UDC,* [204] in which the court of appeal was tasked to decide whether a ticket could be regarded as a contractual document. The facts which came under the spotlight included: The plaintiff wished to hire a deck chair. He took a chair from a pile near a notice indicating the price and duration of time and requesting hirers to obtain a ticket from the attendant. The plaintiff did so, but when he used the chair it collapsed, causing him injury. It was accepted that the collapse of the chair was due to the negligence of the defendant (Barry UDC), but the council argued that it was protected by a statement on the ticket that: "*The council will not be liable for any accident or damage arising from hire of chair*". It was held by the Court of Appeal however, that the ticket was a mere receipt. It was not a document on which the consumer would expect to find contractual terms and the exclusion clause printed on it was therefore not incorporated. The purpose of the ticket was simply to provide evidence for the hirer that he had discharged his obligations to pay for the chair. It was, the court felt, distinguishable from, for example, a railway ticket which contains upon it the terms upon which a railway company agrees to carry the passenger.

More recently in *Interfoto Picture Library Ltd v Stelletto Visual Programmes Ltd,* [205] Interfoto Library hired 47 transparencies to Stiletto. The transparencies were despatched to Stilleto in a bag containing a delivery note, containing conditions, printed in small but visible lettering on the face of the document, including condition 2, which stated that a holding fee of $5 plus VAT per day will be charged for each transparency retained longer than 14 days. The daily rate per transparency was many times greater than was usual but nothing whatever was done by Interfoto to draw Stiletto's attention, particularly, to condition 2. Stilletto returned the transparencies 4 weeks later and Interfoto claimed $3,783.50.

The Court of Appeal held that the contract was made when, after the receipt of the transparencies, Stilletto accepted them by telephone. Although, to the extent the conditions were common form or usual terms, they were incorporated into the contract, it was held that condition 2 had not been incorporated. Bingham L.J. stated:

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203 *Thorton v Shoe Lane Parking Ltd* (1971) 2 QB 163; (1971) 1 ALL ER 686.

204 (1940) 1 KB 532; (1940) 1 ALL ER 356.

205 1989 QB 433.

"(Stiletto) are not to be relieved of liability because they did not read the condition although doubtless they did not, but in my judgement they are to be relieved because (Interfoto) did not do what was necessary to draw this unreasonable and extortionate clause fairly to their attention." [206]

The English courts developed a second rule as a means of judicial control over exclusionary clauses, namely, the rule of `construction' or sometimes referred to as the rule of `interpretation'. The rule operates as follows: Once it has been established that a clause has been incorporated into the contract, the wording of the clause is examined to establish whether the terms imposed upon the consumers are unfair in their application. As an aid at common law, the courts evolved certain canons of constructions which normally work against the party seeking to claim the benefit of the exemption. In the first instance, the courts usually apply a strict interpretation when examining a clause. For that reason, it has been suggested before the words of the exemption clause must exactly cover the liability which it is sought to exclude. For example, a clause excluding liability for breach of warranty will not exclude liability for breach of condition. [207]

This formed the subject matter for decision in the leading case of *Wallis, Son and Wells v Pratt and Haynes,* [208] in which the appellant bought seed described as `common English Sainfoin', subject to an exemption clause that the sellers give no warranty, express or implied, as to growth, description, or any other matters. The seed turned out to be Giant Sainfoin, indistinguishable in seed, but inferior in quality and of less value. The appellant was forced to compensate those to whom it had subsequently sold the seed and sued to recover the money lost. The respondent pleaded the exemption clause.

It was held by the House of Lords that, even though the appellant had accepted the goods and could therefore only sue for breach of warranty *ex post facto*, there was nevertheless, originally a breach of the condition implied by the section 13 of the *Sale of Goods Act* and this had not been successfully excluded.

In the second instance, the courts frequently applied the `*contra proferentem*' rule, which has the effect that the words in written documents are construed more forcibly against the party putting forward the document to be considered. In the case of exemption clauses this

206 *Interfoto Picture Library Ltd v Stilletto Visual Programmes Ltd* 1989 QB 433 at 445.

207 *Baldry v Marshall* (1925) 1 K.B. 260.

208 (1911) A.C. 394.

would be applicable to the party seeking to impose the exemption and there is doubt or ambiguity in the terms or conditions included in the clause.

In *Beck and Co v Szymanowski and Co,* [209] the contract provided that, goods delivered were, deemed to be in satisfactory condition unless complaint was made within fourteen days of receiving them. The clause was ineffective to exclude liability for short delivery (i.e. for goods not delivered) even though complaint was made more than fourteen days after receiving the goods.

In *Lee (John) and Son (Grantham) Ltd v Railway Executive,* [210] the lease of a railway warehouse contained a clause exempting the lessors from liability, `loss damage costs and expenses however caused (whether by act or neglect of the company or their servants or agents or not) which but for the tenancy hereby created would not have arisen'. Goods in the warehouse were damaged by fire, owing to the alleged negligence of the lessors in allowing a spark to escape from their railway engines. The lessors claimed that the clause exempted them from liability.

The Court of Appeal held that, applying the *contra proferentem* rule, the operation of the clause was confined by the words `but for the tenancy hereby created' to liabilities which arose only by reason of the relationship of landlord and tenant created by the lease. The clause was capable of a wider meaning, but, it had to be construed against the grantor and the defendants were not protected.

Although this rule rests on the existence of ambiguity in the meaning of the exemption clause, the courts have been resourceful in finding such ambiguity when it has suited them to be able to cut down the impact of a clause.

In *Houghton v Trafalgar Insurance Co Ltd,* [211] a car insurance policy did not give protection to cover damage occurring when the car was conveying `any load in excess of that for which it was constructed'. An accident occurred when the car, designed to carry five people, was carrying six. The Court of Appeal considered that `load' was ambiguous, and construed it against the insurers to limit it to excess weight, rather than excess passengers.

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209 (1924) AC 43.

210 (1949) 2 ALL ER 581. See also *Adams v Richardson and Starling Ltd* (1969) 1 WLR; *Tor Line A.R. v Allmans Group of Canada Ltd* (1984).

211 (1954) 1 QB 247.

A more recent example of this approach may be found in *Morley v United Friendly Insurance plc*. [212] An insurance policy excluded claims resulting from `wilful exposure to needless peril'. The Court of Appeal held that an intentional and risky act did not fall within the scope of the clause where the risk was modest and the party affected did not have time to assess the peril involved.

The *contra proferentem* rule is now expressly incorporated in the *Unfair Terms in Consumer Contracts Regulations* (1999). [213] It provides that:

"If there is doubt about the meaning of a written term, the interpretation which is most favourable to the consumer shall prevail."

However, this principle is excluded from operation in respect of pre-emptive challenges to clauses in standard forms.

In certain instances, when applying the *contra proferentem* rule, the courts have also adopted a policy to limit the scope of exclusion clauses by restricting the scope of the exclusion. In this regard, the courts have shown a reluctance to extend the scope of an exclusion clause to other liabilities. A person wishing to void liability has been required to be very precise in the use of language to achieve that aim. When applying the *contra proferentem* rule in these circumstances, the courts interpret an exclusion clause against the person putting it forward. [214]

In circumstances where the defendant seeks to exclude liability for negligence in the performance of a contract the courts have followed the approach by construing the exemption clause as extending to the ground alone, even if the words used are, *prima facie,* wide enough to cover negligence. [215]
The principles to be applied were set out by the Privy Council in *Canada Steamship Lines*

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212 (1993) 1 WLR 996.

213 Reg 7 (2) Si 1999/2083.

214 See *Andrews v Singer* (1934) 1 KB 17; *Wallis, Son and Wells v Pratt* (1910) 2 KB 1003.

215 *Alderslade v Hendon Laundry Ltd* (1945) KB 189 at 192; *Canada Steamship Lines Ltd v The King* (1952) A.C. 292 at 304; *Sonat Offshore S.A. v Amerada Hess Development Ltd* (1988) 1 Lloyd Rep 145, 157; *Shell Chemicals UK Ltd v PandO Roadtanks Ltd* (1995) 1 Lloyds Rep 297, 301; *Ailsa Craig Fishing Co Ltd v Malvern Fishing Co Ltd* (1983) 1 W.L.R. 964 at 970.

Ltd v The King. [216] The facts, briefly stated, included: This case involved a lease of a freight shed, provided that the lessee should `not have any claim against the lessor for damage to goods' in the shed. Owing to the negligence of the lessor's employees, a fire broke out and the lessee's goods in the shed were destroyed. The Judicial Committee of the Privy Council held that a strict liability was imposed upon the lessor by the Civil Code of Lower Canada and the exemption clause should be confined to that head of liability. The lessor was accordingly liable for the negligent destruction of the goods.

In this case Lord Morton included the following test:

"(1) if the clause contains language which expressly exempts the person in whose favour it is made (hereinafter called the preference) from the consequence 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 used are wide enough, in their ordinary meaning, to cover negligence on the part of the servants of the preferens;

(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 forceful or remote that the preference cannot be supposed to have desired protection against it, but subject to this qualification the evidence of a possible head of damage other than negligence is fatal to the preference: even if the words used are prima facie wide enough to cover negligence on the part of his servants." [217]

The introduction of the *Unfair Contractual Terms Act* 1977 and the existence of stricter statutory controls over exclusion clauses have indicated to the courts that there is no need for the rule of construction to be used in an artificial way. When businesses negotiate at arm's length to conclude commercial agreements containing exclusion clauses, they are pressured to know what they are doing and expected to look after themselves.

In *Photo Production Ltd v Securicor Transport Ltd,* [218] Lord Wilberforce commented that, in the light of parliamentary intervention to protect consumers (by means of the UCTA 1977):

"In commercial matters generally when the parties are not of unequal bargaining power, and when risks are normally borne by insurance, not only is the case for judicial intervention undemonstrated, but there is everything to be said, and this seems to have been Parliament's intention, for leaving the parties free to apportion the risks as they think fit and for respecting their decisions."

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216 (1952) AC 192.

217 *Canada Steamship Lines Ltd v The King* (1952) A.C. 292.

218 1980 AC 827; (1980) 1 ALL ER 556.

Lord Diplock, agreeing with Lord Wilberforce, commented that:

"In commercial contracts negotiated between businessmen capable of looking after their own interests and of deciding how risks inherent in the performance of various kinds of contract can be most economically borne (generally by insurance), it is, in my view, wrong to place a strained construction on words in an exclusion clause which are clear and fairly susceptible of one meaning only." [219]

In *Ailsa Craig Fishing Co. Ltd v Malvern Fishing Co*, [220] the House of Lords held that the question whether an exemption clause operated to limit a party's liability was one of construction of the contract, read as a whole. Towards this end, Lord Wilberforce suggested that a distinction should be drawn between two different types of exemption clause, viz.:

(i) an exclusion clause, whereby the parties alter the primary obligations which would otherwise arise under the contract, i.e., the parties agree not to undertake particular primary obligations and are therefore not liable for their non-performance;

(ii) a limitation clause, whereby the parties alter their secondary obligation to pay damages in the event of a breach of particular primary obligations of the contract, i.e., the parties agree to limit the damages otherwise payable as a result of a breach of the contract.

Lord Wilberforce considered that an exclusion clause should be "*rigidly and strictly*" construed, while a limitation clause should be given its "*natural*" meaning.

Lord Fraser agreed that limitation clauses need not:

" ..... be judged by the specially exacting standards which are applied to exclusion and indemnity clauses. It is enough that the clause must be clear and unambiguous." [221]

A vivid account of the history of the rule of construction was given by Lord Denning MR in *George Mitchell (Chesterhall) Ltd v Finney Lock Seeds Ltd*: [222]

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219 *Photo Production Ltd v Securicor Transport Ltd* 1980 AC 827 (1980) 1 ALL ER 556 at 568.

220 (1983) 1 ALL E.R. 101 at 104.

221 *Ailsa Craig Fishing Co Ltd v Malvern Fishing Co* (1983) 1 ALL E.R. 101 at 102-103; 105-106.

222 (1983) QB 284.

"None of you nowadays will remember the trouble we had when I was called to the Bar - with exemption clauses. They were printed in small print on the back of tickets and order forms and invoices. They were contained in catalogues or timetables. They were held to be binding on any person who took them without objection. No one ever did object. He never read them or knew what was in them. No matter how unreasonable they were, he was bound. All this was done in the name of "freedom of contract". But the freedom was all on the side of the big concern which had the use of the printing press. No freedom for the little man who took the ticket or order forms and invoices. The big concern said, "Take it or leave it". The little man had no option but to take it. The big concern could and did exempt itself from liability in its own interest without regard to the little man. It got away with it time after time. When the courts said to the big concern, "You must put it in clear words", the big concern had no hesitation in doing so. It knew well that the little man would never read the exemption clauses or understand them.

Faced with this abuse of power - by the strong against the weak -by the use of the small print of the conditions - the judges did what they could to put a curb upon it. They still had before them the idol, "freedom of contract". They still knelt down and worshipped it, but they concealed under their cloaks a secret weapon. They used it to stab the idol in the back. This weapon was called "the true construction of the contract". They used it with great skill and ingenuity. They used it so as to depart from the natural meaning of the words of the exemption clause and to put upon them a strained and unnatural construction. In case after case, they said that the words were strong enough to give the big concern exemption from liability, or that in the circumstances the big concern was not entitled to rely on the exemption clause. If a ship deviates from the contractual voyage, the owner could not rely on the exemption clause. If a warehouseman stored the goods in the wrong warehouse, he could not pray in aid of the limitation clause. If the seller supplied goods different in kind from those contracted for, he could not rely on any exemption from liability. If a ship-owner delivered goods to a person without production of the bill of lading, he could not escape responsibility by reference to an exemption clause. In short, whenever the wide words - in their natural meaning - would give rise to an unreasonable result, the judges either rejected them as repugnant to the main purpose of the contract, or else cut them down to size in order to produce a reasonable result." [223]

Lord Denning then continued to explain the position of exclusion clauses since the passing of the *Unfair Contract Terms Act* 1977 when he stated:

"We should no longer have to go through all kinds of gymnastic contortions to get round them."

Citing further some leading English cases he continued:

"A few years earlier, in Photo Production Ltd v Securicor Transport Ltd (1980) AC 827, 843 Lord Wilberforce had said much the same thing:

There were a large number of problems productive of injustice, in which it was worse than unsatisfactory to leave exception clauses to operate. Lord Reid referred to these in Swisse Atlantique Societe d'Armemente SA v Rotterdamsche Kolen Centrale NV 1 AC 361, 406, pointing out at the same time that the doctrine of fundamental breach was a dubious specific. But since then Parliament has taken a hand. It has passed the Unfair Contract Terms Act 1977. This Act applies to consumer contracts and those based on standard terms and enables exception clauses to be applied with regard to what is just and reasonable. It is significant that Parliament refrained from legislating over the whole field of contract. After this Act, in commercial matters generally, when the parties are not of unequal bargaining power, and when risks are normally borne by insurance, not only is the case for judicial intervention undemonstrated, but there is everything to be said, and this seems to have been Parliament's intention, for leaving the parties free to apportion the risks as they think fit and for respecting their

223 *George Mitchell (Chesterhall) Ltd v Finney Look Seeds Ltd* (1983) QB 284 at 296-297.

decisions."

Lord Denning then commented as follows:

"The lesson which I would draw from the development of the rules construing exemption clauses is that the judicial creativity, bordering on judicial legislation, which the application of that doctrine involved is a desperate remedy, to be invoked only if it is necessary to remedy a widespread injustice. Otherwise there is much to be said for giving effect to what on ordinary principles of construction the parties agreed." [224]

The doctrine of fundamental breach was also a means adopted by the English courts to curtail the unlimited usage of exclusionary clauses, in that some breaches of contract are so serious that no exclusion clause can cover them. The doctrine found its origin in shipping law, where there is strong authority that if a ship `deviates' from its agreed route, there can be no exclusion of liability in relation to events which occur after the deviation. [225]

The courts, as far back as 1838, also prevented a contracting party from relying on an exclusionary clause where the contract stipulated for the supply of peas and beans were provided instead. [226] The supplier, in such a case, had departed so far from the basic contractual obligation that the court felt that it could not be justifiable to allow him to exclude liability. Besides this form of the doctrine of fundamental breach which is concentrated at a particular term, a second form saw in its existence in the 1950's and beyond. The second form of the doctrine of fundamental breach does not look at a particular term which had been broken, but, at the overall effects of the breach which had occurred. Two cases illustrate the aspect of the doctrine:

In *Karsales v Wallis* [227] the contract was for the supply of a Buick car, which the plaintiff had inspected and found to be in good condition. When delivered (late at night), however, it had to be towed, because it was incapable of self propulsion. Amongst other things, the cylinder head had been removed, the valves had been burnt out and two of the pistons had been broken. The defendant purported to rely on a clause of the agreement which stated:

"No condition or warranty that the vehicle is roadworthy, or as to its age, condition or fitness for purpose is given by the owner or implied herein."

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224 *George Mitchell (Chesterhall) Ltd v Finney Look Seeds Ltd* 1983 QB 284 at 298-299.

225 *Joseph Thorley Ltd v Orchis SS Co Ltd* (1907).

226 *Chanter v Hopkins* (1838).

227 (1956) 1 WLR 936.

The court a quo held for the defendant, but the Court of Appeal reversed this. The majority of the court (Lord Denning reached the same conclusion, but on slightly different grounds) held that what had been delivered was not, in effect, a `car'. The defendant's `performance' was totally different from that which had been contemplated by the contract (that is, the supply of a motor vehicle in working order). There was, therefore, a breach of a fundamental term of the agreement and the exclusion clause had no application.

In the case of *Harbutt's Plasticine Ltd v Wayne Tank and Pump Co Ltd,* [228] the contract involved the supply of pipe work in the plaintiff's factory. The type of piping used was unsuitable and resulted in a fire which destroyed the whole of the plaintiff's factory. The obligation to supply piping that was fit for its purpose could clearly have been broken in various ways, not all of which would have led to serious damage to the plaintiff's premises. In this case, however, the consequences of the defendant's failure to meet its obligation in this respect were so serious, that the Court of Appeal regarded it as a `fundamental breach' of the contract, precluding any reliance on an exclusion clause.

In arriving at its decision the Court of Appeal had to deal with the views expressed by the House of Lords in *Swisse Atlantique Societe d'Armemente SA v Rotterdamsche Kolen Centrale NV*. [229] The case concerned a charter which included provisions whereby, if there were delays the charterer's liability was limited to paying $1,000 per day `demurrage'. The owners attempted to argue that the charterer's breach was so serious that the demurrage clause should not apply and that they should be able to receive their full losses. The House of Lords rejected this and in so doing, expressed strong disapproval of the argument that there was a substantive rule of law which meant that certain types of breach automatically prevented reliance on an exclusion claim.

Lord Denning, the architect of this doctrine, however remarked:

"When one party has been guilty of a fundamental breach of the contract, that by a breach which goes to the very root of it, and the other side accepts it, so that the contract comes to an end, or if it comes to an end anyway by reason of the breach, then the guilty party cannot rely on an exemption or limitation clause to escape from his liability for the breach."

228 (1970) 1 QB 447 at 467.

229 (1967) 1 AC 361; (1966) 2 ALL E.R. 61.

The *Harbutt's `Plasticine*' [230] judgement did not survive long as the House of Lords, when given a further opportunity to clarify the law in *Photo Production Ltd v Securicor Transport Ltd,* [231] demolished, by a careful analysis, the last vestiges of the fundamental breach rule of law. The facts briefly stated included: The plaintiffs owned a factory and engaged the defendants to provide security services, including a night patrol. Unfortunately, one of the guards, employed by the defendants to carry out these duties, started a fire, on the premises, which got out of control and destroyed the entire factory. Thus, rather than protecting the plaintiff's property, as they had been contracted to do, the defendants could be said to have achieved the exact opposite. The contract, however, contained a very broadly worded exclusion clause, which, on its face, seemed to cover even the very serious breach of the agreement which had occurred. The Court of Appeal took the view that this could not protect the defendants. There had been a fundamental breach and the exclusion clause was ineffective. The House of Lords, however, took the opportunity to state its position. Lord Wilberforce acknowledged (at p.843) that the doctrine of "fundamental breach" in spite of its imperfections and doubtful parentage [had] served a useful purpose' but went on, in the passage quoted by Lord Hoffman in BCCI v Ali, to state that there was no longer any need for the doctrine in the light of the enactment of the *Unfair Contract Terms Act*.

The final demise of the doctrine of fundamental breach was recognised in *George Mitchell (Chesterhall) Ltd v Finney Lock Seeds Ltd,* [232] when Lord Bridge stated that Photo Production *"gave the final quietus to the doctrine that a final breach of contract deprived the party in breach of the benefit of clauses in the contract excluding or limiting his liability."*

The position was also reconfirmed in *Edmund Murray Ltd v BSP International Foundations Ltd* [233] (1993) Con LR when Neil LJ stated:

> *"It is always necessary when considering an exemption clause to decide whether as a matter of construction it extends to exclude or restrict the liability in question, but, if it does, it is not permissible at common law to reject or circumvent the clause by treating it as inapplicable fundamental breach."* [234]

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230 *Harbutt's Plasticine Ltd v Wayne Tank and Pump Co Ltd* (1970) 1 QB 447 at 467.

231 (1970) 1 QB 447.

232 (1983) 2 AC 803.

233 (1993) 33 Con LR 1, 16.

234 *Edmund Murray Ltd v BSP International Foundations Ltd* (1993) 33 Con LR 1, 16.

11.3.2.3 Legal Opinion

Exclusionary clauses have, through the years, been recognized as playing a role in the English Law of Contract. [235]

With the invention of standard form contracts, the doctrine of contractual freedom and the sanctity of contract lived to its full potential as contracting parties were expected to look after their own interests, as they were free to enter into a contract and they had a full understanding of the consequences of their actions and the terms of the contract. [236]

A feature of exclusionary clauses which crept into standard form contracts was, besides attempting to exclude any obligation to pay compensation or to limit the amount of compensation, contracting parties sought to avoid the consequences of their failure to

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235 For recognition by the English legal writers see Stone *Principles of Contract Law* (1998); Stone *The Modern Law of Contract* (2003) 163; Beatson *Anson's Law of Contract* (2002) 436-437; Poole *Textbook on Contract Law* (2004) 195; O'Sullivan and Hilliard *The Law of Contract* (2004) 243; Furmston Cheshire Fifoot *Furmston's Law of Contract* (1986) 149; Treitel *The Law of Contract* (2003) 216; Yates and Hawkins *Standard Business Contracts: Exclusions and Related Devices* (1986) 4-6; Coote *Exception Clauses* (1964) 137-138; Atiyah *An Introduction to the Law of Contract* (1995) 310ff; Chin Nyuk-Yin *Excluding Liability in Contracts* (1985) 125ff; Waddams "Unconscionability in Contracts" *The Modern Law Review* Vol. 39 (July 1976) No 4 378-379; *The Law Commission and the Scottish Law Exemption Clauses Second Report* (1976). For English case law see *Parker v South Eastern Railway* (1877) 2 CPD 416. This was one of the first cases in which the court held in the absence of fraud, exemption clauses are recognized. See also *Cholzen v William* (1804) 5 East 507; *Karsales (Harron) Ltd v Wallis* (1956) 2 ALL E.R. 866; *McCutheon v David MacBryne Ltd* (1964) 1 ALL E.R.; *Thorton v Sherlane Parking Ltd* (1971) 1 ALL E.R. 686; *Olley v Marlborough Court Hotel* (1949) 1 KB 532; *Spurling v Bradshaw* (1956) 2 ALL E.R. 121; *Chapilton v Barry UDC* (1946) 1 KB 32; (1940) 1 ALL E.R. 356; *Baldey v Marshall* (1925) 1 K.B. 260; *Wallison and Wells v Pratt and Haynes* (1911) A.C. 394; *Beck and Co v Szymanowski and Co* (1924) A.C. 43; *Lee (John) and Son (Cratham) Ltd v Railway Executives* (1949) 2 ALL E.R. 581; *Adams v Richardson and Starling Ltd* (1969) 1 WLR; *Tor Line A.R. v Allmans Group of Canada Ltd* (1984); *Houghton v Trafalgar Insurance Co Ltd* (1954) 1 QB 247; *Morley v United Foreindly Insurance P/C* (1993) 1 WLR 996; *Andrews v Singer* (1934) 1 KB 17; *Aldersade v Hendon Laundry Ltd* (1945) K.B. 189 at 192; *Canada Steamship Lines Ltd v The King* (1952) AC 292 at 304; *Sonat Offshore SA v Amerada Hess Development Co* (1988) 1 Lloyd Rep 145, 157; *Shell Chemicals Oil Ltd v Leo Roadtanks Ltd* (1995) 1 Lloyd's Rep 3297, 301; *Ailsa Craig Fishing Co Ltd v Malvern Fishing Co* (1983) 1 ALL E.R. 101.

236 Stone *The Modern Law of Contract* (2003) 219-224; McKendrick *Text, Cases and Materials* (2003) 163; Stone *Principles of Contract Law* (1998) 146; Poole *Textbook on Contract Law* (2004) 197; Beatson and Friedmann *Good Faith and Fault in Contract Law* (1997) 7-8; Cheshire et al *Law of Contract* (1986) 21-22; Standing Committee of Officials of Consumer Affairs Unfair Contract Terms - *A Discussion paper* (January 2004) 15-16; O'Sullivan and Hilliard *The Law of Contract* (2004) 3-5. This was very much the position in the early dicta of *Parker v South Eastern Railway* (1877) 2 CPD 416; *Printing and Numerical Registering Co v Sampson* (1875) L.R. 19 EQ 462 at 465 in which the much quoted dictum of Jessel M.R. was conceived namely: *:If there is one thing which more than another public policy requires it is that man 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."* See also Lord Bramwill's dicta in *Manchester, Sheffield and Lincolnshire Ry. v Brown* (1883) 8 App. Cas. 702, 716-720; *Salt v Marquis of Northampton* (1892) A.C. 1, 18-19. In more recent times in the cases of *Swisse Atlantique Societe D'armiwent Maritine SA v N.V. Rotterdamsche Kolen Centrale* (1967) 1 A.C. 361; *Photo Production Ltd v Securicor Transport Ltd* (1980) A.C. 827, 848 in which exclusionary clauses were recognized because of the principle of freedom of contract.

perform their contractual obligations. [237]

Although these types of contracts found favour in the commercial world, [238] nonetheless, they did not escape academic and judicial criticism. The primary focus of the attack was concentrated on the fact that classical law assured that contracting parties moved on a terrain of equal bargaining, whereas, in reality it was not so. Often the stronger exploited the weaker. The contracting parties no longer negotiated the terms of the contract. [239]

They often merely adhered to the standard form contract, containing standard terms and conditions, including exclusionary clauses. The weaker party often accepted the terms of the agreement on a "take it or leave it" basis. [240] These could prove to be extremely harmful to, especially, the weaker party.

A commercial practise developed in which the weaker contracting party was often exploited by a stronger or more powerful contracting party, who would exempt himself (itself) from any liability towards the weaker contracting party. This, together with the advent and growth of monopolies and restrictive practises, saw the introduction of protective measures to counter the operations of monopolies, as well as matters concerning inequality of bargaining power. [241]

The protective measures comprised both judicial and legislative measures. The judicial measures introduced, comprised the expectation of certain standards of notice, in respect

237 Beatson *Anson's Law of Contract* (2002) 436.

238 Standing Committee of Officials of Consumer Affairs Unfair Contract Terms - *A discussion paper* January (2004) 16. The advantages include the reduction of transaction costs; allowing for lengthy and detailed contracts to be finalized with the minimum of time and by lay persons who are only required to negotiate the specifics such as price, description of goods and services and delivery times. They also bring a certain amount of understanding of trading practice. See also McKendrick *Text, Cases and Materials* (2003) 163-164; Stone *Principles of Contract Law* (1998) 145; Poole *Textbook on Contract Law* (2004) 197; Treitel *The Law of Contract* (2003) 215.

239 McKendrick *Text, Cases and Materials* (2003) 163-164; Poole *Textbook on Contract Law* (2004) 198; Stone *The Modern Law of Contract* (2003) 164, 219-220. This inequality of bargaining power and the unfair advantage gained by one of the contracts was aptly explained by Lord Denning in Lloyds Bank Ltd v Bundy (1975) QB 326 (CA). See also the remark made by Lord Reid in *A Schroeder Music Publishing Co Ltd v Macaulay* 1974 (3) ALL ER 616 723 and Lord Denning in *British Crane Hire Corporation Ltd v Ipswich Plant Hire Ltd* 1975 (1) QB 303 (CA).

240 Poole *Textbook on Contract Law* (2004) 198; McKendrick *Text, Cases and Materials* (2003) 164; Stone *Principles of Contract Law* (1998) 145.

241 Treitel *The Law of Contract* (2003) 215; Beatson *Anson's Law of Contract* (2002) 165; Atiyah *An Introduction to the Law of Contract* (1995) 16-17; 19; Beale "Unfair Contract Terms Act 1977" *British Journal of Law and Society* Vol. 5 No 1 (1978) 114 at 115; Tillotson *Contract Law in Perspective* (1995) 40.

of ordinary terms. In addition, the courts introduced rules of construction in interpreting the provisions of a contract most favourably for the weaker contracting party. [242]

The courts also approached clauses which are said to exclude such liability on the assumption that is `inherently improbable' that the innocent party would have agreed to the exclusion of the contract-breakers negligence. To have any effect, however, the contractual term in question, must exclude liability for negligence clearly and unambiguously. [243]

A further measure introduced by the English courts concerning exclusionary clauses was the principle of fundamental breach. The doctrine entailed that some breaches were so serious that no exclusionary clauses could cover them. [244]

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242 Tritely *the Law of Contract* (2003) 215; Beatson *Anson's Law of Contract* (2002) 165; Atiyah *an Introduction to the Law of Contract* (1995) 16-17; 19; Beale "Unfair Contract Terms Act 1977" *British Journal of Law and Society* Vol. 5 No 1 (1978) 114 at 115; Tillotson *Contract Law in Perspective* (1995) 40.

243 McKendrick *Text, Cases and Materials* (2003) 164; Stone *The Modern Law of Contract* (2003) 220ff; Treitel *The Law of Contract* (2003) 215ff; Stone *Principles of Contract Law* (1998) 145ff; Beatson *Anson's Law of Contract* (2002) 438ff; Poole *Textbook on Contract Law* (2004) 198-200; O'Sullivan and Hilliard *The Law of Contract* (2004) 243ff; Atiyah *An Introduction to the Law of Contract* (1995) 20ff. The court in *McChutheon v David Macbrayne Ltd* (1964) 1 ALL E.R. made it clear that in certain instances it would be necessary to bring terms and conditions to the notice of the other contracting party. See also *Thorton v Sheelane Parking Ltd* (1971) 1 ALL E.R. 686. In *Spurling v Bradshaw* (1956) 2 ALL E.R. 121 it was also held that the more unreasonable the clause, the greater the expectation to bring this to a contracting party's notice. See also *Interfoto Picture Library Ltd v Stilletto Visual Programmes Ltd* 1985 QB 433. The English courts in *Wallisson and Wells v Pratt and Haynes* (1911) A.C. 394; *Beck and Co v Szymanowski and Co* (1924) A.C. 43; *Lee (John) and Son (Cratham) Ltd v Railway Executives* (1949) 2 ALL E.R. 581; *Adams v Richardson and Starling Ltd* (1969) 1 WLR; *Tor Line A.R. v Allmans Group of Canada Ltd* (1984); *Houghton v Trafalgar Insurance Co Ltd* (1954) 1 QB 247; *Morley v United Friendly Insurance P/C* (1993) 1 WLR 996 applied the *contra proferentem* rule in controlling exclusion clauses. The courts interpreted exclusion clauses against the person putting it forward. See *Andrews v Singer* (1934) 1 KB 17; *Wallis, Son and Wells v Pratt* (1910) 2 KB 1003; See also the all important judgement of *Canada Steamship Lines Ltd v The King* (1952) AC 192 in which the court laid down a valuable test for interpreting ambiguous terms including exclusionary clauses. In *Ailsa Craig Fishing Co Ltd v Malvern Fishing Co* (1983) 1 ALL E.R. 101 the court also considered the rules of construction to determine if an exclusionary clause was invalid. See further *George Mitchell (Chesterhall) Ltd v Finney Lock Seeds Ltd* (1983) QB 284.

244 Stone *The Modern Law of Contract* (2003) 230-231; Stone *Principles of Contract Law* (1998) 152-153; Treitel *The Law of Contract* (2003) 225ff; McKendrick *Text, Cases and Materials* (2003) 174; O'Sullivan and Hilliard *The Law of Contract* (2004) 265; Beatson *Anson's Law of Contract* (2002) 449-450; Poole *Textbook on Contract Law* (2004) 206; Beale "Unfair Contract Terms Act 1977" *British Journal of Law and Society* Vol. 5, No 1 (Summer 1978) 114, 116. Cases in which the English court recognized the principle of fundamental breach include *Karsales v Wallis* (1956) 1 WLR 936; *Harbutt's Plasticene Ltd v Wayne Tank and Pump Co Ltd*. See however *Photo Production Ltd v Securicor Transport Ltd* (1970) 1 QB 447 in which the principle of fundamental breach was given the death knell. This was confirmed in *George Mitchell (Chesterhall) Ltd v Finney Lock Seeds Ltd* (1983) 2 A.C. 803 and reconfirmed in *Edmund Murray Ltd v BSP International Foundations Ltd* (1983) 33 Con L.R.1.

In this regard the English courts felt that it could not be justifiable to allow him to exclude liability. The doctrine did not have a particularly long life-span, in that the last vestiges of the doctrine were demolished in 1980. [245]

Despite the common law measures introduced to curb the unfair consequences which exclusionary clauses brought into the law of contract, the courts were not always consistent in applying, especially, the rules of construction. The courts were then frequently criticised for adopting artificial constructions or to stray beyond merely seeking the ordinary meaning of the words used. [246]

Consequently, the British Government appointed the Law Commission to investigate the unfair consequences of exclusionary clauses. The terms of reference given to the English Law Commission and the Scottish Law Commission in 1969, in the main, comprised the following:

(1) To investigate the gap between the classical theories of contract law in which the notion of freedom of contract is advocated and the ills modern, standard-form contracts incorporating exclusionary clauses, had brought with them.

(2) To investigate the abuse of the bargaining power and, in particular, the inequality of bargaining power between the stronger and weaker contracting parties, often using clauses limiting or excluding liability in favour of the stronger party, often monopolies.

(3) To investigate the possibility of placing a restriction on the freedom of a person to exclude or restrict a duty or obligation which he would otherwise owe to another to take reasonable care of to exercise reasonable skill. [247]

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245 Poole *Textbook on Contract Law* (2004) 208; O'Sullivan and Hilliard *The Law of Contract* (2004) 264; Beale "Unfair Contract Terms Act" *British Journal of Law and Society* Vol. 5 No 1 (Summer 1978) 114, 115 opines that *"because of their adherence to the notion of freedom of contract the courts were sometimes obliged to uphold unfair clauses provided they have been incorporated in the contract."* Stone *Principle of Contract Law* (1998) 151-152; Stone *The Modern Law of Contract* (2003) 229; the Law Commission and the Scottish Law Commission *Exemption Clause Second Report* (Report No 69 1976) 16.

246 Poole *Textbook on Contract Law* (2004) 208; O'Sullivan and Hilliard *The Law of Contract* (2004) 264; Beale "Unfair Contract Terms Act" *British Journal of Law and Society* Vol. 5 No 1 (Summer 1978) 114, 115 opines that *"because of their adherence to the notion of freedom of contract the courts were sometimes obliged to uphold unfair clauses provided they have been incorporated in the contract."* Stone *Principle of Contract Law* (1998) 151-152; Stone *The Modern Law of Contract* (2003) 229; The Law Commission and The Scottish Law Commission *Exemption Clause Second Report* (Report No 69 1976) 16.

247 The Law Commission and The Scottish Law Commission *Exemption Clauses Second Report* (Report No 69 1975) 19.

The commission consequently resolved:

(1) Exemption clauses, exempting contracting parties from liability for negligence, are, in many cases, a social evil.

(2) The powers at the disposal of the courts for dealing with such clauses showed that they were far from adequate.

(3) The case for some stricter form of control was indicated.

The salient factors impacting upon the resolution can briefly be stated as follows:

(1) Although the doctrine of freedom to contract has entrenched itself in common commercial practise in England and Scotland, an unlimited or unrestricted freedom is likely to operate unreasonably and, in many instances, they operate against the public interest.

(2) The unreasonableness which exclusionary clauses bring, stem from contracting parties remaining ignorant until it is too late. Moreover, he may not have sufficient bargaining strength.

(3) Parties, especially in standard form contracts, often bargain from a position of inequality or insufficient bargaining strength. This is often abused by the stronger contracting party.

(4) Exemption clauses may take away rights where social policy requires that a party should be given those rights.

(5) Despite the courts applying common law practises, rules of construction to override the harshness of exemption clauses, the differences of judicial opinion have led to inconsistencies which, in time, showed up the lack of power possessed by the courts in dealing with exemption clauses. [248]

The Commission concluded that a general scheme of control was needed and that it ought

[248] The Law Commission and the Scottish Law Commission *Exemption Clauses Second Report* (Report No 69 1975) Paras 38-39.

to take the form of a reasonableness test. [249]

The Commission also concluded that, in some instances, there ought to be control in the form of a complete ban on such exemptions, whilst, in commercial contracts there should be selective control instead of outright control.

Instances in which the commission recommended that there be an outright ban on clauses totally excluding liability, include, excluding liability for death or personal injury due to negligence. The primary reasons advanced there-for by the commission are that: *"A civil society should attach greater importance to human person than to property"* and *"to permit a person who owes such a duty to contract out of liability for the breach of it, is tantamount to giving him a license to behave carelessly. This, it may be said, is unjust and socially inexpedient; unjust because it deprives the person to whom the duty is owed of a right he is legally and morally entitled to; socially inexpedient because it tends to reduce standards of care and competence."* [250]

Consequently, the British parliament stepped in and legislated the *Unfair Contract Terms Act* 1977, as well as the *Unfair Terms in Consumer Contract Regulations* 1994.This legislation significantly affected exclusionary clauses in England, especially exclusion of liability for negligence. The effect of the introduction of the said legislative measures is said to influence the courts in this way, namely, unless a clause purporting to exclude negligence complies with the requirements of reasonableness, the courts are obliged to declare clauses to the contrary, void. [251]

In so far as the exclusion of liability for negligent acts resulting in death or personal injury is concerned, the Act places a prohibition on the exclusion or restriction of liability for death or personal injury resulting from negligence, ensuring that a claim for damages under these circumstances remains an inalienable right. [252]

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249 The Law Commission and the Scottish Law Commission *Exemption Clauses Second Report* (Report No 69 of 1975) Para 188.

250 The Law Commission and the Scottish Law Commission *Exemption Clauses Second Report* (Report No 69 1975) Par 54.

251 The *Unfair Contract Terms Act* 1977 S11(1); Stone *The Modern Law of Contract* (2003) 229; McKendrick *Text, Cases and Materials* (2003) 185-186; Stone *Principles of Contract Law* (1998) 151-152; Beatson *Anson's Law of Contract* (2002) 441-442; Poole *Textbook on Contract Law* (2004) 208; Beale "Unfair Contract Terms Act 1977" *British Journal of Law and Society* Vol. 5 No 1 (Summer 1978) 114, 117-119; O'Sullivan and Hilliard *The Law of Contract* (2004) 270; Treitel *The Law of Contract* (2003) 222.

252 Sec 2(1) of the *Unfair Contract Terms Act* (1977).

Besides the *Unfair Contract Terms Act* 1977, as well as the *Unfair Terms in Consumer Contract Regulations* 1994, which give guidance to the English Courts in deciding the validity of exclusionary clauses in medical contracts, should such a situation ever arise, the English *Human Rights Act* 1998, it is submitted, will also influence judicial thinking. The *Human Rights Act* 1998, besides its protection of individual human rights in the United Kingdom in general, has been designed to develop the common law in a way which is compatible with the European convention. [253] Any conduct by a public authority in contravention of the convention, will be unlawful in terms of the *Human Rights Act* 1998. [254]

In so far as the practise of medicine is concerned, decisions taken by public authorities, including doctors and hospitals, must be made on the basis of current ethical standards and in compliance with the provisions of the *Human Rights Act*. [255]

The effect of the adoption of the *Human Rights Act* 1998 amounts to this, namely, the United Kingdom courts and tribunals are required to take account of the *Human Rights Act* and ensure that the development of the common law is compatible with the European Convention Rights. As the convention is described as a "living instrument" any legal issue must be interpreted in the light of the present day limitations, reflecting the changing social attitudes, which include patient expectations and ethical standards. [256]

11.3.3 UNITED STATES OF AMERICA

11.3.3.1 Legal Writings

In America, as was the position in Great Britain, standard form contracts, especially, since the era of industrialization and the expanding use of mass transportation, became the order

253 See the discussion of Murray Hunt "The horizontal effect of the Human Rights Act retrieved from "http://ea.wikipedia.org/wiki/human rights act 1998". See also the discussion of the Committee on Medical Ethics: British Medical Association. The impact of the Human Rights Act 1998 on medical decision making. London: British Medical Association 2000.

254 Section 6(1) of the *Human Rights Act* 1998. Public authority include any institution or person *"whose functions are functions of public nature".* Section 6(3) (b).

255 See the Committee on Medical Ethics, British Medical Association. The impact of the *Human Rights Act* 1998 on medical decision making. London: British Medical Association 2000.

256 See the Committee on Medical Ethics: British Medical Association. The impact of the Human Rights Act 1998 on medical decision making. London: British Medical Association 2000.

of the day. [257]

Consequently, standard form contracts or as it is also known, contracts of adhesion, are to be found in all walks of life in America today, ranging from commerce, insurance, transport, communications, public services for example warehousing, garage-keeping, parking etc. [258]

Although these types of contracts have brought with them distinct advantages, *inter alia,* controlling risks in insurance contracts, providing consistency in respect of contracts generally, saving on expense in drafting individual contracts etc, [259] nonetheless, they have not escaped criticism from the legal writers and the courts alike. Some of the main strands of criticism include, they are drafted by the party with the stronger bargaining power, most of the terms are not subject to negotiation or bargaining, unfair terms are imposed in adhesion contracts over which the weaker contracting party has no control; often harsh and unfair terms are included in these type of contracts which are then hidden in a maze of fine print of which the unsophisticated, poor customer is expected to make himself aware. [260] One of the most common abuses in standardized or adhesive contracts is the unfair use of exclusionary clauses or disclaimers of warranties and limitation of remedies. [261]

Exclusionary clauses or disclaimers are widely recognised and used in America. Not only do they have a long history, exculpatory clauses or exclusionary clauses continue to be used in the automobile industry, consumers' credit transactions, the insurance industry etc. [262]

A striking characteristic of these types of clauses is that they are utilized to exclude unforeseen risks, exclude one of the contracting parties against liabilities and even to exempt sellers from essential obligations of such transactions. [263]

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257 Deutsch *Unfair Contracts* (1977) 2; Kessler "Contracts of Adhesion - Some thoughts about freedom of contract" 43 *Colum.L.Rev* 629, 631-33; 640-41 (1943); Summers and Hillman *Contract and Related Obligations: Theory, Doctrine and Practise* (1987) 583.

258 Williston *Contracts* (1936 with 1865 cumulative supplement) Vol. 6 Para 1751C quoted in Von Hippel. "The control of exemption clauses - A Comparative Study" *International and Comparative Law Quarterly* (Vol. 16) July 1967 591 at 599; Summers and Hillman (1987) 584.

259 Summers and Hillman (1987) 584; Deutsch (1977) 1-2.

260 Deutsch (1977) 1-5; Summers and Hillman (1987) 584.

261 Deutsch (1977) 8.

262 Deutsch (1977) 8-9.

263 Deutsch (1977) 8-9.

It is especially in a variety of consumer and commercial transactions and personal injury cases where liabilities and risks are exempted, that these types of contracts have received their greatest criticism. [264]

During the pre-code era there was no actual doctrine designed to deal specifically with the deficiencies and unfairness which standardized contracts, incorporating exclusionary clauses or indemnity clauses, bring. Traditional defences, such as lack of mutual assent (due to fine print), lack of mutuality, failure of consideration, defects in formation of the contract, public policy, fraud, duress, interpretation and construction would be invoked to invalidate unfair standardized contracts. [265]

It was especially public policy which was often used to invalidate clauses of waiver or exclusionary clauses. Its use was, however, severely restricted due to the lack of clear rules of application, matched by the process that *"[public police] is a very unruly horse; and when once you let astride it you never know where it will carry you."* [266]

Although methods of interpretation and construction were adopted to invalidate or restrict unfair disclaimers, they were also applied inconsistently. [267]

It is suggested by *Deutsch* [268] that the means used to overcome unfairness in these types of contracts, suffered from several defects and were insufficient to protect the weaker party in these types of contracts.

Other problems encountered, included, the use of these tools resulted in the undermining of the stability and certainty of the defences employed. The interpretation and construction tools were so manipulated, that they would distort the failure of traditional contract doctrines, so much so that, they were almost endangered. [269]

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264 Deutsch (1977) 9.

265 Deutsch (1977) 11.

266 Deutsch (1977) 13.

267 Deutsch (1977) 14-15; Summers and Hillman (1987) 585; Kessler (1943) 629 at 631-633, 640-641.

268 *Unfair Contracts* (1977) 15.

269 Deutsch (1977) 16; Summers and Hillman (1987) 585; Kessler (1943) 629 at 631-633, 640-641.

Llewellyn [270] in this regard wrote:

"The difficulty with these techniques of ours is threefold. First, since they all rest on the admission that the clauses in question are permissible in purpose and content, they invite the draughtsman to recur (sic) to the attack. Give him time and he will make the grade. Second, since they do not face the issue, they fail to accumulate either experience or authority in the needed direction; that of making out for any type of transaction what the minimum decency are which a court will insist upon as essential to an enforceable bargain of a given type, or as being inherent in a bargain of that type. Third, since they purport to construe, and do not really construe, nor are intended to, but are instead tools of intentional and creative misconstruction, they seriously embarrass later efforts of true construction, later efforts to get at the truth of those wholly legitimate contracts and clauses which call for their meaning to be got at instead of avoided. The net effect is unnecessary confusion and unpredictability, together with inadequate remedy, and evil persisting that calls for remedy. Covert tools are never reliable tools." [271]

The inadequacy of the traditional defences to provide a solution to the deficiencies of these types of contracts gave impetus to the evolution of the doctrine of unconscionable-ness in the code. [272]

Before the code was introduced however, the traditional thinking had been that disclaimers in adhesion contracts were enforced upon the contracting parties merely on the basis of freedom of contracts, notwithstanding the fact that, upon closer examination, it might have revealed their unfair nature. [273] Generally then, exemption clauses were accepted and enforced, save for those clauses adopted in contracts where a public service is rendered or a human safety requirement is violated. [274]

Put differently, where the type of disclaimer or exculpatory clause did not adversely affect the public interest, they were generally accepted. But, despite this, lip service had been paid to the doctrine of freedom of contract, contracting parties; especially the weaker parties, were protected against unfair exemption clauses. The courts, during the pre-code era, often adopted covert techniques in exercising judicial control over these types of

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270 Llewellyn, Book Review, 52 *Harv.L.Rev* 700, 703 (1938-39).

271 Llewellyn, Book Review, 52 *Harv.L.Rev* 700, 703 (1938-39).

272 Deutsch (1977) 18-19.

273 Deutsch (1977) 20; Sales "Standard form contracts", 16 *Mod.L.Rev* 318, 320 (1953); Lenkoff "Contracts of Adhesion and the Freedom of Contract: A Comparative study in the light of American and Foreign Law", 36 *TUL.L.Rev* 481 (1960).

274 Annotation (1938) 117 ALR Paras 42, 45, 48, Williston (1936) with cumulative supplement Vol 6 Para 239; P4968-4969.

clauses. [275]

Besides protecting contracting parties against agreements arising from contracts which contain exclusionary clauses, which violate public duties as aforementioned, similarly, where there was an unequal bargaining power, public interest called for the rejection of an exculpatory clause exacted by the dominant party.

In time, unconscionable-ness, often influenced by a prodigious amount of bargaining power on behalf of the stronger party, became a factor often considered by the courts to declare unjust contract provisions unenforceable. [276]

In determining the validity of an exculpatory agreement or disclaimer, which is made part of a contract, much, therefore, depends upon the positions of the contracting parties. If they do not stand on a footing of equality, this may very well influence the courts in declaring these types of clauses invalid. [277]

In so far as certain type of clauses are concerned, it is especially Furrow et al, [278] who, with reference to the case of *Tunkle v Regents of the University of California,* [279] denounce waivers of liability and other attempts at exculpating health care providers from liability. Reasons advanced by the authors for such a standpoint include; the vulnerability of patients, the anxious state they are often in when entering the hospital and the unfairness in trading-off the patient's common law right to sue in exchange for health care. For a more comprehensive discussion on the American academic approach, as well as the courts attitudes towards waivers in medical contracts, see Chapter 14.
The trend to exercise judicial control of exemption clauses continued and is favoured by the *Uniform Commercial Code,* which expressly empowers the courts to strike down "unconscionable" clauses.

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275 Von Hippel (1967) 600; Deutsch (1977) 20-21.

276 Williston (1938) with cumulative supplement (1966) Para 1741; Von Hippel (1967) 699; Deutsch 20-21.

277 Williston (1938) with cumulative supplement (1966) Paras 1715C, 1851B stated:
"A promise not to sue for the future damage caused by simple negligence may be valid. Such bargains are not favoured, however, and, if possible, bargains are construed not to confer this immunity".

278 *Health Law* (1995) 256.

279 32 Cal. RPTR. 33, 383 P.2d 441 (Cal. 1963).

The *Uniform Commercial Code* (UCC) of the United States of America, was approved of in 1952, amended and adopted since then, by all of the United States, except Louisiana. S2-30 serves as one of the earliest legislative attempts to give courts a general discretionary standard by which to judge the fairness of a contract or its terms. Section 2-302(1) provides:

"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 an unconscionable result."

Other attempts made to protect the public against unfair terms in exculpatory or indemnity clauses includes the intervention in the *Restatement of the Law of Contracts*, [280] Section 575, *inter alia*, provides as follows:

"(1) 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:

(a) The parties are employer and employee and the bargain relates to negligent injury of the employer in the course of the employment, or

(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.

(2) A bargain by a common carrier or other person charged with a duty of public service limiting to a reasonable agreed valuation the amount of damages recoverable for injury to property by a non-wilful breach of duty is lawful." [281]

From the aforementioned it is clear that an employer is not allowed to exonerate himself from liability for negligence to an employee. The rationale for this prohibition is said to be based on the inequality of the bargaining strength of the employer and employee. [282]

Likewise, in the so-called carrier cases, owners of carriers cannot relieve themselves from loss resulting from the negligence of themselves or their agents. This is based on public service considerations, human safety requirements and the relative inequality of bargaining power. [283]

11.3.3.2 Case Law

280 *Restatement (Second) of Contracts* (1981).

281 *Restatement (Second) of Contracts* (1981).

282 Von Hippel (1967) 599.

283 Von Hippel (1967) 599.

In so far as the status of exclusionary is concerned, there is no unanimity in the courts functioning in the different states of America. The position is very aptly described, in a number of cases, in different states. In *McCutcheon v United Homes Corp*. [284] the Supreme Court of Washington after considering, *inter alia,* the importance of *"freedom of contract"* and the recognition exculpatory clauses had received from legal writers, including, the eminent writer, Williston, 6 Williston - *A Treatise on the Law of Contract* 1951 C P.4968 (Rev ed 1938) and the courts alike, as early as 1936 and 1947, in the cases of *Broderson v Rainier Nat'l Park Co* 187 Wash. 399, 60 P.2d 234 (1936) and *Griffiths v Broderick, Inc* 27 Wash 2d 901, 182 P.2d 18 (1947), respectively, as well as the negative influence of the unequal bargaining position of the contracting parties, especially, the weaker and further, the danger exclusionary clauses may hold in causing standards established by law to be lowered, nonetheless, with reference to the so-called "majority rule" in cases, stated: *"It is safe to say, however, that there is no true majority rule. There are only numerous conflicting decisions, decisions concerned with contracts of indemnity, cases relating to property damage under business leases, and a disposition of the courts to emasculate such exculpatory clauses by means of strict construction."*

And further: *"From this one can reasonably infer that even though such clauses are recognized by some courts, a great number have regarded them with disfavour."* [285]

The unanimity of the status of exculpatory clauses, albeit in the form of a warranty in an automobile manufacturing contract, was also dealt with in *Henningsen v Bloomfield Motors Inc,* [286] in which the Supreme Court of New Jersey stated:

"Although the courts, with few exceptions, have been most sensitive to problems presented by contracts resulting from gross disparity in buyer-seller bargaining positions, they have not articulated a general principle condemning, as opposed to public policy, the imposition on the buyer of a skeleton warranty as a means of limiting the responsibility of the manufacturer. They have endeavoured thus far to avoid a drastic departure from age-old tenets of freedom of contract by adopting doctrines of strict construction, and notice and knowledgeable assent by the buyer t the attempted exculpation of the seller. 1 Corbin, supra, 337; 2 Harper and James supra, 1590; Prosser, "Warranty of Merchantable Quality", 27 Minn.L. Rev 117, 159 (1932). Accordingly to be found in the cases are statements that disclaimers and the consequent limitation of liability will not be given effect if "unfairly procured", if not brought to the buyer's attention and he was not made understandingly aware of it; ..... or if not clear and explicit ....." [287]

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284 79 Wash. 2d 443, 486 P.2d 1093 (1971).

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

286 32 N.J. 358, 161 A. 2d 769 (1960).

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

The position is also expressed as follows in *Le Vine et al v Shell Oil Company*: [288]

"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, a rule has evolved under which courts have carefully scrutinized these agreements for an expression of an intent to indemnify and for some indication of the scope of that indemnification." [289]

The influence and recognition of exculpatory clauses in, especially, commercial and business transactions is expressed in *Kuzmiak v Brookchester Inc* [290] when it is stated:

"The use of exculpatory clauses in commercial and business transactions as a device for release from liability is widespread, and the validity of a particular contract depends upon many factors." [291]

Consequently the court identified "public interest" as a prominent factor influencing the validity and enforceability of exclusionary contracts.

In *Chazen v Trail Mobile,* [292] the Supreme Court of Tennessee identified the freedom of contract as rationale for the recognition of exculpatory clauses when holding:
"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. 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. Hartford Fire Ins Co v Chicago M and St P.R. Co 175 U.S. 91, 20 S.Ct 33, 44 L.Ed 84; Sears Roebuck and Co Poling, 248 Iowa 582, 81 N.W. 2d 462." [293]

The sanctity of contracts and the enforcement of contracts entered into freely and voluntarily, were recognized in *Chicago and North Western Railway Company v Rissler and McMurray Construction Co and Truck Insurance Exchange,* [294] wherein it was held:

"Turning now to the question of the Railway Company indemnifying itself against its own negligence, an agreement to place another person at the mercy of one's own negligence is not ipso facto against public policy.

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288 28 N.Y. 2d 205, 269 N.E. 2d 799, 321 N.Y.S. 2d 81 (1971).

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

290 33 N.J. Super 575 111 A 2d 425 (1955).

291 *Kuzmiak v Brookchester Inc* 33 N.J. Super 575 111 A. 2d 425 (1959).

292 215 Tenn. 87, 384, S.W. 2d 1 (1964).

293 *Chazen v Trail Mobile* 215 Tenn. 87, 384 S.W. 2d 1 (1964).

294 184 F. Supp 98 (1960).

12 Am.Jur. Sec 181 page 282. 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 unless it clearly appears that they contravene public right or the public welfare'. Courts will not extend the public policy rule arbitrarily. Here the parties have entered into their own agreement freely and voluntarily." [295]

The rationale underlying the argument for enforceability of exclusionary clauses based upon the doctrine of freedom of contract also received the attention of the Supreme Court of Tennessee in the case of *Crawford v Buckner,* [296] in which an exculpatory clause in the context of a landlord-tenant relationship received the courts scrutiny.

Referring to exculpatory clauses in general, the Supreme Court of Tennessee stated:

"The rationale underlying the argument for enforceability of such clauses has often been based upon the doctrine of freedom of contract. Courts employing that reasoning have said: that the public policy in apparent conflict with the freedom of contract argument in real-estate lease exculpatory clause cases, namely, that a landlord should be liable for the negligent breach of a duty which is owed to his tenant, is subservient to the doctrine that a person has the right to freely contract about his affairs. Some cases, especially the older ones, have reasoned that the relationship of landlord and tenant is in no event a matter of public interest, but is purely a private affair, so that such clauses cannot be held void on purely public policy grounds. John D Perovich, Annotation, Validity of Exculpatory Clause in Lease Exempting Lessor from Liability, 49 A.L.R. 3d 321, 325 (1973)"

But, cautions the court: *"However, because of the burden-shifting effect of such clauses which grant immunity from the law, it is not surprising that their validity has been challenged and that courts have reached different conclusions as to their enforceability. 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)" [297]

The recognition of the validity of exculpatory clauses and indemnity contracts is expressed

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295 *Chicago and North Western Railway Company v Rissler and McMurray Construction Co and Truck Insurance Exchange* 184 F. Supp 98 (1960); See also *Occidental Savings and Loan Association v Venco Partnership* 206 N.E.B. 469, 293 N.W. 2d 843 (1980); *Equitable Loan and Security Co et al v Waring et al* 62 L.R.A. 931 117 Ga 599, 44, S.E. 320, 97 AM ST 173.

296 839 S.W. 2d 754 (1992).

297 *Crawford v Buckner* 893 S.W. 2d 754 (1992).

by the Supreme Court of Minnesota in the case of *Schlobohm et al v Spa Petite Inc*, [298] in which the court stated:

"When considering exculpatory clauses contained in construction contracts and commercial leases, we have held that 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. Northern Pacific Railway Co v Thornton Brothers Co 206 Minn 193, 196, 288 N.W. 226, 227 (1939) ....."

But, warns the court: *"Even though we have recognized the validity of exculpatory clauses in certain circumstances, they are not favoured in the law. A clause exonerating a party from liability will be strictly construed against the benefited party. If the clause is either ambiguous in scope or purports to release the benefited party from liability for intentional, wilful or wanton acts, it will not be enforced. Thus, we held in Farmington Plumbing and Heating Co v Fischer Sand and Aggregate Inc 281 N.W. 2d 838, 842 (Minn. 1979), that the 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) ....."*

Referring to the position of exculpatory clauses in Health Spa contracts in other jurisdictions, the court held:

"Though we have not heretofore addressed the issue, courts of other jurisdictions have held such clauses invalid if they purport to exonerate a party from wilful or wanton recklessness or intentional torts. See e.g. Jones v Dressel, Colo. 623 P.2d 370, 376 (1981); Winterstein v Wilcom 16 Md.App. 130, 136, 293 A.2d 821, 824-25 (1972)." [299]

The status and effect of exclusionary clauses, besides the freedom of contract is also influenced by other factors including public policy, public interests, as well as the equality of bargaining power.

In the first instance the American courts have stated, unreservedly, that they will only declare contracts in general to be void as against public policy, where the contract or certain provisions of the contract, are *"clear and free from doubt, and the injury to the public is substantial and not theoretical or problematical,"* [300] or *"in their tendency, are so*

298 326 N.W. 2d 920 (1982).

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

300 *Oregon R.R. and Navigation Co v Dumas* (C.C.A.) 181 F, 781; *North Cutt et ux v Highfeld et al* 9 S.W. 2d 209, 225, 456, 9 S.W. 2d 209 (1928); *Styles v Lyon* 87 Conn. 23, 86 A. 564 (1913); *Twin Pipe Line Co et al v*

inimical to the public interest ....." [301]

It is, especially, in hospital contracts containing exculpatory provisions that the American courts have frequently held that as the exculpatory provisions involve the public interest they will not stand. [302]

In the second instance, as previously indicated, "public interest" is an influencing factor in determining the validity and enforceability of exclusionary clauses. But, in order to qualify as an improprietary transaction, it has been stated before that "the public interest is not well served by indulging baseless suspicions of wrongdoings", there must be a "clear and manifest injury to the interests of the state" or "injurious to the public interests or the

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Harding Glass Co 283 U.S. 353, 51, S.Ct 476; *Smith v Simon* 224 So. 2d 565 (1969); *Martin v Allianz Insurance Company of North America* 573 N.W. 2d 823 (1998); *Wunchel Law Firm, P.C. v Clabaugh* 291 N.W. 2d *In re Estate of Barnes*, 256 ICWA at 1052, 128 N.W.2d at 192; *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); *Powell v American Health Fitness Centre of Fort Wayne Inc* 694 N.E. 2d 757 (1998); *Graham d/b/a The Graham Seed Company v Chicago, Rock Island and Pacific Railroad Company* 431 F. Sup. 444 (1976); *Sunny Isles Marina Inc v Adulami et al* 706 So. 2d 920 (1998); *Foster v Matthews* 714 So. 2d 1215 (1998); *Swift v Chick et al* 242 A.D. 2d 188 674 N.Y.S. 2d 17 (1998); *Chicago Great Western Railway Company v Farmers Produce Company* 164 F. Supp 532 (1958); *Smit v Seaboard Coast Line Railroad Company* 639 F. 2D 1235 (1981); *United States v United States Cartridge Co* 198 F. ed 456 (1952); *Messersmith v American Fidelity Co* 232 N.Y. 161, 33 N.E. 432 (1921); *Shell Oil Company v Visconto* 28 N.Y. 2d 205, 269 N.E. 2d 799, 321; *Krohnert Yacht System Hawai Inc* 4 Haw.App. 190, 664 P.2d 738 (1983); *Chicago and North Western Railway Company v Rissler and McMurray* 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 v Waking et al* 44 S.E. 320 (1903); *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); *Banfield v Louis Cat Sports, Inc* 589 So. 2d 441 (1991); *Olson v Molzen* 558 S.W. 2d 429 Tenn (1977); *Crawford v Buckner* 839 S.W. 2d 754 (1992); *Kuzmiak v Brookchester* 33 N.J. Super 575, 11, A. 2d 425 (1955); *Schlobohm v Spa Petite Inc* 326 N.W. 2d 920 (1982).

301 *North Cutt et ux v Highfill et al* 8 S.W. 2d 209 225 456 (1928); *Anderson v Blair* 202 ALA 209, 80, So. 31 (1918); *Home Beneficial Ass'n v White* 180 Tenn. 585, 177, S.W. 2d 545 (1944); *Bay Tucker and Sons Inc v GTE Directors Sales Corporation* 253 Neb 458, 571 N.W. 2d 64 (1997); *Allan v Snow Summit Inc* 51 Cal.App 4th 1358; 59 Cal Rptr 2d 813 (1956); *McCutheon v United Homes Corp* 79 Wash. 2d 443, 486 P. 2d 1093; *Henningsen v Bloomfield Motors, Inc* 32 N.J. 358, 161 A.2d 69 (1960); *Kuzmiak v Brookchester Inc* 33 N.I. Super 575 A.2d 425, 575, 111 (1955); *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); *Globe Home Improvements Co v Perth Amboy Chamber of Commerce Credit Rating Bureau Inc* 116 N.J.L. 168, 182 A; *Banfield v Louis Cat Sports Inc* 589, So. 2d 441 (1991; *Olson v Molzen* 558, S.W. 2d 429 Tenn (1977); *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 Spa* 252 Pa. Super 162, 381 A.2d 164 (1977).

302 *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 (1990); *Tatham v Hoke* 469 F. Supp 914 (1979); *Emory Univ v Porubiansky* 248 Ga. 391, 282 S.E. 2d 903 (1981); *Tunkl v Regents of University of California* 60 Cal. 2d 92, 98-101, 32 Cal. RPTR. 33, 37-38, 383 P. 2d 441 (1963); *Cudnick v William Beaumont Hospital* 207 Mich. App. 378, 525 N.W. 2d 891; *Leidy v Deseret Enterprises Inc* 252 Pa. Super 162, 381 A.2d 164 (1977).

welfare of the general public." [303]

Factors influencing public interests include, "inequitable harsh and oppressive terms; [304] "the loss of important rights"; [305] the activity complained of concerns business of a type generally suitable for public regulations or the party seeking exculpation is engaged in performing service of great public performance and of practical necessity for some members of public. [306] The contract, transaction or course of dealing, is prohibited under a constitutional provision, statutory provision, or prior judicial decision. [307] The statutory provision referred to encompasses a public duty of care owed to members of the community. It is especially in the so-called hospital contracts containing exculpatory

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303 *Ingalls v Perkins* 263 P. 761 (1928); *Martin v Allianze Life Insurance Company* 573 N.W. 2d P23 (1998); *Styles v Lyon* 86 A. 564 (1913); *Anderson v Blair* 80 So. 31 (1918); *Twin City Pipe Line Co v Harding Glass Co* 283 U.S. 353, 51 S.Ct 476 (1931); *Banfield v Louis Cat Sports Inc et al* 589 So. 2d 441 (1991); *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); *Tucker and Sons Inc v GTE Directories Sales Corporation* 253 NEB 458, 57 N.W. 2d 64 (1997); *Hunter v American Rentals Inc* 189 Kan. 615, 371 P.2d 131 (1962); *Dessert Seed Co In v Drew Farmers Supply Inc* 248 Ark. 858, 454 S.W. 2d 307 (1970); *Occidental Savings and Loans Association v Venco Partnership* 206 NEB 469, 293 N.W. 2d 843 (1980).

304 *Styles v Lyon* 86 A.564 (1913); *Diamond Match Co v Roeber* 106 N.Y. 473, 13 N.E. 419 (1987); *Martin v Allianz Life Insurance Company of North America* 573 N.W. 2d 823 (1998); *Henningsen v Bloomfield Motors Inc* 32 N.J. 358, 161 A.2d 69 (1960); *Williams v Walker-Tomas Furniture Co* 32 N.J. 97 404, 161 A.2d at 95.

305 *Hennigsen v Bloomfield Motors Inc* 32 N.J. 358, 161 A.2d 69 (1960); *Chicago Great Western Railway Company v Farmers Produce Company* 164 F.Supp 532 (1958).

306 *Banfield v Louis Cat Sports Inc* 589 So. 2d 441 (1991); *Chicago Great Western Railway Company v Farmers Produce Company* 164 F.Supp 532 (1958); *Hunter v American Rentals Inc* 189 Kan. 615, 371 P.2d 131 (1962); *Belshaw v Feinstein* 258 Cal App 2d 711, 65 Cal Rptr 788 (1968); *Ash et al v New York University Dental Centre* 164 A.D. 2d 366, 564 N.Y.S. 2d 308; *Tatham v Hoke* 469 F.Supp 914 (1979); *Tunkl v Regents University of California* 383 P.2d 441 (1963); *Cudnick v William Beaumont Hospital* 207 Mich. App. 378, 525 N.W. 2d 891 (1995).

307 *Banfield v Louis Cat Sports Inc* 589 So.2d 441 (1991); *Stack v State Farm Mutual Automobile Insurance Company* 507 So. 2d 617 (1987); *Twin City Pipe Line Co et al v Harding Glass Co* 283 U.S. 353; 51 S.Ct 476 (1931); *Smith v Simon* 224 So. 2d 565 (1969); *Zeitz v Foley* 264 S.W. 2d 267 (1954); *Home Beneficial Ass'n v White* 180 Tenn. 585, 177 S.W. 2d 545 (1944); *Powell v American Health Fitness Centre of Fort Wayne Inc* 694 N.E. 2d 757 (1998); *Singer v Bulk Petroleum Corp* 9 F.Supp 2d 916 (1998); *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); *Batson-Cook Co v Georgia Marble Setting Co* 112 Ga. App. 226, 229-30, 144 S.E. 2d 547 (1965); *Smith v Seaboard Coast Line Railroad Company* 639 F.2d 1235 (1981); *Continental Corporation v Gowdy et al* 283 Mass. 204, 186 N.E. 244 (1933); *United State v United States Cartridge Co* 198 F. 2d 456 (1952); *Mayford Fabrics v Henly* 48 N.J. 483; 226 A.2d 602 (1967); *McCutcheon v United Homes Corp* 75 Wash. 2d 1093 (1971); *Henningsen v Bloomfield Motors Inc* 32 N.J. 358, 161, A.2d 69; *Levine v Shell Oil Company and Visconte* 28 N.Y. 2d 205, 269 N.E. 2d 799, 321 N.Y.S. 2d 81 (1971); *Krohnert v Yacht Systems Hawai Inc* 4 Haw. App 190, 664 P.2d 738 (1983); *Chicago and North Western Railway Company v Rissler* 184 F. Supp 98 (1960); *Crawford v Buckner* 839 S.W. 2d 754 (1992); *Schlobohm et al v Spa Petite Inc* 326 N.W. 2d 920 (1982); *Leidy v Deseret Enterprises Inc* 252 Pa, Super 162, 381 A.2d 164 (1977); *Tatham v Hoke* 469 F. Supp 914 (1979); *Olson v Molzen* 558 S.W. 2d 429 (1977); *Tunkl v Regents of University of California* 60 Cal 2d 92 32 Cal. RPTR 33, 383 P. 2d 441 (1963); *Cudnik v William Beaumont Hospital* 207 Mich. App. 378, 525 N.W. 2d 891 (1995).

provisions that it has, frequently, been held that professional standards cannot be compromised, as they negatively impact on public interests. Instead, what is required is to provide health care in a safe and professional manner. [308]

Thirdly, the equality of bargaining power has become a very prominent factor, in especially the more modern era in America, which greatly influences the status of exculpatory provisions in contracts. Factors which play a major role in determining whether exculpatory provisions, included in contracts, are invalid and unenforceable due to the inequality of bargaining power, include, the unconscionable-ness of certain agreements; [309] the type of adhesion agreements; [310] the monopolous position, especially, the stronger contracting party occupies in the contractual relationship. [311]

Other factors influencing the status of exculpatory clauses or exculpatory contracts in general, include, illegal or immoral contracts; [312] contracts tainted with fraud; [313] cases

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308 *Belshaw v Feinstein* 258 Cal App 2d 711, 65 Cal Rptr 788 (1968); *Ash et al v New York University Dental Centre* 164 A.D. 2d 366, 564 N.Y.S. 2d 308; *Tatham v Hoke* 469 F. Supp 914 (1979); *Emory University v Porubiansky* 248 Ga 351, 282, S.E. 2d 903; *Olson v Molzen* 558 S.W. 2d 429 (1977); *Tunkle v Regents of the University of California* 60 Cal 2d 92, 32 Cal. Rptr 33, 383 P.2d 441 (1963); *Cudnik v William Beaumont Hospital* 207 Mich. App. 378, 525 N.W. 2d 891 (1995).

309 *Williams v Walker-Thomas Furniture Co* 350 F,.2d 445 D.C. Cir (1965); *Martin v Allianz Life Insurance Company of North America* 573 N.W. 2d 823 (1998); *Horner v Boston Edison Company* 45 Mass. App Ct 139, 695 N.E. 2d 1093 (1998); *Central Alarm of Tucson v Ganem* 116 Aliz 74, 567 P.2d 1203 (1977); *Allan v Snow Summit Inc* 51 Cal App 4th 1358, 59 Cal Rptr. 2d 813 (1996); *Weaver v American Oil Co* 257 Ind 458, 276 N.E. 2d 144 (1971); *Henningsen v Bloomfield Motors Co* N.J. 358, 161 A.2d 69 (1960); *Mayfair Fabrics v Henley* 48 N.J. 483, 26 A.2d 602 (1968); *Leidy v Desert Enterprises Inc d/b/a Body Health Spa* 252 P.A. Super 162, 381 A.2d 164 (1977).

310 *Banfield v Louis Cat Sports Inc* 589 So. 2d 441 (1991); *Martin v Allianz Life Insurance Company of North America* 573 N.W. 2d 823 (1998); *Allan v Snow Summit Inc* 51 Cal App 4th 1358, 59 Cal Rptr 2d 813 (1996); *McCutcheon v United Homes Corp* 79 Wash. 2d 443, 486 P.2d 1093 (1971); *Henningsen v Bloomfield Motors Inc* 32 N.J. 358, 161 A 2d 69 (1960); *Levine v Shell Oil Company and Visconte* 28 N.Y. 2d 205, 269 N.E. 2d 799, 321 N.Y.S. 2d 81 (1971); *Kuzmiak v Brookchester Inc* 33 N.J. Super 575, 111 A. 2d 425 (1955); *Crawford v Buckner* 839 S.W. 2d 754 (1992); *Schlobohm et al v Spa Petite Inc* 326 N.W. 2d 920 (1982); *Cudnik v William Beaumont Hospital* 207 Mich Ap 378, 525 N.W. 2d 891; *Olson v Molzen* 558 S.W. 2d 429 (1977); *Tatham v Hoke* 469 F. Supp 914 (1979); *Ash et al v New York University Dental Centre* 164 A.D. 2d 366, 564 N.Y.S. 2d 308 (1990).

311 *Henningsen v Bloomfield Motors Inc* 32 N.J. 358, 161, A.2d 69 (1960); *Graham v Chicago Rock Island and Pacific Railroad Company* 431 F.Supp 444 (1976); *Kuzmiak v Brookchester Inc* 33 N.J. Super 575, 111 A. 2d 425 (1955); *Banfield v Louis Cat Sports Inc* 589 So. 2d 441 (1991); *Crawford v Buckner* 839 S.W. 2d 754 (1992); *Olson v Molzen* 558 S.W. 2d 429 (1977); *Ash et al v New York University Dental Centre* 164 A.D. 2d 366, 564 N.Y.S. 2d 308 (1990).

312 *Ingalls v Perkins* 263 P. 761 (1928); *Anderson v Blair* 80 So. 31 (1918); *Smith v Simon* 224 So 2d 565 (1969); *Zeitz v Foley* 264 S.W. 2d 267 (1954); *Ryan v Griffen* 199 Va. 891, 103 S.E. 2d 240 (1958); *United States v United States Cartridge Co* 198 F.2d 45 6 (1932).

313 *Zeitz v Foley* 264 S.W. 2d 267 (1954); *Continental Corporation v Gowdy et al* 283 Mass 204, 186 N.E. 244

involving private transactions, provided, they are not opposed to public interests. [314]

The effect of exculpatory provisions which are found to be contrary to public policy or public interests is that they are regarded as invalid and unenforceable, due to the fact that they are void. [315]

11.3.3.3 Legal Opinion

Standard form contracts are phenomena that have dominated the American contractual sphere over several decades. They are, today, still found in all walks of life, ranging from commerce, insurance, transport, public services, for example, warehousing, garage-keeping, parking etc. [316]

Although it is recognized that these types of contracts have brought with them distinct advantages, nonetheless, they have not escaped criticism from the legal writers and the courts alike. The main strands of criticism include, these types of contracts are drafted by the contracting party with the stronger bargaining power, terms are not frequently negotiated, and often unfair terms are imposed upon weaker contracting parties, over which they have no control, often leading to harsh and oppressive consequences. [317]

The standardized contracts which have, perhaps, received the greatest attention by the American courts is that of exclusionary clauses or disclaimers, be that in consumer

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(1933); *United States v United States Cartridge Co* 198 F.2d 456 (1952); *Levine v Shell Oil Company et al and Visconti* 28 N.Y. 2d 205, 269 N.W. 2d 799, 321 N.Y.S. 2d 81 (1971); *Equitable Loan and Security Co et al v Waring et al* 44 S.E. 320 (1903); *Schlobohm et al v Spa Petite Inc* 326 N.W. 2d 920 (1982); *Tunkl v Regents of University of California* 383 P.2d 441 (1963).

314 *Dixilyn Drilling Corp v Crescent Towing and Salvage Co* 372 U.S. 697, 83 S.Ct. 967, 10 L.E. 2d 78 (1963); *Bisso v Inland Waterways Corp* 349 84, 75 S.Ct 625, 99 L.E.D 911 (1955); *Kansas City Power and Nemark Morning Ledger Co* 111 N.J. Super 104, 267 A.2d 557 (1970) (such clause although not favoured depends on the position of the parties, i.e. special legal relationship and public interest *Ciofalo v Vic Tanney Gyms Inc* 10 N.Y. 2d 294, 177 N.E. 2d 925, 220 N.Y.S. 2d 962 (1961); *McCutcheon v United Homes Corp* 79 Wash. 2d 443, 486, P.2d 1093 (1971).

315 *Smith v Simon et al* 224 So 2d 565 (1969) (where the principal purpose of the contract is to provide protection to an illegal enterprise); *Zeitz v Foley* 264 S.W. 2d 267 (1954) (the direct object of the contract is to violate the constitution or state statute or some ordinance); *Ryan v Griffin* 199 Va 891, 103 S.E. 2d 240 (1958) (where the contract promotes something immoral like divorce).

316 Deutsch *Unfair Contracts* (1977) 2; Kessler "Contracts of Adhesion - Some thoughts about freedom of contract" 43 *Coolum Lire* 629, 631-33; 640-41 (1943); Summers and Hillman *Contract and Related Obligations: Theory, Doctrine and Practice* (1987) 583-584; Williston *Contracts* (1936 with 1865 cumulative supplement) Vol. 6 Para 1751C quoted in Von Hipper "The control of exemption clauses - A Comparative Study" *International and Comparative Law Quarterly* (Vol. 16) July 1967 591 at 599.

317 Deutsch (1977) 1-5; Summers and Hillman (1987) 584.

transactions, commercial transactions, be that personal injury cases where liabilities and risks are exempted. Moreover, these types of transactions have often been criticised by the courts. [318]

The position with regard to exclusionary clauses in contract and the different opinions expressed by the American courts are dealt with in a number of cases. Exclusionary clauses had first received recognition as early as 1936 in the case of *Broderson v Rainier National Park Co* [319] and followed thereafter in the case of *Griffiths v Broderick Inc*. [320]

In *Chazen v Trail Mobile,* [321] the court, with regard to landlord and tenant contracts, recognised that parties may contract to absolve themselves from liability prior to the Chazen case. The court, in *Kuzmiak v Brookchester Inc,* [322] recognized the influence of exculpatory clauses in especially, commercial and business transactions. But the court did declare: *"..... the validity of a particular contract depends upon many factors"* including "public interest" as a prominent factor influencing the validity and enforceability of exclusionary contracts.

There are however, cases in which the courts were very critical of the incorporation of exclusionary contracts in contracts, especially warranties in the manufacturing of automobiles. This formed the subject matter in the case of *Henningsen v Bloomfield Motors Inc,* [323] in which the court recognized the inherent danger of the gross disparity in the bargaining position of contractual parties. Accordingly, the court found that disclaimers and the consequent limitation of liability will not be given effect to if unfairly precluded and not brought to the notice of the other contracting party.

This position was followed in the case of *Levine et al v Shell Oil Company* [324] in which the court emphasized that courts should carefully scrutinize these types of agreements.

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318 Deutsch (1977) 9.

319 187 Wash. 399, 60 P.2d 234 (1936).

320 27 Wash. 2d 901, 182 P. 2d 18 (1947).

321 215 Tenn. 87, 384, S.W. 2d 1 (1964).

322 33 N.J. Super 575 111 A 2d 425 (1955).

323 32 N.J. 358, 161 A. 2d 769 (1960).

324 28 N.Y. 2d 205, 269 N.E. 2d 799, 321 N.Y.S. 2d 81 (1971).

But, there were courts, in this period that used the doctrine of freedom of contract as underlying rationale for recognizing the enforceability of exclusionary clauses. [325]

In the case of *Scholobohm et al v Spa Petite Inc,* [326] the court stated that, although exclusionary clauses are widely favoured, nonetheless, where exclusionary clauses violate public policy to protect themselves against liability resulting from their own negligence, they will be invalid.

But the courts have stated, unreservedly, that they will only declare contracts, in general, void against public policy where the contract or certain provisions of the contract are *"clear and free from doubt, and the injury to the public is substantial and not theoretical or problematical"* [327] or *"in their tendency, are so inimical to the public interest"*. As there was no other independent doctrine to deal with the deficiencies and unfairness which these type of contracts bring, prior to the inception of the *Uniform Commercial Code*, the traditional defences, such as lack of mutual assent, fraud, duress and especially public policy, were used to invalidate unfair standardized contracts or clauses of waiver or exclusionary

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325 *Chicago and North Western Railway Company v Rissle and McMurray Construction Co and Truck Insurance Exchange* 184 F. Supp 98 (1960); See also *Occidental Savings and Loan Association v Venco Partnership* 206 N.E.B. 469, 293 N.W. 2d 843 (1980); *Equitable Loan and Security Co et al v Waring et al* 62 L.R.A. 931 117 Ga 599, 44, S.E. 320, 97 AM ST 173; *Crawford and Buckner* 839 S.W. 2d 754 (1992).

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

327 *Oregon R.R. and Navigation Co v Dumas* (C.C.A.) 181 F, 781; *North Cutt et ux v Highfeld et al* 9 S.W. 2d 209, 225, 456, 9 S.W. 2d 209 (1928); *Styles v Lyon* 87 Conn. 23, 86 A. 564 (1913); *Twin Pipe Line Co et al v Harding Glass Co* 283 U.S. 353, 51, S.Ct 476; *Smith v Simon* 224 So. 2d 565 (1969); *Martin v Allianz Insurance Company of North America* 573 N.W. 2d 823 (1998); *Wunchel Law Firm, P.C. v Clabaugh* 291 N.W. 2d *In re Estate of Barnes*, 256 ICWA at 1052, 128 N.W.2d at 192; *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); *Powell v American Health Fitness Centre of Fort Wayne Inc* 694 N.E. 2d 757 (1998); *Graham d/b/a The Graham Seed Company v Chicago, Rock Island and Pacific Railroad Company* 431 F. Sup. 444 (1976); *Sunny Isles Marina Inc v Adulami et al* 706 So. 2d 920 (1998); *Foster v Matthews* 714 So. 2d 1215 (1998); *Swift v Chick et al* 242 A.D. 2d 188 674 N.Y.S. 2d 17 (1998); *Chicago Great Western Railway Company v Farmers Produce Company* 164 F. Supp 532 (1958); *Smit v Seaboard Coast Line Railroad Company* 639 F. 2D 1235 (1981); *United States v United States Cartridge Co* 198 F. ed 456 (1952); *Messersmith v American Fidelity Co* 232 N.Y. 161, 33 N.E. 432 (1921); *Shell Oil Company v Visconto* 28 N.Y. 2d 205, 269 N.E. 2d 799, 321; *Krohnert Yacht System Hawai Inc* 4 Haw.App. 190, 664 P.2d 738 (1983); *Chicago and North Western Railway Company v Rissler and McMurray* 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 v Waking et al* 44 S.E. 320 (1903); *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); *Banfield v Louis Cat Sports, Inc* 589 So. 2d 441 (1991); *Olson v Molzen* 558 S.W. 2d 429 Tenn (1977); *Crawford v Buckner* 839 S.W. 2d 754 (1992); *Kuzmiak v Brookchester* 33 N.J. Super 575, 11, A. 2d 425 (1955); *Schlobohm v Spa Petite Inc* 326 N.W. 2d 920 (1982).

clauses. [328]

The use of public policy was, however, severely restricted, in that there were no clear rules of application, often referred to as were as *"a very unruly horse!."* [329]

Although the courts developed methods of interpretation and construction to invalidate or restrict unfair disclaimers, the inconsistency thereof led legal writers to argue that the measures introduced were insufficient to protect the weaker party in these types of contracts. [330]

Though the courts favoured exculpatory clauses in certain circumstances, the courts have been robust in their recognition, in other circumstances, by openly declaring that these types of clauses are not favoured in law. [331]

The rules of interpretation or construction have been used by the courts to assess whether an exculpatory clause is unfair and against public policy or public interests. Consequently, the courts have held that a clause exonerating a party from liability will be strictly construed against the benefited party. Therefore, if the clause is either ambiguous in scope or purported to release the benefited party for intentional, wilful or wanton acts, it will not be enforced. [332]

But, in time, the courts, during the pre-code era, often adopted techniques in exercising judicial control over these types of clauses. The techniques included the evolution of the doctrine of unconscionable-ness, public duties, the unequal bargaining power of the parties, public interests. [333]

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328 Deutsch (1977) 11.

329 Deutsch (1977) 13.

330 Deutsch (1977) 14-15; Summers and Hillman (1987) 585; Kessler (1943) 629, 631-633.

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

332 *Farmington Plumbing and Heating Co v Fischer Sand and Aggregate Inc* 281 N.W. 2D 838, 842 Minn. 1979; *Solification Inc v Minter* 305 N.W. 2d 871, 873 Minn. 1981; *Schlobohm et al v Spa Petite Inc* 326 N.W. 2d 920 (1982); *Jones v Dressel, Colo* 623 P.2d 370, 376 (1981); *Winterteen v Wiilcom* 16 MD. App 130, 136, 793 A. 2d 821, 824.

333 Deutsch (1977) 18-19; Von Hippel (1967) 600; Williston (1938) with cumulative supplement (1966) Paras 1715C, 1851B provides that where parties do not stand in a footing of equality, this may influence the court in declaring these type of clauses invalid.

The United States of America eventually adopted the *Uniform Commercial Code* [334] which expressly empowers the courts to strike down "unconscionable" clauses. The Act serves as a legislative attempt to give the courts a general discretionary standard by which to judge the fairness of a contract or its terms. [335]

Another legislative measure put in place was the restriction of the law of contracts, [336] which also had as its purpose the protection of the public against unfair terms in exculpatory or indemnity clauses. [337]

It is especially in hospital contracts containing exculpatory provisions that the American courts have frequently held that, as the exculpatory provisions involve the public interest they will not stand. But, cautions the courts, "public interest" will only be regarded as a defence where *"there is a clear and manifest injury to the interests of the state"* or "injurious to the public interests or the welfare of the general public." [338]
There are various factors which influence public interests including the following namely:

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334 Approved in 1952 and amended since on occasions and adopted by most states in the United States of America.

335 See S2-302(1) which provides that if a 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 the remainder of the contract.

336 S579 of the *Restatement (Second) of Contracts* (1981) provides for the denouncement of exemption clauses as illegal where there is a wilful breach of duty or a bargain for exemption from liability for negligence in an employer-employee relationship or one of the parties is charged with a duty of public service and the exemption relates to negligence in the performance of the duty or part thereof exempting him/her from compensation or part thereof.

337 *North Cutt et ux v Highfill et al* 8 S.W. 2d 209 225 456 (1928); *Anderson v Blair* 202 ALA 209, 80, So. 31 (1918); *Home Beneficial Ass'n v White* 180 Tenn. 585, 177, S.W. 2d 545 (1944); *Bay Tucker and Sons Inc v GTE Directors Sales Corporation* 253 Neb 458, 571 N.W. 2d 64 (1997); *Allan v Snow Summit Inc* 51 Cal.App 4th 1358; 59 Cal Rptr 2d 813 (1956); *McCutheon v United Homes Corp* 79 Wash. 2d 443, 486 P. 2d 1093; *Henningsen v Bloomfield Motors, Inc* 32 N.J. 358, 161 A.2d 69 (1960); *Kuzmiak v Brookchester Inc* 33 N.I. Super 575 A.2d 425, 575, 111 (1955); *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); *Globe Home Improvements Co v Perth Amboy Chamber of Commerce Credit Rating Bureau Inc* 116 N.J.L. 168, 182 A; *Banfield v Louis Cat Sports Inc* 589, So. 2d 441 (1991; *Olson v Molzen* 558, S.W. 2d 429 Tenn (1977); *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 Spa* 252 Pa. Super 162, 381 A.2d 164 (1977).

338 *Ingalls v Perkins* 263 P. 761 (1928); *Martin v Allianze Life Insurance Company* 573 N.W. 2d P23 (1998); *Styles v Lyon* 86 A. 564 (1913); *Anderson v Blair* 80 So. 31 (1918); *Twin City Pipe Line Co v Harding Glass Co* 283 U.S. 353, 51 S.Ct 476 (1931); *Banfield v Louis Cat Sports Inc et al* 589 So. 2d 441 (1991); *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); *Tucker and Sons Inc v GTE Directories Sales Corporation* 253 NEB 458, 57 N.W. 2d 64 (1997); *Hunter v American Rentals Inc* 189 Kan. 615, 371 P.2d 131 (1962); *Dessert Seed Co In v Drew Farmers Supply Inc* 248 Ark. 858, 454 S.W. 2d 307 (1970); *Occidental Savings and Loans Association v Venco Partnership* 206 NEB 469, 293 N.W. 2d 843 (1980).

"inequitable harsh and oppressive terms"; [339] *"the loss of important rights"*; [340] *"the activity complained of concerns business of a type generally suitable for public regulation or the party seeking exculpation performs a service of public interests"*; [341] *"the contract or transaction is prohibited under a constitutional provision, statutory provision or prior judicial decision."* [342] The statutory provision referred to, encompasses a public duty owed to members of the community. In this regard the courts have held that professional standards, in especially medical care, cannot be compromised as they impact on public interests. [343]

11.4 Summary and Conclusions

Ever since their first application in Roman law, exclusionary clauses have, throughout the ages, had a major impact on the Law of Contract. With the advent of commerce and the

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339 *Styles v Lyon* 86 A.564 (1913); *Diamond Match Co v Roeber* 106 N.Y. 473, 13 N.E. 419 (1987); *Martin v Allianz Life Insurance Company of North America* 573 N.W. 2d 823 (1998); *Henningsen v Bloomfield Motors Inc* 32 N.J. 358, 161 A.2d 69 (1960); *Williams v Walker-Thomas Furniture Co* 32 N.J. 97 404, 161 A.2d at 95.

340 *Hennigsen v Bloomfield Motors Inc* 32 N.J. 358, 161 A.2d 69 (1960); *Chicago Great Western Railway Company v Farmers Produce Company* 164 F.Supp 532 (1958).

341 *Banfield v Louis Cat Sports Inc* 589 So. 2d 441 (1991); *Chicago Great Western Railway Company v Farmers Produce Company* 164 F.Supp 532 (1958); *Hunter v American Rentals Inc* 189 Kan. 615, 371 P.2d 131 (1962); *Belshaw v Feinstein* 258 Cal App 2d 711, 65 Cal Rptr 788 (1968); *Ash et al v New York University Dental Centre* 164 A.D. 2d 366, 564 N.Y.S. 2d 308; *Tatham v Hoke* 469 F.Supp 914 (1979); *Tunkl v Regents University of California* 383 P.2d 441 (1963); *Cudnick v William Beaumont Hospital* 207 Mich. App. 378, 525 N.W. 2d 891 (1995).

342 *Banfield v Louis Cat Sports Inc* 589 So.2d 441 (1991); *Stack v State Farm Mutual Automobile Insurance Company* 507 So. 2d 617 (1987); *Twin City Pipe Line Co et al v Harding Glass Co* 283 U.S. 353; 51 S.Ct 476 (1931); *Smith v Simon* 224 So. 2d 565 (1969); *Zeitz v Foley* 264 S.W. 2d 267 (1954); *Home Beneficial Ass'n v White* 180 Tenn. 585, 177 S.W. 2d 545 (1944); *Powell v American Health Fitness Centre of Fort Wayne Inc* 694 N.E. 2d 757 (1998); *Singer v Bulk Petroleum Corp* 9 F.Supp 2d 916 (1998); *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); *Batson-Cook Co v Georgia Marble Setting Co* 112 Ga. App. 226, 229-30, 144 S.E. 2d 547 (1965); *Smith v Seaboard Coast Line Railroad Company* 639 F.2d 1235 (1981); *Continental Corporation v Gowdy et al* 283 Mass. 204, 186 N.E. 244 (1933); *United State v United States Cartridge Co* 198 F. 2d 456 (1952); *Mayford Fabrics v Henly* 48 N.J. 483; 226 A.2d 602 (1967); *McCutcheon v United Homes Corp* 75 Wash. 2d 1093 (1971); *Henningsen v Bloomfield Motors Inc* 32 N.J. 358, 161, A.2d 69; *Levine v Shell Oil Company and Visconte* 28 N.Y. 2d 205, 269 N.E. 2d 799, 321 N.Y.S. 2d 81 (1971); *Krohnert v Yacht Systems Hawai Inc* 4 Haw. App 190, 664 P.2d 738 (1983); *Chicago and North Western Railway Company v Rissler* 184 F. Supp 98 (1960); *Crawford v Buckner* 839 S.W. 2d 754 (1992); *Schlobohm et al v Spa Petite Inc* 326 N.W. 2d 920 (1982); *Leidy v Deseret Enterprises Inc* 252 Pa, Super 162, 381 A.2d 164 (1977); *Tatham v Hoke* 469 F. Supp 914 (1979); *Olson v Molzen* 558 S.W. 2d 429 (1977); *Tunkl v Regents of University of California* 60 Cal 2d 92 32 Cal. RPTR 33, 383 P. 2d 441 (1963); *Cudnik v William Beaumont Hospital* 207 Mich. App. 378, 525 N.W. 2d 891 (1995).

343 *Belshaw v Feinstein* 258 Cal App 2d 711, 65 Cal Rptr 788 (1968); *Ash et al v New York University Dental Centre* 164 A.D. 2d 366, 564 N.Y.S. 2d 308; *Tatham v Hoke* 469 F. Supp 914 (1979); *Emory University v Porubiansky* 248 Ga 351, 282, S.E. 2d 903; *Olson v Molzen* 558 S.W. 2d 429 (1977); *Tunkl v Regents of the University of California* 60 Cal 2d 92, 32 Cal. Rptr 33, 383 P.2d 441 (1963); *Cudnik v William Beaumont Hospital* 207 Mich. App. 378, 525 N.W. 2d 891 (1995).

arrival of the industrial revolution, the use of standardized contracts, often incorporating exclusionary clauses, became the order of the day. Exclusionary clauses have, as their foundation, the principle of the freedom to contract. To draw from the philosophy of Grotius, *"man's right to contract"*. A further underlying philosophy which influenced the recognition of exclusionary clauses during the early period is that of *laissez-faire,* which meant that the law should interfere with people as little possible. This resulted in Judges being reluctant, during this time, to interfere with contractual arrangements. Beyond this period, especially during the twentieth century, the universal use of standardized contracts incorporating exclusionary clauses reached gigantic proportions. The usage of these types of contracts in the commercial sphere included insurance, banking, transport and every other conceivable business, including, hospital contracts.

In time, with the formation of consumer affairs bodies, whose aim was to protect consumers against exploitation and exploitative practises, the ills that standardized contracts and exclusionary clauses had brought with them were recognised. One of the major discoveries made by the consumer affairs movement was that exclusionary clauses became a mighty tool for the exploitation of the weaker contracting party, by the stronger party. This arose from the unequal bargaining position in which the contracting parties found themselves.

The era of consumerism brought about new thinking and legal jurisprudence. A new ethos emerged, switching from `to honour and enforce a contract' to the moral principle that one ought not to take advantage of an unfair contract.

But, despite the efforts made by the consumer bodies to curb the use of exclusionary clauses, these types of clauses, universally, remain a major force in the commercial sphere.

Different jurisdictions have, however, engaged different authoritative bodies, including the courts and the legislature, in curbing exploitative practises by the use of exclusionary clauses in contract. The South African courts, for example, have used the doctrine of public policy to denounce exclusionary clauses which have been shown to be harsh and oppressive. Other factors used by our courts include, public interest and the violation of public welfare. Other methods used by the courts include the application of the *contra proferentem* rule. But, the courts have not been consistent in their approach. No wonder the South African Law Commission stepped in by investigating the means of controlling unfair exclusionary clauses. Unfortunately, despite making positive findings for law reform in South Africa and compelling draft legislation to regulate unfair contracting provisions

which are unfair, unreasonable and unconscionable, this was not carried further. More recently, an attempt has also been made by the legislature in introducing the Consumer Protection Bill.

This, as has been seen in this Chapter, has resulted in South Africa lagging behind in its efforts to strive for fairness in contract.

In contrast, English Law, besides engaging the courts to adopt certain measures to alleviate the position of the weaker contracting parties, also engaged the legislature to affect legislation. The purpose of the legislation was to control unfair contractual clauses. The measures adopted by the courts include the application of the incorporation rule, the notice of the exclusionary clause rule, and the rule of construction or otherwise, the rule of interpretation, alias *contra proferentem* rule.

Because of the inconsistency shown by the courts in denouncing unfair exclusionary clauses, the British Government appointed the English Law Commission and Scottish Law Commission in a joint effort to investigate the possibility of transforming the English Law of Contract, as means of bringing about reform to the controlling of exemption clauses. This resulted in the eventual enactment of legislation in England in the form of the *Unfair Contract Terms Act* 1977. This was widely accepted by the English courts and greater control of unfair contractual terms resulted. More recently, the *Human Rights Act* 1998, also dictates that any decision made by a public authority, including, hospitals and doctors, concerning medical practise, must be made on the basis of current medical ethical standards and in compliance with the provisions of the *Human Rights Act*.

The United States pursued a similar path to England. The American courts, first of all armed themselves with the traditional common law defences, including public policy, public interests, fraud, undue influence, lack of mutuality in curbing unfair contractual terms. Other methods adopted by the courts also included the rule of incorporation and the rule of constriction, also known as the *contra proferentem* rule.

But, as in England, the American courts were very inconsistent in denouncing unfair exclusionary clauses, however harsh or oppressive they may have been. It may have had as a consequence, a contracting party losing a remedy against the other based on liability arising from a negligent act.

This resulted in the American legislature eventually stepping in and enacting legislation in

the form of the *Uniform Commercial Code* 1952 and the *Restatement of the Law of Contracts* 1981. This move, it is said, was to exercise judicial control over exemption clauses, empowering the courts to strike down these types of clauses where they are unconscionable, harsh and oppressive. There are many other factors which also move the courts to declare certain exclusionary clauses void.

In this Chapter brief mention is made of the factors, including public policy, public interest, statutory provisions, the inequality of bargaining power and the criteria required to successfully rely on these factors.

In this Chapter the history of exclusionary clauses was explored. Part of the discourse included the recognition of exclusionary clauses generally. Part of the discourse also included what factors impact adversely on the recognition of exclusionary clauses. The latter merely served as an introduction.

A more comprehensive discussion on the factors impacting on exclusionary clauses generally will be covered in the next Chapter.

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.

Chapter 13

Constitutional issues surrounding the Law of Contract and the impact the Constitution has on exclusionary clauses in hospital contracts

13.1 Introduction

Since the *Constitution of the Republic of South Africa* [1] is the supreme law of the Republic, all law be that the common law, be that the statutory law, is subordinate to the *Constitution*. [2]

The *Constitution* is also said to affect not only the relationship between the State and other government structures and its citizens, but also private relationships between business enterprises and their clients. It includes, as will be argued in due course, the relationship between hospitals and patients. The new legal order in South Africa, with its overarching *Constitution,* emphasizes values in a way that the pre-1994 legal system had not catered for. It has also been stated that the values represent the spirit of the law, whilst the *Constitution* and more especially, the *Bill of Rights*, in many respects embodies the spirit of

1 Act No 108 of 1996.

2 Currie and De Waal *The Bill of Rights Handbook* 5ed (2005) 7-8 note that *"the Constitution, in turn, shapes the ordinary law and must inform the way legislation is drafted by the legislators and interpreted by the courts and the way the courts develop the common law."* They also state that *"any law or conduct that is not in accordance with the Constitution, either for procedural or substantive reasons, will therefore not have the force of law".* See also *The Executive Council of the Western Cape Legislature v President of the Republic of South Africa* 1995 (4) SA 877 (CC) Para 62.

the law. [3] The specific values the *Constitution* and more especially, the *Bill of Rights,* as will be seen from this chapter promotes, are those that underlie an open and democratic society based on human dignity, equality and freedom.

Insofar as the relationship between the *Constitution* and the *Law of Contract* is concerned, the same values that, underlie the *Bill of Rights* and which affect the spheres of law in general, also affects the law of contract. As was stated before, the *Constitution* permeates all law in South Africa, including the common law that regulates the enforcement of contracts. Whilst the importance of the historical background of South African contractual law has been emphasized in the preceding chapters, both the courts, and especially, a host of legal writers, have also pointed to the need to break with the past and, to retain from it, only that which is defensible. South Africa has a legal system which has always been premised upon precedent, which has created some form of turbulence and some uncertainty, especially, with the advent of our constitutional state. [4] This has resulted in the transformation of the South African legal system, not only in terms of procedural law but also the substantive law. This has resulted in an alignment with constitutional principles in the new constitutional order. To this end, traditional legal doctrines, methods of interpretation and legal principles stand in line to be tested against the new standards set by the *Constitution*. This is then referred to as `transformative constitutionalism.' [5]

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3 Pearmain "A Critical Analysis of the Law of Health Service Delivery in South Africa" *Unpublished LLD Thesis University of Pretoria* (2004).

4 De Vos "A Bridge Too Far? History as Context in the Interpretation of the South African Constitution". *South African Journal of Human Rights* (2001) 17 *SAJHR* 1 at 3-4, expresses this tension in the following terms: "The fact that the text of the 1996 Constitution is often vague, ambiguous and seemingly contradictory, means that it cannot provide a self-evident and fixed meaning to those who read it. Instead, it requires interpretation, and to do so it seems necessary to invoke sources of understanding and value external to the text and other legal materials. Most judges, lawyers and legal academics in South Africa seem profoundly uncomfortable with the notion that judicial decision-making in the constitutional sphere is not (always) aimed merely at discovering a `true', `'objective' or `original' meaning of the text and hence is not based (solely) on predictable and neutral principle. For if this is so, the interpreter of the constitutional text will (often) have to rely on other, subjective and extra textual factors - perhaps even the interpreter's own personal, political and philosophical views to give meaning to that text. The discomfort flows from the fact that most judges, lawyers and legal academics in South Africa broadly adhere to the traditional liberal school of adjudication, a tradition that jealously guards the boundary between law and politics" quoted with approval in Pearmain (2004) 115.

5 Klare "Legal Culture and Transformational Constitutionalism" (1998) 14 *SAJHR* 146 argues that the 1996 Constitution can be understood as establishing a long-term project described as `transformative constitutionalism' in terms of which the Constitution is seen as a transformative, dynamic document that requires continual reinvention to make sense of a changing world. It is a project with no instant solutions, requiring constitutional enactment, interpretation and enforcement committed to transforming South African social and political institutions and power relationships in a democratic, participatory and egalitarian direction. He points out that "transformative constitutionalism connotes an enterprise of inducing large scale social change through non-violent political processes grounded in law. I have in mind a transformation vast enough to be inadequately captured by the phrase `reform', but something short of or different from `revolution' in any traditional sense of the word." It

Consequently, there is thus great value in exploring and considering, in this chapter, constitutional legal principle and the underlying values in relation to factual situations that arise in the conclusion of contracts. Such an exercise will give direction to the focal point of this thesis in determining whether the entering into a medical contract in which the patient exonerates a hospital and its staff from liability flowing from the hospital or its staff's negligence causing damages to the patient would be inconsistent with the *Constitution* and invalid? An exercise undertaken in this chapter, although in the abstract, is likely to be fruitful when explored conceptually, in a rational and methodical way, so as to arrive at deductions and inferences which can be of considerable value in their practical applications. Since the study undertaken in this thesis involves a number of different branches of law including medical law, contract law, delict and constitutional law, it is of paramount importance to understand the constitutional principles with regard to these various branches. As constitutional law affects the conclusion of contracts, it is critical to gain a greater understanding of when and how the common law, of which the law of contract is an integral part, can be developed.

In this chapter, constitutional issues surrounding the law of contract will be looked at. What will also be considered is the possible impact of the *Constitution* or constitutional principles on exclusionary clauses in hospital contracts. What will be included for discourse in this chapter is the constitutional approach to the law of contract. This includes a discussion of how the *Constitution* and the *Bill of Rights* have impacted on the law, in general, in South Africa. The discourse also underlines the "value" approach South African law has adopted since the introduction of the new South African constitutional order. A great part of the introductory remarks have already focused on the impact the constitutional values have had on the South African legal system, including, the law of contract. It was previously stated and needs to be emphasized again, the common law to which the law of contract belongs, is subject to constitutional control. From the introductory remarks it is also clear that the common law which regulates the enforcement of contracts, must promote the values that underlie the *Bill of Rights*. The primary values identified include openness, dignity, equality and freedom. What has also emerged, amongst the legal writers and to a limited extent the courts, is that other values, including, fairness and good faith, as well as normative values and normative medical ethics, ought also to be adopted and promoted, especially in medical contracts.

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is submitted that the South African legal system itself must therefore be seen as being in a considerable state of flux as traditional legal doctrines, methods of statutory interpretation and legal principles stand in line to be tested against the new standard set by the Constitution. Uncertainty, at least in the beginning, is the price one pays for a new legal order" quoted with approval in Pearmain (2004) 115.

What is also comprehensively discussed in this chapter is the influence of the *Bill of Rights* on contract law principles. From this discourse it is clear that, since the *Constitution* first came into operation, the *Bill of Rights* has had a significant impact on the enforceability of contracts. It is especially the values of freedom and equality which play a fundamental role in determining the validity and enforceability of contracts.

Whereas the freedom of contract and its corollary of *pacta sunt servanda* in the pre-constitutional dispensation, played a significant role, in the new constitutional order, although the courts leave space for the doctrine to operate, the courts at the same time, allow courts to declare to enforce contractual terms that are in conflict with the constitutional values, even though the parties may have consented to them. Factors such as unfairness and unreasonableness have begun to play a significant role with the courts.
This chapter also considers the influence of values of equality and dignity and how they impact on the common law principle of *pacta sunt servanda* in a constitutional context. What follows is also a discourse on the influence of communal values and community interests and how they impact on the doctrine of *pacta sunt servanda* in the new constitutional order. What is significant is the fact that, in the new constitutional order, constitutional values of equality and dignity may prove to be decisive when the issue of the parties' relative bargaining position is an issue.

In this chapter, the aspect of validly waiving or limiting a contractual right is also considered against the background of certain rights in the *Bill of Rights,* they being regarded as inalienable and incapable of waiver. To this end, the validity of exclusionary clauses in hospital contracts, in which the hospital and/or its staff is exonerated from liability arising from their negligence, is considered, given especially, the fact that the right to healthcare is guaranteed by the constitutional order. In South Africa healthcare services are regulated by both the common law and statutory law. Factors which influence the common law, include, medical ethics governed by professional rules, codes and the *Hippocratic Oath,* which ultimately controls professional standards. What is significant, from medical ethics, is that the patient's interests are primary, especially, when weighed against the commercial interests of the medical practitioner or hospital. The welfare of the patient, likewise, must outweigh the private and personal consideration of the medical practitioner or hospital. From a constitutional point of view, normative ethics, in which the medical practitioner/hospital undertakes to do no harm and to act in the best interest of the patient, must be seen as, to a great extent, a human rights issue. The medical practitioner/hospital has an obligation not to harm the patient and to maintain, instead, a standard of due care

and skill. As will be seen from this chapter, disclaimers against medical negligence in hospital contracts would amount to an unreasonable/unfair/unethical acceptance, on the part of the patient, to contract to his/her potential harm. In a constitutional context, it would be inconsistent with the constitutional values. Factors which influence the statutory law include the fact that the licensing of private hospitals is regulated by statutory controls. One of the strict requirements for a private hospital to obtain and maintain a license is to show that a reasonable degree of care and skill will be attained and is being maintained by the hospital. This has to serve the best interests of the patient. It will be submitted, in due course, that once a license is granted, the continued licensing of the hospital is dependant on just that. It will also be submitted that a failure to maintain these standards would lead to the license being revoked. Other legislation applicable includes the *Nursing Act,* which requires from them the maintenance of high standards of reasonable care and skill and which serves the best interests of the patient.

The general public also has the expectation that they will be treated by a medical practitioner and/or hospital in a professional manner and with professional standards which will cause them no harm. This ethical conduct referred to earlier and the maintenance of professional standards must be upheld in treating patients or when surgery is conducted. Any attempt to compromise same, as will be seen in the succeeding chapter, would be a denial of adequate healthcare services and regarded as inconsistent with constitutional values and against public policy or the legal convictions of the community.

In this chapter, the significant role that public policy played, prior to the adoption of the new constitutional order and continues to play post the introduction of the Constitution and the *Bill of Rights* will be looked at. From the discourse in this chapter it is clear that a contract will not be enforced where its enforcement would be against public policy. This has repeatedly been highlighted by both the South African legal writers and the courts alike. But, as much as the principle has been aimed at protecting a contracting party in appropriate circumstances, what the courts have emphasized is that they will not exercise such power hastily or rashly and only in the clearest of cases. What stood out during the pre-constitutional era is that, although the courts had the power to declare contracts or contractual provisions contrary to public policy, the courts would not merely do so just because the contract or its terms offend `one's individual sense of propriety and fairness'. During this era it was continuously emphasized that `public policy generally favours the utmost freedom of contract'. Whilst it is generally accepted that public policy will continue to play a key role in the post-constitutional era, strong voices have gone up that the over-cautious approach by the courts in the past should be replaced by a strategy that any

provision or agreement, which is clearly at odds with the values enshrined in the Bill of Rights, should be treated as *contra bonos mores*. It has also been suggested that the values underlying fundamental rights and protected in the Bill of Rights, should be considered as important policy factors determining public policy. In this regard, it has been suggested that the principle of *pacta sunt servanda* should be interpreted to conflict as little as possible with fundamental rights, including, equality, the standard of care and medical ethics, in medical contracts, fairness and dignity. Other factors which, some of the legal writers suggest, influence public policy include, the unequal bargaining power of the parties, unjust and unreasonable clauses and good faith. There is also a strong call, from some of the legal writers, that the sanctity of contract must now also be constitutionally scrutinized against the values that animate the *Constitution*.

It will be noticed from this chapter that the South African courts have, to some degree, undergone some change in their approach when assessing conduct which ought to be found to be contrary to public policy. Some courts have identified certain aides, including normative values in which a balance has to be struck between the interests of the parties and the conflicting interests of the community. Other courts encourage the courts to consider fundamental values, including human dignity and the achievement of equality and the advancement of human rights.

More recently, in the contractual domain, the position has changed, albeit slightly. Whilst the courts still focus on the significance of contractual autonomy, they have also begun to caution against the excessive application of freedom of contract. Such an approach, it is submitted, leaves space for the doctrine of *pacta sunt servanda* still to operate. But, at the same time, allows courts to decline to enforce contractual terms that are in conflict with the constitutional values, even though the parties may have consented to the terms. The Constitutional Court, [6] in a very recent judgement, used Section 34 of the Constitution as a fundamental value impacting on public policy.

Although the jurisprudence concerning the influence of the *South African Constitution* on the law of contract is sparse and not well developed, in the last few years, however, more and more legal writers, [7] through their publications, have given some content to the

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6 *Barkhuizen v Napier* 2007 (5) SA 323 (CC).

7 See in this regard the writings of Tladi *"Breathing constitutional values into the law of contract: Freedom of Contract and the Constitution" De Jure* (2002) 306; Pearman "A critical analysis of the Law on Health Service Delivery in South Africa" - *An unpublished doctoral thesis* (2004) University of Pretoria 114; Van Aswegen "The implications of a Bill of Rights for the law of contract and delict." (1995) *SAJHR* 40; Hopkins "Standard-form

jurisprudential body. In this chapter the most relevant provisions of the *Bill of Rights* and how they impact on the law of contract, will be looked at. The sections include, Sections 8, 9, 34, 38 and 39. From the discussion of section 8 it is clear that the *Constitution* recognises that the rights in the *Bill of Rights* may also be enforced against private parties, be they, natural persons or juristic persons, through the direct and indirect `horizontal' operation of rights in private disputes between the parties. Constitutional Law, therefore, applies to the law of contract by the application of any right with horizontal application under Section 8(2) of the Bill of Rights. A difference of opinion, however, exists whether the Bill of Rights applies directly or indirectly. A popular view is that it applies indirectly.

The commitment to equality in terms of the *Constitution* is fundamental in the new constitutional order. Section 9 of the *Bill of Rights* provides for the right to equality and its corresponding duties. The rationale for the recognition of the right to equality is said to be focused on the unjust domination by the stronger contracting parties, often big enterprises or monopolies, to the detriment of the weaker contracting parties. Although the South African legal jurisprudence is not rich with case law regarding the influence of Section 9 to the constitutional commitment to equality in contract, more recently, both the South African Court of Appeal [8] and the Constitutional Court, [9] have left traces of the direction that the courts may follow in the future. It has been shown, by the said courts that the Constitutional values of equality and dignity may prove to be decisive in contractual disputes. But, the courts require the party who rely on the inequality in bargaining power to prove the inequality between the two contracting parties. The popular view amongst the South African legal writers [10] seems to be, despite the fact that the inequality of bargaining power has never been a free-floating ground upon which a contracting party may rely to

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contracts and the evolving idea of private law justice: A case of democratic capitalist justice versus natural justice" *TSAR* (2003) 1 150; Bhana and Pieterse "Towards a reconciliation of contract law and constitutional values: Brisley and Afrox revisited (2005) 123 *SALJ* 865; Tladi "One step forward, two steps back for constitutionalising the common law: Afrox Healthcare v Strydom (2002) 17 *SAPR/PL* 473; Hawthorne "The principle of equality in the law of contract" 1999 (58) *THRHR* 157; Carstens and Kok "An assessment of the use of disclaimers by South African hospitals in view of constitutional demand, foreign law and medico-legal considerations" (2003) 18 *SAPR/PL* 430; Hopkins "Constitutional rights and the question of waivers: How fundamental are fundamental rights? (2001) 16 *SAPR/PL* 122.

8 *Napier v Barkhuizen* 2006 (4) SA 1 (SCA); 2006 (9) BCLR 1011 (SCA).

9 *Barkhuizen v Napier* 2007 (5) SA 323 (CC).

10 See especially, the writings of Currie and De Waal *The Bill of Rights Handbook* (2005) 337; See also the writings of Jansen and Smith "Hospital Disclaimers: Afrox Healthcare v Strydom (2003) *Journal for juridical science* 28(2) 210, 217; Van den Heever "Exclusion of Liability in Private Hospitals in South Africa" *De Rebus* (April 2003) 47-48; Tladi (2002) 17 *SAPR/PL* 473; Bhana and Pieterse (2005) 123 *SALJ* 865.

recile from a contract, in terms of the *Constitution*; regard must be had to the right to equality, as enshrined in the *Bill of Rights*. Some writers believe the principle of equality can give content to the existing open concept of public policy. Others believe it ought to be a defence on its own.

In this chapter, the effect of Section 34 on the validity of exclusionary clauses or indemnity clauses, in which one of the contracting parties waives or limits his/her right to have a dispute settled by a court of law, is also considered. From the discourse in this chapter it is clear that Section 34, as contained in the *Bill of Rights,* gives expression to a foundational value in guaranteeing everyone the right to seek the assistance of the courts. The rationale for the existence of this foundational value is founded on the principle that we need to live in a stable and orderly society, free of self-help. [11] From this chapter it will also be seen that prior to the introduction of the *Constitution*, the common law also sought to protect potential litigants from being deprived of having a dispute adjudicated by a court of law. Any attempt to deny a contracting party such a right would be seen as contrary to public policy. [12] The introduction of Section 34 of the *Constitution* has actually strengthened the legal position. It appears, therefore, that a blanket deprivation of access to the courts, in a contract containing an exclusionary clause, would be inconsistent with the values of the *Constitution* and against public policy.

Section 36, which deals with the justification of limiting constitutional rights, is of paramount importance for the research undertaken in this thesis. What is highlighted in this chapter is that constitutional rights and freedoms are not absolute. A right may be limited if it is shown that it is a law of general application and it is reasonable and justifiable in an open and democratic society, based on human dignity, equality and freedom. [13] Several criteria, as will be seen in this chapter, must be present before it can be said that the limitation is reasonable and justifiable. The purpose of the limitation is also of significant importance.

Another relevant section, which will be considered in this chapter and which has had a

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11 See especially, the innovative and persuasive reasoning of Hopkins "Exception clauses in contracts" *De Rebus* (June 2007) 22. See also the majority judgement of Ncgobo J in the Constitutional Court judgement of *Barkhuizen v Napier* 2007 (5) SA 323 (CC).

12 See the cases of *Nino Bonino v De Lange* 1906 (TS) 120; *Schierhout v Minister of Justice* 1925 (AD) 417; *Barkhuizen v Napier* 2007 (5) SA 323 (CC).

13 Section 36 of the *Constitution* recognizes the restrictions. See also the writings of Currie and De Waal (2005) 164ff.

marked influence on the development of the common law, is Section 39. This section serves as an aide in developing the common law, where no law exists or law reform is necessary, especially where the competing rights conflict with the values in the *Constitution*. From this chapter it will become clear that although some of the South African judges have shown a cautious reluctance to use Section 39 as an aide in developing the common law, [14] there can be no denial that, in some leading cases, the Constitutional Court [15] relied heavily on foreign law when interpreting the *Bill of Rights* and developing the common law. Whereas, on the one hand, certain judges fear that, when receiving foreign law, they may come from different social structures and milieu, as well as a difference in historical backgrounds, on the other hand, other judges believe they should adapt the common law, by using foreign law, to reflect the changing social, moral and economical fabric of the country.

Where the competing rights conflict with the values in the *Constitution*, from this chapter it will become clear that, although some of the South African judges have shown a cautious reluctance to use Section 39 as an aide in developing the common law, there can be no denial that, in some leading cases, [16] the Constitutional Court relied heavily on foreign law when interpreting the Bill of Rights and developing the common law. On the one hand, judges fear that when receiving foreign law, such law may come from different social structures and milieu. A difference in historical backgrounds may also exist between the two countries. [17] On the other hand, judges believe they should adapt the common law by using foreign law to reflect the changing social, moral and economic fabric of the country. [18]

In this chapter a brief discussion will also take place on how the *Constitution* influences the

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14 *Qozeleni v Minister of Law and Order and Another* 1994 (2) SALR 340 at 348; *Park-Ross and Another v The Director, Office of Serious Economic Offences* 1995 (2) BCLR 198 (C) 208-209; See especially, the remarks of Kriegler RJ in *Bernstein v Bester* 1996 4 BCLR 449 (CC); 1996 (2) SA (CC) Para 133.

15 *S v Makwanyane* 1995 (3) SA 391 (CC) Para 9; See especially, the leading case of *Carmichele v Minister of Safety and Security* 2001 (4) SA 938 at 954ff in which the court relied heavily on foreign law in developing common law.

16 *S v Makwanyane* 1995 (3) SA 391 (CC) Para 9; *Carmichele v Minister of Safety and Security* 2001 (4) SA 938 at 954ff.

17 See especially the remarks of Kriegler in *Bernstein v Bester* 1996 4 BCLR 449 (CC); 1996 (2) SA (CC) Para 133.

18 *S v Makwanyane* 1995 (3) SA 391 (CC) Para 9; *Carmichele v Minister of Safety and Security* 2001 (4) SA 938 at 954ff.

right to healthcare. Before this, however, can take place, brief attention is also paid in this chapter, to International Law and the right to healthcare. From the brief discourse it will be seen that the right to healthcare is recognized by *Public International Law*. [19] It is also recognized in the *International Human Rights Law*. [20] But, despite the recognition which the right to healthcare has received internationally, it remains an ideal, instead of a practical reality. Many factors influence this, ranging from the differences in domestic and other circumstances, etc. For that reason, the South African courts have adopted a very conservative approach.

In this chapter the South African *Constitution* and the right to healthcare, as previously stated, will be looked at. From the discourse in this chapter it is clear that the South African *Constitution* contains a number of references to healthcare services and medical treatment. It is also clear that there is no all embracing section in the *Constitution* which encapsulates the right to healthcare. Certain rights enshrined in the *Bill of Rights* are inextricably intertwined with the Constitutional right to healthcare. These rights include the right to life, the right to dignity, and the right to emergency medical treatment.

In so far as the right to life is concerned, it is necessary that the delivery of healthcare services has to be maintained in order to fulfil the right to life. [21] But, in South African law, where the *Constitution* is applied, certain limitations are sometimes placed on the delivery of healthcare services. When it comes to prolonging life, as opposed to protecting life, different values are applied.

The right to dignity, as with the right to life, is central to the provisions of the South African *Constitution*. Both these rights rank foremost in the hierarchy of rights in terms of the *Constitution*. As a constitutional right and value, it has been suggested that these rights are inalienable and any attempt to waive these rights would be inconsistent with the values of the *Constitution*. [22] The South African *Constitution* also provides for the right to emergency treatment. Therefore, a person who has, unexpectedly, met with a catastrophe,

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19 See the discussion of Pearmain "A critical analysis of the law on health services delivery in South Africa" *A Doctoral Thesis University of Pretoria* (2004) 51.

20 Pearmain (2004) 51.

21 Pearmain (2004) 118; Currie and De Waal (2005) 280.

22 See the very constructive comments by Hopkins "Constitutional rights and the question of waiver: How Fundamental are Fundamental Rights?" (2001) 16 *SAPR/L* 122 at 129.

should not be refused ambulance or other emergency services. Section 27(3) [23] contains a right and a duty to seek emergency medical treatment. Although it is generally applicable between State hospitals and patients, there is authority that Section 27(3) could horizontally also apply to the duty of private hospitals as well. [24]

13.2 **The Constitutional approach to the Law of Contract**

The *Constitution* of the Republic of South Africa [25] has heralded in a new dispensation in our country, affecting not only the relationship between the State and other government structures and its citizens, but also private relationships between business enterprises and their clients. [26]

One of the concepts which underlies the *Constitution* and which influences constitutional reconstruction, reconciliation and development, is that of values. [27]

It is especially the Constitutional court that has promoted the values which underlie an open and democratic society. In this regard, the Constitutional court has committed itself to a purposive approach to the interpretation of the *Bill of Rights*. [28] As the *Constitution* is the

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23 The *Constitution of South Africa.*

24 Currie and De Waal (2005) 553; Christie *Bill of Rights Compendium* (2002) 3H-40.

25 Act No 108 of 1996. Also referred to as the 1996 *South African Constitution* because of the fact that it is much more than an ordinary Act.

26 Tladi "Breathing Constitutional values into the Law of Contract: Freedom of Contract and the Constitution" *De Jure* (2002) 306 expresses the view that the *South African Constitution* is one of the most egalitarian constitutions in the world which *"presents a clear break from the past and are at odds with the values which dominated in the apartheid era."*

27 Several of the academic writers have described the influence of Constitutional values in different ways. Cockrell "Rainbow Jurisprudence" (1996) *SAJHR* 1 states that: *A convenient starting point is to focus on the one word which resonates like a leitmotiv throughout the judgements of the Constitutional Court in the past year: `values'."* Botha "The values and principles underlying the 1993 Constitution" (1994) 9 *SAPL* 233 state that: *"The Constitution is a repository of values"* and goes on to identify the following values in the constitutional text: national unity; limited government; liberty and equality; and pluralism. Van der Walt "Tradition on trial: A critical analysis of civil-law tradition in *South African Property Law*" (1995) 11 *SAJHR* 169 at 191-192 acknowledges those *"constitutional values"* and suggests that *"the Constitution must be interpreted in terms of values which take the past into account, but in doing so it looks towards the future, towards reconstruction and reconciliation in an "open and democratic society based upon freedom and equality"* (at 192). The writer adds: *"The Constitutional Court's pre-occupation with the intrusion of `values' into the adjudicative process provides us with an important clue for understanding the changes that have occurred at a deep level within the South African legal system over the past year."* The writer concludes: *"..... In essence my argument will be that the explicit intrusion of constitutional values into the adjudicative process signals a transition from a `formal vision of law' to a `substantive vision of law'."*

28 See De Waal and Currie, Erasmus 5ed (2005) 148 and the cases referred to therein footnote 12, where it is

Supreme law of the Republic of South Africa, all law or conduct inconsistent with the *Constitution* is, therefore, invalid. To this end, constitutional values have a profound and pervading impact on the way that law is interpreted and applied in South Africa. Moreover, in the new South Africa, the new legal order emphasizes values which, in a way, the pre-1994 legal system did not. [29] The values today represent the spirit of the law, the

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observed that the purposive approach is also sometimes referred to as "*value oriented*" or *"teleological"*. According to the court in *Baloro and Others v University of Bophuthatswana and Others* 1995 (4) SA 197 (B), referring to the *Interim Constitution*, (Act 200 of 1993): *"Chapter 3 contains at least one section (s35) which deals with its interpretation in explicit terms. According to s35 (1) a court interpreting the provisions of the chapter is firstly required to ("a ..... Court ..... shall") promote the values which underlie an open and democratic society based on freedom and equality. This formula opens the door to the evolution of a teleological approach to the interpretation of chapter 3 which, amongst others, allows for the interpretive adaptation of the human rights norms enshrined in it to constantly changing circumstances."* Ackerman J in *Ferreira v Levin No and Others, Vryenhoek and Others v Powell NO and Others* 1996 (1) SA 984 (CC) stated: *"A teleological approach, also requires that, the right to freedom be construed, generously and extensively."* In S v Makwanyane and Another (1995) (3) SA 394 (CC) Para 325, p506, O'Regan J. adopting such a teleological approach, observed the value as follows: *"Respect for the dignity of all human beings is particularly important in South Africa. For apartheid was a denial of a common humanity. Black people were refused respect and dignity and thereby the dignity of all South Africans was diminished. The new Constitution rejects this past and affirms the equal worth of all South Africans. Thus recognition and protection of human dignity is the touchstone of the new political order and is fundamental to the new Constitution. In my view exactly the same approach needs to be adopted in the case of the right to freedom."* In *Thoroughbred Breeders' Association v Price Waterhouse* 2001 (4) SA 551 (SCA) Olivier J, commenting on the virtues of the teleological approach stated at p623 that: *"The last-mentioned approach, in particular, not only `encapsulates in a synthesis the meritorious aspects of other theories and excludes their limitations (Devenish Interpretation of Statutes (1992) at 53) but also gives expression to the fundamental principles and ethos of the legal system as a whole: it is a value-coherent approach which best accords with the values of our Constitution."* O'Regan J in *S v Makwanyane and Another* 1995 (3) SA 391 (CC) Para 325, p506 states: *"In giving meaning to s9, we must seek the purpose for which it was included in the Constitution. This purposive or teleological approach to the interpretation of rights may at times require a generous meaning to be given to provisions of chap 3 of the Constitution and at other times a narrower or specific meaning. It is the responsibility of the courts, and ultimately this Court, to develop fully the rights entrenched in the Constitution. But that will take time. Consequently any minimum content which is attributed to a right may in subsequent cases be expanded and developed."*

29 See Pearmain "A critical analysis of the law on health service delivery in South Africa" - *An unpublished doctoral thesis* (2004) University of Pretoria 114. This view was expressed in several constitutional dicta. See for instance the judgement of Mohamed J in *S v Makwanyane and Another* (fn 4 supra) at 487 where he states: *"In some countries the Constitution only formalizes, in a legal instrument, a historical consensus of values and aspirations evolved incrementally from a stable and unbroken past to accommodate the needs of the future. The South African Constitution is different: it retains from the past only what is defensible and represents a decisive break from, and a ringing rejection of, that part of the past which is disgracefully racist, authoritarian, insular, and repressive, and a vigorous identification of and commitment to a democratic, universalistic, caring and aspirationally equalitarian ethos expressly articulated in the Constitution. The contrast between the past which it repudiates and the future to which it seeks to commit the nation is stark and dramatic."* See also the same judgement at p498 where he states: *"The Constitution makes it particularly imperative for courts to develop the entrenched fundamental rights in terms of a cohesive set of values, ideal to an open and democratic society. To this end, common values of human rights protection the world over and foreign precedent may be instructive."* At p505, O'Regan J observes that: *"In interpreting the rights enshrined in chap 3, therefore, the Court is directed to the future: to the ideal of a new society which is to be built on the common values which made a political transition possible in our country and which are the foundation of its new Constitution. This is not to say that there is nothing from our past which should be retained. Of course this is not so. As Kentridge AJ described in the first judgement of this Court (S v Zuma and Others 1995 (2) SA 642 (CC) (1995) 1 SACR 568), many of the*

Constitution and, more especially, the *Bill of Rights*. [30]

The specific values the *Constitution* promotes are those that underlie an open and democratic society, based on human dignity, equality and freedom. [31]
In so far as the relationship between the common law and the *Constitution* is concerned, it has been stated before that the common law is subject to constitutional control. [32]

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rights entrenched in s25 of the Constitution concerning criminal justice are long-standing principles of our law, although eroded by statute and judicial decision. In interpreting the rights contained in s25, those common law principles will be useful guides. But generally s35 (1) instructs us, in interpreting the Constitution, to look forward not backward, to recognize the evils and injustices of the past and to avoid their repetition. In Ryland v Edros 1997 (2) SA 690 (C) at p709, the court stated that: "I agree with the submission that the values of equality and tolerance of diversity and the recognition of the plural nature of our society are among the values that underlie our Constitution. In my view those values `irradiate', to use the expression of the German Federal Constitutional Court cited earlier, the concepts of public policy and boni mores that our Courts have to apply. Contrary to public policy (as opposed to those that are contra bonos mores) are contracts which might redound to the public injury. See Voet 1.14.16. The distinction is clearly put by Aqualius in the article to which I have already referred (1941) 58 SALJ 335 at 346. In my opinion the `radiating' effect of the values underlying the new Constitution is such that neither of these grounds for holding the contractual terms under consideration in this case to be unlawful can be supported. In S v Jordan and Others (Sex Workers Education and Advocacy Task Force and Others Amici Curiae) 2002 (6) SA 642 (CC), at p670 the court observed that: "The Constitution itself makes plain that the law must further the values of the Constitution. It is no answer then to a constitutional compliant to say that the Constitutional problem lies not in the law but in social values when the law serves to foster those values. The law must be conscientiously developed to foster values consistent with our Constitution. Where, although neutral on its face, its substantive effect is to undermine the values of the Constitution, it will be susceptible to constitutional challenge."

30 The relevant sections of the *Constitution* include: Sections 9 (equality), 22 (freedom of trade, occupation and profession), 23 (labour relations, 24 (environment), 25 (Property), 26 (housing), 27 (healthcare, food, water and social security), section 32 (the right of access to information), section 33 (the right to just administrative action) and section 41 (co-operative government) all of which contemplate legislative measures and expressly, in the case of sections 32, 33 and 41 mandate legislation to give effect to the principles enunciated in the *Constitution*. Section 39(2) of the *Bill of Rights*, provides that a court, tribunal or forum interpreting legislation and developing the common law must promote the spirit, purport and objects of the *Bill of Rights*. According to Pearmain (2004) 51 the same holds true, subject to the provisions of section 36, for Parliament when exercising its legislative power. (Section 44 (4) of the Constitution states that *"when exercising its legislative authority, Parliament is bound only by the Constitution, and must act in accordance with, and within the limits of, the Constitution. Section 36(2) states that `except as provided in subsection (1) or in any other provision of the Constitution, no law may limit any right entrenched in the Bill of Rights."*

31 Section 1 of the *Constitution* provides: *"The Republic of South Africa is one, sovereign, democratic state founded on the following values: (a) Human dignity, the achievement of equality and the advancement of human rights and freedoms (b) non-racialism and non-sexism (c) supremacy of the constitution and the rule of law (d) universal adult suffrage, a national common voters roll, regular elections and a multi-party system of democratic government, to ensure accountability, responsiveness and openness."* Section 7 provides: *"The Bill of Rights is a cornerstone of democracy in South Africa. It enshrines the rights of all people in our country and affirms the democratic values of human dignity, equality and freedom."* Section 39(1) requires that *"the rights in the Bill of Rights must be interpreted in such a way that the values that underlie an open and democratic society based on human dignity, equality and freedom are promoted."*

32 In this regard Chaskalson, stated in "The Impact of Seven Years of Constitutionalism on Law and Government in South Africa" *http://kas/org/Publications/SeminarReports/Constitution%20and%20Law%20iv/chaskalson.pdf* that

Academic writers have also aired their views on the extent to which the *Constitution* permeates the prevailing law and governs private relations. [33]

In so far as the effect of the Constitutional values on the *Law of Contract* is concerned, it has been stated, over and over before, that all law in South Africa, including the common law, that regulates the enforcement of contracts, must promote the values that underlie the *Bill of Rights*. [34]

Besides the recognition of values such as openness, dignity, equality and freedom what is mooted is that other values underlying the *Constitution* including fairness and good faith

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the Constitutional Court has stated in The Pharmaceutical Manufacturers Association of South Africa in re: The ex parte Application of the President of the Republic of South Africa 2000 (3) BCLR 241 (CC) Para 44 that: There are not two systems of law, each dealing with the same subject matter, each having similar requirements, each operating in its own field with its own highest court. There is only one system of law. It is shaped by the Constitution which is the supreme law, and all law, including the common law, derives from the Constitution and is subject to constitutional control." He also observes that in *Carmichele v Minister of Safety and Security and Another* 2001 (1) SA 489 (SCA) the court said that *"where the common law deviates from the Bill of Rights the courts have an obligation to develop it by removing that deviation."*

33 See for example Van Aswegen 1995 *SAJHR* 40; Visser "A successful invasion of the Private Law" 1995 THRHR 745; Botha and Carpenter "The Constitutional attack on Private Law: Are the Fears Well Founded?" 1996 *THRHR* 126; Springman and Osborne "Du Plessis is not Dead: South Africa's 1996 Constitution and the Application of the Bill of Rights to Private Disputes" 1999 *SAJHR* 25; Rautenbach "The Bill of Rights Applies to Private Law and Binds Private Persons" 2000 *TSAR* 296; Van der Walt "Die Toekoms van die Onderskeid tussen Publiekreg en Privaatreg in Die Lig van die Horisontale Werking van die Grondwet (deel 1)" 2001 *TSAR* 416.

34 See Hopkins *TSAR* (2003) 1 150 at 157. The writer holds the view that the values include openness, dignity, equality and freedom. The writer however, suggests that besides the aforementioned values, the courts must also broaden the values to include fairness and reasonableness. See also Cockerell: "Private Law and the Bill of Rights: A threshold issue of Horizontality" *Bill of Rights Compendium* (1997). See also Christie Bill of Rights Compendium (1997) 3H quoting Devenish *A Commentary on the South African Constitution* (1998) 101-102, Davis *Democracy and Deliberation: Transformation and the South African Legal Order* (1999) 162 holds the view that the *Constitution "seeks to infuse all South African Law with the spirit of its fundamental values so that the legal system can promote a society based on human dignity, freedom and equality"*. The writers Bhana and Pieterse (2005) 123 *SALJ* 865 states that whilst acceptance must be given to the values of freedom and equality nonetheless caution the writers at (879), liberty and contractual freedom is not immune from limitation. Consequently the writers' state: *"It is accordingly clear that the value of freedom does not equate with complete individual liberty and does not found an independent right to unlimited contractual liberty. What is also clear is that the meaning of the value of freedom in the 1996 Constitution is substantially less than its meaning in classical liberal theory. In particular, the value of freedom is reined in significantly by its interactions with the constitutional values of equality and dignity, as will now be contemplated."* The writers emphasize in particular the value of equality when they state (at 880): *"To this end, the value of equality (and the right in which it finds concrete expression) aids the transformation of South African society into an ultimately more egalitarian one through measures which may, to varying extents, limit a variety of individual liberty interests. In the contractual realm, for instance, such liberty-limiting measures include provisions of the Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000. This Act declares both the imposition of contractual terms, conditions or practices that have the effect of perpetuating the consequences of past unfair discrimination and the unfair limiting or denial of contractual opportunities to be practices which may amount to (prohibited) unfair discrimination."*

also be recognized. [35]

Strong arguments have also gone up to promote the adoption of normative values and normative medical ethics in, especially, medical contracts. [36]

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35 See Tladi (2002) 17 *SAPR/PL* 473 at 477.Besides recognizing freedom as a Constitutional value, the writer suggests that other values underlying the Constitution *inter alia* fairness, dignity and equality, especially the drive towards substantive equality should also be recognized. For the influence of the value of equality see also Hawthorne 1999 (58) *THRHR* 157 at 166-167; Hawthorne "Public Policy and Micro-Lending - Has the Unruly horse died?" (2003) 66 *THRHR* 116. The legal writers also plead for the reintroduction of the value of good faith in contract. According to Bhana and Pieterse (2005) 890 this will ensure a just and equitable law of contract.

36 Bhana and Pieterse (2005) 890 ff. persuasively, argue that: *"The law of contract, as a branch of the common law, is equally meant to embrace normative and constitutional values so as to adapt to the changing needs of the community. It is therefore difficult to discern a cogent explanation for contract law's apparent need for more certainty and its attendant `elevated' status."* Carstens and Kok in (2003) 18 *SAPR/PL* 430 at 449 also convincingly argue that the practice of especially disclaimers in hospital contracts under the influence of a value-driven Constitution now dictates that normative medical ethics and broader medico-legal considerations ought to be considered when the purposive approach is adopted. Value statements in the *Constitution* have often been invoked by our courts to throw light on contractual issues. In one of the first cases involving the sanctity of contract in the Constitutional scheme of things Cameron JA in *Brisley v Drotsky* 2002 (4) SA 1 relying on the value of freedom explained the position as follows: *"The Constitution's values of dignity and equality and freedom require that the courts approach their task of striking down contracts or declining to enforce them with perceptive restraint. One of the reasons is that contractual autonomy is part of freedom. Shorn of its obscene excesses contractual autonomy informs also the constitutional value of dignity..... The Constitution requires that its values be employed to achieve a careful balance between the unacceptable excesses of contractual "freedom" and securing a framework within which the ability to contract enhances rather than diminishes our self-respect."* The Supreme Court of Appeal per Brand JA in the much discussed case of *Afrox Healthcare Bpk v Strydom* 2002 (6) SA 21 (SCA) recognizes that Constitutional values do play a role in deciding contractual matters. Besides recognizing the Constitutional value that *"everyone has a right to medical care" as envisaged by section 27(1) of the Constitution, also points out that section 27(1) (a) is not the only Constitutional value relevant to the present case. Brand JA quotes with approval the passage formulated by Cameron JA in Brisley v Drotsky (supra) where it was stated: "The constitutional values of dignity and equality and freedom require that the Courts approach their task of striking down contracts or declining to enforce them with perceptive restraint contractual autonomy is part of freedom. Shorn of its obscene excesses, contractual autonomy informs also the constitutional value of dignity."* Brand JA, states that the constitutional nature of contractual freedom embraces in its turn the principle *pacta sunt servanda*. He notes that this principle was expressed by Steyn CJ in *SA Sentrale Ko-op Graanmaatskappy Bpk v Shifren en Andere* as follows: *"Die elementêre en grondliggende algemene beginsel dat kontrakte wat vryelik en in alle erns deur bevoegde partye aangegaan is, in die openbare belang afgedwing word."* In the light of these considerations, said Brand JA, the respondent's position that a contractual provision in terms of which a hospital is indemnified against the negligent actions of its nursing staff is in principle contrary to the public interest cannot be accepted. More recently, the Supreme Court of Appeals in the case of *Napier v Barkhuizen* 2006 (4) SA 1 (SCA); 2006 (9) BCLR 1011 (SCA) highlighted that contractual claims are now subject to the *Constitution*. It also accepted at Para 7 that a contractual term that is contrary to public policy is unenforceable and that 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."* However, it found that the evidence placed before it by way of a stated case was "extremely slim" for it to determine whether these constitutional values have been impeached.
But the Supreme Court of Appeals also cautioned at Para 12: *"that the fact that a term in a contract is unfair or may operate harshly does not, by itself, lead to the conclusion that it offends the values of the Constitution."* Here, it emphasized the principles of dignity and autonomy which *"find expression in the liberty to regulate one's life by freely engaging in contractual arrangements."* The court at paragraph 13 also suggested that the correct approach in considering the values of the *Constitution* would be to *"employ its values to achieve a balance that*

The values identified, generally include, human dignity, the achievement of equality and the advancement of human rights and freedoms. The writers have also, as discussed above, pleaded for the re-introduction of good faith in contract to be elevated as a free-floating and independent value. There are also those writers, as seen above, who have, quite correctly, suggested that normative ethical and medico-legal considerations ought to be added to the list of values to be used in appropriate situations.

13.3 The Influence of the Bill of Rights on the principles of the law of contract

Since the *Constitution of the Republic of South Africa Act,* 148 of 1996 came into operation; it has, as seen hereinbefore, impacted on the enforceability of contracts. The *Bill of Rights* embodied in Chapter 2 of the *Constitution*, contains various sections, namely; Section 7-39 and defines various Constitutional rights which affect the validity and enforceability of contracts. It has been stated before that any contract that infringes any of these rights will, generally, be unenforceable. [37] As was stated earlier, any interpretation of the *Bill of Rights* must promote the values that underlie an open and democratic society based on human dignity, equality and freedom. [38] In so far as the freedom aspect is concerned, the freedom referred to includes the freedom of contracting parties to contract in whatever manner and with whomever, unless restricted by some particular rule of law. [39] The same notion of the concern of the law of contract to voice this freedom and to enforce

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strikes down the unacceptable excesses of `freedom of contract', while seeking to permit individuals the dignity and autonomy of regulating their own lives." (Para 12) The Supreme Court of Appeal also accepted that the constitutional values of equality and dignity may prove to be decisive when the issue of parties' relative bargaining positions is an issue. In an appeal to the Constitutional Court in the case of *Barkhuizen v Napier* 2007 (5) SA 323 (CC) Ngcobo J in the majority judgement commented as follows to the role the Constitution plays in respect of contracts, namely: *"All law, including the common law of contract, is now subject to constitutional control. The validity of all law depends on their consistency with the provisions of the Constitution and the values that underlie our Constitution."* The court goes on to say: *"The application of the principle pacta sunt servanda is, therefore, subject to constitutional control."* The court does recognize the role fairness, justice and reasonableness plays in contract law, but, consequently holds that public policy ensures their existence. As to the recognition of good faith, the court rejects the idea that good faith ought to serve as one of the constitutional values governing the law of contract. In this regard the court states: *"As the law currently stands good faith is not a self-standing role, but an underlying value that is given expression through existing rules of law."*
Quoting the authority Hutchinson "Non-variation clauses in contract: Any escape from the Shifren straitjacket?" (2001) 118 *SALJ* 720 at 743-4 and quoted with approval in Brisley above at Para 22, the court suggests *"Good faith has a creative, a controlling and a legitimating or explanatory function. It is not, however, the only value or principle that underlies the law of contracts."*

37 Christie "The Law of Contract and the Bill of Rights" Chapter 3H in the *Bill of Rights Compendium* (2004) repeated in Christie *The Law of Contract in South Africa* (2006) 347.

38 Christie (2006) 347.

39 Christie "The Law of Contract and the Bill of Rights" Chapter 3H in the *Bill of Rights Compendium* (2004) 7.

agreements, finds expression in the maxim *pacta sunt servanda*. Freedom of contract is thus a corollary of *pacta sunt servande,* since each principle involves the other. [40] Consequently, in the section that follows, the influence of the *Bill of Rights* on the maxim *pacta sunt servanda* will be investigated. Part of the notion of freedom of contract and the maxim *pacta sunt servanda* is the belief that a contracting party may freely waive or limit a right by way of an agreement. What will be considered in this section as well is to what extent may constitutional rights be waived or excluded? What will be considered further is, whether a constitutional right is capable of being waived? Since certain South African writers hold the view that any attempts to waive a fundamental right are contrary to public policy, as some rights are inalienable, [41] what will be considered in this section is whether a waiver in a hospital contract, exonerating a hospital and its staff for liability arising from their negligence, is invalid and unenforceable.

Since the *South African Constitution* was born out of seriously considered public opinion stemming from widespread consultation and negotiation prior to its drafting and widespread approval, public policy plays a fundamental role and is deeply rooted in our *Constitution* and the values which underlie it. [42] For that reason, the role of public policy in the new constitutional dispensation will also be looked at.

13.3.1 The maxim *pacta sunt servanda*

The maxim *pacta sunt servande,* ever since it was first reinforced by the English courts, as far back as 1875, in the case of *Printing and Numerical Registering Company v Sampson* [43]

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40 Christie "The Law of Contract and the Bill of Rights" Chapter 3H in the *Bill of Rights Compendium* (2004) 7.

41 Hopkins (2001) 16 *SAPR/PL* 122.

42 See the writings of Christie "The Law of Contract and the Bill of Rights" Chapter 3H in the *Bill of Rights Compendium* (2004) 12. For the host of decisions in which this was held see *Carmichele v Minister of Safety and Security and Another (Centre for Applied Legal Studies Intervening)* 2001 (4) SA 938 (CC); 2001 (10) BCLR 995 (CC) at pares 54-6; *Price Waterhouse Coopers Inc and Others v National Potato Co-operative Ltd* 2004 (6) SA 66 (SCA); 2004 (9) BCLR 930 (SCA) at Para 24; *Afrox Healthcare Bpk v Strydom* 2002 (6) SA 21 (SCA) (2002) 4 ALL SA 125 (SCA) at Para 18; *Brisley v Drotsky* 2002 (4) SA 1 (SCA); 2002 (12) BCLR 1229 (SCA) at Para 91; and *Bafana Finance Mabopane v Makwakwa and Another* 2006 (4) SA 581 (SCA); (2006) 4 ALL SA 1 (SCA) at Para 11 quoted with approval in *Barkhuizen v Napier* 2007 (5) SA 323 (CC).

43 1875 CR 19 EQ 462. In this case Jessel MR stated: *"If there is one thing more than another which public policy requires it is that men of full age and competent understanding shall have the utmost liberty in contracting and that their contracts when entered into freely and voluntarily shall be held sacred and shall be enforced by Courts of Justice."* This view was echoed by Van den Heever JA in *Tjollo Ateljees (Edms) Bpk v Small* 1949 (1) SA 856 (A) at 873: *"Since the alleged rule (ie laesio enormis) encourages a party to divest himself of obligations which he has freely and solemnly undertaken, I do not consider it in harmony either with immanent reason or public policy."* The rationale therefore can be found in the working definition of a contract described by Christie *The Law of Contract in South Africa* (2006) 2 repeated in Christie *Bill of Rights Compendium* (2004) 3H5 namely: *"A contract is an*

has, and continues to play, an influencing role the world over. So great is the influence of the maxim that, even more recently and despite the new constitutional legal order in South Africa, the South African courts have again emphasized the importance of *pacta sunt servanda* in varying degrees.

One of the first cases post the introduction of the interim *Constitution,* [44] in which the Constitutional Court started showing signs of recognizing the freedom of contract as one of the cornerstones of the law of contract in South Africa, is that of *Ferreira v Levin*. [45] In this case, although the court did not deal with a purely contractual issue, but rather a liquidation of a company issue pertaining, *inter alia,* to the rule against self-incrimination in insolvency inquiries, the court balanced this with the protection of the liquidation that protect the interests of the creditors.

The court consequently recognized that in different contexts, greater or lesser weight must be given to the principle of freedom of contract. Ackerman J in this case consequently referred to *"rights of contractual freedom protected by the Constitution."*

In the case of *Knox d'Arcy Ltd v Shaw,* [46] Van Schalkwyk J, in a case concerning the validity and enforcement of a restraint of trade clause in favour of an employer had to balance the right to engage freely in economic activity with the principle of *pacta sunt servanda*. The court approached the issue, by indicating some of the reasons why some of the rights are weighty, as follows:

"It must be understood that there is a moral dimension to a promise which is seriously given and accepted. It is generally regarded as immoral and dishonourable for a promisor to break his trust and, even if he does so to escape the consequences of a poorly considered bargain, there is no principle that inheres in an open and democratic society, based upon freedom and equality, which would justify his repudiation of his obligations. On the other hand, the enforcement of a bargain (even one which was ill-considered) gives recognition to the important constitutional principle of the autonomy of the individual."

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agreement intended to be enforceable in law and the law of contract exist to give effect to the intention." The rationale can also be found in the work of Sir Frederick Pollock *The Principles of Contract* (1905) 1 in which he states: *"The Law of Contract may be described as the endeavour of public authority, a more or less imperfect one according to the nature of the case, to establish a positive sanction for the expectation of good faith which has grown up in the mutual dealings of men of average right-mindedness."*

44 *The Constitution of the Republic of South Africa Act* 200 of 1993.

45 1996 1 SA 984 (CC) Para (65).

46 1996 2 SA 651 (W) 660I-661A; 1995 12 BCLR (CC) 1702.

But it was Cameron JA, in the Supreme Court of Appeal's judgement of *Brisley v Drotsky,* [47] in a case concerning an order of eviction from rented premises where the landlord, having entered into an agreement of lease, seeks to have the lessee evicted. The court's response included constitutional principle which is encapsulated in the following comments: *"The Constitution's value of dignity and equality and freedom require that the courts approach their task of striking down contracts or declining to enforce them with perceptive restraint. One of the reasons is that contractual autonomy is part of freedom. Shorn of its obscene excesses, contractual autonomy informs also the constitutional value of dignity. The Constitution requires that its values be employed to achieve a careful balance between the unacceptable excesses of contractual "freedom", and securing a framework within which the ability to contract enhances rather than diminishes our self-respect."* [48]

In this case, Harms JA emphasized that only contracts that were patently incompatible with public policy could be regarded as void and unenforceable when he stated, at 16A-B:

"Om eenklaps aan regters 'n diskresie te verleen, om kontraktuele beginsels te verontagsaam, wanneer hulle dit as onredelik of onbillik beskou, is in stryd met hierdie werkswyse. Die gevolg sal immers wees dat die beginsel van pacta sunt servanda grotendeels verontagsaam sal word omdat die afdwingbaarheid van kontraktuele bepalings sal afhang van wat 'n bepaalde regter in die omstandighede as redelik en billik beskou."

In the subsequent, much criticized judgement of *Afrox Healthcare v Strydom,* [49] a case concerning the validity of an exclusionary clause in a hospital contract, in which the hospital exonerated itself and its staff from liability for its negligence, the court, per Brand JA, relies on freedom of contract as encapsulated in the common law maxim *pacta sunt servanda* for its conclusion. The Court noted that freedom is one of the values underlying the *Constitution*. Relying on the case of *Brisley v Drotsky,* the Court declared that the freedom of contract is, in fact, a constitutional value, as it forms part of freedom.

Brand JA cited with approval the dictum of Steyn CJ in the case of *Shifren* [50] in which it was stated:

"die elementêre en grondliggende beginsel dat kontrakte wat vryelik en in alle erns deur bevoegde partye

47 2002 12 BCLR 1229 (SCA) Para 94.

48 *Brisley v Drotsky* 2002 12 BCLR 1229 (SCA) Para 94.

49 (2002) 4 ALL SA 125 (SCA) 133.

50 *SA Sentrale Ko-op Graanmaatskappy Bpk v Shrifren* 1966 (4) SA 760 (A) 767A.

aangegaan is, in die openbare belang afgedwing word."

But, notwithstanding the value placed on the maxim *pacta sunt servanda* by, especially, the Supreme Court of Appeal in the cases of *Brisley v Drotsky* [51] and *Afrox Healthcare v Strydom*, [52] the judgements have come under scathing attacks from many South African academic writers. Many grounds for disagreeing with the fore stated dicta in these cases have been advanced. Some of the main opposition to the dicta includes the skewed value being placed upon the common law principle of *pacta sunt servanda* in a constitutional context. [53]

What is suggested by some legal writers is that the community interests, or communal values, ought to weigh heavier than personal autonomy. [54]

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51 (2002) 12 BCLR 1229 (SCA).

52 (2002) 4 ALL SA 125 (SCA) 133.

53 The writers Bhana and Pieterse *SALJ* (2005) 122 865 are very critical in that the classical liberal theory in which individual autonomy, freedom of contract and individual liberty is augmented. The writers go on to state that *"liberty is not, and indeed should not be, immune from limitation."* They add: "*It is accordingly clear that the value of freedom does not equate with complete individual liberty and does not found an independent right to unlimited contractual liberty. What is also clear is that the meaning of the value of freedom in the 1996 Constitution is substantially less than its meaning in classical liberal theory. In particular, the value of freedom is reined in significantly by its interaction with the constitutional values of equality and dignity."* The writers also raise concern at the ease at which the Supreme Court of Appeal favoured a classical liberal understanding of freedom of contract. In this regard the writers conclude that the classical concept of contractual liberty does not enjoy unequivocal constitutional support. Other writers who have stated before that freedom of contract has never been an absolute freedom include Hawthorne "Closing of the Open Norms in the Law of Contract" (2004) 67 (2) *THRHR* 294 pointing to the writings of Murray and Lubbe Farlam and Hathaway *Contract, Cases, Materials, Commentary* (1988) 37; Grove "Die Kontraktereg, Altruisme, Keusevryheid en die Grondwet 134 (2003) *De Jure* 146. For contrary views see Jordaan "The Constitution's Impact on the Law of Contract in Perspective" 50 (2004) *De Jure* 61-62. The writers Bhana and Pieterse (2005) *SALJ* 865, 879ff also express concern at the lack of insight by the court in the value of equality and the value of dignity. In this regard the writers argue: *"Even if one accepts (which we do not) Cameron JA's contention that inequality in bargaining power is irrelevant when considering the Shifren principle, that does not render irrelevant the impact of the value of equality on the matter. At the very best, it should have been acknowledged that the value of equality has an indirect impact on the matter conceding that the classical concept of contractual liberty does not enjoy unequivocal constitutional support."* As to the assertion by Brand JA in *Afrox v Strydom* that not only does freedom of contract form part of the Constitutional values of freedom and dignity, it constitutes an independent constitutional value in itself, the writers persuasively argue that not only is this assertion erroneous, it indicates an ideological value judgement that is *"out of step with the constitutional text, context and ethos."* The writers add *"the elevation of contractual freedom to the status of constitutional value seems unfounded."*

54 See the writings of Pretorius "Individualism, Collectivism and the Limits of Good Faith" 2003 (66) *THRHR* 638 at 640-642 who convincingly argues that the modern approach ought to focus on collectivism an antithesis of individualism. The writer stresses communal values as opposed to personal autonomy. According to the writers, it displays a commitment to ethics of altruism in terms of which the interests of others are considered. This according to the writer ties in *"with the rise of consumer protection and consumer welfarism which promote the collective principles within contract law which counter individualistic stance ....."* The writer also emphasizes the concern of other academic writers when he states: *"The over-emphasis of traditional contract ideology runs counter to an ever-growing body of academic literature as well as those cases which recognize the possibility of*

Some of the writers argue that although the Supreme Court of Appeal held that freedom of contract promotes the constitutional values, this is not always applicable, as freedom as a constitutional value has to be balanced with other values underlying the *Constitution*. [55]

Following the principle adopted in *Brisley v Drotsky* [56] and *Afrox v Strydom,* [57] the Supreme Court of Appeal in *Napier v Barkhuizen* [58] also accepted that contractual claims are subject to the *Constitution*. The Supreme Court of Appeal cautioned that the fact that a term in a contract is unfair or may operate harshly *"does not, by itself, lead to the conclusion that it offends the values of the Constitution"*. The court also emphasized the principles of dignity and autonomy, which the court states: *"find expression in the liberty to regulate one's life by freely engage[ing] [in] contractual arrangements"*. What the Constitution requires of the courts, the Supreme Court of Appeals held, is that they *"employ its values to achieve a balance that strikes down the unacceptable excesses of `freedom of contract', while seeking to permit individuals the dignity and autonomy of regulating their own lives."* The Supreme Court of Appeal further, with regard to the *pacta sunt servanda* rule, emphasized *"that intruding on apparently voluntarily concluded arrangements is a step that Judges should countenance with care, particularly when it requires them to impose their individual conceptions of fairness and justice on parties' individual arrangements."*

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the principle of good faith functioning as corrective measure to a harsh contract in appropriate circumstances."

55 The writer Tladi (2002) 17 *SAPR/PL* 473 at 477 highlights the values of fairness, dignity and equality, especially the drive towards substantive equality. In this regard, the writer persuasively argues that freedom of contract when abused by the stronger party resulting in unreasonable and unjust contracts undermine the values of equality and dignity that are supposed to permeate our constitutional dispensation. The writer is especially, critical of Brand JA's dictum in Afrox Healthcare v Strydom for ignoring the principles of reasonableness, justice, equity and good faith. In this regard the writer is critical of Brand JA dismissing those principles as mere *"abstract ideas"* which the writer approximates *"these values to which our constitution requires the common law to strive towards".* See also the comments made by Hawthorne "The End of bona fides" (2003) 15 *SA Merc LJ* 271 at 277. See further the comments of Hopkins *TSAR* (2003-1) 150 at 155 wherein the writer argues that: *"The sanctity of contract rule has prevented our courts from applying equitable solutions in situations where the contract is clearly unfair, harsh and oppressive."* The writer suggests that *"although the common law sanctity of contract rule has once epitomized contractual justice, in the new constitutional dispensation, the sanctity of contract must also be constitutionally scrutinized against the values that animate the Constitution."* The writer also convincingly argues that *"the freedom to contract can never serve as a justification for enforcing a private agreement that has the purpose and effect of limiting the other party's fundamental rights"*. In a further article Hopkins (2001) 16 *SAPR/PL* 122 at 133-135 convincingly argues that certain rights as in *Shifren* in the constitution era inalienable and cannot be limited or waived.

56 (2002) 12 BCLR 1229 (SCA) Para 94.

57 (2002) 4 ALL SA 125 (SCA) 133.

58 2006 (4) SA 1 (SCA); 2006 (9) BCLR 1011 (SCA) Para 10.

However, the Supreme Court of Appeal accepted that the constitutional values of equality and dignity may prove to be decisive when the question of the parties' relative bargaining positions is an issue.

Since the decision of the Supreme Court of Appeal, [59] the Constitutional Court, in *Barkhuizen v Napier* [60] was also confronted in dealing with the validity of a time-bar clause. Turning, to the value of the maxim *pacta sunt servanda*, the Constitutional Court, per Ngcobo J delivering the majority judgement, stated: *"I do not understand the Supreme Court of Appeal as suggesting that the principle of contract pacta sunt servanda is a sacred cow that should trump all other considerations".*

The court continues:
"All law, including the common law of contract, is now subject to constitutional control. The validity of all law depends on their consistency with the provisions of the Constitution and the values that underlie our Constitution. The application of the principle pacta sunt servanda is, therefore, subject to constitutional control."

The court then looked at the approach previously adopted by the Supreme Court of Appeal and concludes that the approach followed is not the proper approach to adjudicating the constitutionality of contractual terms. The court suggested the proper approach:

"..... is to determine whether the term challenged is contrary to public policy as evidenced by the constitutional values, in particular, those found in the Bill of Rights."

This approach, according to the court, leaves space for the doctrine of *pacta sunt servanda* to operate, but, as the court puts it, at the same time allows courts to decline to enforce contractual terms that are in conflict with the constitutional values, even though the parties may have consented to them.

This, it is submitted, is a significant shift from the stance taken by Cameron JA in the *Brisley case* and Brandt JA in the *Afrox case,* in which freedom of contract was elevated to a constitutional value. The court also holds:

"While it is necessary to recognise the doctrine of pacta sunt servanda, courts should be able to decline the

59 *Napier v Barkhuizen* 2006 (4) SA 1 (SCA); 2006 (9) BCLR 1011 (SCA).

60 2007 (5) SA 323 (CC).

enforcement of a time limitation clause it would result in unfairness or would be unreasonable." [61]

It will be argued in the succeeding chapter that when one assesses the validity of exclusionary clauses in hospital contracts, regard must be had firstly to communal values as opposed to the personal autonomy of hospitals. Applying this principle, regard will be had to a commitment to ethics in terms of which the interests of others are considered. Normative ethics, as with community convictions, also dictate that the obligation by a medical practitioner/hospital which flows from his/her/its duty of care, whether contractually or generally is to exercise a standard of care expected of a reasonable doctor or specialist in his/her class. The same follows for hospitals.

What will also be argued in the succeeding chapter is that as the principle of *pacta sunt servanda* is subject to constitutional control and the principle cannot trump over, *inter alia,* the values of equality and dignity, the fact that a patient stands in an unequal bargaining position to that of a medical practitioner/hospital causes the contractual liberty of a contracting party to be scrutinized against the values that animate the *Constitution*. To this end, it will be argued that freedom of contract, when abused by the stronger party, resulting in unreasonable and unjust contracts, as is the case of exclusionary clauses in hospital contracts, it undermines the values of equality and dignity and ought to be found to be inconsistent with the values enshrined in the *Constitution* and the *Bill of Rights*.

13.3.2 Waiving or limiting a contractual right

An important question that needs to be answered is, to what extent can the rights enshrined in the *Bill of Rights* be waived or limited? Put differently, can a fundamental right be validly waived? An example of the waiver of a fundamental right can be found in the South African criminal law where an accused person, who has a constitutional right to silence, decides to make a confession or pleads guilty to the charge. [62] The rationale for the acceptance of a waiver in these circumstances lies in the sound administration of justice or, as it was stated in *S v Lavhengwa*: [63]

"..... Even if the rule permitting an adverse inference impinged upon the right of the accused to remain silent,

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61 *Barkhuizen v Napier* 2007 (5) SA 323 (CC). See also the comment of Sachs J in a minority judgement who confirms that the jurisprudential pedestal, on which the maxim *pacta sunt servanda* had once occupied, has been singularly narrowed in the great majority of democratic societies.

62 Hopkins (2001) 16 *SAPR/PL* 122; Currie and De Waal (2005) 751.

63 1996 (2) SA SALR 453 (W).

it is in any event probably a justifiable limitation." [64]

In other instances two of the rights in the *Bill of Rights,* which stand out above the others in order of importance, are said to be inalienable by the authorities. They include the rights to life and dignity. [65]

Hopkins [66] persuasively argues that, despite recognising that some of the rights in the Bill of Rights ought to be regarded as inalienable and incapable of waiver, there are, however, rights, according to the writer, which can be alienated. The rights most affected are said to be freedom rights. [67]

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64 *S v Lavhengwa* 1996 (2) SALR 453 (W); See also the principles enunciated in *S v Boesak* 2001 (1) SA 912 (CC); *S v Thebus* 2003 (6) SA 505 (CC) Para 55.

65 Hopkins (2001) 16 *SAPR/PL* 122 at 129. See also the comments by Chaskalson P in *S v Mawayane* 1995 (3) SA 391 (CC) Para 144 in which he stated: *"The rights to life and dignity are the most important of all human rights and the source of all other personal rights in Chapter 3. By committing ourselves to a society founded on the recognition of human rights we are required to value these two rights above all others."* The Constitutional court then looked at *inter alia* the Hungarian law and quotes with approval the two factors stressed therein, namely, the relationship between the rights of life and dignity. The court consequently stated: *"First, the relationship between the rights of life and dignity, and the importance of these rights taken together. Secondly, the absolute nature of these two rights taken together. Together they are the source of all other rights. Other rights may be limited, and may even be withdrawn and then granted again, but their ultimate limit is to be found in the preservation of the twin rights of life and dignity. These twin rights are the essential content of all rights under the Constitution. Take them away, and all other rights cease."* In the case of *S v Makwanyane* the Attorney-General (as he was known) argued that *"the right to life and the right to human dignity were not absolute concepts. Like all rights they have their limits. One of those limits is that a person, who murders in circumstances where the death penalty is permitted by section 277, forfeits his or her right to claim protection of life and dignity."* The court consequently rejected this argument. The court held: *"But subject to this, the rights vest in every person, including criminals convicted of vile crimes. Such criminals do not forfeit their rights under the Constitution and are entitled, as all in our country now are, to assert these rights, including the right to life, the right to dignity and the right not to be subjected to cruel, inhuman or degrading punishment. Whether or not a particular punishment is inconsistent with these rights depends upon an interpretation of the relevant provisions of the Constitution, and not upon a moral judgement `that a murderer should not be allowed to claim them'."* The importance of dignity is stated by O'Regan J in the case of *S v Makwanyane* at Para 327 as follows: *"Without dignity, human life is substantially diminished."* O'Regan J goes on to pronounce, in the same case at Para 328 that the prime value of human dignity could be stated in the following terms: *"The importance of dignity as a founding value of the new Constitution cannot be over emphasized. Recognizing a right to dignity is an acknowledgement of the intrinsic worth of human beings; human beings are entitled to be treated as worthy of respect and concern. This right therefore is the foundation of many of the other rights that are specifically entrenched in Chapter 3 (now Chapter 2) in the Final Constitution)."*

66 See Hopkins (2001) 16 *SAPR/PL* 122.

67 Currie "Bill of Rights Jurisprudence" 1999 *Annual Survey of South African Law* 54-55 quoted with approval by Hopkins "Constitutional rights and the question of waiver: How fundamental are fundamental rights?"(2001)16 *SAPR/PL* 122 at 124. Currie suggests that freedom rights (such as the right to freedom of religion) can for example be waived when he explains this by stating: *"This is because freedom rights can be positively or negatively exercised. Just as one can exercise the right to freedom of expression by choosing to remain silent, one is free to practice one's religion and equally free to choose not to. A waiver therefore amounts, as it were, to an undertaking to exercise the right negatively. The undertaking in clause 20(b) [of the contract of sale] not to make calls to prayer would be similar to a contractual undertaking not to disclose certain information, or not to work in*

In order to find answers to the key issue, or core, of this thesis, namely, whether an exclusionary clause in a hospital contract, in which the hospital or other healthcare provider exonerates himself/herself and/or its staff from liability arising from their negligence, is invalid, it is important that we shall look briefly at the aspect of whether the key to the answer does not lie in the fact that the right to health care services, being a fundamental constitutional right, can be regarded as inalienable, resulting in the right being incapable of being limited or waived? To find a possible answer we need to assess, briefly, the effect of the right to healthcare services. S27 of the *Bill of Rights* provides:

"*Healthcare, food, water and social security*
27(1) everyone has the right to have access to-

(a) Healthcare services, including reproductive healthcare;
.....
(c) The State must take reasonable legislative and other measures, within its available resources, to achieve the progressive realisation of each of these rights.

(3) No one may be refused emergency medical treatment."

Healthcare services, in this regard, it is submitted, are regulated by both common law [68]

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one's chosen profession, or to perform nude on stage, or to attend religious instruction in a private school. These are respectively waivers of the rights to freedom of expression, to occupational freedom, to privacy and to freedom of religion. There should, in principle, be no objection to enforcing contractual undertakings such as these since they are not violations of a constitutional right."

68 From the critical discussion in Chapter 2, it is clear that hospitals and other healthcare providers are ethically obliged by their professional rules to take due and proper care and exercise their mandate and professions with diligence. The promotion and maintenance of medical standards are embodied in the *Hippocratic Oath*, the *Declaration of Geneva*, and other codes of medical ethics. The underlying rationale for the promotion and maintenance of the standards stems from the philosophy that respect for human life needs to be maintained. See Smit "Die Geneeskunde en die Reg" *De Jure* 117-119; Mason and McCall Smith *Law and Medical Ethics* (1991) 3-6. So entrenched are these professional ethics and standards that they have existed for many centuries, including, the Ancient period, the Greek period, the Roman era, the pre-modern era and finally, the modern era. It is the *Hippocratic Oath* which has become the touchstone of modern medical ethics and which has governed the conduct of medical practitioners for many centuries. The *Hippocratic Oath* also very much influenced the doctor-patient relationship and continues to do so in modern times. It therefore remains the prevailing ethos of how doctors ought to behave towards their patients. The belief in ethics was so strong that Plato advocated that the doctor's duty should be placed for the good of the people at the expense of his interest. See Chapman *Physicians, Law and Ethics* (1984) 40. The authors quote Hammurabe's belief *"that the strong may not oppress the weak"* at page 5 of their writings. Medical humanism was also widely advocated in which it was widely believed that where *good and bad are given the same value, medicine is degraded and, in a sense ceases to be a profession"* See Chapman (1984) 40-41. Formalistic regulations to control professional standards in the doctor-patient relationship first saw the light in the Roman system of legal medicine. What emerged according to Amundsen (1993) 17-25 was the control exercised in maintaining standard of care and medical ethics. Measures were put in place to deal with physicians who failed to observe the standard of conduct that the law requires. So strong was the influence of medical ethics that Cronje-Retief (2000) 32 and *Carmi Hospital Law* (1988) 7 state that medical ethics were inspirational in the finding of hospitals. The duty perceived to treat their patients was also derived from medical ethics. England in the early days in particular, regulated the medical profession in order to control ethical conduct

and statutory law [69] requirements. What appeared hereinbefore is the fact that healthcare

in an endeavour to increase the value of services rendered. See Cronje-Retief (2000) 35; Castiglione (1995) 659-660, Peters et al (1981) 126. The Renaissance period also saw the establishment of the Royal College of Physicians. The idea of a social contract between the physician and patient was created. A set of moral norms was also established for the profession. The patient's interests were viewed to be primal, especially, where it sometimes has to be weighed against the physician's commercial interest. See Chapman (1984) 77. It is particularly Thomas Percival's writings which influenced general thinking in the profession. His writings are quoted with authority by Chapman (1984) 82-83 and Veatch *Medical Ethics* (1997) 9. To this end Percival's ethics included *"..... the physician's concern for the patient's recovery must be uninfluenced by private and personal considerations ....."* The strong commitment to long-standing principles of medical ethics and the maintenance of medical standards remained very much intact in the pre-modern era and continue to do so in the modern era. See in this regard the writings of the English writers Jones (1998) 18; Mason and McCall-Smith (1991) 14-17; the American writings of Ficarra quoted in Sanbar et al (1995) 147ff; Skegg (1988) 8 and the South African writing of Beauchamp and Childress (2001) 1-7, 27; Veatch (1997) 21, Strauss (1996) 181, Steyn (2003) 67-68. It is especially the writers Carstens and Kok (2003) 449-451 who persuasively argue that in the Constitutional state wherein we find ourselves, the role of normative medical ethics is *"a protective measure of human rights"* namely *"to do no harm"* and *to act in the best interest of the patient."* To this end, the writers argue that disclaimers against medical negligence in hospital contracts would amount to an unreasonable/unfair/unethical acceptance on the part of the patient to contract to his/her potential harm. After all, the medical practitioner (and hospital) is ethically bound not to harm. The right to have access to healthcare services, it is submitted, notionally brings about such a right, but, it also brings about an obligation on the part of the medical practitioner and/or hospital not to harm the patient. Constitutionally therefore, this obligation to maintain a standard of due and skill cannot be compromised.

69 In so far as statutory controls are concerned, the regulations published in the *Government Gazette* on the 1st February 1980 No 2948 No 6832 control the reasonable degree of care and skill which has to be maintained by private hospitals in securing a license granted to them. Regulation 25(23) of the regulations so published requires that *"all services which are reasonably, generally and necessary for adequate care and safety of patients, are maintained and observed."* Besides the regulations controlling the professional standards of private hospitals, the conduct of nurses and the setting of professional standards for nurses are reflected in the *Nursing Act*, 1978 (Act No 50 of 1978). Section 29(1) (C) of the Act makes provision for the removal from the register of registered nurses and midwives following on a disciplinary inquiry by the South African Nurses Council. The South African courts have also since as long ago as 1957, not been loath to protect hospitals against the conduct of nurses who deviated from professional standards. Consequently, the courts have held hospitals to be vicariously liable for the conduct of the nurses. This principle featured prominently in the cases of *Esterhuizen v Administrator, Transvaal* 1957 (3) SA 710 (T) and *Dube v Administrator, Transvaal* 1963 (4) SA 260 (W). See also the discussion of this subject in *Mtetwa v Minister of Health* 1989 (3) SA 600 (D) and the discussion thereof in *Lower Umfolosi District War Memorial Hospital v Lowe* 1937 NPD 31 and *St Augustine's Hospital (Pty) Ltd v Le Breton* 1975 (2) SA 530 (D). In Mtetwa the court expressly refused to follow the approach of Feetham J in Lower Umfolosi and stated that: *"I accept the proposition that in the performance of their professional duties nurses are not under the control of the hospital authority so as to become its servants, and that the obligation of the hospital authority in regard to the professional work of its nurses is limited to taking reasonable care to assure itself of the professional competence of the nurses, whom it employs."*
The court consequently concluded: *"They were acting, therefore, in a professional manner and not as domestic servants insofar as they dealt with the hot water bottle, and, that being so, they failed in the carrying out of professional duties for the discharge of which the hospital authority was not responsible."*
Nienaber J found in *Mtetwa* that: *"The point on which the decisions in the Lower Umfolosi case hinged was that a member of the professional staff of a hospital was not a servant proper for whose misdeeds the hospital was accordingly responsible. At the time that was perceived to be a principle of law. Nowadays, I venture to suggest, the question is purely one of fact. The degree of supervision and control which is exercised by the person in authority over him is no longer regarded as the sole criterion to determine whether someone is a servant or something else. The deciding factor is the intention of the parties to the contract, which is to be gathered from a variety of facts and factors. Control is merely one of the indicia to determine whether or not a person is a servant or an independent worker."* He held that: *"To the extent that the judgement in the Lower Umfolosi case purported*

professionals are ethically obliged, by their professional rules or codes and by virtue of statutory regulations, to take due and proper care and exercise their professions with diligence. The general public have the expectation that, when they are treated by a medical practitioner and/or hospital, they are treated in a professional manner and with professional standards which will not cause them harm. The ethical conduct and the professional standards they are obliged to uphold in treating patients or when conducting surgery in furthering access to healthcare services, cannot be compromised in any way nor can they, it is submitted, validly be excluded in contract form wherein the patient signs an indemnity clause couched as such to exclude a medical practitioner and/or hospital from liability arising from their own negligence. To do otherwise and allow, especially the hospitals, to exclude their liability would, as *Pearmain* [70] persuasively argues, encourage the patient to go to Joe public for those services. She poses the question: *"What would be the reason for seeking out professional help if it meant that the professional in question was not bound to follow certain ethical rules and standards of practise associated with his profession?"*

It is for that reason that the reasoning of Brand AJ, in the Afrox case, with regard to clause 2 of the exemption clause, exculpating the hospital from liability arising from the nurse's negligence being a *non sequitur,* is questionable. The effect of the judgement is that it leaves patients who are victims of negligence of nurses, without recourse to compensation. The court reasoned that the conduct of the nurses is subject to disciplinary hearings, by the professional council, at the instance of the public. This thinking is correctly criticized in many quarters. [71]

The position advocated by the Supreme Court of Appeal needs to be severely criticized as it

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to enunciate a universal principle of law, namely that a hospital assumes no responsibility for the negligence of any member of its staff engaged in professional work, it has thus been overtaken by more recent authority, not only by the South African cases referred to but indeed by English ones as well. (See, for instance Gold v Essex County Council (1942) 2 KB 293; Collins v Hertfordshire County Council (1947) KB 598; Cassidy v Ministry of Health (1951) 2 KB 343 (CA); Roe v Minister of Health (1954) 2 QB 66). Professor JC van der Walt suggests (1976 THRHR 399 at 405) that the later English cases have undermined the foundation on which the judgement in the Lower Umfolozi case was based. I agree. The ratio decidendi of that judgement, in my respectful view, is outmoded and accordingly no longer authoritative."

70 "A Critical Analysis of the Law on Health Services Delivery in South Africa" *Unpublished LLD Thesis University of Pretoria* (2004) 702.

71 Pearmain (2004) 703 in particular argues that disciplinary hearings as a substitute for civil litigation is but a cold comfort to a patient who has lost the ability to work or to function in society and who has experienced considerable pain and suffering and who has to undergo future medical and hospital expenses as a result of professional negligence. The thinking of the Supreme Court of Appeal in this regard according to the writer is naive, to say the least.

does not keep track with the realities of life. [72] Brand JA, in his argument, almost creates the impression that nurses employed by a private hospital operated as an autonomous body, with the private hospital having no authority to control the nurses, subject, of course, to the nurses facing disciplinary measures, where necessary, by their controlling body namely, the nurses' professional council. This thinking, it is submitted, ignores the principle of vicarious liability which, as seen earlier, is deeply entrenched in the South African Law. The argument by the Supreme Court of Appeal that there is adequate protection for the patient against the risk of professional negligence, as the professional council has a reputation and a competitive edge, is also not acceptable. [73] A citizen's right to claim for damages can never be substituted for disciplinary proceedings conducted by a professional body controlling professional standards. [74]

The inclusion, by *Afrox Healthcare,* in their admission form an exclusionary clause, in an attempt to exonerate the hospital and its staff from liability arising from the breach of their standards, is also in contradiction to their vision and mission statement. [75]

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72 Pearmain (2004) 706 convincingly argues that an employer who is not vicariously liable for negligence of its employees may be less concerned about taking preventive action to preclude professional negligence even if it takes action to discipline the nurse as an employee after the event. The author also argues that once a nurse is subject to a disciplinary proceeding by her professional body it is too late as the negligent act has already harmed a patient.

73 As Pearmain (2004) 707 remarks such thinking is a fallacy.

74 It was held more recently by the Constitutional Court in the *Barkhuizen case* that section 34 of the Bill of Rights *"not only reflects the foundational value that underlie our Constitutional order, it also constitutes public policy."* Our 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. See *Schierhout v Minister of Justice* 1925 AD 417, 424; See also *Nino Bonino v De Lange* 1906 TS 120 at 123-4.

75 Presently on the website (*http://www/afroxhealth.co.za/*) is a document entitled "Core Values". It reads:
Core Values
Organizational values are principles or qualities considered worthwhile by an organization. At Afrox Healthcare there is a fundamental commitment to these values throughout the entire organization - merely posting them on a bulletin board and paying them lip service is not tolerated. `Living" these values in our day-to-day business activities provides us with the foundation of what is important to us - namely, providing world-class patient care.
Accountability
We ensure employees know what they are responsible for and are empowered to deliver.
Collaboration
We maximize our achievements as a group, not as individuals.
Transparency
We believe that visible problems can be solved and that informed people make better decisions.
Stretch
We continuously push the boundaries of performance.
Another entry on the website reads:
Quality
Afrox Healthcare quest is to maintain world-class quality standards at all its hospital facilities - to the benefit of this patients, employees, supporting medical practitioners and funders, a world-class quality management process. We believe that our unique process of managing quality standards in our hospitals matches and probably exceeds

The guarantee given of the right to access health care services, as provided for by section 27 of the *Constitution,* can also not be compared with the service expected of, say, an electrician who is hired to attend to a household electrical problem. The effect of the judgement in the *Afrox case* is that, despite recognised ethical codes and professional standards, which other suppliers of services do not have, the court seemed to place in its judgement on the same level as commercial enterprises. This, with respect, cannot be the case. After all, the *Constitution* guarantees access to healthcare services, whereas, the *Constitution* does not prescribe to other business services. [76]

It is further submitted that the obligations which arise from the access to healthcare services is inescapable and cannot be excluded by way of contract. [77]

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the best to be found anywhere in the world today.
The Afrox total quality management (TQM) process was launched through the company in 1993, exposing each and every employee to the company's vision for quality management. The Healthcare division then adapted the program to satisfy the unique demands of the healthcare industry. The program incorporates a vision, policies and procedures, critical success factors with supporting key performance indicators and specified activities. It is reviewed and upgraded on an ongoing basis. Continued adherence to these standards has been maintained by encouraging each and every employee to participate fully in the process and contribute in the decision-making processes. All new employees are exposed to the process as part of their indication training. Today, Afrox Healthcare and its member hospitals are reaping the rewards of this visionary approach to quality management. A culture of service excellence, a spirit of teamwork amongst all levels of staff and a continuous quest for improvement are now firmly entrenched. This, in turn, means that patients, funders and supporting medical practitioners can rely on our consistently high standards in all disciplines associated with hospital management, particularly nursing care. We also embarked on a scientific quality improvement program at the Eugene Marais Hospital during 1997. This ward resource management program has now been implemented in most Afrox Healthcare hospitals with both input and output measures based on quality improvement. This program ensures quality care through resource and standards management."

76 Pearmain (2004) 710 correctly emphasizes that the court incorrectly takes a very narrow view of the issue of access holding that the clause did not interfere with access to healthcare services in that it did not have the effect of barring anyone from obtaining healthcare services. The author also persuasively argues that a narrow construction of the meaning of access to health services should be given, so as to permit them to be rendered in conditions which in themselves put the life or health of the patient at risk. This she believes aligns with the object of the Constitutional right contained in section 27(1) of the *Constitution*.

77 See in this regard Pearmain (2004) 710-711. The writer suggests that an attempt to compromise the standard of conduct defeating the object of the Constitutional right to access to healthcare is contrary to public policy or to the legal convictions of the community as expressed in the *boni mores*. The writer emphasizes this aspect, especially, where the contracting parties is also in an unequal bargaining position. The writer goes on to state: *"It is extremely difficult to see why the broader community, as opposed to the business community with which the Supreme Court of appeal seemed primarily concerned in this case, would prefer the right to freedom of contract to the right of access to effective and properly delivered healthcare services. It is submitted that the Supreme Court of Appeal demonstrates not only in this case but also in others such as Carmichele a surprising and unfortunate reluctance to take opportunities to align the more traditional common law principles with the Constitution and that within this court, judicial inertia is the order of the day."* Brand D in `Disclaimers in Hospital Admission Contracts and Constitutional Health Right: Afrox Healthcare v Strydom *ESR Review* Vol. 3 No 2 September 2002 published by the Socio-Economic Rights Project, University of the Western Cape also gave great consideration to Brand JA's recognition of the exemption of healthcare services and critically states: *"The Court's judgement puzzles. The Court's finding that there was equality of bargaining power ignores the self-evident inequality inherent in the contractual relationship. It is submitted that the nature of the service at stake created an unequal bargaining*

13.3.3 Public Policy Setting

Public policy has always played a prominent role in determining whether a contract, or contractual provision, will be enforced or not. In this regard, the principle that a contract will not be enforced if its enforcement would be against public policy has repeatedly been highlighted by both the South African legal writers [78] and the courts [79] alike. More recently,

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position. One cannot do without healthcare services, which are a fundamental constitutional right. Since all private and public hospitals in South Africa use indemnity clauses, it is clear that the respondent had no bargaining power regarding the indemnity clause - if he objected to it he had nowhere else to go and would not have gained access to healthcare services. The Court's reasoning on the clash between the indemnity clause and constitutional values is equally suspect. The Court concluded that, in the absence of the threat of action for damages, disciplinary action by professional bodies and concern for a hospital's reputation ensure that hospitals avoid negligent conduct. The Court's reasoning ignores the fact that the respondent litigated precisely because of negligence that incurred despite these `sanctions' and that caused the respondent damage, for which he cannot now be compensated." The writer continuous: *"In addition, the case seemed significant because it concerned the indirect horizontal application of a socio-economic right. It allowed the Court an opportunity to demonstrate its regard for constitutional values. However, the judgement raises doubt as to the extent to which the Court considers these values. This observation is most evident in the consideration of whether the indemnity clause offends public policy. This consideration comes down to a balancing of the individual interests of the contracting parties and the general, constitutional interests of the public. The Court opted for the protection of the individual (commercial) interests while ignoring almost completely the fact that the service the parties bargained about was a constitutional right. With regard to the scope of the limits engendered by an indemnity clause, the Court held that those limits should be defined by business considerations such as saving in insurance premiums and competiveness. The Court missed an opportunity: it again insulated that common law, from constitutional infusion."* Insofar as inalienable rights are concerned Hopkins (2001) 122 at 137 persuasively argues that contracts whose enforcement would entail the violation of a right in the *Bill of Rights* are unenforceable because they are contrary to public policy. Enforcement of such a contract (waiver) so it is further argued by Hopkins would mean in effect, the limitation of a contracting party's constitutional right. The writer further suggests that this can only be done if the reason for the limitation is reasonable and proportionate to the benefit obtained. It is suggested that the right to the access to healthcare, falls into this category of rights which cannot be limited, for such right is inalienable.

78 Van der Merwe et al (2003) 215; Kerr (1998) 405; Christie (1996) 204; Lubbe and Murray (1988) 238; Naude and Lubbe (2005) 442; Jansen and Smith (2003) 213; Hawthorne (2004) 296; Tladi (2002) 475; Lewis (2003) 333-334; Hawthorne (2003) 274; Carstens and Kok (2003) 435; Jordaan (2004) 60-61; Hopkins (2001) 127-128; Hawthorne (1995) 173; Neels (1993) 690; Fletcher (1997) 3; Pearmain (2004) 502ff.

79 Insofar as the South African courts are concerned, the courts have also throughout the years pronounced that the courts will not enforce a contract that is against public policy or *contra bonos mores*. The modern law is then founded on the words of Innes CJ in *Eastwood v Shepston* 1902 TS 294 302: *"Now this Court has the power to treat as void and to refuse in any way to recognize 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 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 at is the tendency of the proposed transaction, not its actually proved result."* After quoting the above passage in *Sasfin (Pty) Ltd v Beukes* 1989 (1) SA 1 (A) 8 Smalberger JA added: *"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."* The application of public policy to the law of contract was further defined by Hoexter JA in *Botha (now Griesel) v Finanscredit (Pty) Ltd* 1989 (3) SA 773 (A) 782I-783C: *"I proceed to consider whether the provisions of clause 7 are, in the language of the majority judgement in the Sasfin case (at 8C-D): "..... clearly inimical to the*

with South Africa becoming a constitutional state, the role of public policy has not disappeared. The role and value of public policy, in the constitutional context, takes many forms and has been the subject of jurisprudential debate amongst many of the South African legal writers. [80] The South African legal writers have been especially critical of the

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interests of the community, whether they are contrary to law or morality, or run counter to social or economic expedience ....." and accordingly, unenforceable on the grounds of public policy. In such an investigation (see the remarks of Smalberger JA at 9A-G of the Sasfin case) there must be borne in mind: (a) that, while public policy generally favours the utmost freedom of contract, it nevertheless properly takes into account the necessity for doing simple justice between man and man; and (b) that a court's power to declare contracts contrary to public policy should be exercised sparingly and only in cases in which the impropriety of the transaction and the element of public harm are manifest. So approaching the inquiry in the instant matter, I am not persuaded that the provisions of clause 7 of the suretyships are plainly improper and unconscionable. While at first blush the provisions of clause 7 may seem somewhat rigorous they cannot, I think, having regard to the particular circumstances of the present case, fittingly be described as unduly harsh or oppressive." More recently, the Supreme Court of Appeal in an number of cases including *Brummer v Gorfil Brothers Investments (Pty) Ltd en Andere* 1999 (3) SCA) at 420f; *De Beer v Keyser and Others* 2002 (1) SA 827 (SCA) at 837C-E and *Afrox Healthcare Bpk v Strydom* 2002 (6) SA 21 (SCA) used public interest which is often been used inter changeably with public policy to denounce the validity of a contractual provision. To this end, the court repeated the principle accepted and applied in *Sasfin (Pty) Ltd v Beukes* 1989 (1) SA 1 (A) and *Botha (now Griesel) and Another v Finanscredit (Pty) Ltd* 1989 (3) SA 773 (A), Brand JA quoted the dictum of Smalberger JA in the former where he 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. 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 trammeled by restrictions on that freedom."

80 It is especially; in developing the common law of contract in conformity with the *Bill of Rights* that many writers suggest, public policy can play a vital role. It is Christie *Bill of Rights Compendium* (1997) 3H-21 who convincingly argue that the *Constitution* itself provides an exceptionably reliable statement of seriously considered opinion, by reason of the widespread consultation and negotiation that preceded the drafting of the Constitution. Christie with reference to the case of *Ryland v Edros* 1997 (2) SA 690 (C) in which Farlam J was able to depart from Ismail v Ismail 1983 (1) SA 1006 (A) in which potentially polygamous Muslim marriages had been held contrary to public policy by radiating the effect of many provisions of the interim Constitution from which it was clear that such marriages could no longer be regarded as contrary to public policy. De Vos "Pious wishes or directly enforceable human rights? Social justice and economic rights in South Africa's 1996 Constitution" 1997 SAJHR 67 101 advocates similarly that this can be reached by treating as *contra bonos mores* any provision which is clearly at odds with the basic principles enshrined in the Bill of Rights. Van Aswegen 1994 (57) *THRHR* 448 at 451 on the other hand suggests that the values underlying fundamental rights protected in the Bill of Rights, should be considered as important policy factors determining public policy in the circumstances. The author goes on to state all principles of contract law will have to be interpreted as far as possible in accordance with the values underlying fundamental rights. An example suggested by the author is that the present principle of *pacta sunt servanda* should be interpreted to conflict as little as possible with fundamental rights such as equality etc. It is especially Hawthorne 1995 (58) *THRHR* 157 who opines that the principle of equality is one of the cornerstones of South Africa's Constitution. The author suggests that other policy considerations than the principle of *pacta sunt servanda* (which was once one of the foundations of the classical theory of contract) ought to be considered for example public interest. See also the writings of Christie *Bill of Rights Compendium* 3H-21 who, like Hawthorne, suggests that public policy is the most satisfactory instrument for dealing with cases of inequality of bargaining

Supreme Court of Appeal's approach, in attempting to develop the common law, in reflecting the spirit of the *Bill of Rights*. [81] Included in the considerations suggested by some of the legal writers are the unequal bargaining positions of the parties, unjust and unreasonable clauses, contracts contrary to good faith. [82]

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power.

81 It is especially, the court's approach in the *Afrox case* that has elicited strong criticism in its use of public policy standards. In this regard Naude and Lubbe (2005) 441 at 443 advances the view that as regard the public policy standard, the court fell back on the elementary principle, virtually elevated into a constitutional value, namely that *"public interest requires the enforcement of contracts freely and earnestly entered into."* What the authors do advocate however, are broader policy considerations *inter alia* the maintenance of a standard of care and medical ethics. The writers Jansen and Smith (2003) 210 at 217 is also critical of Brand JA in not considering foreign law when considering whether exclusionary clauses in hospital contracts were invalid or not. In this regard the writers suggest that had the court considered foreign law, they would surely, have followed England, America and Germany in pronouncing that such clauses are contrary to public policy. Tladi (2002) 17 *SAPR/PL* 473 is particularly critical of the Supreme Court of Appeal in the *Afrox case* for relying on freedom of contract for its conclusion. The court noted that freedom is one of the values underlying the Constitution. Relying on the *Brisley v Drotsky* case, the court decided that the freedom of contract is in fact a constitutional value as it forms part of freedom. The writer in this regard, suggests that freedom of contract may promote constitutional values in some cases, but not in all. In instances where there is an unequal bargaining power between contracting parties this can lead to `obscene excesses'. It is for that reason that Tladi suggest at 477 that freedom as a constitutional value has to be balanced with other values underlying the *Constitution*, namely *"fairness, dignity and equality"*. The writer suggests that public policy dictates that considerations of unequal bargaining power of the parties, unjust or unreasonable clauses, contracts contrary to good faith ought to be considered when deciding contractual provisions or contracts to be unenforceable.

82 Support for the development of the open norms of the South African common law to include *bona fides*, public policy and *boni mores* in accordance with the Constitutional mandate, is also promoted by Hawthorne (2003) 15 *SA Merc LJ* 271 at 277. The writers Carstens and Kok (2002) also convincingly argues that the Supreme Court of Appeal made too much of contractual autonomy which is not explicitly recognised in the *Bill of Rights*. Moreover, the writers suggest that contractual autonomy must yield to enhancing access to professional healthcare services. Hopkins *TSAR* (2003) 150 at 157 also persuasively argue that although public policy is a very useful and resourceful body of doctrine, all law in South Africa (including the common law), must promote the value that underlie the *Bill of Rights*. The values suggested by Hopkins, include, openness, dignity, equality and freedom. But, cautions the writer that whereas the common law once valued sanctity of contract as epitomizing contractual justice, it is no longer the case. Sanctity of contract must now also be constitutionally scrutinized against the values that animate the *Constitution*. The *Bill of Rights* according to Hopkins is a guarantee to all South Africans that their fundamental rights will be protected against infringement. An area of concern, raised by the writer, and contracts often entered into between parties to the contract where there is a huge disparity in their bargaining power, for example, in standard-form contracts. Such contracts ought to receive different treatment from the courts, especially, in those where there is no radical difference in bargaining power. A solution suggested by Hopkin is that as public policy is already entrenched in our common law and in particularly the law of contract wherein contracts contrary to public policy are declared unenforceable, the *Bill of Rights* should itself provide for an exceptionally reliable statement of seriously considered public opinion. This solution according to Hopkins is compatible with the rationale behind Section 39(2) of the *Bill of Rights* - that the common law be developed so as to be made compliant with the values that underlie the *Constitution*. To this end, it is argued that any standard-form contract that contains a clause that conflicts with the provisions of the *Bill of Rights* is *prima facie* unenforceable, unless, good cause is shown by the party to the contract relying on the clause. Hopkins also persuasively argues that the enquiry by the judges in adjudicating these matters ought no longer to be restricted to judicial precedent, contractual capacity and the legality of the transaction. Instead, they will have to grapple with issues such as fairness and reasonableness as well. See also Christie "The Law of Contract and the Bill of Rights" *Bill of Rights Compendium* (1997) 3H-7. *Contra* the remarks by Jordaan "The Constitution's impact on the Law of

The role and value of public policy in the constitutional context has also been the subject of jurisprudential debate by the judiciary. [83] But, it has taken some time for the courts,

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Contract in Perspective" 60 2004 *De Jure* 58 who relies heavily on the elaboration of Cameron JA in *Brisly v Drotsky* 2002 (4) SA 1 (A) in which he states: *"It is not difficult to envisage situations in which contacts that offend these fundamentals of our new social compact will be struck down as offensive to public policy. They will be struck down because the Constitution requires it, and the values it enshrines will guide the courts in doing so. The decisions of this Court that proclaim that the limits of contractual sanctity lie at the borders of public policy will therefore receive enhanced force and clarity in the light of the Constitution and the values embodied in the Bill of Rights."* The writer ought to be criticized though when he states that unequal bargaining position *per se* is not vital to public policy, nor should it be used in isolation from other relevant factors. What the writer loses sight of however is the equality clause enshrined in the *Bill of Rights* and guaranteed by the *Constitution*. This is particularly relevant in instances where the inequality is such that the stronger contracting party abuses the power imbalance to such a degree that the weaker party's rights are infringed.

83 Since South Africa became a constitutional State in which constitutional democracy reign supreme, public policy as seen in a number of judgements, is now deeply rooted in the *South African Constitution* and the values which underlie it. Commencing with the case of *Carmichele v Minister of Safety and Security and Another (Centre for Applied Legal Studies Intervening)* 2001 (4) SA 938 (CC); 2001 (10) BCLR 995 (CC) at Paras 54-6, a case though not involving contract but the law of delict, the court per Ackerman et Goldstone JJ found that the *Constitution " ..... is not merely a formal document regulating public power. It embodies, like the earlier Constitution, an objective normative value system."* The court suggested that it is within the matrix of this objective normative value system that the common law must be developed. As to the development of the common law the court emphasizes the caution previously sounded by the Constitutional Court in the case of *Du Plessis v De Klerk and Another* 1996 (3) SA 850 (CC) 1996 (5) BCLR 658 Para 61 quoting the dictum of Zacobucci J in *R v Salituro* and cited with approval by Kentridge AJ, namely: *"Judges can and should adapt the common law to reflect the changing social, moral and economic fabric of the country. Judges should not be quick to perpetuate rules whose social foundation has long since disappeared. Nonetheless there are significant constraints on the power of the Judiciary to change the law in a constitutional democracy such as ours it is the legislature and not the courts which have the major responsibility for law reform..... The Judiciary should confine itself to those incremental changes which are necessary to keep the common law in step with the dynamic and evolving fabric of our society."* The proper development of the common law as provided for by Section 39(2) the court suggests, would be: *"A balance had to be struck between the interests of the parties and the conflicting interests of the community according to what the court conceives to be society's notions of what justice demands. Under s39(2) of the Constitution concepts such as `policy decisions and value judgements' reflecting `the wishes and the perceptions of the people' and `society's notions of what justice demands' might well have to be replaced, or supplemented and enriched by the appropriate norms of the objective value systems embodied in the Constitution."* In the case of *Brisley v Drotsky* 2002 (4) SA 1 (SCA) a case involving a written contract between landlord and tenant, the court relied upon public policy to determine whether the agreement is unenforceable or not. The court first looked at the pre-constitutional dispensation when it remarked at Para 91: *"The jurisprudence of the Court has already established that, in addition to the fraud exception, there may be circumstances in which an agreement, unobjectable in itself, will not be enforced because the object it seeks to achieve is contrary to public policy. Public policy in any event nullifies agreements offensive in themselves - a doctrine of very considerable antiquity."* The court also looked at the post constitutional era and remarked: *"In its modern guise, `public policy' is now rooted in our Constitution and the fundamental values it enshrines. This includes human dignity, the achievement of equality and the advancement of human rights and freedoms, non-racialism and non-sexuality."* The court goes on to state: *"It is not difficult to envisage situations in which contracts that offend these fundamentals of our new social compact will be struck down as offensive to public policy. They will be struck down because the Constitution requires it, and the values it enshrines will guide the courts in doing so. The decisions of this Court that proclaim that the limits of contractual sanctity lie at the borders of public policy will therefore receive enhanced force and clarity in the light of the Constitution and the values embodied in the Bill of Rights."* The court endorses the cautious approach courts are to take when developing the common law when Cameron JA states: *"I share the misgivings the joint judgement expresses about over-hasty or ineffective importation into the field of contract law of the concept of `boni mores'. The legal convictions of the community - a concept open to misinterpretation and*

especially, the Supreme Court of Appeal, to unshackle the ethos of contractual freedom and the sanctity of contract. [84]

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misapplication - is better replaced as the Constitutional Court itself has suggested, by the appropriate norms of the objective value system embodied in the Constitution. What is evident is that neither the Constitution nor the value system it embodies give the courts a general jurisdiction to invalidate contracts on the basis of judicially perceived notions of unjustness or to determine their enforceability on the basis of imprecise notions of good faith." And further: *"On the contrary, the Constitution's value of dignity and equality and freedom require that the courts approach their task of striking down contracts or declining to enforce them with perceptive restraint. One of the reasons, as Davis J has pointed out is that contractual autonomy is part of freedom. Shorn of its obscene excesses, contractual autonomy informs also the constitutional value of dignity."* Consequently, the court concluded: *"The Constitution requires that its values be employed to achieve a careful balance between the unacceptable excesses of contractual freedom; and securing a framework within which the ability to contract enhances rather than diminishes our self-respect and dignity. The issues in the present appeal do not imperil that balance."* The Supreme Court of Appeal in a succeeding judgement of *Afrox Healthcare Bpk v Strydom* 2002 (6) SA 21 quoted with approval the principle enunciated in the Carmichele matter in which it was held: *"Where a court develops the common law, the provisions of s39 (2) of the Constitution obliged to have regard to the spirit, purport and objects of the Bill of Rights."* Although the *Carmichele case* involved a matter dealing with a delictual issue the court in Afrox held that the same principle can be applied in contractual issues as well where contractual provisions are in conflict with the interests of the community. The court further quotes the dictum of Cameron JA in *Brisley v Drotsky* at Para 91:*"Public policy nullifies agreements offensive in themselves - a doctrine of considerable antiquity. In its modern guise "public policy" is now rooted in our Constitution and the fundamental values it enshrines."* In a subsequent judgement in the case of *Price Waterhouse Coopers Inc and Others v National Potato Co-operative Ltd* 2004 (6) SA 66 (SCA) in which the validity of a champertous agreement to finance the respondent's action against a firm of accountants was challenged, the court stated the common law position with regard to the influence of public policy in determining the validity of contracts or contractual provisions as it appeared prior to the *Constitution* coming into being. (Para 23) The court subsequently also looked at the legal position post the *Constitution* being introduced. With regard to the influence of public policy the court remarked at Para 24 as follows: *"What public policy is and when an agreement is contrary to public policy are often difficult and contentious questions. Once the advent of the Constitution public policy is rooted in the Constitution and the fundamental values it enshrines. (Brisley v Drotsky (supra Para 91); Afrox Healthcare Bpk v Strydom (supra Para 18)). The fundamental values enshrined in the Constitution and the interests of the community or the public are accordingly of the utmost importance in relation to the concept of public policy. Therefore an agreement will be regarded as contrary to public policy when it is clearly inimical to these constitutional values, or the interests of the community, whether it be contrary to law or morality or runs counter to social or economic expedience (Sasfin (Pty) Ltd v Beukes (supra) at 8C-D; Botha (now Griesel) and Another v Finanscredit (Pty) Ltd (supra) at 782I-J). It is important to bear in mind that views about what public policy entails are constantly evolving (Magna Alloys and Research (SA) (Pty) Ltd v Ellis 1984 (4) SA 874 (A) at 891H) and the court must be careful not to conclude that an agreement is contrary to public policy just because some of its terms offend against its sense of propriety and fairness. (Sasfin (Pty) Ltd v Beukes (supra) at 9B-C). It is also important to bear in mind that to decide whether an agreement is against public policy a court must look at the tendency of the proposed transaction, not its actually proved result (Sasfin (Pty) Ltd v Beukes (supra) at 8G-9B; Eastwood v Shepstone 1902 TS 294 at 302)"* Subsequent to the *Price Waterhouse Coopers case*, the Supreme Court of Appeal in the *Bafana Finance Mabopane v Makwakwa and Another* 2006 (4) SA 581 (SCA) was called upon yet again to pronounce on the validity of a clause in a money lending contract i.e. micro-lending agreement whereby the debtor purports to undertake not to apply for an administration order and that the loan debt will not form part of the administration order for which the debtor might apply. The court considered the common law position prior to the enactment of the *Constitution* as enunciated in the case of Sasfin and quoted with authority in many cases thereafter, including, more recently the cases of *Brisley, Afrox Healthcare and Price Waterhouse Coopers*. The court also stated the post Constitutional position of public policy, namely: *"..... 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."*

84 More recently in a succeeding case of *Napier v Barkhuizen* 2006 (4) SA 1 (SCA); 2006 (9) BCLR 1011 (SCA) the

It was especially the Constitutional Court, in a more recent judgement, which has placed greater emphasis on other values which influence public policy. [85] The Constitutional Court

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Supreme Court of Appeal dealt with a time limitation clause in a short-term insurance policy the respondent having relied on the contention that the clause is unconstitutional in that it violates the right to approach a court for redress. The court accepted that in the post Constitutional era a contractual term that is contrary to public policy is unenforceable and added that 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."* But, cautions the Supreme Court of Appeal that the fact that a term in a contract is unfair or may operate harshly does not, by itself, lead to the conclusion that it offends the values of the *Constitution*.
In this regard the court emphasized the principles of dignity and autonomy which *"find expression in the liberty to regulate one's life by freely engaging in contractual arrangements."* (Para 12). What the *Constitution* requires of the courts, the Supreme Court of Appeal held, is that they *"employ its values to achieve a balance that strikes down the unacceptable excesses of `freedom of contract', while seeking to permit individuals the dignity and autonomy of regulating their own lives."* (Para 12) The Supreme Court of Appeal further explained at Para 13 that this entails *"that intruding on apparently voluntarily concluded arrangements is a step that Judges should countenance with care, particularly when it requires them to impose their individual conceptions of fairness and justice on parties' individual arrangements."* The court broke the shackles of contractual autonomy when it accepted that the constitutional values of equality and dignity may prove to be decisive when the issue of the parties' relative bargaining positions is an issue.

85 In the case of *Barkhuizen v Napier* 2007 (5) SA 323 (CC) still unreported and decided on the 4th April 2007 under case number 72/05, the Constitutional Court per Ngcobo J who gave the majority judgement, emphasizes the importance of public policy when he stated: *"Public policy represents the legal convictions of the community; it represents those values that are held most dear by the society."* The court goes on to state: *"Determining the content of public policy was once fraught with difficulties. It is no longer the case. Since the advent of our constitutional democracy, public policy is now deeply rooted in our Constitution and the values which underlie it."* The court adds: *"..... The founding provisions of our Constitution make it plain: our constitutional democracy is founded on, among other values, the values of human dignity, the achievement of equality and the advancement of human rights and freedoms, and the rule of law. And the Bill of rights, as the Constitution proclaims, "is a cornerstone" of the democracy; "it enshrines the rights of all people in our country and affirms the democratic (founding) values of human dignity, equality and freedom."* The court consequently considered the role of public policy when it stated: *"What public policy is and whether a term in a contract is contrary to public policy must now be determined by reference to the values that underlie our constitutional democracy as given expression by the provisions of the Bill of Rights. Thus a term in a contract that is inimical to the values enshrined in our Constitution is contrary to public policy and is, therefore, unenforceable."* The court also suggested: *"The proper approach to the constitutional challenges to contractual terms is to determine whether the term challenged is contrary to public policy as evidenced by the constitutional values, in particular, those found in the Bill of Rights. This approach leaves space for the doctrine of pacta sunt servanda to operate, but at the same time allows courts to decline to enforce contractual terms that are in conflict with the constitutional values even though the parties may have consented to them."* The court then considered the relationship between public policy and the right of access to the courts as provided for in Section 34 of the *Constitution* which guarantees to seek the assistance of the courts. Section 34 provides: *"Everyone has the right to have any dispute that can be resolved by the application of law decided in a fair public hearing before a court ....."* The court emphasizes this right when it states: *"This is fundamental to the stability of an orderly society. It is indeed vital to a society that, like ours, is founded on the rule of law. Section 34 gives expression to this foundational value by guaranteeing to everyone the right to seek the assistance of a court." (Para 31)* And further at Para 33: *"Section 34 therefore not only reflects the foundational values that underlie our constitutional order, it also constitutes public policy."* The court consequently laid down the following test at Para 36: *"The proper approach to this matter is, therefore, to determine whether clause 5.2.5 is inimical to the values that underlie our constitutional democracy, as given expression to in section 34 and thus contrary to public policy."* Insofar as time limitation clauses in contracts between private parties are concerned and whether such a clause offends public policy the court held: *"What is also apparent from the clause is that it does not deny the applicant the right to seek judicial redress: it simply*

placed great emphasis on the bargaining position of the parties, as well as the right of access to the courts which influence public policy.

13.4 Relevant provisions of the Bill of Rights impacting on the Law of Contract

From the foregoing it is clear that in the new constitutional order, the legal order emphasizes values which the pre-1994 legal system did not. It is, especially, the Constitutional Court which encourages the purposive approach to the interpretation of rights. The values today represent the spirit of the law, the *Constitution* and more especially, the values enshrined in the *Bill of Rights*. In so far as the effect of the constitutional values on the law of contract is concerned, it has been stated, over and over before, that all law in South Africa, including the common law that regulates the enforcement of contracts, must promote the values that underlie the *Bill of Rights*. The most significant values include, *inter alia,* dignity, equality and freedom etc.

For the purposes of the research undertaken in this thesis, only the relevant provisions of the *Bill of Rights* impacting on the law of contract will be looked at.

In the first instance it is important to note that the *South African Constitution* does not only apply vertically between organs of the State and Government Departments or citizens of the State, it is significant to note that the *Constitution* also applies horizontally, between private parties, whether natural persons or juristic persons, in private disputes between the parties. In the immediate subsection that follows, a brief investigation will take place as to how the *Constitution* can apply to the law of contract, by the application of any right with horizontal application under Section 8(2) of the *Bill of Rights*.

The next provision of the *Bill of Rights* that needs to be considered is, how the right to equality, recognized by the *Bill of Rights*, impacts on the law of contract. It is, especially, in contractual disputes where an unequal bargaining power exists between the contracting parties and the fact that the inequality of bargaining power has never been recognized as been a free-floating ground for defence, that the solution, perhaps, lies in the strict application of Section 9 of the *Constitution*. This will be investigated more fully in the subsection that follows.

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requires him to seek judicial redress within the period it prescribes failing which the respondent is released from liability. It is in this sense that the clause limits the right to seek judicial redress." The court consequently held: *"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. What is also relevant in this regard is that the Constitution recognizes that the right to seek judicial redress may be limited in certain circumstances where this is sanctioned by a law of general application in the first place, and where the limitation is reasonable and justifiable in the second. The Constitution thus recognizes that there may be circumstances when it would be reasonable to limit the right to seek judicial redress. This too reflects public policy."*

As access to the courts is now guaranteed, as a fundamental right by the *Constitution*, the significance thereof in limiting or waiving a right to have a dispute adjudicated will be considered. Section 34 is particularly relevant in this regard. As Section 34 gives expression to a foundational value, namely, guaranteeing a right to access to the courts, any attempt to limit or exclude that right may very well be declared inconsistent with the *Constitution* and against public policy. This aspect will, briefly, be considered.

The limitation of rights, as provided in terms of Section 36 of the *Constitution,* is an important provision to be considered. It determines whether an infringement can be justified as a permissible limitation of the right. In other words, it provides an answer to the question of whether the limitation is reasonable and justifiable. This aspect will also be considered, very briefly, in the section that follows.

Finally, what is regarded as a relevant provision of the *Bill of Rights,* which impacts on the law of contract and which will be considered in the section that follows is, to what degree foreign law influences the South African courts? Section 39 of the *Constitution* provides that, when interpreting the *Bill of Rights*, courts may consider international law and foreign law. This is significant in finding answers to the focal point of this thesis. It follows, therefore, that a brief discussion of Section 39 and how it impacts on the law of contract will follow.

13.4.1 Section 8 Application of the Bill of Rights

From the research undertaken in this chapter, it appears that no significant inroads have been made in challenging the constitutionality of contractual terms or provisions, however unfair or unreasonable their results. Save for the most recent constitutional court judgement, in the matter of *Barkhuizen v Napier*, [86] the contribution made by our courts in developing the South African jurisprudence in the law of contract, is sparse. It is especially, in the light of the *obiter* remarks made by the Chief Justice, Langa CJ, in the fore stated case that an investigation on how Section 8 of the *Bill of Rights* impact on the law of contract, is indicated.

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86 2007 (5) SA 323 (CC). In this case Ngcobo J delivering the majority judgement held that the only acceptable approach to challenging the constitutionality of contractual terms is the indirect application under Section 39(2). See Para 30. The Chief Justice Lange CJ agreed that the indirect application under Section 39(2) may ordinarily be the best method to address the problem. Lange CJ also stated albeit obiter that *"I am not convinced that Section 8 does not allow for the possibility that certain rights may apply directly to contractual terms or the common law that underlies them."*

What strengthens the supposition that the *Bill of Rights* impact on the law of contract is the fact that the *Constitution* recognizes that rights in the *Bill of Rights* may in essence also be enforced against private parties albeit natural persons, or juristic persons, through the direct and indirect `horizontal' operation of rights in private disputes between parties. [87]

Now that it has been established that the *Constitution* can apply to the law of contract by the application of any right with horizontal application under Section 8(2) of the *Bill of Rights*, the issue to be decided is, whether the *Bill of Rights* applies directly or indirectly to a legal dispute involving a contractual issue? The answer to this, according to the South African legal writers, lies firstly, in whether the criteria required for direct application had been established. The criteria according to *Currie and De Waal* [88] include the following:

"(a) A right of a beneficiary of the Bill of Rights has been infringed by (b) a person or entity on which the Bill of Rights has imposed the duty not to infringe the right, (c) during the period of operation of the Bill of Rights and (d) in the national territory."

Where, on the other hand, the *Bill of Rights* does not apply directly to a dispute because one or more of the criteria set out hereinbefore is not present, it may, according to the authors *Currie and De Waal,* [89] apply indirectly, in that, all law must be developed,

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87 Sec 8(2) of the *Constitution Act* 108 of 1996 provides: *"A provision of the Bill of Rights binds a natural or a juristic person if, and to the extent that, it is applicable, taking into account the nature of the right and the nature of any duty imposed by the right."* In turn, Sec 8(3) of the *Constitution* provides that when applying any of the provisions of the *Bill of Rights* to a natural person or juristic person and the legislation referred to does not give effect to that right, the common law could be developed. In this regard Section 8(3) provides:

"(3) When applying a provision of the Bill of Rights to a natural or juristic person in terms of subsection (2), a court – (a) in order to give effect to a right in the Bill, must apply, or if necessary develop, the common law to the extent that legislation does not give effect to that right, and (b) may develop rules of the common law to limit the right provided that the limitation is in accordance with section 36(1)"

The South African legal writers recognize the fact that the *Constitution* can apply to the law of contract by application of any right with horizontal application under section 8(2). See in this regard Pieterse "Beyond the Welfare State: Globalization of the neo-liberal culture and the protection of social and economic rights in South Africa" *Still LR* 2003.1 3 at 9; Toady *De Jude* (2002) 306 at 307-308; Carstens and Kok (2003) 18 *SAPR/PL* 430 at 438-440; Grove 2003 *De Jure* 134 at 139-140; Hawthorne 2004 67 (2) *THRHR* 294; Christie *Bill of Rights Compendium* 3H-7; Bhana and Pieterse *SALJ* (2005) 865 at 869-870; Cheadle and Davis "The Application of the 1996 Constitution in the Private Sphere" *South African Journal on Human Rights* Vol.12 (1996) 19 at 30-34; De Vos *South African Journal on Human Rights* Vol. 13 (1997) Para 5; Chaskalson et al "Constitutional Law of South Africa 1999 as revised 10-58ff; Currie and De Waal 2005 at 53 who have reservations whether S8(2) apply to private hospitals as *"the duty imposed by the right (Access to healthcare services S27(1) and emergency medical treatment S27(3)) is too burdensome to impose on private individuals."*

88 *The Bill of Rights Handbook* (2005) 32. The authors hold the view that in disputes in which the *Bill of Rights* act as directly applicable law, it overrides ordinary law and *" ..... any conduct that is inconsistent with it and, to the extent that ordinary legal remedies are inadequate or do not give proper effect to the fundamental rights, the Bill of Rights generates its own remedies."*

89 op cit. The writers Currie and De Waal relying upon the *Carmichele matter*, reason that the indirect application is

interpreted and applied in a way that conforms to the *Bill of Rights*.

A difference of opinion exists amongst the South African legal writers [90] on whether the application, under Section 8(2) of the *Bill of Rights,* applies horizontally, alternatively, whether it applies indirectly, in contractual disputes.

13.4.2 Section 9 - The Constitutional Commitment of Equality

The *South African Constitution* provides for the commitment to equality, however difficult the achievement may be in certain circumstances. [91] But, despite the difficulties, the *Constitution* expects the courts, lawyers and academic writers to grapple with these difficulties in achieving equality. [92] The *Constitution* also prescribes that the type of society that it wishes to create is one based on equality, dignity and freedom. [93]

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founded on the fact that the *Constitution* and the *Bill of Rights* establish an `objective normative value system'. The set of values must therefore be respected whenever the common law or legislation is interpreted, developed or applied. The authors add that when the right is directly applied, the *Bill of Rights* does not override ordinary law or generate its own remedies. Rather, the *Bill of Rights* respects the rules and remedies of ordinary law, but, demands furtherance of its values mediated through operation of ordinary law.

90 The most significant writings have come from Grové "Die Kontraktereg, Altruisme, Keusevryheid en die Grondwet" 136 (2003) *De Jure* 140 who holds the views that where Sections 8(2) and 8(3) are read together it is clear that the Constitution provides for the indirect horizontal application of the *Bill of Rights*. The writer also hold the view that although there is no legislation as provided for in Section 8(3) (a), nonetheless, the courts are obliged to develop the common law in order to ensure fundamental rights enshrined in the *Bill of Rights* are protected (For authority the court relies on the case of *Carmichele v Minister of Safety and Security (Centre for Legal Studies Intervening)* Page 955. Tladi (2002) 17 *SAPR/PL* is of the view that both Sections 39(2) and 8(2) of the *Constitution* emphasize the fact that the common law is not immune from constitutional scrutiny. The writer further states that these provisions serve to remind one that there is a constitutional duty on the courts (not only the Constitutional Court) to infuse constitutional values into the common law. The writer also seems to work with the indirect horizontal approach. Hawthorne (2003) 15 *SA Merc LJ* 271 holds the view that in the absence of legislation regulating the law of contract Sections 8(2) and (3) apply indirectly and horizontally. See also Carstens and Kok *SAPR/PL* (2003) 430 at 439-440. Tladi (2002) *De Jure* 306 at 308 expresses the opinion that the *Constitution* can apply to the law of contract in at least three ways, firstly, by the explicit horizontal application of Section 9(4). Secondly, by application of any right with horizontal application under Section 8(2); thirdly, by the operation of Section 39(2) requiring the promotion of the object, spirit and purport of the *Bill of Rights* in the interpretation and development of the common law. Pieterse *Stell LR* (2003) 3 at 9 share his view namely the *Bill of Rights* may in principle also be enforced against private parties through direct and indirect *"horizontal operation of rights in private disputes"*. The writer strengthens his view by emphasizing that horizontally enforceable rights must triumph over individual liberty in the furtherance of collective social interests.

91 The authors Currie and De Waal (2005) 230 describes the idea of equality as *"..... a difficult and deeply controversial social ideal"*. According to the authors the difficulty lies in determining the similarity of the people's situation and secondly, to determine what constitutes similar treatment of people who are, similarly situated.

92 Currie and De Waal (2005) 231. See also Section 1 of the *Constitution Act* 108 of 1996 which provides:
"The Republic of South Africa is one, sovereign, democratic state founded on the following values:
(a) Human dignity, the achievement of equality and the advancement of human rights and freedoms."

93 In this regard Section 9(1) provides *"everyone is equal before the law and has the right to equal protection and*

A clear distinction is drawn between the two forms which equality takes, namely, formal and substantial equality. [94] In the former instance, the law is said to treat individuals in like circumstances alike, whereas, in the latter instance, the law is required to ensure the equality of outcome. [95]

Another characteristic of the two forms equality takes is this, whereas the formal equality does not take actual social and economic disparities between groups and individuals into account, with substantive equality, an examination of the actual social and economic conditions of groups and, individuals are considered to determine whether the constitutional commitment to equality is being upheld? [96]

The right to equality is said to protect the equal worth of bearers of the right. [97] All natural persons are bearers of the right. [98] The right to equality, in the *South African Constitution*, describes the duties of those who are bound by the right in Sections 9(1) and 9(3), whereas Section 9(2) contains the requirements for measures to promote equality for those who have been unfairly discriminated against in the past. [99]

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benefit of the law." It is especially Currie and De Waal op cit who stresses the importance of the equality right in the post-apartheid order as means to implement measures to correct the wrongs of the past. The authors Chaskalson et al *Constitutional Law of South Africa* 1996 and Supplemented Revision Service 5, 1999 at 14-55 states that as equality is a core value of the *Constitution*, the *Constitution* recognizes the injustices of the past seeking to found a society based on democratic values, social justice and fundamental human rights.

94 Currie and De Waal (2005) 232-233; Hawthorne (2002) 114 at 119.

95 Currie and De Waal (2005) 233.

96 Currie and De Waal (2005) 333 are of the view that a substantive conception of equality is supportive of these fundamental values. They are also of the view that a purposive approach to constitutional interpretation means that s9 must be read as grounded on a substantive conception of equality.

97 Christie *Bill of Rights Compendium* (2002) 1A-88 put the equal worth of human beings to include human dignity, life, physical and psychological integrity etc.

98 Christie op cit 1A 89.

99 Christie op cit 1A-89; In this regard the provisions of the Equality clause provide:
"Equality
9. (1) everyone is equal before the law and has the right to equal protection and benefit of the law.
(2) Equality includes the full and equal enjoyment of all rights and freedoms. To promote the achievement of equality, legislative and other measures designed to protect or advance persons or categories of persons, disadvantaged by unfair discrimination may be taken.
(3) The state may not unfairly discriminate directly or indirectly against anyone on one or more grounds, including race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language and birth."
From the wording of the provisions it is clear that Sec 9(1) covers all forms of unequal treatment that do not

Those who are bound by the rights as provided for, by the provisions of Section 9 of the *Constitution,* cannot escape from such duties except if they successfully invoke the general limitation clause. [100] Since the *Constitution* first came into being, the South African courts had to decide the issue of equality in many matters pertaining to, *inter alia,* race, gender and sex, marital status, sexual orientation, HIV/Aids, affirmative action, municipal rates and taxes etc. [101] The courts have, thus far, not been called upon to decide the issue of equality in a contractual dispute.

For the purposes of the research undertaken in this thesis, the question needs to be begged, to what extent may a contracting party, who was admitted to a private hospital and who signed an agreement containing an exemption clause, absolving a hospital and its staff from liability flowing from the negligence of the staff and who consequently suffers damages, resile from the agreement by having the agreement set aside for being in conflict with the constitutional values of equality and dignity? Although the South African courts have, to date, not decided the issue, [102] there is sufficient authority amongst the South African legal

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amount to unfair discrimination. Sec 9(3) deals with unfair discrimination, direct, or, indirect. See Christie op cit 1A-89.

100 See Currie and De Waal (2005) 237 who hold the view that the general limitation clause as contained in s36 of the *Constitution* and which applies to all the rights listed in the *Bill of Rights*, also applies to Section 9 of the *Constitution*. The authors suggest a two stage test to determine if certain conduct or a provision of the law, has infringed a right in the *Bill of Rights*. The first stage is to determine whether that right has in fact been infringed. The second stage commences once it has been shown that a right has been infringed. The respondent is required to show that the infringement is a justifiable limitation of the right. This then entail showing that the criteria set out in s36 are satisfied i.e. the right has been limited by law of general application for reasons that are reasonable and justifiable in an open and democratic society, based on human dignity, equality and freedom. See in this regard *Harksen v Lane NO* 1998 (1) SA 300 (CC) Para 53; See also Christie op cit 1A-91; Chaskalson op cit 14-65 to 14-66.

101 See the discussion of this issue in which the applicable cases are cited in Christie op cit 1A-89.

102 Traces of the direction the South African Court of Appeal and the Constitutional Court may take when confronted with the legal question posed in the text have been revealed by the Supreme Court of Appeal in *Napier v Barkhuizen* 2006 (4) SA 1 (SCA); 206 (9) BCLR 1011 (SCA) in which the court held that the constitutional values of equality and dignity may prove to be decisive when the issue of the parties' relative bargaining positions is an issue. It was held by the court that the critical question is whether the applicant in effect was forced to contract with the insurer on terms that infringed his constitutional rights to dignity and equality and in a way that requires the court to develop the common law of contract so as to invalidate the terms in question. The court however, concluded that it was not possible to make any conclusion in this aspect in the light of the scanty evidence before it (Para 14). This follows the Supreme Court of Appeal's recognition of unequal bargaining power being a factor which together with other factors, plays a role in the consideration of public policy in the case of *Afrox v Strydom* 2002 (6) SA 21 (SCA); (2002) 4 ALL SA 125 (SCA) Para 18. Although the court found ultimately that on the facts there was no evidence of an inequality of bargaining power, this does not detract from the principle enunciated in that case, namely, that the relative situation of the contracting parties is a relevant consideration in determining whether a contractual term is contrary to public policy. This principle was endorsed in the

writers that the *Bill of Rights* in the *Constitution*,[103] which defines the constitutional rights, may very well hold the key as any contract or contractual provision that infringes any of these rights will generally be unenforceable. [104]

Although at common law, the inequality of bargaining power has never been a free-floating ground upon which a contracting party may rely to have an agreement set aside, [105] in terms of the *Constitution*; [106] regard must be had to the right to equality enshrined in the *Bill of Rights*. [107]

Constitutional Court judgement in the case of *Barkhuizen v Napier* 2007 (5) SA 323 (CC) Para 59 per Ngcobo J delivering the majority judgement. Sachs J in a minority judgement is very critical of the universal influence of standard form contracts in which the supplier of goods or services present to the customer on a "take-it-or-leave-it" basis. The customer is usually in an unequal bargaining position. They also sign without knowing the full implications of their act. Sachs J Para 140 also expresses the opinion that clauses in a standard form contract that are unreasonable, oppressive or unconscionable are inconsistent with the values of an open and democratic society that promotes human dignity, equality and freedom.

103 Act 108 of 1996.

104 Christie *The Law of Contract in South Africa* (2006) 347.

105 Christie (2006) 15.

106 Act 108 of 1996.

107 Christie (2006) 15; In terms of Section 9(1) of the Bill of Rights *"Everyone is equal before the law and has the right to equal protection and benefit of the law."*
Christie *Bill of Rights Compendium* (2002) 3H-20 hold the view that Section 9 of the Constitution considered with the *Promotion of Equality and Prevention of Unfair Discrimination Act* 4 of 2000, are concerned not with theoretical equality but with effective equality. According to the author an acceptance of the general right of equality before the law leads to the belief that one should counter inequality of bargaining power. In this regard the author relies heavily on the English law, especially, the dictum of Lord Denning in *Lloyds Bank Ltd v Bundy* (1975) 1 QB 326 (CA) and the Australian case of *Commercial Bank of Australia Ltd v Amadio* (1983) 151 Cir 447. Hawthorne 1995 (58) *THRHR* 157 at 176 considers the principle of equality provided for in the erstwhile *Interim Constitution*, namely, Section 8 as the cornerstone of the Constitution. The writer predicts that the principle of equality will have a significant effect on the development of the law of contract. For that reason the writer provides for the inclusion of the doctrine of inequality into the law of contract to prevent the continued unjust domination. He believes that the principle of equality can give content to the existing open concept of public policy. This, is very much supported by Christie *Bill of Rights Compendium* (2002) 3H-23. The writer states that by using public policy to give effect to the constitutional and statutory right of equality before the law, the courts will be able to handle any otherwise unclassifiable cases of injustice that may arise from inequality of bargaining power. Other legal writers who have criticized the lack of recognition of measures to counter the inequality of bargaining power include Naude and Lubbe (2005) 441 at 460-461. The writers hold the view that in hospital exemption contracts there is an imbalance between the interests of the parties which causes the patient to be an object of commercial law. The writers are especially, critical of the dismissal of the Supreme Court of Appeal in the case of *Afrox v Strydom* of the fact that the unequal bargaining position of the parties was not proved. Other writers who have also been very critical of the *Afrox judgement* concerning the court's failure to decide the case on the principle of inequality of bargaining power include Jansen and Smith (2003) 217-218; Van Heerden (2003) 47-48; Tladi (2002) 477 promotes the drive towards substantive equality when he states that freedom as a constitutional value has to be balanced with other values underlying the *Constitution* such as fairness, dignity and equality. The writer argues that as far as freedom of contract is concerned, when abused by the stronger party to

What has been suggested by the legal writers is that, in the light of Section 9 of the *Constitution*, [108] public policy now recognises a general right (not limited to cases of discrimination) of equality before the law and that, in contract, where an inequality of bargaining power, has on the facts of a case led to the infringement of this right, the *caveat subscriptor* rule will be relaxed when the necessity of preventing the infringement outweighs the necessity of enforcing the contract. [109]

13.4.3 Section 34: Access to Courts

The next aspect to be looked at is what is the effect of significantly limiting or waiving a right to have a dispute settled by a court of law, especially now that access to the courts is guaranteed as a fundamental right by the Constitution? [110]

This guaranteed right to access to the courts, it is submitted, is founded upon the emphasized values in the new South African constitutional order, as eluded to earlier on in this Chapter. [111] It has as a pedestal, constitutionalism, bolstered by the specific entrenchment of the rule of law. [112]

The rule of law, in turn, in terms of Section 34 of the *Constitution*, gives expression to a foundational value, namely, guaranteeing to everyone the right to seek the assistance of a court [113] and further, guaranteeing orderly and fair resolutions of disputes by courts or

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achieve unreasonable and unjust contracts, undermines the value of equality and dignity that are supposed to permeate our constitutional dispensation. The writer adds 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 .....*" See also the supporting writings of Bhana and Pieterse (2003) 22.

108 Act 108 of 1996.

109 Christie *Bill of Rights Compendium* (2002) 3H-22. Other writers who have come out in favour of developing public policy includes De Vos "Pious wishes or directly enforceable human rights? Social Justice and Economic Rights in South Africa's 1996 Constitution" 1997 *SAJHR* 67 101.

110 Section 34 of the *Constitution Act* 108 of 1996 under the heading `*Access to Courts*', provides:
"Everyone has the right to have any dispute that can be resolved by the application of law decided in a fair public hearing before a court or, where appropriate, another independent and impartial tribunal or forum."

111 op cit. fn 7.

112 Section 1 of the *Constitution* provides:

"The Republic of South Africa is one, sovereign, democratic state founded on the following values:
(c) Supremacy of the constitution and the rule of law."

113 To this end the authors Currie and De Waal (2005) 704 states that *"a fundamental principle of the rule of law is anyone may challenge the legality of any law or conduct."* The authors also emphasize the fact that the purpose of

independent and impartial tribunals. [114]

Now that we have a greater understanding of the principles underlying the rule of law and the purpose of Section 34 of the *Constitution*, we need to give brief consideration to exemption clauses, limitation clauses or waivers as devices which limit the right of access to court as provided for in Section 34. Put differently, what effect do exemption clauses, limitation clauses or waivers have on Section 34, which gives expression to a foundational value, namely, guaranteeing a right to access to the courts? This can never be satisfactorily answered without having regard to the common law in South Africa. Our common law has always acknowledged the right of a litigant to approach a court of law where he/she/it feels aggrieved and where either a contractual or delictual infringement has taken place.

The South African courts have, for decades, held that a term in a contract which deprives a party of the right to seek judicial redress is contrary to public policy. [115] Since the

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Section 34 has as its grounding the higher value of the rule of law in that *" ..... It promotes the peaceful institutional resolution of disputes and to prevent the violence and arbitrariness that results from people taking matters in their own hands"* and further *"..... By insisting on the resolution of legal disputes by fair, independent and impartial institutions [it] prohibit the resort to self-help"*. What this Section does according to Currie and De Waal is to provide *"access, independence, impartiality and fairness."*

114 See in this regard the attitude of the Constitutional Court in *Chief Lesapo v North West Agricultural Bank and Another* 2000 (1) SA 409 (CC); 1999 (12) BCLR 1420 (C) at Para 22 in which the court stated: *"The right of access to court is indeed foundational to the stability of an orderly society. It ensures the peaceful, regulated and institutionalised mechanisms to resolve disputes without resorting to self-help. The right to access to court is a bulwark against vigilantism, and the chaos and anarchy which it causes. Construed in this context the rule of law and the principle against self-help in particular, access to court is indeed of cardinal importance"* and quoted with approval in *Zondi v MEC for Traditional and Local Government Affairs and Others* 2005 (3) SA 589 (CC); 2005 (4) BCLR 347 (CC) at Para 63 in which the court with reference to Section 34 also held: *"Section 34 is an express constitutional recognition of the importance of the fair resolution of social conflict by impartial and independent institutions. The sharper the potential for social conflict, the more important it is, if our constitutional order is to flourish, that disputes are resolved by courts."* More recently in another Constitutional Court matter of *Barkhuizen v Napier* 2007 (5) SA 323 (CC) at Para [31] put the position as follows: *"Our democratic order requires an orderly and fair resolution of disputes by courts or other independent and impartial tribunals. This is fundamental to the stability of an orderly society. It is indeed vital to a society that, like ours, is founded on the rule of law. Section 34 gives expression to this foundational value by guaranteeing to everyone the right to seek the assistance of a court."* The court at Para [33] relying on public policy concluded: *"Section 34 therefore not only reflects the foundational values that underlie our constitutional order, it also constitutes public policy."*

115 This principle was first enunciated in a case decided in 1906. In the matter of *Nino Bonino v De Lange* 1906 (TS) 120 the court considered whether in contracts of pledge a clause stipulating for the right of *parate executis* in which the pledge can realize and execute upon the pledged property without obtaining the judgment of any court was valid or not? The court consequently held it was a contract against public policy and void. The same principle was applied in the Appellate Division (as it was known then) case of *Schierhout v Minister of Justice* 1925 (AD) 417 in which the court held: *"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."* In a number of other cases the South African courts have also considered whether certain sections incorporated in legislation and in contracts hampered the ordinary rights of an aggrieved person to seek the assistance of the courts? Consequently, in the following cases, the denial of a right to seek the assistance of a court was considered to be contrary to public policy and in conflict with common law. See *Administrator, Transvaal and Others v Traub and Others* 1989 (4) SA 729 (A) at 764E; *Avex Air (Pty) Ltd v Borough of Vryheid*

introduction of the *Constitution*, it appears that Section 34 has not changed the common law position. [116]

What, then, is the position with regard to a contractual provision, containing an exclusionary clause, in which a contracting party undertakes to exonerate the other contractual party from liability arising from the other party's negligence? This position remains uncertain, notwithstanding academic writings [117] and the guidelines laid down by

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1973 (1) SA 617 AD at 621F-G; *Stokes v Fish Hoek Municipality* 1966 (4) SA 421 (C) at 423h-424C; *Gibbons v Cape Divisional Council* 1928 CPD 198 at 200; and *Benning v Union Government (Minister of Finance)* 1914 AD 29 at 31.

116 Christie *Bill of Rights Compendium* (2002) 3H-50 summarizes the position as follows: *"Section 34 cannot have been intended to change this common law position, as it expressly provides for a fair public hearing before another independent and impartial tribunal or forum where appropriate."* Considering whether an arbitration agreement would fall into this category, Christie, states: *An arbitration agreement would undoubtedly make such a hearing appropriate, because, by agreeing to arbitration, the parties have expressed a preference for that method of resolving their dispute."* With regard to self-help agreements in the form of *parate executie* the author suggests that any such agreement must be carefully examined so that it can be determined whether its effect is to contravene the common law and Section 34 by ousting the jurisdiction of the courts. The common law position was restated by Harms JA in *Bock v Duburora Investments (Pty) Ltd* 2004 2 SA 242 (SCA) 247-248 as: *"The principles concerning parate executie (immediate execution) are trite. A clause in a mortgage bond permitting the bondholder to execute without recourse to the mortgager or the court by taking possession of the property and selling is void."* Harms JA then highlights two judgements of the Constitutional Court namely *Chief Lesapo v North West Agricultural Bank* 2000 1 SA 409 (CC) and *First National Bank of South Africa Ltd* 2000 3 SA 626 (CC) and states the unconstitutionality of these type of clauses: *"I find it difficult to extend the proscription of these statutory provisions by the Constitutional Court to parate executie of movables which are lawfully in the possession of the creditor. This procedure does not authorize a creditor to bypass the courts and "seize and sell the debtor's property of which the debtor was in lawful and undisturbed possession"; it does not entitle the creditor to `take the law into his or her hands'; it does not permit `the seizure of property against the will of a debtor in possession of such property'. And since the debtor may seek the protection of the court if, on any just ground, he can show that, in carrying out the agreement and effecting a sale, the creditor acted in a manner which prejudiced him in his rights, the creditor cannot be said to be judge in his own cause."*
The Constitutional Court has also held that a statutory time-bar on the enforcement of pre-existing rights may, if it is unreasonably short, contravene section 34. See in this regard *Mohlenu v Minister of Defence* 1996 12 BCLR 1559 (CC), 1997 1 SA 124 (CC); *Maise v Greater Germiston Transitional Local Council* 2001 4 SA 491 (CC).

117 The legal writer Hopkins in a most recent publication "Exemption clauses in contracts" *De Rebus* June 2007 22 at 24 suggests that if one were to take the proposition seriously that the *Bill of Rights* is an accurate statement of public policy *" ..... then it follows that contracts which violates provisions of the Bill of Rights (if enforced) without good reason should be deemed unconstitutional and therefore in violation of public policy with the result that they should be unenforceable."* The author is critical of the approach adopted by the Supreme Court of Appeal in the cases of *Afrox Healthcare Bpk v Strydom* 2002 (4) SA 125 (SCA) 133 and *Johannesburg Country Club v Stott* 2004 (5) SA 511 (SCA) which involved exemption clauses. The writer suggests that in these cases the question of exemption clauses were not adequately tested against the constitution. He also holds the view that the legal team for the patient in Afrox case selected the wrong right when challenging the unconstitutionality of the contractual provisions. Whereas in Afrox, the writer reasons, the exemption clause could never have resulted in the limitation of the right to access to health, in the Stott case, he argues, the SCA wrongly implicated the right to life clause. For that reason the writer argues *"It is crucial to determine, upfront, exactly what right is limited if the contract is upheld"*. In other words, one has to ask the right questions: What right will be limited if the contract is allowed to stand? The answer lies in the nature and scope of exemption clauses - "Exemption clauses according to Hopkins page 29 "*prevent a potential plaintiff from suing a potential defendant in a court of law or in any other tribunal or forum."* They are devices which limit the right to access to court as provided for in terms of

the Constitutional Court in the recent decision of *Barkhuizen v Napier*. [118] It will, however,

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Section 34 of the *Constitution*. For courts to enforce exemption clauses in a contract, effectively closes the doors of the courts to injured parties. This Hopkins adds, is contrary to the provisions of Section 34 of the *Constitution*. The second part of the enquiry is whether or not the limitation of the constitutional right should nevertheless be allowed to stand because it is reasonable and justifiable? For a right to be limited in the particular circumstances s36 of the *Constitution* needs to be invoked that a person's constitutional rights may be limited where it is `reasonable and justifiable' to do so in a free and open democracy based on human dignity, equality and freedom. (s36) Although exemption clauses in contracts will always amount to a limitation of the Constitutional right contained in section 34, it does not according to Hopkins at page 25 mean that all exemption clauses are unconstitutional and therefore in violation of public policy. The answer lies in whether the limitation of a constitutional right can be justified? Here Hopkins at page 29 correctly draws a distinction between exemption clauses prevalent in some industries which are justified and others which can quite simply never be justified. Hopkins also suggests that the basis for deciding the validity of exemption clauses could no longer be decided under the traditional sanctity of contract, but, will always be a constitutional call. It will therefore be up to the party seeking to exclude itself from liability to justify to the court why, in that particular case, there is a reasonable and justifiable basis for having the exemption clause in the contract.

118 The *Barkhuizen case* 2007 (5) SA 323 (CC) decided in the Constitutional court succeeds an earlier decision in the Supreme Court of Appeal decision of *Napier v Barkhuizen* 2006 4 SA 1 (SCA) concerning a contract that creates rights and contains an agreed time-bar on the enforcement of these rights as has become custom in many short-term insurance policies. Although Cameron JA stated that when weighing up whether section 34 had been contravened, evidence may show the agreed time-bar is unreasonable and infringes on constitutional rights (at Para 10), he concluded in this: *"The Plaintiff's rights to insurance cover arose from his contract with the defendant, which in creating his right stipulated at its inception that a claim, to be enforceable, had to be instituted within 90 days of repudiation. The access-to-courts provision in the Bill of Rights does not prohibit this."* (Para 37). In *Barkhuizen v Napier* Ngcobo J delivering the majority judgement emphasized the value of Section 34 of the Constitution which *"not only reflects the foundational values that underlie our constitutional order, it also constitute public policy"*. The court consequently considered the common law position of an aggrieved person's right to seek the assistance of a court of law and whether the time-bar clause 5.2.5 was contrary to public policy and unenforceable? As to the nature of the clause, the court stated: *"What is also apparent from the clause is that it does not deny the applicant the right to seek judicial redress; it simply requires him to seek judicial redress within the period it prescribes failing which the respondent is released from liability. It is in this sense that the clause limits the right to seek judicial redress."* As to the question whether public policy tolerates time limitation clauses in contracts, the court found that time limitations are a common feature *"both in our statutory and contractual terrain"*. The court goes on to state that the effect of these time-bar clauses is that they do not bar potential litigants from instituting action through the courts although *"they deny the right to seek the assistance of a court once the action gets barred because the action was not instituted within the time allowed."* Ngcobo J quoting from the *Mohlomi v Minister of Defence* 1997 (1) SA 124 (CC) 1 1996 (12) BCLR 1559 (CC) decision, emphasized the importance of these clauses when he stated: *"Rules that limit the time during which litigation may be launched are common in our legal system as well as many others. Inordinate dealings in litigating damage the interests of justice. They protract the disputes over the rights and obligations sought to be enforced, prolonging the uncertainty of all concerned about their affairs. Nor in the end is it always possible to adjudicate satisfactorily on cases that have gone stale. By then witnesses may no longer be available to testify. The memories of ones whose testimony can still be obtained may have faded and become unreliable. Documentary evidence may have disappeared. Such rules prevent procrastination and those harmful consequences of it. They thus serve a purpose to which no exception in principle can cogently be taken."* (Para 11). Consequently the court held: *"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. What is also relevant in this regard is that the Constitution recognizes that the right to seek judicial redress may be limited in certain circumstances where this is sanctioned by a law of general application in the first place, and where the limitation is reasonable and justifiable in the second. The Constitution thus recognizes that there may be circumstances when it would be reasonable to limit the right to seek judicial redress. This too reflects public policy."*
The court also weighed up the principle of freedom of contract and the need to ensure access to the courts and concluded: *"In approaching this question, a court will bear in mind the need to recognize freedom of contract but*

be argued in the succeeding chapter, that hospital contracts containing exemption clauses in which the patient indemnifies or exonerates a hospital from liability, notwithstanding the negligence of the hospital's staff, would fall in the category of contracts which violate provisions of the *Bill of Rights* without good reason. It will also be contended that such an agreement should be declared to be unconstitutional and therefore, in violation of public policy, with the result they should be declared unenforceable.

13.6.4 Section 36: Limitation of rights

It is generally accepted that constitutional rights and freedoms are not absolute. [119] Although some rights may justifiably be infringed, it is believed that the reason for limiting a right needs to be exceptionally strong [120] in order to determine whether an infringement can be justified as a permissible limitation of the right. The South African courts work with what is known as a two-stage approach. [121] Besides having to determine whether a right has been infringed by law or conduct, [122] the court will also have to establish whether the limitation of that right is justifiable. [123]

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the court will not let blind reliance on the principle of freedom of contract override the need to ensure that contracting parties must have access to courts." (Para 55).

119 Section 36 of Act 108 of 1996 recognizes restrictions of the rights enshrined in the *Bill of Rights*. The limitations provided by the Constitution read: 36(I) *"Limitation of rights :The rights in the Bill of Rights may be limited only in terms of law of general application to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors, including - (a)the nature of the right; (b)the importance and extent of the purpose of the limitation;(c)the nature and extent of the limitation;d)the relation between the limitation and its purpose; and (e) less restrictive means to achieve the purpose. Sec36 (2) provides "Except as provided in subsection (1) or in any other provision of the Constitution, no law may limit any right entrenched in the Bill of Rights."*
According to Currie and De Waal (2005) 163 Fn1 Section 36 only applies to the rights in the *Bill of Rights*. Provisions elsewhere in the Constitution cannot be limited by reference to Section 36. See also, *Van Rooyen v S (General Council of the Bar of South Africa Intervening)* 2002 (5) SA 246 (CC) Para 35 in which it was held that judicial independence cannot be subjected to limitation.

120 Currie and De Waal (2005) 164 in this regard state that the limitation must serve a purpose that most people would regard as compellingly important and further that there is no other `realistically available' way in which the purpose can be achieved with restricting rights. *S v Mandela* 2000 (3) SA 1 (CC) Para 32.

121 Currie and De Waal (2005) 166 put the test down as the following: The first question that is asked is whether a right in the *Bill of Rights* has been infringed by law or conduct of the respondent. If the answer is in the affirmative the next question to be answered is whether the infringement can be justified as a permissible limitation of the rights?

122 This stage according to Currie and De Waal (2005) 166 is ascertained through the interpretation of the provisions of the law and the *Bill of Rights*.

123 This according to Currie and De Waal (2005) 167 involves a far more factual enquiry than the question of interpretation. Appropriate evidence need to be lead to justify a limitation of a right and that it is `reasonable' or

Before a court will legitimately limit a right in the *Bill of Rights,* it must be shown firstly, that it is a law of general application [124] and secondly, it is reasonable and justifiable in an open and democratic society, based upon human dignity, equality and freedom. [125]

`justifiable' in an open and democratic society based on human dignity, equality and freedom. The type of evidence that need to be lead according to the authors, include, sociological or statistical data to justify the legislative restriction on society, unless, of course, the purpose of a limitation and the relationship between the limitation and its purpose is self-evident. See also, *S v Meaker* 1998 (8) BCLR 1038 (W). Where the justification rests on factual and/or policy considerations the respondent must put such material before the court. Failure to do so, may lead to a finding that the limitation is not justifiable.

124 Currie and De Waal (2005)168; Christie *Bill of Rights Compendium* 1A-67.

125 The law of general application is said to be an expression of a basic principle of liberal political philosophy and of constitutional law better known as the rule of law. Currie and De Waal (2005) 168. The authors opine that there are two components to this principle namely, in the first place, the government that has lawful authority, has the power to make law. Once it is established that it is a law made by government, the next question is what forms of law qualify as `law of general application?' In this regard a wide interpretation is given to the meaning of `law'. It appears therefore that all forms of legislation (delegated and origin) qualify as `law'.*Carbi-Odam v MEC for Education (North West Province)* 1998 (1) SA 745 (CC) Para 27. In this case the Constitutional Court held that subordinate legislation applying to all educations in South Africa was a law of general application as does common law (both private law and public law rules) and customary law. See *Du Plessis v De Klerk* 1996 (3) SA 850 (CC) pares 44 and 136. Currie and De Waal (2005) 169 hold the view however, that a mere policy or practice (even of an organ of state) cannot qualify as `law'. See also *Hoffman v South African Railways* 2001 (1) SA 1 (CC) Para 41. In this case the Constitutional Court held that a policy of an organ of state that HIV positive persons are not qualified for employment as airline cabin attendants was not a law of general application. Although the limiting of rights is performed mostly by the legislature, Currie and De Waal (2005) 169 point out that the courts also have the power to develop limitations by virtue of their power to develop the common law. Section 8(3)(b) of the *Constitution* specifically authorizes the courts in cases of direct horizontal application of the *Bill of Rights* to the common law, provided, that limitation is in accordance with Section 36. Cheadle et al *South African Constitutional Law: The Bill of Rights* (2002) 698-9 hold the view that rights can also be limited in cases of the indirect application of the *Bill of Rights*. See *S v Mamambolo* 2001 (3) SA 409 (CC) in which the court applied the reading-down rule to save the common law offence of scandalizing the court in the form of contempt *ex facie curiae* from constitutional invalidity. The court in this case acknowledged a limitation to the right of freedom of expression. The second component according to Currie and De Waal (2005) 169 relates to the character of quality of the law that authorizes a particular action. What is expected is that the law must be sufficiently clear, accessible and precise that those who are affected by it can ascertain the extent of their rights and obligations. See *Dawood v Minister of Home Affairs* 2000 (3) SA 936 (CC) Para 47. What is expected is that the law applies impersonally, equally to all and it must not be arbitrary in application. Currie and De Waal (2005) 169-170. Section 36 therefore prevents laws that are personal, unequal or arbitrary in application from qualifying as legitimate limitations of rights. The rationale for the second component is set out by Ackerman J in *S v Makwanyane* (Fn 9 supra) Para 156 as: *"We have moved from a past characterized by much which was arbitrary and unequal in the operation of the law to a present and future in a constitutional state where state action must be such that it is capable of being analyzed and justified rationally. The idea of the constitutional state presupposes a system whose operation can be rationally tested against or in terms of the law ....."* In the case of *De Lille v Speaker of the National Assembly* 1998 (3) SA 430 (C) the court looked at the requirements of equality and non-arbitration when considering the punitive suspension of a member of parliament by an ad hoc committee of the National Assembly. The High Court held that the suspension was a violation of the rights to freedom of expression just administrative action and access to courts. The court also held that the violation was not justifiable under the limitation clause because it was not authorized by law of general application in that the rules and standing orders of parliament laws of general application.

Section 36 contains a set of relevant factors which courts are obliged to take into consideration when determining the question of reasonableness and justifiability of a limitation. This includes:

(i) the nature of the right;

(ii) the importance of the purpose of the limitation;

(iii) the nature and extent of the limitation;

(iv) the relation between the limitation and its purpose; and

(v) less restrictive means to achieve the purpose.

Insofar as the nature of the right is concerned, the proportionality required by s36 involves weighing up the harm done by a law against the benefits that the law serves to achieve. [126] The importance of the purpose of the limitation is a significant factor in determining the reasonableness and justifiability of a limitation. [127]

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126 As to the meaning of reasonableness and justifiability Currie and De Waal (2005) 176 suggest that the rationale behind this amount to this, the law must be reasonable in that it should not invade rights any further than it needs to in order to achieve its purpose. In order to satisfy the limitation test, the authors Currie and De Waal (2005) 176, suggest that it must be shown that the law in question serves a constitutionally acceptable purpose and that there is sufficient proportionality between the harm done by the law (the infringement of fundamental rights) and the benefits it is designed to achieve (the purpose of the law). The Constitutional Court in S v Makwanyane (Fn 9 Supra) Para 104 adopted the following approach to the application of the general limitation clause: *"The limitation of constitutional rights for a purpose that is reasonable and necessary in a democratic society involves the weighing up of competing values and ultimately an assessment based on proportionality."* The court acknowledged that different rights have different implications. There is therefore no absolute standard which can be laid down for determining reasonableness and necessity. The court also acknowledged that principles can be established, but, cautions the court *"the application of these principles to particular circumstances can only be done on a case-by-case basis. This is inherent in the requirement of proportionality, which calls for the balancing of different interests. In the balancing process, the relevant considerations will include the nature of the right that is limited, and its importance to an open and democratic society based on freedom and equality, the purpose of which the right is limited and the importance of that purpose is such a society; the extent of the limitation, its efficiency and particularly where the limitation has to be necessary, whether the desired ends could reasonably be achieved through other means less damaging to the right in question ....."* The foretasted paragraph according to Currie and De Waal (2005) 177 has become a standard reference when the Constitutional Court considers the legitimacy of limitation. See *S v Mbatha* 1996 (2) SA 464 (CC) Para 14; *S v Bhulwana* 1996 (1) SA 388 (CC).

127 See Currie and De Waal (2005) 178 suggest a court must assess what the importance of a particular right is in the overall constitutional scheme. A right that is of particular importance to the *Constitution's* ambition to create an open and democratic society based on human dignity, freedom and equality will carry a great deal of weight in the balancing of rights against justifications for their infringement. The authors use the case of *S v Makwanyane* (Fn 9 supra) as an example how the court went about in balancing a right against the justification for its infringement. The court considered the death penalty and whether it is justified given that the death penalty infringed the rights to life, to human dignity and to freedom from cruel, inhuman or degrading punishment? In the light thereof the death penalty to be constitutional would have to qualify as a reasonable and justifiable limitation of the three rights. In order to ascertain whether the death penalty qualifies as a reasonable and justifiable limitation the court balanced the benefits it was designed to achieve against the harm it did - the violation of the three rights. The court consequently attached great weight to the three rights and emphasized their importance in an open and democratic society based on freedom and equality in stating: *"The rights to life and dignity are the most important of all human rights, and the source of all other personal rights in the Bill of Rights. By committing ourselves to a society founded on the recognition of human rights we are required to value these two rights above all others. And*

The nature and the extent of the limitation is also a necessary part of the proportionality enquiry, for the proportionally enquiry, entails that the infringement of rights should not be more extensive than is warranted by the purpose, the limitation seeks to achieve. A further factor to consider in deciding whether the limitation is reasonable and justifiable is to look at the relationship between the limitation and its purpose. [128]

A limitation would only serve as a legitimate limitation of a right, where the law that infringes the right is reasonable and justifiable. [129] In other words, there must be a good reason for the infringement. The proportionality test, when applied, weighs up the harm done by the infringement and the beneficial purpose that the law is meant to achieve. Where the law does not serve the purpose that it is designed to serve, or marginally contribute to achieve its purpose, it can never be an adequate justification for an infringement of fundamental rights. [130]

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this must be demonstrated by the State in everything that it does, including the way it punishes criminals." The court held that this meant that very compelling reasons would have to be found to justify the limitation of such important rights. No compelling reasons were found however in this case.

128 Currie and De Waal (2005) 179 states that a limitation of rights that serves a purpose that does not contribute to an open and democratic society based on human dignity, equality and freedom cannot therefore be justifiable. It was held in the case of *S v Makwanyane* that despite the state's argument that the death penalty serves the purposes of deterrence to violent crimes; preventing the recurrence of violent crimes; retribution for violent crimes, the court clearly found difficulty with the third purpose of the death penalty as retribution was not considered to be a purpose fitting the type of society that the constitution wished South Africa to be. The Constitution envisaged a society based on values of reconciliation and ubuntu and not vengeance and retaliation; which *"..... Can never be a worthy purpose of punishment in the enlightened society to which we South Africans have now committed ourselves."* (Para 185). According to Currie and De Waal (2005) 182 the test here is to ensure that the limitation does not do more damage to rights than is reasonable for achieving its purpose. It was put in the following terms by the Constitutional Court in the case of *S v Mananela* 2000 (3) SA 1 (CC) Para 34 namely a law that limits rights, should not use a sledgehammer to crack a nut. In the Makwanyane case (Fn 9 Supra) 236 the Constitutional Court, although finding nothing untoward with the purposes of deterrence and prevention of recurrence of violent crime, nevertheless found difficulty with the retribution purpose. Consequently it was held that the death penalty has grave and irreparable effects on the rights concerned. The court with regard to the nature and extent of the limitation held that the inroads that the death penalty made on the rights to life, dignity and freedom from cruel punishment, could not be more severe. Currie and De Waal (2005) 182 also hold the view that to serve as a legitimate limitation of a right, a law that infringes the right must be reasonable and justifiable. What it means is that there must be good reason for the infringement. According to the authors there must be proportionality between the harm done by the infringement and the beneficial purpose that the law is meant to achieve. In the case of *S v Mankwanyane* (Fn 9 Supra) 184 the court considered this principle and came to a finding that there was no satisfactory evidence establishing a connection between the death penalty and a reduction in the incidence of violent crime. The court per Didcott Para 184 held: *"The protagonists of capital punishment bear the burden of satisfying us that it is permissable under S33(1), to the extent that their case depends upon the uniquely deterrent effect attributed to it, they must therefore convince us that it indeed serves such a purpose. Nothing less is expected from them in any event when human lives are at stake lives which may not continue to be destroyed on the mere possibility that some good will come of it ....."*

129 Currie and De Waal (2005) 182-183

130 Currie and De Waal (2005) 183

A further legitimacy requirement for the limitation of a fundamental right is that the benefit must be in proportion to the scope of the limitation. Therefore, a law that invades rights more than is necessary to achieve its purpose, is evidently disproportionate. [131]

A section 36(1) enquiry therefore, consists of the following, where it is established that a law of general application infringes a right protected by the *Bill of Rights*. The State or person relying on the law may argue that the infringement constitutes a legitimate limitation of the right. [132] As rights are not absolute, they may be infringed, but only when the infringement is for compelling good reasons. A compelling good reason will be present only where the infringement serves a purpose that is considered legitimate in a constitutional democracy that values human dignity, equality and freedom above all other considerations. [133]

13.4.6 Section 39: Interpretation of the Bill of Rights

13.4.6.1 The Influence of Foreign Law on the South African Courts

From the earlier discussion in this chapter it is clear that the constitutional values have a profound and prevailing impact on the way the law is interpreted and applied in South Africa. [134] In this new constitutional order, values such as human dignity, equality and freedom in particular, are emphasized. [135] As was also stated earlier, the common law is subject to constitutional control. For that reason, it has been stated over and over before, that all law in South Africa, including, the common law, must promote the values that underlie the *Bill of Rights*. [136] It has, further, also been stated on numerous occasions that, where necessary, the common law has to be developed in this constitutional order to reflect the spirit, purport and objects of the *Bill of Rights*. [137]

What has also emerged in the new constitutional order is that judges today, unlike in the legal order which prevailed prior to the constitutional state coming into being, can develop

131 Currie and De Waal (2005) 184

132 Currie and De Waal (2005) 185

133 Currie and De Waal (2005) 185.

134 op cit fn 29.

135 op cit fn 31.

136 op cit fn 36.

137 op cit fn 40.

the common law where no law exists or law reform is necessary, i.e. where the competing rights conflict with the values in the *Constitution*. [138]

The *Constitution* [139] in this regard provides several aides to interpreting the *Bill of Rights* when courts are confronted with weighing up competing rights. The aids include the use of both international law and foreign law.

From the remarks made by the Constitutional Court in *S v Makwanyane,* [140] one gains the

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138 Tladi (2002) 17 *SAPR/PL* 473; Hawthorne (2003) 15 *SA Merc LJ* 271 at 272; Carstens and Kok (2003) 18 *SAPR/PL* 430 at 445 - 446; Hopkins *TSAR* (2003-1) 150 at 157; Tladi *De Jure* (2001) 306 at 307; Grove (2003) 134 at 140; Christie *Bill of Rights Compendium* 3H-7; Currie and De Waal (2005) 159; See also *Carmichele v Minister of Safety and Security* 2001 (4) SA 938 at 952-953. For a discussion of the attitudes in the apartheid era that they were not `makers of law' but merely the `adjudicators of law' see Hugh Corder *Judges at Work: The Roles and Attitudes of the South African Appellate Judiciary* 1910-50 (1984); John Dugard *Human Rights and the South African Legal Order* (1978); C F Forsyth *In danger of Their Talents: A Study of the Appellate Division of the Supreme Court of South Africa from 1950-80* (1985); Victor Soutwell `Working for Progressive Change in South African Courts' (1995) 28 (*CILSA* 261 at 266 quoted by De Vos "Pious wishes or directly enforceable human rights? Social and economic rights in South Africa's 1996 Constitution" *South African Journal on Human Rights* (1997). It is stated that *"Judges were able to lull themselves into believing that they had no choice when interpreting racist and oppressive statutes. It was the body of statutory law which contained the law of apartheid and no more."* The writer De Vos holds the view that it seemed the same road which some of the Constitutional Court judges had also walked. He uses several dicta of the Constitutional Court to support his view namely: In *S v Zuma* 1995 (4) BCLR 401 (SA) (CC) Kentridge AJ, while admitting that general language does not have a single `objective' meaning, nevertheless warns that the main task of the judiciary should remain the interpretation of a written instrument and that a less rigorous approach may entail the danger that the Constitution may be taken to mean whatever one wishes it to mean (at 412F-G); Also in *S v Makwanyane* 1995 (6) SA 665 (CC) where Kriegler J remarks: *"In answering the question the methods to be used are essentially legal, not moral or philosophical. The incumbents are Judges, not sages; their discipline is the law, not ethics or philosophy and certainly not politics"* (at 747F-748A). For an extensive discussion on the jurisprudence of the Constitutional Court, see Alfred Cockrell `Rainbow Jurisprudence' (1996) 12 *SAJH R* 1-38. Cockrell argues that the judges of the Constitutional Court had by and large failed to go beyond the formulation of formal reasons for their decisions and had not engaged in the moral and political reasoning required when making the difficult decisions about matters of political morality. But, notwithstanding some of the judges' hesitancy to move with the times, some of the judges changed their mindset. It was Kentridge AJ in *Du Plessis v De Klerk* above Fn 99 who quoted with approval the Canadian dictum in *R v Saliture* (1992) 8 CRR 2d 173 (1991) 3 SCR 654 wherein it was stated: *"Judges can and should adapt the common law to reflect the changing social, moral and economic fabric of the country. Judges should not be quick to perpetuate rules whose social foundations have long since disappeared. Nonetheless there are significant constraints on the power of the judiciary to change the law. In a constitutional democracy such as ours it is our legislature and not the courts which have the major responsibility for law reform. The judiciary should confine to show incremental changes which are necessary to keep the common law in step with the dynamic and evolving fabric of our society."*

139 *The Constitution of the Republic of South Africa Act* 108 of 1996.

140 Chapter 2 of the *Bill of Rights* provides as follows:

"Interpretation of Bill of Rights"

39. (1) When interpreting the Bill of Rights, a court, tribunal or forum:

(a) must promote the values that underlie an open and democratic society based on human dignity, equality and freedom;

(b) must consider international law; and

(c) may consider foreign law.

(2) When interpreting any legislation, and when developing the common law or customary law,

distinct impression that the Constitution permits reference for purposes of interpretation to international human rights law in general. [141]

Apart from international law, the courts, as previously stated, may also consider foreign law when interpreting the *Bill of Rights*, especially when developing the common law. [142]

But, as will be seen in the discussion below several High Court judges have cautioned against the use of foreign law, alternatively, the usage thereof where necessary, should be

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every court, tribunal or forum must promote the spirit, purport and objects of the Bill of Rights ....."

When interpreting the *Bill of Rights*, a court, tribunal or forum must therefore consider international law. See Blake "The world's law in one country: the South African Constitutional Court's use of public international law" 1998 *SALJ* 668; Botha "International law in the Constitutional Court" 1995 *SAYIL* 668 as quoted in Christie Bill of Rights Compendium (2002) 1A-21. According to the learned author the rule is peremptory, but, except where international agreements and international law are law in South Africa, a court is not obliged to apply international law, it must merely consider it. The learned author relies on ss231, 232 and 233 of the *Constitution* which indicate that the *Constitution " ..... is the primary source of the protection of human rights in South Africa, in principle, international agreements become part of South African law only after they have been enacted as Acts of parliament and customary international law is law in the Republic unless it is inconsistent with the Constitution or an Act of parliament. See LS v AT 2001 2 BCLR 152 (CC), 2001 1 SA 1171 (CCO par [27]"*

It is especially, the Constitutional Court in *S v Makwanyane* 1995 (3) SA 391 (CC) Para 9 who emphasizes that both binding and non-binding public international law may be used as tools of interpretation when it stated: *"International agreements and customary international law provide a framework within which ..... (The Bill of Rights) can be evaluated and understood, and for that purpose decisions of tribunals dealing with comparable instruments, such as the United Nations Committee on Human Rights, the Inter-American Commission on Human Rights and the European Court of Human Rights and in appellate cases, reports of specialized agencies such as the International Labour Organisation may provide guidance as to the correct interpretation of particular provisions."*

141 The Constitutional Court in *S v Makwanyane* as suggested by Currie and De Waal (2005) 160 relied heavily on the work of John Dugard. (Fn 36 of the Judgement) "The Role of International Law in interpreting the Bill of Rights" (1994) 101 *SAJHR* 208. The eminent author Dugard with reference to Section 39(1) suggests that a court should not merely consider a treatise to which South Africa is a party or customary rules that have been accepted by South African courts, but also to national conventions; international custom generally accepted as law; general principles of law recognized by civilized nations; judicial decisions relevant. Dugard International Law (2000) 25 with reference to the case of *CC Maynard et Alii v The Field Cornet of Pretoria* (1894) 1 SAR 214 at 233 quoted the words of Chief Justice Kotze who declared that municipal law : *"Must be interpreted in such a way as not to conflict with the principles of international law ..... It follows from (this), as put by Sir Henry Maine, "that the state which disclaims the authority of international law places himself outside the circle of civilized nations."* Emphasizing the importance of international law in this regard the author states: *"South Africa's new constitutional order, which requires courts to interpret all legislation, and particularly the Bill of Rights, to accord with international law, and the nation's commitment to the Rule of Law and Human Rights, sets the scene of renaissance of international law both in South Africa's foreign policy and in the jurisprudence of its courts."*

142 See Christie *Bill of Rights Compendium* (2002) 1A-21 - 1A-22; Currie and De Waal (2005) 160. It is especially the Constitutional Court per Chaskalson P (as he was known then) who in the case of *S v Makwanyane* Fn 9 Para 37 who set the tone for the courts to use foreign law when laying down the following guidelines: *"In dealing with comparative law, we must bear in mind that we are required to construe the South African Constitution, and not an international instrument or the constitution of some foreign country, and that this has to be done with due to regard to our legal system, our history and circumstances, and the structure and language of our own Constitution. We can derive assistance from public international law and foreign case law, but we are in no way bound to follow it."*

used with great circumspection. The reasons advanced often include the different contexts within which other constitutions were drafted, the different social structures and milieu existing in these countries, compared with those in this country. Also the different historical backgrounds are often included. [143]

But, it is also clear from the authorities, that the South African courts, especially, the Constitutional Court, have heard the constitutional call to develop the South African law by making use of foreign law. [144]

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143 In this case the court dealt with the application of section 35(1) of the *Interim Constitution Act* 200 of 1993, the equivalent of Section 39(1) (b) of the *Final Constitution Act* 108 of 1996. The South African courts have throughout the years although not hesitant to consider foreign law, been cautious in receiving foreign law. It is especially, during the operation of the interim Constitution Act 200 of 1993 that the courts per several High Court judges cautioned against the use of foreign law alternatively, the usage thereof where necessary, with great circumspection. The reasons often advanced were the *"different contexts within which other Constitutions were drafted, the different social structures and milieu existing in those countries compared with those in this country, and the different historical backgrounds against which the various Constitutions came into being."* See in this regard *Queen v Minister of Law and Order and Another* 1994 (2) SALR 340 E at 348; *Park-Ross and Another v The Director, Office for Serious Economic Offences* 1995 (2) BCLR 198 (C) 208-209; *Berg v Prokureur-Generaal van Gauteng* 1995 (11) BCLR 1441 (T) at 1446; *Potgieter en 'n Ander v Killian* 1995 (11) BCLR 1498 (N); *Nortje and Another v Attorney-General of the Cape and Another* 1995 (2) BCLR 236 (C) at 247; *Shabalala v Attorney-General of Transvaal* 1995 (1) SA 608 (TPD) at 640-641. The pre 1996 *Constitution* era however, did have courts that were more progressive in their thinking. It was the Ciskeian Division (as it was known then) in the case of *Matinkinca and Another v Council of State, Ciskei and Another* 1994 (1) BCLR (CK) who stated: *"The Constitution must not be read in isolation but within the context of a fundamental humanistic constitutional philosophy. In that regard, the preamble (if any) and the manifold structures of the Constitution could be indicative of such a humanistic philosophy. The value judgement must objectively be articulated and identified. In the process of such objective identification regard must be had to the contemporary norms, aspirations, expectations and sensitivities of the population as expressed in inter alia, the Constitution. Furthermore (and still in the process of such objective articulation), values emerging in the `civilised international community' should be taken cognizance of."* But, post 1996 the Constitutional Court in *Sanderson v Attorney-General, Eastern Cape* 1998 (2) SA 38 (CC) Para 26 summed up the position when considering foreign law as follows: *"Comparative research is generally valuable and is all the more so when dealing with problems new to our jurisprudence but will develop in mature constitutional democracies. Both the Interim and the Final Constitutions, moreover, indicate that comparative research is either mandatory or advisable... nevertheless the use of foreign transplants requires careful management..... "*. In the Constitutional Court case of *Bernstein v Bester* 1996 4 BCLR 449 (CC), 1996 2 SA (CC) par [133], Kriegler J (Didcott J concurring) stated: *"I however wish to discourage the frequent and, I suspect, often facile resort to foreign `authorities'. Far too often one sees citation by counsel of, for instance, an American judgement in support of a proposition. The prescripts of section 35(1) of the (Interim) Constitution are also clear: where applicable, public international law in the field of human rights must be considered, and regard may be had to comparable foreign case law. But that is a far cry from blithe adoption of alien concepts or inapposite precedents"* See also *Ferreira v Levin; Vryenhoek v Powell* 1996 1 BCLR 1 (CC), 1996 1 SA 984 (CC) par (190). The Constitutional Court in commenting on the use of foreign precedents in applying constitutional provisions also suggested in *S v Mamabolo* 2001 5 BCLR 449 (CC); 2001 3 SA 409 (CC) Para [36] that the following approach be adopted, namely: *"Before one could subscribe to a wholesale importation of a foreign product one needs to be persuaded, not only that it is significantly preferable in principle, but also that its perceived promise is likely to be substantiated in practice in our legal system and in the society it has been developed to serve. More pertinently, it would have to be established that (the importation) was consonant with our South African constitutional value system."*

144 A number of the High Courts in South Africa have considered and recognized international and foreign law authorities which they expressed to be useful and instructive in incorporating in their judgements. Some of the cases include but are not restricted to the following: See *S v Scholtz* 1997 (1) BCLR 103 (NMS); *S v Mathebula*

and Another 1997 (1) BCLR 123 (W); *Fraser v Children's Court, Pretoria North and Others* 1997 (2) BCLR 153 (CC); *Chinamora v Angwa Furnishers (Pty) Limited and Another (Attorney-General intervening)* 1997 (2) BCLR 189 (ZS); *Du Preez v Attorney-General of the Eastern Cape* 1997 (3) BCLR 329 (E); *Fose v Minister of Safety and Security* 1997 (7) BCLR 851 (CC); *Coetzee and Others v Attorney-General, Kwazulu Natal and Others* 1997 (9) BCLR 989 (C); *S v K* 1997 (9) BCLR 1283 (C); *S v Coetzee and Others* 1997 (4) BCLR 437 (CC); *Du Preez and Another v Truth and Reconciliation Commission* 1997 (4) BCLR 531 (A); *Elliott v Commissioner of Police and Another* 1997 (5) BCLR 670 (ZS); *President of the Republic of South Africa and Another v Hugo* 1997 (6) BCLR 708 (CC); *S v Naidoo and Another* 1998 (1) BCLR 376 (E); *S v J* 1998 (4) BCLR 424 (SCA); *National Coalition for Gay and Lesbian Equality and Others v Minister of Justice and Others* 1998 (6) BCLR 726 (W); *New National Party of South Africa v Government of RSA and Others* 1999 (4) BCLR 457 (C); *National Media Ltd and Others v Bogoske* 1999 (1) BCLR 1 (SCA). In the case of *Carmichele v Minister of Safety and Security* 2001 (4) SA 938 at 954ff the Constitutional Court relied heavily on foreign law to develop the common law in particular in the field of delictual liability by extending the general duty of care in accordance with spirit, purport and objects of the Bill of Rights as intended in Section 39(2) of the *Constitution*. In this case the court found the prosecution and the police had a duty imposed on them not to perform any act infringing on the dignity, equality and freedom of citizens but rather to provide appropriate protection to everyone through and structures designed to afford such protection. Where such rights are infringed, the court held there is no ground for immunity of public officials from delictual causes by the public. This case is filled with foreign law cases ranging from Canadian Law, English Law and American Law and the European Court of Human Rights. The said cases pioneered the Constitutional Court in developing the common law. In the first instance the court supported the dictum of Tacobucli J in the Canadian decision of *R v Saliture* (1992) 8 CRR (2d) 173 (1991) 2 GCR 654 quoted with approval in *Du Plessis v De Klerk* 1996 (3) SA 850 (CC) 1996 (5) BCLR 658 at pares [15] - [24] wherein the iudex discussed the role judges should play in adopting the common law. In this regard the iudex held: *"Judges can and should adapt the common law to reflect the changing social, moral and economic fabric of the country. Judges should not be quick to perpetuate rules whose social foundation has long since disappeared. Nonetheless there are significant constraints on the power of the Judiciary to change the law. In a constitutional democracy such as ours it is the Legislature and not the courts which have the major responsibility for law reform. The Judiciary should confine itself to those incremental changers which are necessary to keep the common law in step with the dynamic and evolving fabric of our society."* The court also relied on International Law considered consistent with the rights enshrined in our Constitution aimed at the wellbeing of the South African population. The court consequently looked at the provisions of the *European Convention on Human Rights (Convention)*. Article 2(1) of the *Convention* provides that: *"everyone's right to life shall be protected."* To this and the court held that: "*This corresponds with our Constitution's entrenchment of the right to life."* The court also adopted with approval the principle enunciated in the European Court of Human Rights' case of Osman v United Kingdom 29 EHHR 245 at 305 Para 115 in which it was held: *"It is common ground that the State's obligation in this respect extends beyond its duty to ensure the right to life by putting in place effective criminal law provisions to deter the commission of offences against the person backed up, by law enforcement machinery for the prevention, suppression and sanctions of breaches of such provisions. It is thus accepted by those appearing before the Court that Art 2 of the Convention may also imply in certain well-defined circumstances a positive obligation on the authorities to take preventive operational measures to protect an individual whose life is at risk from the criminal acts of another individual."* The court also looked with approval to the English law decision of *Barrett v Enfield London Burough Council* (1999) 3 ALL ER 193 (H in which Lord Browne-Wilkinson stated: *"(1) Although the word "immunity" is sometimes incorrectly used, a holding that it is not fair, just and reasonable to hold liable a particular class of defendants whether generally or in relation to a particular type of activity is not to give immunity from a liability to which the rest of the world is subject. It is a prerequisite to there being any liability in negligence at all that as a matter of policy it is fair, just and reasonable in those circumstances to impose liability in negligence ....."* The European Court of Human Rights also considered this principle in *X and Others v United Kingdom* EHHR Case no 29392/95 delivered 10 May 2001 unreported. The European Court held that the immunity approach effectively precluded the Plaintiff's from having *" ..... available to them an appropriate means of obtaining a determination of their allegations that the local authority failed to protect them from inhuman and degrading treatment and the possibility of obtaining an enforceable award of compensation for the damages suffered thereby."* This was found to contravene the provisions of Art 13 of the Convention and the Court consequently made an award of damages to the appellants. The general obligation to develop the common law appropriately as stated in *Carmichele v Minister of Safety and Security (Centre for Applied Legal Studies intervening)* has been quoted with approval in many cases which have

Having considered the influence which foreign law may have as an aide in developing the South African common law in the new constitutional order, it is disappointing that Brandt JA, in the controversial dictum of *Afrox v Strydom,* ignored this aide at the court's disposal. It will, however, be argued in the succeeding chapter that, by ignoring the application of section 39 available to the court in developing the common law, especially, the law of contract in the new constitutional order was to ignore the challenges the *Constitution* has brought with it.

13.5 International healthcare and the right to healthcare

The right to healthcare is recognized in the public international law sphere but expressed in different ways in a number of different international instruments. [145]

Various factors have, however, been identified as militating against the use of a single international instrument which recognizes the right to healthcare. [146] But, despite the lack of

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since been decided in our courts. See *Fourie and Another v Minister of Home Affairs and Others* 2005 (3) SA 429 (SCA) 436. In this case the court relied heavily on foreign law to decide the issue of the validity of marriage between two persons of the same sex. In fact, the decision ultimately reached by the court is stooped in the influence of foreign case law and International law. In *Barkhuizen v Napier* 2007 (5) SA 323 (CC) it is especially, Sachs J in a minority judgement who relies heavily on International law in an attempt to develop contractual jurisprudence in South Africa. Sachs J with reference to Section 39(1) of the *Constitution* seeks guidance from international practice when he remarks at Para [162]: *"In considering the standards of contractual behaviour required by public policy in South Africa, attention should be paid to the manner in which standard form contracts are being dealt with in other open and democratic societies."* In this regard Sachs J relied on the *Unfair Contract Terms Act* 1977 and Art 3 of the European Council Directive on *Unfair Terms in Consumer Contracts Council Directive* 93/13/EEC OJL 095/29 (5 April 1993) 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."* Sachs J also refer to the development in South American countries when he states: *"It appears that a number of South American countries have also enacted legislation since 1990 providing for consumer protection against unfair contracts similar to legislation existing in so-called first world countries. According to the SALRC these statues were heavily influenced by the Mexican Consumer Protection Law of 1974 and the Brazilian Consumer Protection Code of 1990, as well as Spanish and French consumer protection law."*

145 Pearman (2004) 51 demonstrates the recognition of the right to healthcare in the public international sphere by referring to the preamble to the *Constitution of the World Health Organization* adopted in 1946 which provides: *"The enjoyment of the highest attainable standard of health is one of the fundamental rights of every human being without distinction of race, religion, and political belief, economic or social conditions."* More recently Art 12 *The Right to the highest attainable standard of physical and mental health of the International Convention on Economic Social and Cultural Rights* (ICESCR) has been reviewed under the auspices of the United Nations published under General Comment 14 `The Right to the highest attainable standards of Health' UN Doc E/C12/2000/4 (2000). Currie and De Waal (2005) 591 are of the opinion the comment on the Right to Healthcare though broader than S27 of the *South African Constitution* will serve as an aid in interpreting the South African *Bill of Rights*.

146 Pearmain (2004) at 51 identifies a number of factors including (1) the variety of language used in the various international instruments makes it difficult to identify the content of the rights recognized. (2) the question of interpretation *inter alia* whether the textual approach need to be adopted poses difficulties.

a uniform international instrument, it appears however, that, from the commentaries on the ICES or document, there is a single right to health in International Human Rights law. [147] However noble the idea may be to strive for a uniform instrument, *as Pearmain* [148] correctly points out, it remains but a goal, an ideal, rather than a practical reality. [149]

For that reason then, it has been suggested that when one has to examine the right to healthcare services in terms of Section 27 of the *Constitution,* in the light of International law, direct comparisons and inferences of direct relationships between domestic rights and international rights are not always possible. [150]

The South African approach currently amounts to this, while South Africa recognises the basic principle of a right as contained in an instrument of public international law, the content of the right is subject to interpretation with regard to domestic legal and other circumstances. [151]

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147 Pearmain (2004) at 51, states that this right to healthcare embraces a wide range of socio-economic factors including food and nutrition, housing etc.

148 Pearmain (2004) at 51 states that domestic legal systems still tend to approach the question of rights from a perspective of what is presently attainable. See also the cases of *Minister of Health and Others v Treatment Action Campaign and Others (No2)* 2002 (5) SA 721 (CC); *Government of the Republic of South Africa v Grootboom and Others* 2001 (1) SA 46 (CC); *Soobramoney v Minister of Health, Kwazulu-Natal* 1998 (1) SA 765 (CC). The eminent author Pearmain (2004) 54 also convincingly argues that: *" ..... an overly idealistic interpretation by the judiciary of the socio-economic rights granted in the Bill of Rights would diminish the effective value of the right in question by elevating it beyond the realms of what is practical and achievable. One ends up with judgements which, although laudable in their intentions and limitless in their scope, are not realistically capable of implementation."*

149 Pearmain (2004) at 55 eloquently puts i.e. that: *".... domestic rights must be considered for the most part in the light of present realities rather than that of dreams of the future."*

150 Pearmain (2004) at 55.

151 See Pearmain (2004) at 55; The Constitutional Court in a number of cases also points to the socio-economic rights interpretation. See Madala J in *Subramoney* who stated that: *"Some rights in the Constitution are the ideal and something to be strived for. They amount to a promise in some cases, and an indication of what a democratic society aiming to salvage loss, dignity, freedom and equality should embark upon. They are values which the Constitution seeks to provide nurture and protect for a future South Africa."* And further: *"In its language, the Constitution accepts that it cannot solve all our society's woes overnight, but must go on trying to resolve these problems."* The Constitutional Court pointed out in *Ex parte Chairperson of the Constitutional Assembly: In re Certification of the Constitution of the Republic of South Africa* 1996 (1996) (4) SA 744 (CC) at Para 78) in dealing with an objection that socio-economic rights are not justifiable, that *"At the very minimum, socio-economic rights can be negatively protected from improper invasion."* The content of the right may change as circumstances change, but it must have some degree of content in the present. In the TAC case the court, referring to *Soobramoney*, explicitly recognised the fact that *"the corresponding rights themselves are limited by reason of the lack of resources"*. This observation, coupled with the fact that the test is one of reasonableness, leads to the inevitable conclusion that the content of the right may be subject to fluctuation, depending upon changing circumstances and the availability of resources. This is why, as Yacoob J stated in *Grootboom* (Fn 37 supra at 61) *"The question is therefore not whether socio-economic rights are justiciable under our Constitution, but how to enforce them in a given case. This is a very difficult issue which must be carefully explored on a case-by-case basis."*

For that reason, the Constitutional Court has adopted a cautious and conservative approach to the application of international legal principles within South Africa. [152] It has also been acknowledged that whilst the principles enshrined in the *Constitution* may well be consistent with those of international law in a general way, it is still to the *Constitution* that one must turn when wanting to apply those principles to particular circumstances in the South African context. [153]

13.6 The South African Constitution and the Right to Healthcare

In order to ascertain how the *Constitution* impacts on the law of contract and more specifically, exclusionary clauses exonerating a hospital and its staff from liability arising from the staff's negligent conduct in providing healthcare services, it is important to get a better understanding of the nature of the rights, conferred by the *Constitution,* with regard to healthcare services. This will also provide possible answers to the question of whether the right to healthcare and maintaining standards of conduct may be alienated.

The *South African Constitution* [154] contains a number of references to healthcare services and medical treatment. [155]

There is no single, all embracing, section in the *Constitution* which encapsulates the right to healthcare. This is said to flow from the fact that the rights in the *Bill of Rights* are not distinct legal concepts, but rather elements of a system of fundamental rights that are inextricably intertwined. [156] According to *Pearmain* [157] there is a suite of rights which, when

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152 See Pearmain (2004) at 107-108 who emphasizes that although the role of international law in interpreting the provisions of the *Bill of Rights* has been acknowledged this role has not been overplayed by South African Courts. The precept of local conditions and the country's history has often been placed on the foreground.

153 Pearmain (2004) at 109 with reference to Section 2 of the *Constitution* states that: *"International law does not override the Constitution for the purposes of the South African legal system. Section 2 of the Constitution clearly states that: "This Constitution is the supreme law of the Republic; law of conduct inconsistent with it is invalid, and the obligations imposed by it must be fulfilled."*

154 Act 108 of 1996.

155 *"Healthcare, food, water and social security*
27(1) Everyone has the right to have access to-
(a) Healthcare services, including reproductive healthcare;
.....
(c) The State must take reasonable legislative and other measures, within its available resources, to achieve the progressive realization of each of these rights.
(3) No one may be refused emergency medical treatment."

156 See Pearmain (2004) at 117 who quotes the case of *Government of the Republic of South Africa and Others v*

viewed collectively, could be said to constitute a right to health.

Consequently, each of the rights will be discussed, briefly, with regard to their relevance relating to healthcare services. This will give us a greater understanding of the rights that relate specifically to the delivery of healthcare services, which is important to the central focus of this thesis.

13.6.1 Life

The right to life, when measured in the hierarchy of fundamental rights, is rated by both legal writers [158] and the South African courts, [159] as the most important of all human rights. What is also important to understand is that the term "right to life" should not be given a narrow meaning i.e. a mere organic meaning, but broader, which includes the right to live as a human being, to be part of a broader community, to share in the experience of humanity. [160]It is for that reason that the delivery of healthcare services has to be

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Grootboom and Others 2001 (1) SA 46 (CC) in which the court observed at p83: *"But s26 is not the only provision relevant to a decision as to whether state action at any particular level of government is reasonable and consistent with the Constitution. The proposition that rights are interrelated and are all equally important is not merely a theoretical postulate. The concept has immense human and practical significance in a society founded on human dignity, equality and freedom. It is fundamental to an evaluation of the reasonableness of State action that account is taken of the inherent dignity of human beings."*

157 (2004) at 117 Pearmain includes in the suite of rights the following rights namely: the right to life (Sec 11), the right to dignity (Sec 10), the right to bodily and psychological integrity (sec 12(2), the right to privacy (Sec 14), the right to an environment that is not harmful to health or wellbeing (sec 24(a), the right to emergency medical treatment, the right to access to health care services (Sec 27(a), and the rights to sufficient food and water and social security including appropriate social assistance (Sec 27(1)(b)and(c).

158 Currie and De Waal (2005) 280; Pearmain (2004) 118 states that the right to life has been characterized as the most fundamental of all human rights.

159 It is especially the Constitutional Court in the case of *S v Makwanyane* 1995 (3) SA 391 (CC) which dealt with the constitutionality of the death penalty who described the right to life and dignity as the most important of all human rights. In this case the different judges expressed themselves differently to the importance of this right. Kriegler J Para 215 stated *"in the hierarchy of values and fundamental rights guaranteed under [The Bill of Rights] I see [the right to equality, dignity and freedom] as ranked below the right to life ....."* Langa J Para 219 describes this right as follows: *"[The right to life is] the most fundamental of all rights, the supreme human right!"* O'Regan J at Para 224 also observed: *"The right to life is, in one sense, antecedent to all the other rights in the Constitution. Without life, in the sense of existence, it would not be possible to exercise rights, or to be the bearer of them. But the right to life was included in the Constitution not simply to enshrine the right to human being, to be part of a broader community, to share in the experience of humanity. This concept of human life is at the centre of our constitutional values. The Constitution seeks to establish a society where the individual value of each member of the community is recognised and treasured. The right to life is central to such a society. The right to life, thus understood, incorporates the right to dignity. So the rights to human dignity and life are entwined. The right to life is more than existence - it is a right to be treated as a human being with dignity, without dignity, human life is substantially diminished. Without life, there cannot be dignity."*

160 Pearmain (2004) 118; Christie *Bill of Rights Compendium* (2002), states that the right to life protects the physical-

maintained in order, therefore, to respect, protect and to fulfil the right to life. [161] But, there are limitations placed, sometimes, upon the delivery of healthcare services, to carry out the duty when it comes to prolonging life, as opposed to protecting life through emergency medical treatment. [162]

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biological existence of human beings.

161 In this regard Pearmain (2004) 118-119 emphasized this duty by the State subject to certain limitations.

162 The limitation is very well illustrated in the case of *Soobramoney v Minister of Health, Kwazulu-Natal* 1997 (12) BCLR 1606 (CC) in which the court firstly recognized: *"The state has a constitutional duty to comply with the obligations imposed on it by section 27 of the Constitution."* But, emphasized the court that *"it has now been shown in the present case, however, that the State's failure to provide renal dialysis facilities for all persons suffering from chronic renal failure constitutes a breach of those obligations."*
Relying upon the availability of resources to support the limitation of the duty to provide access to healthcare Chaskalson P quoting with approval from an English decision of *R v Cambridge Health Authority, Ex parte B* (1994) ALL ER 129 CA in which the British Court of Appeal stated: *"I have no doubt that in a perfect world any treatment which a patient, or a patient's family, sought would be provided if doctors were willing to give it, no matter how much it cost, particularly when a life was potentially at stake. It would however, in my view, be shutting one's eyes to the real world if the Court were to proceed on the basis that we do live in such a world. It is common knowledge that health authorities of all kinds are constantly pressed to make ends meet. They cannot pay their nurses as much as they would like; they cannot provide all the treatments they would like; they cannot purchase all the extremely expensive medical equipment they would like; they cannot carry out all the research they would like; they cannot build all the hospitals and specialist units they would like. Difficult and agonizing judgements have to be made as to how a limited budget is best allocated to the maximum advantage of the maximum number of patients. That is not a judgement which the court can make."* then observed that: *"The provincial administration which is responsible for health services in Kwazulu-Natal has to make decisions about the funding that should be made available for health care and how such funds should be spent. These choices involve difficult decisions to be taken at the political level in fixing the health budget, and at the functional level in deciding upon the priorities to be met. A court will be slow to interfere with rational decisions taken in good faith by the political organs and medical authorities whose responsibility it is to deal with such matters."* Para 29. The court also rejected the right to life argument which claimed that on the basis of the right to life, everyone requiring life-saving treatment that was unable to pay for such treatment herself or himself was entitled to have the treatment provided at a state hospital without charge. Chaskalson P stated in this regard that: *"In our Constitution the right to medical treatment does not have to be inferred from the nature of the state established by the Constitution or from the right to life which it guarantees. It is dealt with directly in s27. If s27(3) were to be construed in accordance with the appellant's contention it would make it substantially more difficult for the state to fulfill its primary obligations under ss27(1) and (2) to provide healthcare services to `everyone' within its available resources. It would also have the consequence of prioritizing the treatment of terminal illnesses over other forms of medical care and would reduce the resources available to the state for purposes such as preventative health care and medical treatment for persons suffering from illnesses or bodily infirmities which are not life threatening. In my view, much clearer language than that used in s27 (3) would be required to justify such a conclusion."* Para 19. The court consequently held that the state's failure to provide renal dialysis to all persons suffering from chronic renal failure did not constitute a breach of its constitutional obligations as reflected in section 27(1). See also the judgement of Thirion J in *Clarke v Hurst* 1992 (4) SA 630 (D) in which it was shown that it may be lawful to withhold or discontinue medical treatment of a patient who is in a persistent and irreversible vegetative state, in conformity with the patient's wishes expressed in a "living will" while still in good health. Outside the common law, in terms of the *Choice on Termination of Pregnancy Act* 92 of 1992 a woman is permitted to contract for the termination of her pregnancy. The validity of this provision was challenged in the *Christian Lawyers Association of South African v Minister of Health* 1998 (4) SA 1113 (T); 1998 (11) BCLR 1434 (T) on the ground that section 11 of the *Bill of Rights* which provides that *"everyone has the right to life"* the challenge however, failed as the proper interpretation of section 11 *"everyone"* does not include an unborn foetus.

As the availability of resources will determine the limitation placed upon the right to healthcare, it has been stated before that the right to life takes on, somehow, the nature of a socio-economic right. [163]

In order to find answers to the question surrounding the central theme of this thesis, the question may be posed whether an exemption clause in a hospital admission form exonerating a hospital or its staff from liability for the death of, or for personal injury or harm to the patient arising from the hospital or its staff's negligence will be declared unenforceable on the ground that it violates public policy, regard must be had to the patient's entrenched right to life. Strong voices have gone up that, as the twin rights to life and human dignity rank the highest in the hierarchy of other human rights, these rights are inalienable. [164]

Hopkins [165] convincingly argues that once it is accepted that the right to life and dignity are inalienable rights, it follows that any waiver which, either directly or indirectly, must be invalid and consequently, unenforceable. In contract therefore, where a contracting party exonerates a hospital or its staff from liability, despite the loss of life arising from the negligence of the hospital and/or staff members, it is submitted that such a waiver would be unenforceable as it is inconsistent with the constitutionally entrenched right to life.

13.6.2 Dignity

163 Pearmain (2004) 120; Currie and De Waal (2005) 290; See *Soobramoney v Minister of Health, KwaZulu-Natal* Para 15 in which the court dealt with an application for life-saving medical treatment in the context of the socio-economic right to healthcare. This was confirmed in *Khoza v Minister of Social Development* 2004 (6) SA 505 (CC).

164 It is especially Hopkins (2001) 16 *SAPR/L* 122 at 129 in relying on the *S v Makwanyane* 1995 (3) SA 391 (CC) Para 136 of the judgement that despite the Attorney-General's (as he was known then) argument that the right to life and the right to human dignity were not absolute concepts and that like all rights they have their limits, i.e. a person who murders in circumstances where the death penalty is permitted, the criminal loses his/her right to claim protection of life and dignity, the court did not buy into this argument and held that even criminals who commit vile crimes they do not forfeit their rights under the Constitution and they are entitled, as all in our country now are, to assert these rights, including the right to life, the right to dignity and the right not to be subjected to cruel, inhuman or degrading punishment.

165 (2001) 130 the writer persuasively argues that inalienable rights are incapable of limitation as it neither passes the requirement of reasonableness nor proportionality. See the comments of Harms JA in the Supreme Court of Appeal in the case of *The Johannesburg Country Club v Stott* 2004 (5) SA 511 (SCA) 518-519 in which the court seem to indicate that there ought to be winds of change, especially, with regard to the validity of exemption clauses. Reference to the potential of regulating these types of clauses in contract is made by the court in pointing to the *Unfair Contract Terms Act* 1977 as it is applied in England. In this regard Christie (2002) 3H-41 suggests that a strong case could be presented to the Constitutional Court for overruling the Afrox case.

From what was stated during the discussion on the right to life, both the right to life and dignity are central in the founding provisions of the *South African Constitution* and both rank foremost in hierarchy of rights in terms of the *Constitution*. [166]

Although dignity is a difficult concept to define, human dignity has been described, however, as the source of a person's innate rights to freedom and to physical integrity from which a number of other rights flow. [167] It has also been observed that there is a close connection between health and human dignity. Health is equally essential for life as it is for human dignity. As human dignity features both in the *Constitution* [168] and the *Bill of Rights,* [169] it is therefore, a constitutional value and a right. [170] Poor health, therefore, affects both the enjoyment of the rights to life and human dignity. [171]

That being the case, it needs to be repeated from our discourse hereinbefore, that both these rights are inalienable and any attempt to waiving those rights would be inconsistent with the values of the *Constitution* and protected by the *Bill of Rights*, therefore against public policy and unenforceable. [172]

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166 Section 1(a) of Act 108 of 1996 provides the Republic of South Africa is founded on the values of `human dignity, the agreement of equality and the advancement of human rights and freedom'. See also Currie and De Waal (2005) 272 who recognizes that human dignity is a central value of the `objective, normative value system'. The same sentiment is expressed by Pearmain (2004) 120; Chaskalson `Human dignity as a foundational value of our Constitutional Order' (2000) 16 *SAJHR* 193, 196 expresses the importance of human dignity in the Constitutional Order as *"The affirmation of [inherent] human dignity as a foundational value of the Constitutional Order places our legal order firmly in line with the development of Constitutionalism in the aftermath of the Second World War".* The Constitutional Court in *S v Makwanyane* Supra 507 describes the value of dignity as: *"The importance of dignity as a founding value of the new Constitution cannot be overemphasized. Recognizing a right to dignity is an acknowledgement of the intrinsic worth of human beings: human beings are entitled to be treated as worthy of respect and concern" and "The rights to life and dignity is the most important of all human rights, and the source of all other personal rights in Chap 3. By committing ourselves to a society founded on the recognition of human rights we are required to value these two rights above all others" at 451*.

167 Currie and De Waal (2005) 272.

168 In *National Correlation for Gay and Lesbian Equality v Minister of Justice* 1999 (1) SA 6 (CC) Para 30 the court held that human dignity also provides the basis for the right to equality i.e. everyone must be treated as equally worthy of respect.

169 Section 1(a) of Act 108 of 1996.

170 Section 10 of the *Bill of Rights* provide: *"Everyone has inherent dignity and the right to have their dignity respected and protected."*

171 Pearmain (2004) 120.

172 Pearmain (2004) 120 with reference to the medical negligence case of *Clarke v Hurst* 1992 (4) SA 630 (D) 653 in which Thirion J observed:
"As it was put in 58 US Law Week 4936: Medical advances have altered the physiological conditions of death in ways that may be alarming: highly invasive treatment may perpetuate human existence through a merger of body and machine that some might reasonably regard as an insult to life rather than its continuation."

The right to dignity has also been said to serve as a useful cross-check on some of the other sections of the *Bill of Rights*. In this regard *Christie,* [173] with reference to the inequality of bargaining power, suggests that although not every case will produce a result that demands the intervention of the courts, there are however, instances where the result of certain contracts will produce a result that demands the intervention of the court, as the result is such that it impairs the weaker party's dignity. [174] It has also been suggested that the infringement of a party's right to human dignity would also be a strong reason, on public policy grounds, to interfere in the contractual relationship. [175]

It is submitted that where, for example, a patient signs an admission form containing an exclusionary clause when entering a hospital for medical treatment or surgery and, due to the hospital and/or its staff's negligence, the patient is reduced, for example, to a wheelchair, the validity of the exemption clause, it is further submitted, can be challenged on the basis that the patient's right to dignity had been infringed, which results in the provision of the contract entered into being inconsistent with the constitution and against public policy.

13.6.3 Emergency medical treatment

The *South African Constitution* provides for emergency medical treatment. [176] A person who find himself/herself in a dire state of emergency through illness or a sudden catastrophe, for example, through an accident or been a victim of crime and which calls for immediate medical attention, should not be refused ambulance or other emergency services which are available and should not be turned away from a hospital which is able to provide

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173 *Bill of Rights Compendium* (2002) 3H-24.

174 Van Aswegen "Freedom of Contract and Constitutional Rights: A noteworthy decision of the German Constitutional Court" 1995 *THRHR* 696 in suggesting the development of common law by using foreign law in terms of Section 39(1)(c) quotes what the writer calls an instructive case in the German Constitutional Court in which an oppressive contract of surety-ship was challenged on the grounds that it violated the surety's human dignity and private autonomy, and that freedom of contract should not be allowed to obscure a misuse of power by market controlling enterprises against subordinate contractual parties. The court upheld the challenge but observed that legal certainty would forbid a too eager intervention in contractual relationships.

175 Christie (2002) 3H-24. See also the case of *Coetzee v Dimitis* 2001 1 SA 1254 (C) in which the National Soccer League could not rely on its oppressive regulations to which a professional player had agreed because they infringed his right to have his dignity respected and protected. Christie op cit also suggest that the right to human dignity may in itself be decisive in a contractual dispute. An example used by the author involves an actress who is required by her contract of employment to perform in a manner that infringes her human dignity. Should the actress refuse to perform, her refusal, may be justified and her right to dignity will be weighed against *pacta sunt servanda*.

176 See Hopkins (2001).

the necessary treatment. [177] The nature and effect of this `available-and-able" qualification makes it clear that the Constitutional provision, as provided for in Section 27(3), is said to create a positive Constitutional obligation, on the state, to ensure that emergency medical facilities are made available so that no one in an emergency situation can be turned away. [178]

From the cases considered, it is clear that the right flowing from section 27(3) and the corresponding duty that flow there-from, usually takes place between state hospitals and patients. The question may be posed; can this right and corresponding duty apply to patients who seek emergency medical treatment in private hospitals?

Legislatively [179] and constitutionally [180] there is authority that there is a duty on private

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177 Section 27(3) provides that *"no one may be refused emergency medical treatment." See also Currie and De Waal (2005) 592; Pearmain (2004) 126 states that a right not to be refused emergency medical treatment is a fundamental element of a right to health because it relates to the protection of life itself without which a right to health cannot be appreciated or enjoyed. The writer also regards the right of access to emergency medical treatment as part of a minimum one of the right to health.*

178 Currie and De Waal (2005) 593 state that the right that flow from Section 27(3) is not to be arbitrarily excluded from that which already exists. Sachs J in *Soobramoney* Para 51 sums up the value of this right as follows: *"The special attention given by S27 (3) to non-refusal of emergency treatment relates to the particular sense of shock to our notions of human solidarity occasioned by the turning away from hospital of people battered and bleeding or of those who fall victim to sudden and unexpected collapse. It provides reassurance to all members of society that accident and emergency departments will be available to deal with the unforeseen catastrophes which could befall any person, anywhere and at any time."* The court at Para 18 aptly illustrates the type of situation in which the right in terms of S27 (3) applies, by referring to the Indian case of *Paschim Banga Khet Mazdoor Samity and Others v State of West Bengal* (1996) AIR SC 2426. One of the claimants had suffered serious head injuries and brain haemorrhage as a result of having fallen off a train. He was taken to various state hospitals and turned away, either because the hospital did not have the necessary facilities for treatment, or on the grounds that it did not have room to accommodate him. As a result he had been obliged to secure the necessary treatment at a private hospital. According to the Constitutional Court in Soobramoney Para 18 the claimant could in fact have been accommodated in more than one of the hospitals which turned him away. According to the court this is precisely the sort of case which would fall within s27 (3). It is one in which emergency treatment was clearly necessary. The occurrence was sudden, the patient had no opportunity of making arrangements in advance for the treatment that was required, and there was urgency in securing the treatment in order to stabilize his condition. The treatment was available but denied. But the Constitutional Court in *Soobramoney* Para 21 disappointingly held that the situation of a person suffering from chronic renal failure and requiring dialysis two to three times a week to remain alive was not an emergency calling for immediate remedial treatment. Instead it was an ongoing state of affairs resulting from an incurable deterioration of the applicant's renal function. Accordingly s27 (3) did not apply for him to be admitted on a dialysis program. But Chaskalson P in this case gave a common sense interpretation to the right not to be refused emergency medical treatment: *"The purpose of the right seems to be to ensure that treatment is given in an emergency, and is not frustrated by reason of bureaucratic requirements or other formalities. A person who suffers a sudden catastrophe which calls for immediate medical attention should not be refused ambulance of other emergency services which are available and should not be turned away from a hospital which is able to provide the necessary treatment. What the section requires is that remedial treatment that is necessary and available be given immediately to avert that harm."*

179 Section 5 of the *National Health Act* 61 of 2003 provides that public and private health care providers or health establishments may not refuse anyone emergency medical treatment.

180 From a constitutional perspective Currie and De Waal (2005) 593 with reference to S8 (2) of the *Bill of Rights* 3.3

hospitals to render emergency medical treatment which does not include routine medical treatment or free services. [181]

13.7 **Summary and Conclusions**

It is evident from the scope of this chapter that the impact of the *Constitution* on the law in general is far-reaching and profound. The *Constitution* is also said to affect not only the relationship between the State and other government structures and its citizens, but also, private relationships between business enterprises and their clients. It includes therefore, the relationship between hospitals and patients, including private hospitals and their patients.

Besides the impact of the *Constitution* on the law in general, it is evident from this chapter that the *Constitution* and especially the *Bill of Rights,* also impact on the law of contract.

It is clear from the discourse in this chapter that the jurisprudence, in respect of the constitutional approach to the law of contract, is sparse and hitherto under-developed. Although the South African courts have not done much to enhance the jurisprudence, the South African legal writers have made some significant contributions in developing the said jurisprudence.

The scope of their writings emphasize the influence of the *Bill of Rights* on contractual law principles, including, the maxim *pacta sunt servanda*, the waiving or limiting of contractual rights and the effect of public policy in the new constitutional dispensations. It is evident, in this chapter that the maxim *pacta sunt servanda* has, for centuries and continues to play,

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(b) (iii) in Chapter 3 which relate to conduct of private persons or juristic persons state that the right may be applied horizontally, entailing a duty for private hospitals. This view is supported by Christie *Bill of Rights Compendium* (2002) 3H-40 who states that section 27(3) has an unrestricted application and applies to medical practitioners in private practice and private hospitals. To give effect to section 27(3) the writer suggests that it will be necessary to develop the common law further and to impose a duty in delict on other medically qualified persons to render assistance in medical emergency. It also appears that Christie supports the stance taken by the court a quo in the *Afrox case*. It was held in the court a quo that as a patient had exercised his right of access to healthcare services, a private hospital could not rely on an exemption clause in its admission form without drawing the patient's attention to the clause and explaining its impact and significance. On appeal however the Supreme Court of Appeal held that section 27 did not have the effect and had to be read with the constitutional value of freedom of contract. See however the short answer to this approach as noted by Harms JA in *Johannesburg Country Club v Stott* 2004 (5) SA 511 (SCA) 518-519 in which the court mooted for possible change to the law when dealing with exemption clauses. In particular the court referred to the English position in the law of contract in which the *Unfair Contract Terms Act* 1977 play a significant role.

181 Currie and De Waal (2005) 593 also state that emergency treatment may not be refused because of lack of funds, but payment for treatment may be sought after the treatment has been provided.

an influencing role in contract law, universally. But a welcome line was drawn quite recently when the Constitutional Court declared that the principle of *pacta sunt servanda* is not a sacred cow that should trump all other considerations.

From the discussions in this chapter it is also clear that, whilst at common law contractual autonomy played a crucial role when certain rights are waived or limited, this position has changed since the introduction of the new constitutional order. It is advocated, by certain legal writers, that certain rights, as enshrined in the *Bill of Rights*, are inalienable and incapable of waiver. One of these rights is said to be the right to healthcare which is regulated by professional rules, ethics and other professional codes. In addition, the right to healthcare is also controlled by statutory law, on which private hospitals are dependant for the obtainment and maintenance of the licensing of the hospitals. One of the fundamental duties, in this regard, is for hospital to maintain reasonable standards of care and not to harm the patients in any way. In terms of the *Constitution,* access to healthcare services, including standards of care are guaranteed. It can therefore be argued that as obligations to maintain standards of care are derived from the *Constitution* and are inescapable, these obligations cannot be excluded by way of contract.

It is also evident, in the discussions in this chapter, that public policy continues to play a fundamental role as an aide to measure the conduct of governmental organs, businesses and citizens. It is especially in the law of contract that public policy continues to make its presence felt in aiding to determine which contracts, or contractual provisions, fall foul of the law of general application and since the introduction of the Constitution, to be inconsistent with the *Constitution*. It is also evident from this chapter that in the new constitutional dispensation, the values underlying fundamental rights protected in the *Bill of Rights* are considered as important policy factors, determining public policy. Besides the values of freedom, human dignity and equality, it has been suggested that values such as reasonableness, fairness, normative values and ethics and the right to access to the courts ought, also, to be considered as factors which may, very well, in certain circumstances, influence public policy.

The scope of this chapter also deals with selective provisions of the *Bill of Rights* and how they impact on the law of contract. They include, *inter alia,* sections 8, 9, 34, 36 and 39. What were also discussed very briefly are the *South African Constitution* and the right to healthcare. These discussions include to what extent the right to life, dignity and emergency treatment impact on health care. From the provisions of the *Bill of Rights* chosen for the discourse in this chapter, it is clear that, especially sections 9, 34 and 39

will play a fundamental role in our discussion in the succeeding Chapter 14 in determining whether exclusionary clauses in hospital contracts, exonerating hospitals or their staff from liability arising from their negligence, causing damages to a patient, ought to be declared invalid as against public policy and inconsistent with constitutional values. The subsequent Chapter 14 will focus on the core focal point of the research undertaken. The discourse in this chapter will consider, in detail, the attitude of the different jurisdictions chosen, towards the validity of exclusionary clauses in hospital contracts. This chapter will serve as a legal vehicle, by means of which the South African position is measured. The succeeding chapter will also serve as a vehicle for possible legal reform. What will also be considered is whether the South African courts should be seized with the judicial task of bringing about possible legal reform or whether the legislature ought to step in, in bringing about the much needed reform?

Consequently, the effect of exclusionary clauses in hospital contracts is the subject of the next chapter.

Chapter 14

Legitimacy of exclusionary clauses in medical contracts: Conclusions, Comparative Analysis and Recommendations.

14.1 Introduction

Since the inception of standard form contracts and since it has now world wide become the order of the day, standard form contracts or contracts of adhesion as it is also known, are today found in all walks of life, ranging from commerce, insurance, transport, communications, public services for example warehousing, garage-keeping, parking etc. It has also found its way into medical contracts.

One of striking features of these forms of contracts, as was stated earlier, is that they usually contain exclusionary or exculpatory or exemption clauses. An outstanding characteristic of these types of clauses is that they are utilized to exclude unforeseen risks, or exclude one of the contracting parties against liability for tort and/or contract, where personal injury is sustained by one of the contracting parties. This has sparked off, as was seen in the previous Chapters, much criticism, especially, in jurisdictions such as England, the United States of America and South Africa, to which this thesis has been restricted. It is, especially, public policy which has often been used to invalidate exclusionary or exculpatory clauses.

Various other rules, as was seen earlier, have been adopted in the aforementioned countries to curb the unfairness these types of clauses bring with them, methods of interpretation and construction, standards of notice to be given in respect of certain terms etc.
Besides the use of these type of clauses in commercial and other business contracts, exclusionary clauses or exculpatory clauses (sometimes referred to as indemnity clauses), also found their way into hospital contracts or contracts designed by other health care providers, including, doctors, wherein the hospital or other health care providers enter into an agreement with the patient.

Exclusionary, or exculpatory, or indemnity clauses have, for many years, especially in the jurisdictions of the United States of America and South Africa, been widely included in admission forms used by hospitals and other health care providers.

In South African hospitals, especially private hospital, the usual procedure with the admission of patients, is for the clerical staff to make an entry on the admission form (which also serves as a consent form) of the type of treatment or operation which will be undertaken. Some private hospitals make use of an exemption form containing an exclusionary or exculpatory clause, which is signed, depending on the situation, by the patient or his or her parents, guardians or wards or immediate family as a condition of admission to the hospital. Though these clauses may vary in wording their effect it is submitted, are the same.

A typical exemption clause, contained in such an admission form, used by a private hospital, the St George's Hospital in Port Elizabeth, provides:

"I absolve the hospital and/or its employees and/or agents from all liability for and I hereby indemnify each of them against any claims which may be made by any person (including a dependant of the patient for damage or loss of any nature whatsoever including consequential loss or special damage of any kind) arising directly or indirectly out of any injury (including fatal injury) sustained by or any harm caused to the patient or any disease (including fatal injury) sustained by or any harm caused to the patient or any disease (including terminal disease) contracted by the patient whatever the cause may be excluding only wilful default on the part of the hospital, its employees or agents." [1]

The following admission form, including an indemnity clause, is used by the Sandton Medi-Clinic, which reads:

"I, the undersigned, hereby consent to the administration of a general anaesthetic and to the performance of an operation upon ..... (The patient) for Haemorrhoidectomy and excision of polyps.

[1] Admission form used at St George's Hospital, Port Elizabeth 2007.

Therefore, by signing this consent to operation form, a patient and any person who signs this form on behalf of such patient, indemnify the Medi -Clinic Group of Companies, as well as their employees, officials and agents against all liability to such patient and to the person who signs this form on behalf of such patient, for any loss or damage which originates from any cause whatsoever.

I hereby authorize Medi -Clinic Limited to destroy in any manner which they deem fit any tissue or part of my/the patient's body which may be removed during an operation to be performed on me/the patient in this hospital." [2]

Because of the United Kingdom's unique public health system, namely, the NHS System, these types of clauses have not been included in their contracts. These types of contracts, including exclusionary clauses or exculpatory clauses, are frequently included in agreements concerning private hospitals or private agreements involving private health care providers, in countries such as South African and the United States of America. The said clauses, besides their wide inclusion, have, nonetheless, often formed the subject of lively academic debate and legal scrutiny, especially in the United States of America, but, more recently, also in South Africa.

What follows in the discussions hereinafter, includes, the controversy that surrounds the circumstances under which, a contract containing an exculpatory clause, is signed without a contracting party, being familiar with the contents and without the contents being brought to his/her attention. It also covers the legal effect thereof, in especially, the United States of America and South Africa.

At the outset, it can be stated, without any reservation, the aim of the hospital and health care provider, in including an exclusionary or exculpatory clause in such a contract, is to escape liability which, often has a far reaching effect on the plaintiff more specifically, in denying him the opportunity of suing the hospital or health care provider for the personal injury and/or damages which the patient had suffered as a result of the former's negligence.

The position with regard to the legitimacy of exclusion clauses in medical contracts seems to be well settled in the United States of America. It appears that most legal writers are against them and most courts in the United States of America have struck down, or severely limited, attempts by hospitals and other health care providers, to use written clauses containing exclusionary clauses, to exclude or to reduce their liability for negligence.

The underlying reasons for the courts' attitude, as well as that of the legal writers, have

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2 Admission form used at Sandston Medic-Clinic, Sandston Gating 1996.

often, ranged from it being offensive to public policy and violative to public interest, which exists to protect the patient against the practise of minimum levels of performance in the practise of medicine. Further, the hospital's/other health care provider's duty of care is inalienable, for, to hold otherwise, would result in the hospital/other health care provider being given a license to practise negligently, which, in turn, will result in the standards not been upheld.

Another major reason advanced, is that the patient do not stand upon equal footing of equality with that of the hospital/other health care provider. The patient is regarded as the weaker party, who is in a disadvantageous position, when entering into the contract with the hospital/other health care provider.

The position in England seems to be fairly settled as well. Although there are no legal writings on hand, nor, has there been judicial pronouncement on the legitimacy of exclusion clauses in medical contracts, it has been argued that the health system in England does not encourage the creation of private hospitals, where these types of agreements are promoted. Besides, even if a clause was to be inserted in a hospital/other health care provider contract with a patient, excluding liability for personal injury and damages arising from the hospital/health care provider's negligent conduct, English legislative measures in the form of the Unfair Contract Terms Act 1977, protect the patient in that, the clause will be pronounced unenforceable. In this regard the Act places a prohibition on the exclusion or restriction of liability for death or personal injury resulting from negligence, ensuring that a claim for damages under these circumstances remains an inalienable right.

The South African legal position remains less certain, in that, what follows from the discussions surrounding the legitimacy of exclusion clauses in medical contracts, there appears to be a huge divide between the judicial thinking with special reference the cases of *Burger v Medi-Clinic Limited* decided in the WLD (1999) (Unreported) in case number 97/25429, *Afrox Healthcare Bpk v Strydom* 2002 (6) SA 21 (SCA), *Napier v Barkhuizen* 2006 (4) SA 1 (SCA); 2006 (9) BCLR 1011 (SCA) and the subsequent Constitutional Court judgement of *Barkhuizen v Napier* 2007 (5) SA 323 (CC) 66 and the thinking of the South African legal writers. From what follows, it also appears that it may be more feasible and in the interests of fairness, that an attempt be made, in South Africa, to follow the example set by England in 1977, namely, to introduce legislative measures as means to regulate standard terms hurtful to contracting parties. Moreover, attempts should be made to curb terms which are aimed at excluding or restricting the liability resulting from, particularly, the conduct of hospitals and other health care providers, for death or personal injury, resulting

from their negligence.

14.2 Application of exclusion clauses in different jurisdictions

14.2.1 SOUTH AFRICA

14.2.1.1 Legal Writings

In South Africa, it is generally accepted by the legal writers that exclusion clauses in, especially, hospital contracts, seek to protect the hospital against mishaps occurring in connection with the conduct of the nursing staff, doctors employed by the hospitals, or the general handling of the patient. It is also accepted that some of these clauses are couched in such wide wording, that they purport to protect the hospital and its staff against claims, based upon gross negligence, recklessness or intentional acts performed by hospital staff. [3]

There appears, however, to be a significant difference of opinion, today, amongst the South African legal writers, regarding the legal effect of exclusion clauses when incorporated in hospital contracts, in South Africa. Two schools of thought have emerged in this regard. The first school relies heavily on the doctrine of freedom of contract and the maxim *pacta sunt servanda*, wherein, the individual is free to decide whether, with whom, and on what terms he/she is to contract. In addition, once the agreement has been concluded, the enforcement of the contractual obligation is executed, consistent with freedom of contract and consensuality. Ardent supporters of this approach include the author *Hahlo,* [4] who holds the view:

So he knew that he was signing a document which contained terms of his contract. Just below the items he had filled in, but above the space for his signature, he saw what he himself described as a long "passage". The merest glance at it would have shown him that it commenced with the words: "I hereby agree." But "he did not bother to read it." Yet he signed. He knew that he was assenting to something and indeed to something in addition to the terms he had himself filled in. If he chose not to read what that additional something was, he was, with his open eyes, taking the risk of being bound by it. He cannot then be heard to say that his ignorance of what was in it was a justus error." [5]

Burchell and Schäfer [6] adopt a similar conservative and restrictive approach when assessing the validity of exemption or exculpatory clauses, when they state:

"If a patient signed a form containing such a clause the maxim caveat subscriptor applies; let the signatory beware. The patient will escape the effect of the clause only by proving operative mistake or misrepresentation, or

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3 Van Dokkum "Hospital consent forms" *Stellenbosch Law Review* (1996) 1, 2; Burch ell and Schaffer "Liability of hospitals for negligence" *Businessman's Law* (1977) 109; Strauss *Doctor, Patient and the Law* (1991) 305.

4 "Unfair Contract terms in Civil Law Systems" (1981) Vol. 98 *SA Law Journal* 70-71.

5 Hahlo "Unfair Contract terms in Civil Law Systems" (1981) Vol. 98 *SA Law Journal* 70-71.

6 "Liability of Hospitals for Negligence" *Businessman's Law* (1977) 109.

he may, despite the operation of the clause, recover damages from the hospital for intentional or possible grossly negligence conduct on the part of its servants or staff. Obviously, the patient could still recover damages from the negligent doctor or nurse, for example, since they are not parties to the contract. Although in America such an exemption or exculpatory agreement between hospital and patient is regarded as invalid in certain States, our courts are not at liberty to declare these clauses invalid. The most that our courts can do is to place as narrow an interpretation upon such an agreement as possible. However, these exemption clauses which are signed by patients entering a private hospital are often worded in such explicit terms that there is little room for restrictive interpretation." [7]

A similar view is expressed by *Van Aswegen,* [8] when relying on the general principle of party autonomy or freedom of contract, wherein he states:

"..... Legal subjects are free to regulate their legal position by agreement subject to generally applicable legal rules. This includes the freedom to exclude or limit the ambit of any form of liability for breach of contract. This freedom is, however, limited. Any choice which is contra bonos mores is therefore invalid. In accordance with this general proposition, a professional is in general free to regulate his liability towards his client by means of agreement, and so-called exclusion or limitation clauses is a general feature of contracts between professionals and clients. Such clauses can in principle apply to delictual and contractual liability, and consequently there is no inherent difference between liability for breach of contract and delict in this regard." [9]

Van Oosten [10] also holds the view in similar terms that:

" ..... provided they are stated in unambiguous terms, exemption clauses are enforceable unless they exclude liability for intentional medical malpractice in which case they will be regarded by the courts as contra bonos mores and, hence null and void." Whether or not a clause excluding liability for gross medical negligence will be upheld is according to the writer "..... At least, open to doubt." [11]

The other school of thought rely more greatly on aspects such as fairness, equity, ethics, social and moral values and other factors in denouncing the validity of exclusionary clauses in a contract, in which a patient consents to releasing a hospital/other health care provider, including, a medical practitioner, from a legal obligation to show due skill and care. The

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7 Burchell and Schäfer "Liability of hospitals for negligence" *Businessman's Law* (1977) 109. See also van Dokkum "Hospital consent forms" *Stellenbosch Law Review* 1996 (2) 251 set out the South African position with regard to Hospital Consent Forms as follows: *"Our courts sets limits on, and interpret, exemption clauses narrowly or restrictively. Permissibility is determined by public policy, but the courts apply this approach with great care and circumspection."* See further Turpin "Contract and Imposed Terms" (1956) *South African Law Journal* 251.

8 "Professional Liability" *An unpublished thesis University of South Africa* (1966).

9 Van Aswegen "Professional liability" *An unpublished thesis University of South Africa* (1966).

10 *Encyclopedia* (1996) 88.

11 Van Oosten *Encyclopaedia* (1996) 88. See also Strauss (1991) 305; Claassen and Verschoor *Medical Negligence* (1992) 102-103; Burchell and Schaffer (1977) 109-115.

writers *Gordon, Turner and Price,* [12] as long ago as 1953, persuasively argue that *"in the so-called "contracting out" of liability cases, involving medical practitioners, although consent may be clearly established, it may be of only very limited effect,"* that is, *"consent can only protect the surgeon against a claim for assault"* and further *"any attempt by a practitioner to contract out of liability for malpractice may be considered at least probable, that the courts would declare such a contract void as against public policy, leaving the patient's right to sue for damages unimpaired."*

The writers continue to argue that *"society cannot allow a medical practitioner to take such an advantage of his patient in regard to whom he stands in a position of such power."* [13]

In a similar vein, relying upon societal dictates, the authors *Strauss and Strydom*, [14] as far back as 1967, persuasively argue that the trust position of the medical practitioner in relation to the patient, in which the medical practitioner, through his/her expert knowledge, dominates the relationship, in that the patient is dependant upon the medical practitioner's judgement and conduct, result in societal dictates, demanding that in executing his/her profession, the medical practitioner ought not be allowed to relax the degree of care and skill expected of him/her as a practitioner, notwithstanding, the patient consenting thereto. To allow that, would be tantamount to giving the patient the authority to licence the practitioner to deviate from recognised medical norms and ethics. This clearly so it is persuasively argued, would be against public policy or the so-called *boni mores*.

In this regard, the authors opine that exclusionary clauses in contracts concerning a doctor are *de lege ferenda* when they write:

> *"Wat eersgenoemde soort afstanddoening betref, meen ons dat hier presies dieselfde oorweginge geld as by die verweer van vrywillige aanvaarding van risiko en dat sodanige afstanddoening teenoor 'n geneesheer as kragteloos behandel moet word omdat dit teen die goeie sedes indruis. Indien die pasient al by voorbaat 'n moontlike latere aanspreek op skadevergoeding weens 'n geneesheer se nalatige optrede kan prysgee, sou dit daarop neerkom dat hy as't ware die medikus "lisensieer" om sy praktyk nalatiglik te beoefen. Geneeshere sou maklik misbruik kon maak van sodanige afstanddoenings deur eenvoudig by voorbaat alle pasiente 'n skriftelike afstanddoening te laat teken. So 'n praktyk sou 'n miskenning wees van die vertrouensposisie waarin the geneesheer hom vanweë sy deskundige kennis bevind."* [15]

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12 *Medical Jurisprudence* (1953) 153ff, 188ff.

13 Gordon, Turner and Price *Medical Jurisprudence* (1953) 153ff, 188ff.

14 *Die Suid-Afrikaanse Geneeskundige Reg* (1967) 317ff.

15 Strauss and Strydom *Die Suid-Afrikaanse Geneeskundige Reg* (1967) 317ff.

I am, respectfully, of the opinion, that the approach adopted by the authors mentioned just hereinbefore, accords with the modern day approach, wherein significant value is attached to social and moral values, as well as the constitutionally acquired values, founded upon fairness, reasonableness and equity. It is submitted, although reference is made by the authors to the position of the medical practitioner, the same ought to apply to hospitals and other health care providers. It is also submitted should the patient be allowed to abandon a potential claim for damages flowing from the negligent conduct of a physician, or hospital for that matter, it will result in the medical practitioner/hospital/other health care provider, being given a license to practise negligently, it is furthermore submitted, should this be allowed, medical practitioners/hospitals/other health care providers, may easily abuse such abandonment of rights, by getting their patients to sign written abandonments. To allow such practise will result in recognition being given to the breach of the position of trust, which the medical practitioner/hospital/other health care provider occupies, arising from his expert knowledge.

More recently, the validity of an exclusionary clause in a hospital contract, excluding a hospital for liability and arising from both ordinary negligence and gross negligence, received the extensive attention of the modern South African legal writers. This arose from the much controversy surrounding the aforementioned Supreme Court of Appeal's judgement in *Afrox Healthcare Bpk v Strydom* 2002 (6) SA 21 (SCA). In this judgement, the court found, *inter alia,* that the admission document signed by the patient (Respondent), on admission to the hospital, and containing an exemption clause *"absolving the hospital and/or its employer and/or agents from all liability and indemnifying from any claim instituted for damages or loss flowing from any injury or damages caused to the patient through negligence excluding intentional omission"*, to be valid.

The court, with regard to exclusionary and indemnity clauses, found that these type of clauses should be adjudged by adopting the common legal approach and that such clauses should be interpreted restrictively. Furthermore, the standard to be applied in respect of exclusionary clauses was, according to the court, *"no different to that applicable to other contractual terms"*. Public policy considerations, according to the court, ought to dictate. It was further held that the respondent had not relied on gross negligence on the part of the appellant's nursing staff in his pleadings. Consequently, the court left open 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. Moreover, the court consequently held that the contractual provision, in terms of which a hospital excluded liability for the negligent conduct of its nursing staff, was not against public interest as

contended by the respondent and therefore valid.

The modern South African legal writers attack the dictum of Brand JA in the *Afrox case* on several grounds, including the following:

The writers *Carstens and Kok* [16] convincingly argue that disclaimers in hospital contracts, which have traditionally been assessed within the framework of the law of contract, may also be assessed with reference to medico-legal considerations. According to them, under the influence of a value-driven Constitution in South Africa, it is healthy to consider broader medico-legal considerations, including, medical ethics and medical law. [17] In this regard, the authors persuasively argue that the ethical canons/instruments, implemented and upheld through centuries, commencing with the Hippocratic Oath and continuing with the Declaration of Geneva (1968), give guidelines *"for the ethical practice of medicine/protection of human rights within a medical context would be, on strict interpretation, be against the use of disclaimers."* [18]

For that reason, the authors persuasively argue that a hospital/medical practitioner/other health care provider, by accepting and treating a patient, are, first and foremost, required `to do no harm' and `to act in the best interest of the patient'. [19]

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16 "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.

17 Carstens and Kok (2005) 78 *SAPR/PL* 430 18 who is in favour of the notion that any assessment of law within a medico-legal context (such as disclaimers against medical negligence in hospital contracts) should be interpreted on a holistic inter-and-multidisciplinary approach as, by analogy, persuasively been argued by Steyn "The Law of malpractice liability in clinical psychiatry" Unpublished *L.L.M. dissertation UNISA* (2003) 3-27.

18 Carstens and Kok (2005) 78 *SAPR/PL* 450 cites with approval the authorities. In terms of the Hippocratic Oath, which in part, reads as follows: *"I will prescribe regimen to the good of my patients according to my ability and my judgement and never do harm to anyone"?* The Hippocratic Oath according to Carstens and Kok is often acknowledged by both physicians and lay people, to be the foundation of medical ethics for physicians in the West. The Declaration of Geneva (1968) which reads in part as follows: *"I will practice my profession with conscience and dignity, the health of my patient will be my first consideration."* International Code of Medical Ethics and The Declaration of Helsinki (as revised in 2000) (which, although dealing with biomedical research involving human subjects), reads in part as follows: *"It is the mission of the medical doctor to safeguard the health of the people."* For a comprehensive discussion of these codes/instruments see Mason and McCall-Smith (1991) 439-446; See also Roth "Medicine's Ethical Responsibility in Veatch (Ed) Cross Cultural Perspectives in Medical Ethics (1989) 150 wherein the writer opines at 153 that *"medical ethics have, over years, acquired a rather philosophical character ..... it has its roots in a societal concept of summum bomun, with interesting modifications such as that expressed in the repeated maxim primun non nocere"* which means medical ethics have its roots in the highest order which cannot be compromised.

19 Carstens and Kok (2005) 78 *SAPR/PL* 450. See also Veatch (1989) 2; Beauchamp and Childress (1994) 3.

They go further to state that ethics are a reflection on the moral intuitions and moral choices that people make. [20] For that reason, it is argued that societal moral dictates, would indicate:

" ..... disclaimers against medical negligence in hospital contracts would amount to an unreasonable/unfair/unethical acceptance on the part of a patient to contract to the possibility of harm (in the form of personal injury/death resulting from medical malpractice) by an attending medical practitioner (albeit in the hospital setting) who is ethically bound not to do harm." [21]

In so far as the effect of medical law/health care law on exclusionary clauses in hospital contracts is concerned, and with regard being had to the object the said law aims to protect, several writers have convincingly argued before, that a patient is in a disadvantageous position when entering into agreements, with the hospitals, containing exclusionary clauses. From a public policy viewpoint, therefore, the validity of exemption clauses is an undesirable feature. [22]

The fore stated, it is argued, is in line with the strong views held by legal writers against exemption clauses in broad terms where the parties to the contract stand in an unequal bargaining position. In this regard *Van der Merwe et al* [23] remarked:

"Exemption clauses have become the object of suspicion, in as much as they are said to enable contractants who are in a strong bargaining position to exploit the weaker co-contractants." [24]

The authors go on to state that an exemption clause may fail for lack of consensus between the parties. If there is no 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. [25]

The writers *Bhana and Pieterse* [26] are especially critical of the Supreme Court of Appeal's

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20 Carstens and Kok (2005) 78 *SAPR/PL* 450; Veatch (1989) 2-7; Beauchamp and Childress (1994) 3; Mason and McCall-Smith (1991) 4.

21 Carstens and Kok (2005) 78 *SAPR/PL* 450; Veatch (1989) 2-7; Beauchamp and Childress (1994) 3; Mason and McCall-Smith (1991) 4.

22 Strauss (1991) 305; Claassen and Verschoor (1992) 103.

23 *Contract - General Principles* (2003) 274.

24 Van der Merwe et al (2003) 274.

25 Van der Merwe et al (2003) 275.

26 "Towards a reconciliation of contract law and constitutional values: Brisley and Afrox Revisited" (2005) 122 *SALJ*

abstract approach in determining, both, the existence and effect of the unequal bargaining power between contracting parties. In this regard, the writers correctly argue that the court failed to take proper account of the normative considerations of good faith, fairness and equality that were in play in the circumstances. The writers also convincingly argue where the contracting parties stand in an unequal bargaining position, the weaker party cannot contract out of his fundamental rights as set out in the Bill of Rights.

Van den Heever, [27] with regard to the unequal bargaining position of the patient in relation to the hospital, quite correctly opines that any patient who is admitted to hospital for serious illness, trauma or even for elective surgery (the cause of which often results in the patient believing that he or she has no choice but to undergo the requisite treatment), is not in an equal bargaining position with the hospital, as he or she will often be incapable of negotiating the terms of his or her admission under these circumstances. The same holds, thus, for family members (signing on behalf of a patient) who, under such stressful and traumatic circumstances, are more concerned about their loved ones receiving the assistance they need than worrying about the fine print.

Support for this view is expressed by *Jansen and Smith,* [28] who opines that true consensus is not possible, under the circumstances, due to the unequal bargaining position of the parties.

Tladi [29] also expresses the view 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"*.

And further:

"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. The Court confidently assumes that the use and scope of indemnity clauses can be curbed by business considerations (at 8). This laissez-faire attitude ignores the reality that most hospitals (if not all) have such indemnity clauses in their admissions forms. The result of this is that a patient cannot decide to hop on to

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865 at 888.

27 "Exclusion of Liability of Private Hospitals in South Africa" *De Rebus* (April 2003) 47-48.

28 "Hospital Disclaimers: Afrox Healthcare v Strydom" 2003 *Journal for Juridical Science* 28(2) 210, 218.

29 "One step forward, two steps back for Constitutionalising the Common Law: Afrox Healthcare v Strydom" (2002) 17 *SAPR/PL* 473, 477.

another hospital if he or she is dissatisfied with the contractual arrangement. One of the reasons for the heed to `constitutionalise' the common law is to protect the weak and the exploited. The clause complained of exploits the lack of bargaining power of patients to escape a duty of care owed under the common law." [30]

More recently, legal writers have also persuasively argued that *"for reasons of public policy, hospitals should take full responsibility for sub-standard negligent performance of services, organisational failures and systemic defects."* For that reason, an exemption clause is seen as constituting a *pactum de non petendo in anticipando,* whereby the parties envisage the commission of an unlawful act. In such an event, the aggrieved party agrees not to institute an action which he would otherwise have enjoyed. [31]

The fore stated, according to some of the South African legal writers, should never be tolerated. It is argued that in the hospital-patient relationship, akin to that of the doctor-patient relationship, a duty to take care and to act reasonably arises the minute the patient enters into an agreement with the hospital or medical practitioner or other health care provider. Flowing from this relationship, so it is argued, there also arises a position of trust between the parties. Once a position of trust is created between the parties concerned, the hospital/medical practitioner/other health care provider may not breach that position of trust by conducting himself/herself in a negligence manner without incurring liability. [32] It is submitted further, that the duty to take care and to act reasonably, is inalienable and cannot be excluded by way of exclusionary clauses to hospital contracts.

In this regard, *Naude and Lubbe* [33] suggest the parties could, therefore, not modify the consequences of a contract, in a manner opposed to the naturalia of the contract itself. The naturalia of the contract is founded in the duty to take care, which arises from the relationship between the medical caregiver and the patient. [34] The legal writers persuasively

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30 Tladi "One step forward, two steps back for Constitutionalising the Common Law: Afrox Healthcare v Strydom" (2002) 17 *SAPR/PL* 473, 477.

31 See Cronje-Retief (2000) 474; Van den Heever (2003) 47-48 quoted in Carstens and Kok (2005) 78 *SAPR/PL* 454.

32 It is especially those writers who argue that the type of contract which exists between doctor and patient is one of a contract of mandate, who advance the argument that from such agreement a position of trust is created. See Strauss and Strydom (1967) 111; De Wet and Van Wyk (1992) 348. The writers opine that in creating the trust position, the doctor undertakes to execute his or her duties with the necessary good faith and with the utmost care and skill.

33 "Exemption Clauses - A Rethink occasioned by Afrox Healthcare Bpk v Strydom" (2005) 122 *SALJ* 444.

34 Naude and Lubbe (2005) 122 *SALJ* 444, 447.

argue, to allow a medical service provider to exempt the degree of skill expected of him/her/it and which is part of the primary or essential obligation undertaken by him/her/it, would be contrary to the essence of the basic contractual purpose of the parties to such a contract. [35]

Moreover, the writers also persuasively argue that to recognise exemption clauses in admission forms, under these circumstances, would amount to an erosion of the patient's trust in the required professional standards of the medical service provider. [36]

The legal writers, *Naude and Lubbe,* [37] rightfully support the idea that an agreement to obtain medical care is not a simple commercial contract or transaction. What is at stake here is not the patient's patrimonial interest (unlike an ordinary commercial contract), but, the patient's bodily inviolability. As it is, so it is persuasively argued, that to allow such an agreement to be put on the same footing as a commercial agreement, whilst there is an imbalance between the interests of the parties, would be to allow an improper, unconscionable advantage been gained over the patient. A further issue arising from these types of contracts in a commercial sense, which further serves as criticism to the Afrox dictum, is the fact that a large proportion of the South African population is seldom, if ever, exposed to commercial contracts. This factor, coupled with language difficulties, implies that many South Africans would not expect to encounter such a clause (let alone understand the implications thereof.) [38]

I am, respectfully, of the opinion that the answer should be in the affirmative, when *Jansen*

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35 Naude and Lubbe (2005) 122 *SALJ* 444, 456-459.

36 Naude and Lubbe (2005) 122 *SALJ* 444, 456.

37 "Exemption Clauses - A Rethink occasioned by Afrox Healthcare Bpk v Strydom (2005) 122 *SALJ* 444 at 460-463 quoting the authority Jan Hendrik Esser, Who cares? Reflections on Business in Healthcare Unpublished LLM Thesis, University of Stellenbosch (2001) 72 who writers that a patient in seeking healthcare services looks for virtues like compassion, integrity and trust-worthiness. See also Van den Heever (April 2003) 47; De Rebus Jansen and Smith (2003) 28 (2) 214 at 218; Hawthorne "Closing of the open norms in the Law of Contract" (2004) 67 (2) *THRHR* 294, 299.

38 Jansen and Smith (2003) 28 (2) 210 at 218. Similar views are expressed by Carstens and Pearmain *Foundational Principles of South African Medical Law* (2007) 458ff, 467. The writers hold the view that the court in the Afrox case should have distinguished between suppliers of healthcare services and other suppliers of services. By not distinguishing between these to extreme type of services will lead to a patient who might as well go to Joe Public for the same services. Yet the service supplied by other commercial enterprises are clearly not the same as healthcare suppliers who are ethically expected to provide in terms of their professional rules to take due and proper care and exercise their professional skill in the interests of the patients.

and Smith [39] pose the question: *"In the light of the abovementioned, could it thus not be expected that at the very least, a private hospital should be placed under a legal duty to draw a patient's attention to and explain the consequences of, the exemption."* [40]

Support for the above is also found in the writings of *Tladi,* [41] when the writer suggests:

"The purpose of development of the common law in light of constitutional values would prohibit such an exploitation of unequal bargaining power. At the very least a proper development of the common law in terms of the Constitution, would require hospitals to inform the patients on admission and explain the consequences of such a clause as held by the High Court in Strydom v Afrox Healthcare." [42]

The Supreme Court of Appeals, in the case of *Afrox Healthcare v Strydom,* [43] is also criticised by *Tladi* [44] for its *"dismissal of the principles of reasonableness, justice, equity and good faith in contract law"*. [45]

The author *Cronje-Retief* [46] also comes out strongly against the use of exemption clauses in hospital contracts, based on public policy and public interests, when she writes:

" ..... big institutions, corporations or other groups with unrestricted financial resources and adequate insurance exempt themselves from liability of such contracts, are effectively contra bonos mores, against public policy and/or public interest and should be declared invalid by our courts." [47]

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39 "Hospital Disclaimers: Afrox Healthcare v Strydom" 2003 *Journal for Juridical Service* (2003) 28 (3) 210 at 218.

40 Jansen and Smith "Hospital Disclaimers: Afrox Healthcare v Strydom" 2003 *Journal for Juridical Service* (2003) 28 (2) 210 at 218; Carstens and Pearmain (2007) 467 pose a similar question why a lay person entering a hospital expect such a clause in an admission document?

41 "One step forward, two steps back for Constitutionalizing the Common Law: Afrox Healthcare v Strydom" (2002) 17 *SAPR/PL* 473, 477.

42 Tladi "One step forward, two steps back for Constitutionalizing the Common Law: Afrox Healthcare v Strydom" (2002) 17 *SAPR/PL* 473, 477.

43 2002 (6) SA 29 (A).

44 "One step forward, two steps back for Constitutionalizing the Common Law: Afrox Healthcare v Strydom" (2002) 17 *SAPR/PL* 473, 477.

45 Tladi "One step forward, two steps back for Constitutionalizing the Common Law: Afrox Healthcare v Strydom" (2002) 17 *SAPR/PL* 473, 477.

46 The legal Liability of Hospitals *Unpublished LLD Thesis Orange Free State University* (1997) 434.

47 Cronje-Retief The Legal Liability of Hospitals *Unpublished LLD Thesis Orange Free State University* (1997) 440-441. Support for Cronje-Retief's contention is found in Van den Heever (April 2003) 47-48 in which it is stated: *"Hospitals should take responsibility for sub-standard negligent provision of services, organizational failure and systemic defects ..... The present untenable position in which a victim of a medical accident finds himself*

The legal writer *Pearmain* [48] holds the view that there are certain obligations from which hospitals/medical practitioners/other health care providers cannot escape, especially where the bargaining power of the contracting parties is so unequal as to be non-existent on the side of the one, usually the patient.

Bhana and Pieterse [49] are equally critical of Brand JA's reasoning in the Afrox case. More particularly, the writers believe the learned judge, in following Cameron JA's dictum in the Brisley case, pertaining to the Constitutional value of contractual freedom and extending the principle to include; *"not only does freedom of contract form part of the Constitutional values of freedom and dignity, but it also constitutes an independent Constitutional value in itself"* is patiently wrong. The writers add, such assertion *"wrongly indicates an ideological value judgement that seems out of step with the Constitutional text, context and ethos."* It is, respectfully, submitted that, given the consumer welfarism drive and the international movement away from the traditional ethos of contractual freedom and sanctity of contract, (including the strong views recently expressed by the South African legal writers and academics) to a more value laden approach, including standards of fairness, reasonableness and equity, the approach adopted by Brand JA is out of step with such movement.

14.2.1.2 Case Law

Although exclusion clauses or waiver clauses, also known as "owner's risk" clauses, are fairly common in agreements pertaining, for example, to insurance, finance, transport and storage of goods, many private hospitals in South Africa, have also incorporated exclusion clauses or waivers in their consent forms which they require patients or their parents, guardians or wards to sign prior to treatment. The validity of exclusion clauses or waiver clauses in the general contracts, as fore stated, was challenged in the South African courts for many decades. Although, as previously stated, it has become standard practise to include exclusion clauses in admission forms used by, especially, private hospitals, the legitimacy of the existence and application of these type of clauses and/or agreements was never questioned in the South African courts until 1999, in the case of *Burger v Medi-Clinic*

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should in the public interest and with due regard to considerations of public policy be appropriately addressed either by the court, legislature or the hospitals themselves." See also Carstens and Pearmain (2007) 468 who opine that the rights to freedom of contract should not be preferred to the right to access to health care.

48 "A Critical analysis of the Law or Health Service delivery in South Africa" *An unpublished LLD Thesis University of Pretoria* (2004) 492ff; See also Carstens and Pearmain (2007) 467.

49 "Towards a reconciliation of contract law and contractual law values: Brisley and Afrox revisited" (2005) 122 *SALJ* 865, 879.

Ltd. [50] The facts of this case can be stated as follows:

The plaintiff, a former patient of the respondent hospital, sued the hospital owner for damages in the amount of R1 061 114 arising from the nursing staff's alleged negligence or gross negligence.

The patient had been admitted, in 1996, to the hospital, to undergo a haemorrhoid operation. The day after the operation, the patient vomited a blackish liquid and experienced nausea, faintness, dizziness, sweating, yawning and motionlessness. He was pale and his breathing was shallow. The patient later alleged that the nursing staff had failed to take reasonable steps to prevent him from suffering a vasovagal syncope, falling and injuring himself. He claimed that the staff, with full knowledge of his symptoms, discharged him from hospital, without first contacting his doctor. The patient attempted to go to the bathroom on his own, lost consciousness and fell on his head, fracturing his right cheekbone with consequent concussion, pain, depression and permanent disfigurement.

In their plea, the hospital denied most of the patient's allegations except for admitting that they had failed to inform the patient that he should not leave his bed and walk on his own. They also denied liability. As a special defence, the hospital relied on an indemnity clause in the operation consent form and claimed that the plaintiff had indemnified the defendant against any liability arising from his admission to the said clinic and for any injury or loss suffered pursuant to such admission and his treatment in that clinic.

The document is headed "Consent to Operation" and the content included the following:

"I, the undersigned hereby consent to the administration of a General/Local anaesthetic and to the performance of an operation upon Mr DD Burger (The Patient) for Haemorrhoidectomy and excision of polyps Surgeon Dr D Grolman.

Therefore, by signing this consent to operation form, a patient and any person who signs this form on behalf of such patient, indemnify the Medi-Clinic Group of Companies, as well as all their employees, officials and agents against all liability to such patient and to the person who signs this form on behalf of such patient, for any loss or damage which originates from any cause whatsoever.

I hereby authorise Medi-Clinic Limited to destroy in any manner which they deem fit any tissue or part of my/the patient's body which may be removed during an operation to be performed on me/the patient in this hospital."

The facts agreed by the parties, for purposes of the adjudication of the special plea, were the following:

1. The plaintiff signed the "Consent to Operation" on 17 April 1996, in the terms as

[50] Unreported case decided in the WLD (1999) Case No 97/25429.

quoted above;

2. The defendant is the party covered by the indemnity;
3. The word "operation" in the quoted indemnity is to be taken to mean the actual surgical procedure in the theatre;
4. The incident which gave rise to the plaintiff's damages was not caused by any negligent act in the theatre.

In his replication, the plaintiff raised four defences to the special plea, only three of which were persisted with during argument.

1. That the clause indemnifies the defendant only in respect of the performance of the actual surgical procedure in theatre and that the loss in question was caused by conduct unrelated to the surgical procedure;
2. That the indemnity does not protect the defendant in respect of gross negligence on the part of its employees;
3. That the indemnity clause is *contra bonos mores* and therefore void.

On behalf of the patient, it was argued, in court, that the clause indemnified the hospital only in respect of the actual surgical procedure in theatre and that the patient's loss was caused by conduct unrelated to the surgical procedure. It was further agreed that the indemnity clause did not protect the hospital in respect of gross negligence on the part of its employees and that, in any event, the clause was *contra bonos mores* (against public policy) and therefore void.

Snyders J considered the principles enunciated in *Cardboard Packing Utilities v Edblo Transvaal Ltd* 1960 (3) SA 178 founded in *Canada Steamship Lines Ltd v The King* 1952 AC at 208. The relevant summary appears at 179 F-H.

"(1) if the clause contains language which expressly exempts the person in whose favour it is made (hereafter called proferens) from the consequence 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 used wide enough, in their ordinary meaning, to cover negligence on the part of the servants of the proferens. If doubt arises at this point, it must be resolved against the proferens in accordance with Art. 1019 of the Civil Code of Lower Canada:

"In case of doubt, the contract is interpreted against him who has stipulated and in favour of him who has contracted the obligation." (This article expresses the South African Law on the method or construction of a document.)

(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."

Applying the above principles Snyders J found:

"In casu there is no express reference to negligence in the exemption clause. The wording are, however, very wide, and in the absence of any limitation to those words there arises no doubt that it has to be read to include the negligence of the defendant and its employees. There also does not appear to be another possible head of damage based on some other ground than that of negligence. The clause should therefore be given its ordinary meaning, which results in the conclusion that the words are wide enough to embrace the negligence and the gross negligence of the defendant and its employees, officials and agents. In the matter of Government of the RSA v Fibre Spinners and Weavers (Pty) Ltd 1978 (2) SA 794 AD the same conclusion was reached on very similar wording."

The court, furthermore, had to deal with the question of whether public policy demands that the clause be held to be unenforceable. Snyders J found:

"On behalf of the plaintiff reliance for this contention was placed on various authors, none of whom suggests that such a finding is open to a South African court. To the contrary, they refer to the situation in some American States and then suggest that the question is deserving of the attention of the South African Legislator as our courts are not at liberty to declare these clauses invalid."

The court referred to the case *Sasfin (Pty) Ltd v Beukes* 1989 (1) SA 1 (AD) at 7I-9G, in which public policy was discussed. Snyders J emphasized the principle of contractual freedom in concluding:

"In applying those principles, it is clear that in the present case a conclusion that the relevant provision is contrary to public policy, is not possible. At best for the plaintiff, the potential unfairness of a situation in which a patient, desperate for hospitalisation is faced with having to sign an indemnity as a precondition of admission, was emphasized during argument. Not only does that situation not warrant the conclusion that it is contrary to public policy, it as not been raised as a fact in the current instance. In such a situation other remedies might in any event avail a patient. No suggestion has been made in this case that the current facts should not be regarded to indicate an agreement between two parties with full freedom to enter into the agreement under consideration. I am therefore unable to conclude that the current agreement is against public policy." [51]

An appeal [52] was subsequently lodged and heard by the full bench of the same division of

51 *Burger, Douglas Desmond v Medi-Clinic Limited* 1999 (WLD) Unreported judgement 6-7.

52 *Burger, Douglas Desmond v Medi-Clinic Limited* 2000 (WLD) Unreported Appeal under case no. A5034/99.

the High Court, in which the court upheld the appeal.

Relying on the principles enunciated in *Cardboard Packing Utilities v Edblo Transvaal Ltd* 1960 (3) SA 178 (WLD) received from the case of *Canada Steamship Lines Ltd v The King* 1992 AC at 208 and followed in the court a quo, the Court of Appeal analyzed the "consent to operation" form and came to the conclusion that the correct interpretation of its wording was that it covered only incidents *"arising out of or related to the administration of the anaesthetic or the operation"*. The Court of Appeal consequently found that the trial court's finding that *"by reason of the indemnity the plaintiff's claim had to be dismissed"* was incorrect, as what happened in the ward was, accordingly, not covered by the indemnity.

The Court of Appeal focused exclusively on the interpretation of the "consent to operation" form and ruled that it was unnecessary to deal with the issue of public policy.

The Court of Appeal has, thus, not ruled that such a disclaimer of liability by a hospital is null and void, as such. This means that the trial judge's ruling still provides authority for the proposition that such a disclaimer is legally enforceable.

It is, respectfully, submitted that both the court a quo and the Court of Appeal missed out on a golden opportunity to pronounce that these types of clauses in hospital contracts were invalid.

In a subsequent case, in that of *Strydom v Afrox Health Care Limited*, [53] the court was asked to pronounce on the validity of an exclusionary clause in a hospital contract.

The facts briefly state included: The plaintiff, a 50-year old male, sued the defendant who is the owner of the Eugene Marais Hospital, for alleged damages which the plaintiff suffered, alleged to be R2 million, as a result of negligence on the part of the employees of the defendant in their treatment, whilst he was a patient at the Eugene Marais Hospital.

The defendant pleaded that the relationship between the parties was governed by a contract, partly oral and partly in writing. The written part thereof contained a clause, in terms of which the plaintiff indemnified the defendant against any liability arising from his admission to the said hospital.

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53 (2001) 4 ALL SA 618 (T).

The relevant clause in the admission form includes:
"Terms and Conditions of Admission

I acknowledge and agree that any medical practitioner or any medical professional who treats the patient is not an employee or agent of the hospital but an independent practitioner and the hospital is not in any way responsible or liable for any acts or omissions of breach of contract of the medical practitioner.
I absolve the hospital of all liability for any loss and/or damage of whatever nature arising in delict or for breach of contract, including but not limited to consequential loss or damage, arising directly or indirectly out of any act of omission and/or breach and/or injury (including fatal injury) sustained by and/or harm caused to the patient or any disease (including a terminal disease) contracted by patient whatever the cause may be excluding only wilful default on the part of the hospital, his employees or agents.
I hereby indemnify the hospital against any claim, award, judgement, cost and expenses which may be made or awarded suffered by the hospital resulting from or connected with the treatment of the patient."

The plaintiff, moreover, pleaded that the relevant contract was unenforceable in law because the said clause was *contra bonos mores*, it being against public policy. It was also pleaded that the principle of *bona fide*, demand that the employees of the defendant should have pointed out to the plaintiff the existence of such clause and the implication thereof. The reasons advanced included that, the defendant was providing essential health services, which services were a basic right the plaintiff was entitled to. Having regard to the circumstances and the nature of the contract the parties were concluding, there was a legal duty on the officials or employees of the defendant to pertinently draw the attention of the plaintiff to the said clause and in particular its implication. Where they failed to do so, or, they were negligent in not doing so, their failure, would create a false representation to the plaintiff. The representation entailed that they brought the plaintiff under the impression that the medical personnel of the defendant and its staff would treat the plaintiff in a professional and experienced manner. Furthermore, if they failed, the defendant would be held liable for consequential damages suffered as the result of breach of contract through the defendant's personnel's failure to comply with their contractual obligation. Another factor that can be advanced is that the said personnel knew of the said clause and the nature thereof, and that their misrepresentation was false, alternatively, they have been aware thereof and that therefore, the said clause is not applicable on the contractual relationship of the parties.
The court, in deciding that the exclusion clause in the admission form at the Eugene Marais Hospital was invalid, as against *contra bonos mores* relied heavily, *inter alia,* on the dictum of Grosskopf JA, in *Venter v Credit Guarantee Insurance Corporation of Africa Ltd,* [54] wherein the court lays down the following test in determining whether a contract is against public policy or *contra bonos mores* or not, namely:

54 1996 (3) SA (AD) 966.

"1. Has there been full disclosure of relevant factors
2. Was the other party satisfied with the terms of the other; and
3. Were the terms accepted; and
4. Were the rights of the other party not compromised or were there no potential prejudice."

Mavundla AJ, with regard to the duty of the court in cases concerning public policy, relied on the case of *Stembridge v Stembridge* 1998 ALL SA (2) (4) (DACLD) citing Innes CJ in *Eastwood v Stepstone* 1902 TS. 294 at 302 in which it was held:

"Now the 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 agreement void. What we have to look to is the tendency of the proposed transaction, not it's actually proved results."

As to the nature of public policy the court referred to the dictum of Magid J in the *Stembridge case*, in which it was stated:

"Public policy cannot, it seems to me, be static. As more change so too does public policy. The function of the courts when questions of public policy arise is, as Lord Watson said in Nordenfeld v Maxim Nordenfeld Goods and Emulsifiers Company Limited (1984) AC 535 (HL) at 554.

" ..... not necessarily to accept what was held to have been the rule of policy of a hundred and fifty years ago, but to ascertain, with as clear an approach to accuracy as circumstances permit, what is the rule of policy for the then present time."

And further, quoting the dictum of Innes J (as he then was) puts it much better in *Blower v Noorden* 1909 TS 609-905 and quoted in *Eerste Nasionale Bank van Suid-Afrika Beperk v Saayman NO* 1997 (4) SA 302 at 320 B-C where he says:

"There comes time in the growth of every living system of law when old practice and ancient formulae must be modified in order to keep in touch with the expansion of legal ideas, and to keep pace with the requirements of changing conditions." (Vide also *Janse van Rensburg v Grieve Trust CC* 2000 (1) SA 315 at 324E) [55]

But the court also refers to the approach of the Appellate Division (as it was known then) in the case of *Sasfin (Pty) Ltd v Beukes* 1969 (1) SA (A) at 71-79G in which Smalberger JA at 9B points out that the public policy, generally, favours the utmost freedom of contract, and that the power to declare contracts contrary to public policy should be exercised sparingly and only in the clearest of cases.

The court consequently found that the clause complained of was *contra bonos mores* and

55 *Strydom v Afrox Health Care Limited* (2001) 4 ALL SA 618 (T).

of no force or effect in law. Although the motivation of the court in finding for the plaintiff was, with respect, not judicially sound, nor particularly well constructed, it's finding, it is submitted, was just and effectively correct.

In this case the court made findings and assumed facts which is, respectfully, worthy of criticism, the judgement being superficial in texture and lacking in depth.

What it did result in, was that the last word on hospital or professional disclaimers had not been spoken. No wonder in less than one year after this judgement, in the Transvaal Provincial Division, the Supreme Court of Appeals, was asked to decide on the validity of exclusionary clauses in private hospital contracts. In the case of *Afrox Health Care Bpk v Strydom*, [56] the facts briefly stated, revealed that Afrox is the owner of a private hospital.

The respondent had been admitted to this hospital for an operation and remained in the hospital for post-operative medical treatment. Upon admission, a contract had been concluded between the parties. During the post-operative medical treatment, certain negligent conduct by one of the hospital's nursing staff caused the respondent to suffer damages.

The pre-admission agreement concluded between the parties involved a written agreement which contained an indemnity clause. It reads:

> *"2.2 Ek onthef die hospitaal en/of sy werknemers en/of agente van alle aanspreeklikheid en ek vrywaar hulle hiermee teen enige eis wat ingestel word deur enige persoon (insluitende gevolgskade of spesiale skade van enige aard) wat direk of indirek spruit uit enige besering (insluitende noodlottige besering) opgedoen deur of skade berokken aan die pasient of enige siekte (insluitende terminale siekte) opgedoen deur die pasient wat ook al die oorsaak/oorsake is, net met die uitsluiting van opsetlike versuim deur die hospitaal, werknemers of agente."*

According to the respondent, it was a tacit term of this agreement that the appellant's nursing staff would treat him in a professional manner and with reasonable care. After the operation, certain negligent conduct by a nurse led to complications setting in, which caused the respondent to suffer damages.

The respondent argued that the negligent conduct of the nurse had constituted a breach of contract by the appellant and instituted an action, holding appellant responsible for the damages suffered.

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56 2002 (6) SA 29A.

The appellant, on the other hand, relied on the exemption clauses contained in the admission document, which the respondent had signed during his admission to the hospital, providing that the respondent `*absolved the hospital and/or its employees and/or agents from all and indemnified them from any claim instituted by any person (including a dependant of the patient) for damages or loss of whatever nature (including consequential damages or special damages of any nature) flowing directly or indirectly from any injury (including fatal injury) suffered by or damage caused to the patient or any illness (including terminal illness) contracted by the patient whatever the causes are, except only with the exclusion of intentional omission by the hospital, its employees or agents'.*

The appellant therefore relied on such clause to avoid liability.

The respondent advanced several reasons why the provisions of the exclusion clause could not operate against him. The respondent contended, *inter alia,* that the relevant clause was contrary to the public interest, that it was in conflict with the principles of good faith or *bona fides* and that the admission clerk had had a legal duty to draw his attention to the relevant clause, which he had not done.

The grounds upon which the respondent based his reliance on the public interest were the alleged unequal bargaining positions of the parties at the conclusion of the contract, as well as, the nature and ambit of the conduct of the hospital personnel, for which liability on the part of the appellant was excluded and the fact that the appellant was the provider of medical services. The respondent alleged that, while it was the appellant's duty as a hospital to provide medical treatment in a professional and caring manner, the relevant clause went so far as to protect the appellant from even gross negligence on the part of its nursing staff. This was, it was contended, contrary to the public interest.

The respondent argued further that s 39(2) of the Constitution obliged every court, when developing the common law, to promote the spirit, purport and object of the Bill of Rights. The effect of s 39(2) was therefore that, in considering the question of whether a particular contractual term conflicted with the public interest, account had to be taken of the fundamental rights contained in the Constitution. It was argued that the relevant clause conflicted with the spirit, purport and object of s 27(1)(a) of the Constitution, which guaranteed each person's right to medical care, and as such was accordingly in conflict with the public interest.
As an alternative, the respondent argued that, even if the clause did not conflict with the public interest, it was still unenforceable as it was unreasonable, unfair and in conflict wit

the principle of *bona fides* or good faith. As a further alternative, it was argued that the respondent had, when signing the admission document, been unaware of the provisions of the clause. The evidence was that the respondent had signed the document without reading it, even though he had had an opportunity to do so. The respondent contended that the admission clerk had had a legal duty to inform him of the content of the clause and that he had failed to do so. The respondent's reason for contending that such a legal duty existed was that he did not expect a provision such as the one contained in the relevant clause in an agreement with a hospital. The provincial division had found for the respondent.

The vexed issues argued by the respondent as to why clause 2.2 was unenforceable as against public policy, included the following:

(a) The clause was contrary to the public interest;
(b) The clause was in conflict wit the principles of good faith;
(c) The admission clerk had a legal duty to draw is attention to clause 2.2 at the time of the conclusion of the contract and he failed to do so.

The Supreme Court of Appeals, per Brand JA, set about its judgement as follows:

With regard to the public interest, Brand JA stated that a contractual provision which is unfair, on the basis that it is in conflict with the public interest, is legally unenforceable and that this principle was accepted and applied in *Sasfin (Pty) Ltd v Beukes* [57] and *Botha (now Griesel) and Another v Finanscredit (Pty) Ltd*. [58] Brand JA quoted the dictum of Smalberger JA in the former, where he stated:

"The power to declare contracts contrary to public 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. 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."

Brand JA pointed out that these cautionary words were emphasized, more recently, in

57 1989 (1) SA 1 (A).

58 1999 (3) SA 773 (A).

Brummer v Gorfil Brothers Investments (Pty) Ltd en Andere, [59] *De Beer v Keyser and Others,* [60] *Brisley v Drotsky*. [61] He said that, concerning exclusionary or indemnity clauses in South African law the position is, such clauses, although valid and enforceable, must be restrictively interpreted. [62] He observes that these types of clauses have become the rule rather than the exception in standard contracts and that the limits of such clauses are apparently determined largely by business considerations such as savings in insurance premiums, competitiveness and the possibility of scaring off prospective clients. Brand JA stated that the fact that exclusionary clauses, as a category, are enforced does not mean that a specific exclusionary clause cannot be declared, by the court, as being contrary to the public interest and therefore unenforceable. The standard used with regard to exclusionary clauses does not differ from that applicable to other clauses, which are alleged, due to considerations of public interest, to be unenforceable. The three grounds upon which the respondent based his arguments concerning the public interest were:

(a) The uneven bargaining position between the parties with respect to the agreement;
(b) The nature and circumstances of the actions of the hospital staff against which the appellant is being indemnified;
(c) The fact that the appellant was the provider of medical services.

With regard to (a) above Brand JA stated that it was not obvious, on the face of it, that an inequality in bargaining power between the parties does not, in itself, justify a conclusion that a contractual provision, which is to the advantage of the strongest party, will be in conflict with the public interest. At the same time, he said, it must be accepted that unequal bargaining power is indeed a factor which, together with other factors, can play a role in considerations of the public interest. Nevertheless, the answer to the respondent's invocation of this factor in the present case is that there is absolutely no evidence to show that the respondent, during the conclusion of the contract, was in a weaker bargaining position than that of the appellant.
Brand JA stated that the respondent's second ground of objection, which has relevance to the potential scope of the clause 2.2, linked, to some degree, to his third ground. According

59 1989 (3) SA 319 (SCA) at 420f.

60 2002 (1) SA 827 (SCA) at 837 C-E.

61 2002 (4) SA (1).

62 *Government of the Republic of South Africa v Fibre Spinners and Weavers (Pty) Ltd* 1978 (2) SA 794 (A) at 804C-806D and *Durban's Water Wonderland (Pty) Ltd v Botha and Another* 1999 (1) SA 982 (SCA) at 989G-I.

to this ground the respondent's objection was that while the appellant's duty as a hospital was to provide medical treatment in a professional and careful manner, clause 2.2 went so far as to indemnify the appellant against even the gross negligence of its nursing staff. The respondent submitted that this was in conflict with the public interest. The court said that although there was direct support to be found in Strauss, *"Doctor, Patient and The Law"* [63] for the view that the indemnification of a hospital against gross negligence of its nursing staff would be in conflict with the public interest, it must be born in mind in the adjudication of the subjective ground of objection that the respondent did not, in his pleadings, rely upon gross negligence on the part of the appellant's nursing staff. He alleged nothing more than negligence. The question whether the contractual exclusion of a hospital's liability for damages caused by the gross negligence of its nursing staff would be contrary to the public interest, said Brand JA, was thus not the issue in the present case. Brand JA stated that, even if one accepted the submission that it was indeed the case, this would not automatically invalidate clause 2.2. Apparently the provisions of the clause in this case should rather have been interpreted so as to exclude gross negligence. Brand JA quoted the dictum of Innes CJ in *Wells v South African Alumenite Company* [64] where he stated:

"Hence contractual conditions, by which one of the parties engages to verify all representations for himself, and not to rely upon them as inducing the contract, must be confined to honest mistake or honest representations. However wide the language, the Court will cut down and confine its operations within those limits."

Brand JA noted, with respect to the third ground upon which the respondent relied, that it was related to the fact that the appellant was a provider of medical services. According to this ground it was generally impermissible for providers of medical services to add an exclusionary clause such as clause 2.2 to a standard contract. In this regard the respondent relied on section 27(1) (a) of the Constitution, in terms of which everyone has a right to medical care. Brand JA stated that, as he understood the judgement of the court a quo, this was the main ground upon which the decision in favour of the respondent was founded. He noted that the respondent did not rely on the fact that clause 2.2 directly violated the constitutional values which are entrenched in section 27(1) (a). Brand J held that even accepting the section 27(1) (a) is horizontally applicable in terms of section 8(2) of the Constitution and therefore binding on a private hospital - which question did not pertinently arise for decision in this case - clause 2.2 did not prohibit the access of any person to

63 Strauss (1991) at 305.

64 1927 (AD) 65.

medical care. Even from the point of view that section 27(1) bound a private hospital, this section did not, apparently, prevent private hospitals from asking for payment for medical services or imposing legally enforceable conditions on the provisions of such services. The question said Brand J, remained whether clause 2.2 was such a legally enforceable provision or not. According to the respondent's submission, the role of section 27(1)(a) was implied by the provisions of section 39(2) of the Constitution according to which each court was obliged, in the development of the common law, to promote the spirit, purport and objects of the Bill of Rights. The effect of section 39(2), it was argued for the respondent, was that in the consideration of the question of whether a particular contractual provision was in conflict with the public interest, regard had to be had to the fundamental rights which were set out in the Constitution. It was submitted, with regard to the argument, that clause 2.2 was enforceable prior to the Constitution, that it was now in conflict with the spirit, purport and object of section 27(1) (a) and was consequently contrary to the public interest. Brand JA stated that, seeing that the Constitution first came into effect on 4 February 1997, whilst the agreement between the parties arose on 15 August 1995, the first question, in considering this argument, is whether section 39(2) empowers and obliges the court to rely on constitutional provisions, which were not in direct breach, said Brand JA, the constitution having no retrospective power. Transactions which were valid when it commenced, are thus not rendered invalid retrospectively, with regard to the direct application of the Constitution. [65] Brand JA noted that the question concerning the possible retrospective influence of the Constitution, in an indirect manner, as envisaged in section 39(2), had not yet been expressly decided. He noted that the fact that this was not a simple question was evident from *Ryland v Edros* [66] and *Amod v Multilateral Motor Vehicle Accidents Fund (Commission for Gender Equality Intervening)*. [67] Brand JA said he found it unnecessary to give attempt to provide a conclusive answer to this question. In the light of his opinion concerning the effect of section 27(1) (a) on the validity of clause 2.2, he was prepared to accept, in favour of the respondent, that the provisions of section 27(1) (a) should be taken into account, although the relevant agreement was concluded on 15 August 1995 and there was also no matching provision in the interim Constitution. He noted that in *Carmichele v Minister of Safety and Security and Another (Centre for Applied Legal Studies Intervening)*, [68] it was decided that, on the application of

65 *Du Plessis and Others v De Klerk and Another* 1996 (3) SA 850 (CC) 1996 (5) BCLR 658 Para (14); *Gardener v Whitaker* 1996 (4) SA 337 (CC); 1996 (6) BCLR 775 Para (13).

66 1997 (2) SA 690 (K) at 707G-710C.

67 1999 (4) SA 1319 (SCA) at 1329 (A) Para (22).

68 2001 (4) SA 938 (CC) at Para (35).

section 39(2) of the Constitution, the determination of what comprises the convictions of the community, for the purposes of the law of delict, could not take place without taking into account the values to which the Constitution subscribes. Brand JA stated that he has no doubt that the same principle also applied to a consideration of whether a particular contractual provision was contrary to the public interest. In this regard he quoted the dictum of Cameron JA *Brisley v Drotsky*. [69] On the application, said Brand JA of this principle, the only constitutional value upon which the respondent could rely was that contained in section 27(1) (a). This led, immediately, to the question: why was clause 2.2 in conflict with section 27(1) (a)? He observed that it was, indeed, correctly conceded by the respondent that clause 2.2 did not stand in the way of the provision of medical services to anyone and that a hospital's reliance on legally acceptable conditions for the provision of medical services was also not in conflict with section 27(1)(a). The respondent's answer to the question posed, was based on the point of departure that, while the constitutional value embodied in section 27(1) (a) did not envisage the mere provision of medical services, but included the provision of such services in a professional and careful - in other words non-negligent - manner, clause 2.2 was in conflict with the values embodied in section 27(1) (a), and was, thus, in conflict with the public interest. The answer to this argument, said Brand JA, was that it was constructed entirely upon a *non sequitur*. Firstly, the appellant's nursing personnel were already bound by their professional code and they were already subject to the statutory authority of their professional body. Secondly, negligent acts by the appellant's nursing staff would not be in the interests of the appellant's reputation and competitiveness as a private hospital. Thirdly, the respondent's argument came down, in effect, to that fact that the appellant's nursing staff, due to the existence of clause 2.2, would be purposefully (or otherwise intentionally) negligent - something which, by definition, amounted to self contradiction. The court pointed out that article 27(1) (a) was not the only constitutional value which was relevant to the case under consideration. It quoted again from Cameron JA in *Brisley v Drotsky* (supra), where it was stated:

"The constitutional values of dignity and equality and freedom require that the Courts approach their task of striking down contracts or declining to enforce them with perceptive restraint ..... contractual autonomy is part of freedom. Shorn of its obscene excesses, contractual autonomy informs also the constitutional value of dignity."

Brand JA stated that the constitutional nature of contractual freedom embraced, in its turn, the principle *pacta sunt servanda*. He noted that this principle was expressed by Steyn CJ

69 2002 (4) SA (1). According to Cameron JA, "*Public policy nullifies agreements offensive in themselves - a doctrine of considerable antiquity. In its modern guise "public policy" is now noted in our Constitution and the fundamental values it enshrines."*

in *SA Sentrale Ko-op Graanmaatskappy Bpk v Shifren en Andere* [70] as follows:

"Die elementêre en grondliggende algemene beginsel dat kontrakte wat vryelik en in alle erns deur bevoegde partye aangegaan is, in die openbare belang afgedwing word."

In the light of these considerations, said Brand JA, the respondent's position that a contractual provision, in terms of which a hospital was indemnified against the negligent actions of its staff, was, in principle, contrary to the public interest could not be accepted. Brand JA noted the statement of the court a quo that:

"Section 39 of the Constitution implicitly enjoins every court to develop common law or customary law. In my mind the tendency of lower courts blindly following the path chartered many years ago until altered by the higher Court is not consonant with the provisions of section 39 of the Constitution."

And said that if the trial court intended, by this, that the principles of *stare decisis,* as a general rule, were not to be used in the application of section 39(2) this was, at least concerning post-constitutional decisions, clearly wrong. He referred to the dicta of Kriegler J in *Ex parte Minister of Safety and Security and Others, In re S v Walters and another* [71] where stated:

"The Constitution enjoins all courts to interpret legislation and to develop the common law in accordance with the spirit, purport and objects of the Bill of Rights. In doing so, courts are bound to accept the authority and the binding force of application decisions of higher tribunals."

And in Para (61)
"High Courts are obliged to follow legal interpretations of the SCA, whether they relate to constitutional issues or to other issues, and remain so obliged unless and until the SCA, itself decides otherwise or this Court does so in respect of a constitutional issue. It should be made plain, however, that this part of the judgement does not deal with the binding effect of decisions of higher tribunals given before the constitutional era."

Brand JA, stated that; concerning pre-constitutional decisions of the SCA with regard to the common law, and in his view, a distinction should be drawn between three situations that existed in the constitutional context:

1. The situation in which the High Court was convinced that the relevant rule of the common law was in conflict with the constitutional provision. In this instance, the High Court was obliged to depart from the common law. The fact that the relevant

70 1964 (4) SA 760 (A).

71 2002 (4) SA 613 (CC).

rule of the common law was laid down pre-constitutionally by the SCA makes no difference. The Constitution was the supreme law and where a rule of common law was in conflict with it, the latter had to give way.

2. The situation in which the pre-constitutional decision of the SCA was based on considerations such as *boni mores* or public interest. If the High Court was of the opinion that such decision, with regard to constitutional values, no longer reflected that *boni mores* or considerations of public interest, then the High Court was obliged to depart there-from. Such a departure, said Brand JA, was not in conflict with *stare decisis* because, in any event, it was accepted that the *boni mores* and considerations of public interest do not remain static.

3. A situation in which a rule of common law, which was laid down in a pre-constitutional decision of the SCA, was not directly in conflict with any specific provisions of the Constitution and was, also, not dependent on changing considerations such as *boni mores* or public interest. Nevertheless the High Court was convinced that the relevant rule, upon the application of section 39(2), should be changed in order to promote the spirit, purport and objects of the Constitution. Was the High Court, in such a situation, empowered to give effect to its convictions or was it still obliged to apply the common law as it was pre-constitutionally, in terms of the principles of *stare decisis*? The answer, said Brand JA, was that the principles of *stare decisis* still applied and that the High Court was not empowered by section 39(2) to depart from the decisions of the SCA, whether they were pre- or post- constitutional. He noted that section 39(2) of the Constitution should be read in conjunction with section 173. According to the latter, recognition was given to the inherent competence of the High Court - together with the SCA and the constitutional court - to develop the common law. In exercising this inherent competence, said Brand JA, the provisions of section 39(2) are of relevance. Before the Constitution, said Brand JA, the High Court, just like the SCA, had the inherent competence to develop the common law. This inherent competence was, however, dependent upon the rules which found expression in the doctrine of *stare decisis*. In the opinion of Brand JA, this rule was neither expressly, nor impliedly, set aside by the Constitution. Section 39(2), he said, contained the underlying implication that the relevant court had the power to amend the common law. The question of whether the relevant court had that capacity was determined by, inter alia, the *stare decisis* rule. Brand J pointed out that the provisions of the Constitution were not just a set of rules but an

> entire value system. Brand JA observed that there was, sometimes, mutual tension between the values of the system, which could only be resolved by careful consideration and reconciliation. In implementing this value system, individual judges would differ from each other. In such circumstances, the granting, to every judge, of the capacity, on the grounds of his individual perspective in accordance with the application of this value system, the power to deviate from the decisions of the SCA would, necessarily, lead to a lack of uniformity and certainty.

On the subject of good faith as an alternative basis of the respondent's case, Brand JA observed that this principle found its origin in a minority judgement by Olivier JA in *Eerste Nasionale Bank van Suidelike Afrika Bpk v Saayman NO*. [72] He observed that the SCA, in its majority decision in *Brisley v Drotsky* (supra), put the judgement of Olivier JA in perspective. With regard to the place and role of abstract ideas such as good faith, reasonableness, fairness and justice, the majority of the court in Brisley held that; although these considerations underlay the South African law of contract, this did not make them an independent, or `free-floating', foundation for the setting aside of contractual provisions. Put differently, said Brand JA, these abstract considerations represented the foundation and *raison d'être,* for the present legal rules and could also lead to the formulation and alteration of rules of law, but, that were not themselves rules of law. When it came to the enforcement of contractual provisions, the court had no discretion and did not deal in abstract ideas, but, rather, on the basis of crystallised and established rules of law. Thus, said Brand JA, the alternative basis upon which the respondent relied was, in reality, not an independent basis for his case.

With regard to misrepresentation and mistake, Brand JA stated that; consideration of this alternative, required, that the factual background be set out in more detail. He noted that the respondent's evidence was that he signed the admission document, without reading it, in the place indicated with a cross. The respondent's attention was not drawn to clause 2.2. In the absence of any evidence to the contrary, it had to be accepted, said the court, that the respondent was not aware of the contents of clause 2.2, when he entered into the agreement. Nonetheless, the respondent conceded that he knew that the admission document contained the terms of the contract between himself and the appellant and he did not dispute that he had full opportunity to read the document. In the circumstances, the fact that the respondent signed the document without reading it, did not lead, as a rule, to the result that he was not bound by its contents. Brand JA then referred to the case of

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72 1997 (4) SA 302 (SCA) at 318.

Burger v Central South African Railways, [73] in which it was held that a person who signed an agreement without reading it, did so at his own risk and was, consequently, bound thereby as though he were aware of its provisions and expressly consented thereto. [74] Brand JA conceded that there were certain exceptions to this general rule and referred, in this regard, to *Christie*. [75] The exception, relied upon by the respondent, was that the admissions clerk had a duty to inform him of the contents of clause 2.2 and that he failed to do so. The respondent conceded that, as a general principle, there was no legal duty upon a contracting party to inform the other of the contents of their agreement. The reason why the respondent alleged that such a duty existed on the admissions clerk was that he, the respondent, did not expect such a clause in an agreement with a hospital. Seeing that a hospital was supposed to supply medical and professional services in a professional manner, the respondent argued that he did not expect that the applicant would try to indemnify itself against the negligence of its own nursing personnel. The answer to this, said Brand JA, was that the respondent's subjective expectations, concerning the contract between himself and the appellant, played no role in the question of whether there was a duty on the admissions clerk to point out clause 2.2 to him. What was of relevance to this question, said Brand JA, was whether a provision, such as clause 2.2, could reasonably be expected, or, if it was, objectively speaking, unexpected. He stated that indemnity clauses, such as clause 2.2, were the rule, rather than the exception, in standard contracts these days (at the time). Notwithstanding the respondent's submission to the contrary, the court said it could see no reason, in principle, to distinguish between private hospitals and suppliers of other services. Thus, it cannot be said that a provision such as clause 2.2 was, objectively speaking, unexpected. There was, thus, no duty, said Brand JA, upon the admissions clerk to bring the clause to the attention of the respondent. Therefore the respondent was bound to the terms of the clause as if he had read it and expressly agreed to it.

The court concluded that the appeal must succeed, with costs, and that the decision of the court a quo should be reversed.

14.2.1.3 Legal Opinion

Hardly any other issue in contract law has, in recent times, received as much attention from

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73 Burger 1903 RS 571.

74 Brand JA also referred to *George v Fairmead (Pty) Ltd* 1958 (2) SA 465 (A).

75 *The Law of Contract* 4th edition at p.202.

academics in South Africa, as the effect of exclusionary or exculpatory clauses in hospital contracts.

Generally, the legal writers accept that the underlying reason for incorporating exclusionary clauses in, especially, hospital contracts is that they seek to protect the hospital against mishaps occurring in connection with the conduct of the nursing staff, doctors employed by the hospitals, or the general handling of the patient.

It is also accepted that some of these clauses are couched in very wide terms, purporting to protect the hospital and its staff against claims based upon negligence, gross negligence, recklessness or intentional acts performed by the hospital staff. [76]

What has emerged, however, is a division in legal thinking regarding the legal effect of exclusion clauses, when incorporated in hospital contracts. Two prominent schools of thought aver emerged. The first school of thought belong to the so-called traditionalists, comprising legal writers such as Hahlo, Burchell and Schafer, Van Aswegen and Van Oosten. This school of though relies heavily on the doctrine of freedom of contract and the maxim *pacta sunt servanda*, wherein, the individual is free to decide whether, with whom, and on what terms he/she is to contract. Moreover, once the agreement has been concluded, effect must be given to the agreement. The enforcement of a contractual obligation therefore, executed consistent with freedom of contract and consensuality. [77]

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76 Van Dokkum "Hospital consent forms" *Stellenbosch Law Review* (1996) 1, 2; Burchell and Schäffer "Liability of Hospitals for Negligence" *Businessman's Law* (1977) 109; Strauss *Doctor, Patient and the Law* (1991) 305

77 This theory causes Hahlo "Unfair Contract terms in Civil Law Systems" (1981) Vol. 98 *SA Law Journal* 70-71 to remark: *"..... He knew that he was assenting to something and indeed to something in addition to the terms he had himself filled in. If he chose not to read what that additional something was, he was, with his open eyes, taking the risk of being bound by it. He cannot then be heard to say that his ignorance of what was in it was a justus error."* Burchell and Schäfer "Liability of Hospitals for Negligence" *BML* 1977 adopt a very conservative and restrictive approach when assessing the validity of exclusionary clauses in hospital contracts when they hold the view that: *"If a patient signed a form containing such a clause the maxim caveat subscriptor applies; let the signatory beware. The patient will escape the effect of the clause only by proving operative mistake or misrepresentation, or he may, despite the operation of the clause, recover damages from the hospital for intentional or possible grossly negligence conduct on the part of its servants or staff. Obviously, the patient could still recover damages from the negligent doctor or nurse, for example, since they are not parties to the contract. Although in America such an exemption or exculpatory agreement between hospital and patient is regarded as invalid in certain States, our courts are not at liberty to declare these clauses invalid. The most that our courts can do is to place as narrow an interpretation upon such an agreement as possible. However, these exemption clauses which are signed by patients entering a private hospital are often worded in such exploit terms that there is little room for restrictive interpretation."* See also van Dokkum "Hospital consent forms" *Stellenbosch Law Review* 1996 (2) 251 set out the South African position with regard to Hospital Consent Forms as follows: *"Our courts sets limits on, and interpret, exemption clauses narrowly or restrictively. Permissibility is determined by public policy, but the courts apply this approach with great care and circumspection."* See further Turpin "Contract and Imposed Terms" 1956 *South African Law Journal* 251.

The second school of thought holds a dissimilar view. In assessing the validity of exclusionary clauses in a hospital contract, a troupe of South African academics and legal writers, [78] advocate a new ethos of contractual fairness, equity and reasonableness based on social, ethical and moral values. More recently, the constitutional influence has also moved academics and legal writers to advocate, when the validity of exclusionary clauses in contract is assessed, that regard must be had to the Bill of Rights enshrined in the Constitution. But, whatever motivational factors are advanced, legal writers and academics who find themselves in the second group, hold the view that exclusionary clauses in hospital contracts are invalid and unenforceable. It is enlightening to see that, some 50 years ago, the thinking accorded with modern thinking, wherein significant value is attached to social and moral values, founded upon ethical norms, fairness and equity. It is also submitted that, although reference was made then of a medical practitioner, the same position should apply to hospitals and other healthcare providers.

A new trend of academic thinking has emerged post the Supreme Court of Appeal's judgement in the *Afrox case.*[79] *Legal jurisprudence advocated by them and legal opinion expressed by them, has changed the landscape substantially* since the writings of *Professor Hahlo* in 1981, the writings of *Burchell and Schäfer* in 1977, the writings of *Van*

Van Aswegen "Professional Liability" *An Unpublished thesis - University of Society* (1966) also relies on party autonomy or freedom of contract when assessing the validity of exemption clauses in a professional contract when he remarks: *"..... a professional is in general free to regulate his liability towards his client by means of agreement, and so-called exclusion or limitation clauses is a general feature of contracts between professionals and clients. Such clauses can in principle apply to delictual and contractual liability, and consequently there is no inherent difference between liability for breach of contract and delict in this regard."*
Van Oosten Encyclopaedia (1996) 88 in similar terms hold: *"..... Provided they are stated in unambiguous terms, exemption clauses are enforceable unless they exclude liability for intentional medical malpractice in which case they will be regarded by the courts as contra bonos mores and. hence null and void."* Whether or not a clause excluding liability for gross medical negligence will be upheld is according to the writer *"..... at least open to doubt."*

78 But the writers Gordon, Turner, Price *Medical Jurisprudence* (1953) 153ff, 18ff as long ago as 1953 persuasively argue with reference to the so-called "contracting out" of liability cases that: *"any attempt by a practitioner to contract out of liability for malpractice may be considered at least probable, that the courts would declare such a contract void as against public policy, leaving the patient's right to sue for damages unimpaired."* And further: *"Society cannot allow a medical practitioner to take such an advantage of his patient in regard to whom he stands in a position of such power."* The writers Strauss and Strydom *Die Suid-Afrikaanse Geneeskundige Reg* (1967) 317ff in a similar view and relying upon societal dictates as well as the trust position the medical practitioner occupies in relation to the patient convincingly argue that a medical practitioner ought not compromise his/her expert knowledge and relax the degree of care and skill even where the patient consents thereto. To allow this, so it is argued by the learned authors would be tantamount to giving the practitioner a license to operate negligently which is contrary to medical norms and ethics. This conduct, according to the learned writers, is against public policy and so-called *contra bonos mores.*

79 *Afrox Healthcare Bpk v Strydom* 2002 (6) SA 21 (SCA).

Aswegen in 1966 and the writings of *Van Oosten* in 1996. The judgement of the Supreme Court of Appeal, delivered by Brand JA, has, since, undergone severe criticism. Several grounds of criticism have been advanced by a number of legal writers and academics. The main strands of criticism vary from medico-legal considerations, including medical ethics and medical law; [80] the unequal bargaining position of the contracting parties; [81] the contract entered into must be seen as a *pactum de non petendo;* [82] the trust position between the hospital and patient; [83] the language difficulties and literacy of contracting

80 It is especially, the writings of 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 who put a premium on medico-legal considerations in assessing the validity of disclaimers in hospital contracts. Referring to the Hippocratic Oath, the Declaration of Geneva, the International Code of Medical Ethics and the Declaration of Helsinki as well as domestic Medical Codes, the writers persuasively argue that medical ethics have its roots in the highest order that cannot be compromised. For that reason healthcare providers including hospitals are first and foremost required `to do no harm' and to act in the best interests of the patient. See also Roth "Medicine's Ethical Responsibility in Veatch (ed) *Cross Cultural Perspectives in Medical Ethics"* (1989) 150 wherein the writer opines at 153 that *"medical ethics have, over years, acquired a rather philosophical character ..... it has its roots in a societal concept of summum bomun, with interesting modifications such as that expressed in the repeated maxim primun non nocere"* which means medical ethics have its roots in the highest order which cannot be compromised. Beauchamp and Childress *Principles of Biomedical Ethics* (1994) 3. Turning to societal moral dictates the writers Carstens and Kok argue that: *"..... disclaimers against medical negligence in hospital contracts would amount to an unreasonable/unfair/unethical acceptance on the part of a patient to contract to the possibility of harm in the form of personal injury/death resulting from medical malpractice by an attending medical practitioner (albeit in the hospital setting) who is ethically bound not to do harm."*

81 Several writers hold the view that as patients are generally in a disadvantages position resultant from the unequal bargaining position in which they find themselves in when entering into the agreement containing the disclaimer, public policy dictates that these type of agreements are invalid and unenforceable. See in this regard Strauss *Doctor, Patient and the Law* (1991) 305; Claassen and Verschoor *Medical Negligence in South Africa* (1992) 103. The authors Van der Merwe et al *Contract - General Principles* (2005) 274-275 hold the view that not only is the patients exploited by the hospitals in entering into such agreements; it is also questionable whether the parties reach consensus where consensus has in effect been improperly obtained. Support for this view is found in the writings of Jansen and Smith "Hospital Disclaimers: Afrox Healthcare v Strydom" 2003 *Journal for Juridical Science* 28 (2) 210, 218. Van den Heever "Exclusion of Liability of Private Hospitals in South Africa De Rebus (April 2003) 47-48 points out that the unequal bargaining position stem from the fact that the patient is often incapable of negotiating any terms due to stressful and traumatic circumstances. Likewise, with family members, signing on the patient's behalf.

82 Several writers including Cronje-Retief *The Legal Liability of Hospitals* (2000) Unpublished LLD Thesis Orange Free State University (1997) 474; Van den Heever "Exclusion of Liability in Private Hospitals in South Africa" 2003 *De Rebus* 47 and quoted in 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* 454 hold the view that an exemption clause in a hospital must be seen as a *pactum de non petendo in anticipando* whereby the parties envisage the commission of an unlawful act often arising from sub-standard negligent performance of services, organizational failures etc. The aggrieved party then agrees not to institute an action which he/she would otherwise have enjoyed. This, according to the writers cannot be tolerated. One of the strongest arguments therefore is that arising from the hospital-patient relationship is the duty of care and to act reasonably undertaken by the hospital. Such standards as seen earlier in the ethical considerations cannot be compromised.

83 The trust position which flows from the doctor-patient relationship is a consideration which writers espouse to have exemption clauses in hospital contracts declared invalid and unenforceable. It is especially those writers who argue that the type of contract which exists between doctor and patient is one of a contract of mandate, who

parties; [84] the lack of reasonableness, equity and good faith; [85] the Constitutional values founded upon the rights enshrined in the Bill of Rights..

14.3.1 ENGLAND

14.3.1.1 Legal Writings

In so far as the English law of contract, relating to medical contracts is concerned, the influence of their *National Health Service Scheme*, places English Law, outside the sphere of the other jurisdictions referred to earlier. Unlike, America and South Africa, English law has not been confronted to deal with private agreements between hospitals and patients or doctors and patients etc.

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advance the argument that from such agreement a position of trust is created. See Strauss and Strydom *Die Suid-Arikaanse Geneeskundige Reg* (1967) 111; De Wet and Van Wyk *Die Suid-Afrikaanse Kontraktereg* (1979) 348. The writers opine that in creating the trust position, the doctor undertakes to execute his or her duties with the necessary good faith and with the utmost care and skill. The writers argue that once a position of trust is created between the parties concerned. The hospital/other healthcare provider may not breach that position of trust by conducting himself/herself in a negligent manner without incurring liability. It has also been argued that the duty to take care and to act reasonably, is inalienable and cannot be excluded by way of exclusionary clauses to do otherwise, according to Naude and Lubbe "Exemption Clauses - A Rethink occasioned by Afrox Healthcare Bpk v Strydom" (2005) 122 *SALJ* 444 would be contrary to the naturalia of the contract itself which includes the provision of the duty of care alternatively it would be contrary to the essence of the basic contractual purpose of the parties to such a contract. The writers argue that it would further amount to an erosion of the patient's trust in the required professional standard.

84 A consideration which has recently found huge favour amongst the legal writers, lead, especially, by Naude and Lubbe "Exemption Clauses - A Rethink occasioned by Afrox Healthcare Bpk v Strydom (2005) 122 *SALJ* 444 at 460-463 quoting the authority Jan Hendrik Esser who cares? Reflections on business in Healthcare *Unpublished LLM Thesis, University of Stellenbosch* (2001) 72 is that of ethics. In this regard, they write that a patient in seeking healthcare services looks for virtues like compassion, integrity and trust-worthiness. See also Van den Heever "Exemption of Liability of Private Hospitals in South Africa" *De Rebus* (April 2003) 47; Jansen and Smith "Hospital Disclaimers" Afrox Healthcare v Strydom" 2003 *Journal for Juridical Science* (2003) 28 (2) 214 at 218; Hawthorne "Closing of the open norms in the Law of Contract" (2004) 67 (2) *THRHR* 294, 299, he also stresses the genuine ignorance and language difficulties which the majority of people experience in South Africa. The persuasive argument advanced is that the large proportion of the South African population is seldom exposed to commercial contracts. That fact, together with the fact that most South Africans would not expect to encounter such a clause let alone understand the implications thereof, causes the patient to be placed in an unequal bargaining position and totally disadvantaged. A suggestion made by the writers Jansen and Smith which needs to be supported is that a private hospital should perhaps be placed under a legal duty to draw a patient's attention to and explain the consequences of the exemption clause. See also the view of Tladi "One step forward, two steps back for Constitutionalising of the Common Law: Afrox Healthcare v Strydom" (2002) 17 *SAPR/PL* 473, 477.

85 The unfairness and unreasonableness of these type of contracts are highlighted by 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* 450; Veatch *Medical Ethics* (1983) 2-7; Beauchamp and Childress *Principles of Biomedical ethics* (1994) 3; Mason and McCall-Smith *Law and Medical Ethics* (1991) 4. But it is the legal writer Tladi "One step forward, two steps back for Constitutionalising of the Common Law: Afrox Healthcare v Strydom" (2002) 17 *SAPR/PL* 473, 477 who comes out strongly against exclusionary clauses in hospital contracts when he writes that these type of clauses deserve to be dismissed as their acceptance would acknowledge the *"dismissal of the principles of reasonableness, justice, equity and good faith in contract law."*

In terms of the *National Health Service Scheme,* a general medical service is provided by Government and the terms of service, of both the hospital and doctors, are controlled by medical regulations in providing the relevant medical services to the patients. [86]

It has also been suggested, by some English legal writers, that those patients who receive medical treatment under the *National Health Service Scheme* (which represent the majority) do not enter into a direct contract with the hospital himself/herself, nor, with the general practitioner or other health care provider, such as dentists or dispensing pharmacists. [87]

For that reason, it has also been suggested, actions for medical malpractice are primarily actions based on the tort of negligence. It is considered that in the majority of instances, there is only a weak factual basis for suing in contract. [88]

In the latter instance, even where the private patient has not entered into a strictly defined contract with expressly written terms governing the agreement for medical care, the legal writers are *ad idem* that the implied obligations, in the form of the hospital's/doctor's and/or other health care providers implied contractual duty of care, play a significant role in deciding liability. The duty of care, in contract, is said to be identical to the duty of care owed in tort. [89]

The implied contractual duty, according to *Jackson and Powell,* [90] is based on the moral aspect that accompanies the nature of the work done by the medical practitioner. The moral aspect, in turn, includes the commitment expected of practitioners, which go beyond the general duty of honesty, namely, they are expected to provide a high standard of service to the community which often transcends to a particular client or patient. A leading article published in the Times, January 5, 1980 and quoted by *Jackson and Powell,* [91]

86 Kennedy and Grubb *Medical Law Text with Materials* (1994) 64ff; Nelson-Jones and Burton *Medical Negligence Law* (1995) 26; Kennedy and Grubb *Principles of Medical Law* (1998) 283ff; Jones *Medical Negligence* (1996) 18; Jackson and Powell *Professional Negligence* (1997) 590-591; Giesen *International Medical Malpractice Law* (1988) 11.

87 Nelson-Jones and Burton (1998) 26; Kennedy and Grubb (1998) 286-287. See however the contrary views highlighted by the legal authors. Jones (1996) 18; Jackson and Powell (1997) 590-591.

88 Nelson-Jones and Burton (1998) 26; Kennedy and Grubb (1998) 287. Jones (1996) 18-19; Jackson and Powell (1997) 594.

89 Nelson-Jones and Burton (1998) 286; Kennedy and Grubb (1998) 287; Jones (1996) 20; Giesen (1988) 24.

90 *Professional Negligence* (1997) 2; See Giesen (1988) 14.

91 *Professional Negligence* (1997) 3.

includes in its definition of the profession, *" ..... a high degree of detachment and integrity, and, above all, that they have a strong sense of responsibility and an exceptional commitment to the interests of their clients ..... "* [92]

Where, however, private treatment takes place, in respect of which a contractual relationship arises between the hospital and private patient/doctor and private patient/other health care provider and private patient, with express terms being incorporated in a written contract, for example, a consent form, and duly signed by the parties concerned, the obligations of the parties will, therefore, be a matter of construing the terms in the contract in each case. [93]

English legal writers hold a strong view that doctors do not guarantee, or are not expected to guarantee, particular results in the treatment of patients. Nor are they expected, where surgery is conducted. However, what is expected of medical practitioners is the exercise of reasonable care, [94] so much so, that, the eminent author, *Jones*, [95] suggests that medical practitioners cannot, by a contractual term or by a notice, exclude or restrict liability for their actions, where medical practitioners deviate from the exercise of reasonable care. In this regard the author relies upon the *Unfair Contract Terms Act,* [96] which, he believes, may include health care provided under the *National Health Service,* as well.

In invoking Section 2(1) of the *Unfair Contract Terms Act* [97] *Jackson and Powell* [98] opine that *"since the damage resulting from medical negligence is almost always some form of personal injury, doctors are effectively prevented from excluding or restricting liability for negligence."* The authors continue with reference to the test of "reasonableness" as provided for in Section 11 of the Act [99] to state *"it is thought that it would generally be unreasonable for a professional person to exclude liability altogether for negligence vis. a*

92 Jackson and Powell (1997) 3; See also Giesen (1988) 14.

93 Kennedy and Grubb (1998) 288; Jones (1996) 23-25; Wright (1997) 15-16; Jackson and Powell (1997) 592.

94 Jones (1996) 24; See also Kennedy and Grubb (1994) 45.

95 *Medical Negligence* (1996) 24.

96 1977 S.2 (1).

97 *Unfair Contract Terms Act*, 1977, S2 (1).

98 *Professional Negligence* (1997) 68ff.

99 *Unfair Contract Terms Act*, S11.

vis. his client" and to allow this *" ..... it would seem contrary to the principles for which the professions stand if they would then contract out of liability."* [100]

Besides what is written, as set out above, and the case law that follows, English law is fairly settled. Unlike South African Law and American Law, which are rich in academic writings and often supporting cases, the English case law is not rich in pronouncing on the validity of exclusionary clauses, especially, in hospital contracts.

14.3.1.2 Case Law

English case law, as previously stated, unlike other jurisdictions, especially America, is not rich in case law regarding pronouncements on the validity of exclusionary clauses in medical contracts.

What needs, however, to be dealt with here, is the English court's attitude toward upholding the exercise of reasonable care and skill, against the backdrop of excluding oneself, as medical practitioners and/or hospitals, against liability for negligence.

In this regard, what was stated by Tindall C.J., when directing the jury in the case of *Lampher v Phipos,* [101] namely: *"Every person who enters into a learned profession undertakes to bring to the exercise of it a reasonable degree of care and skill. He does not undertake, if he is an attorney, that at all events you shall gain your case, nor does a surgeon undertake that he will perform a cure nor does he undertake to use the highest possible degree of skill,"* [102] still, to a large extent, applies today in English Law. Some time later, in 1925, the position was further stated in the case of *Rex V Bateman*: [103]

"If a person holds himself out as possession special skill and knowledge and he is consulted as possessing such skill and knowledge, by or on behalf of a patient, he owes a duty to the patient to use due caution in undertaking the treatment. No contractual relation is necessary nor is it necessary that the service be rendered for reward. The law requires a full and reasonable standard of care and competence. If the patient's death has been caused by the Defendant's indolence or carelessness it will not avail to show that he has sufficient knowledge, nor will it await to prove that he was diligent in attendance if the patient has been killed by his gross ignorance and unskilful ness." [104]

Three cases that deal, in particular, with the upholding of the standard of care and skill,

100 Jackson and Powell *Professional Negligence* (1997) 69.

101 (1838) 8 Candy P475.

102 *Lampher v Phipos* (1838) 8 Cand P475.

103 (1925) 9 4 LJKB 791.

104 *Rex v Bateman* (1925) 9 5 LJKB 791.

without compromising the standard, included the following decisions. The first case is that of *Thake v Maurice*. [105] The facts of this case included: The plaintiffs, a married couple, consulted the defendant, a surgeon, privately, in order for the husband to undergo a vasectomy, as they did not wish to have any more children. The defendant explained the procedure to the plaintiffs and he pointed out that, although it was possible to restore the husband's fertility, he could not guarantee it and that the plaintiff's should regard the operation as permanent. The plaintiffs signed a consent form which stated, *inter alia, "I have been told that the object of the operation is to tender me sterile and incapable of parenthood. I understand that the effect of the operation is irreversible."* The operation was carried out and appeared successful. However, almost three years later, the wife discovered that she was pregnant. The operation had naturally reversed itself, by a process known as recanalisation and the husband's fertility had been restored. Subsequently a child was born and the plaintiffs sued the defendant, in negligence and for breach of contract. The plaintiffs claimed that they had not been warned of the risk of reversal and that this was negligent. Further, they claimed a breach of contract, in that; the defendant had guaranteed the success of the operation namely, the husband's infertility. Peter Pain J held that the defendant had not, in fact, warned the plaintiffs of the small risk of reversal. He was liable in negligence for this. Also, Peter Pain J held that the defendant was liable in contract, as he had given a contractual warranty of success.

In a subsequent appeal, the Court of Appeal unanimously upheld the Judge's decision in the court a quo. However, the court, per Nourse and Neil LJJ, reversed the decision in the court a quo on the contract claim. In the Court of Appeal, the court emphasized the inexact nature of medical science and unpredictability of medical treatment and, consequently, held that a doctor would only be held to have guaranteed the success of the operation if he expressly said so, in clear and unequivocal terms, when Nourse LJ observed:

"The particular concern of this court in Eyre v Measday was to decide whether there had been an implied guarantee that the operation would succeed. But the approach of Slade LJ in testing that question objectively is of equal value in a case where it is said that there has been an express guarantee. Valuable too are the observations of Lord Denning MR in Greaves and Co (Constructors) Ltd v Baynham, Meikle and Partners (1975) 3 ALL ER 99 at 103-104 (1975) WLR 1095 at 1100 which I now quote in full:

Apply this to the employment of a professional man. The law does not usually imply a warranty that he will achieve the desired result, but only a term that he will use reasonable care and skill. The surgeon does not warrant that he will cure the patient. Nor does the solicitor warrant that he will win the case."

The court held that the defendant had only contracted to exercise reasonable care and skill,

105 (1986) QB 644; (1986) 1 ALL ER 479 (SA).

which he breached by failing to warn the plaintiffs of the risk of reversal, as was his normal practice, when Norse LJ stated:

" ..... A professional man is not usually regarded as warranting that he will achieve the desired result, indeed it seems that this would not fit well with the universal warranty of reasonable care and skill, which tends to affirm the inexactness of the science which is professed. I do not intend to go beyond this case of the doctor. Of all sciences medicine is one of the least exact. In my view a doctor cannot be objectively regarded as guaranteeing the success of any operation or treatment unless he says as much in clear and unequivocal terms."

Neil LJ, in the same case, said: *"It is common ground that the defendant contracted to perform a vasectomy operation on Mr Thake and that in the performance of that contract he was subject to the duty implied by law to carry out the operation with reasonable skill and care."* [106]

In the case of *Eyre v Measday*, [107] the plaintiff underwent a sterilisation operation performed by the defendant. The defendant had explained the nature of the operation (a laparoscopic sterilisation), emphasising that it was irreversible, but, he did not inform the plaintiff that there was a less than one per cent risk of pregnancy occurring, following such a procedure. Both the plaintiff and her husband believed that the operation would render the plaintiff completely sterile. The plaintiff subsequently became pregnant. She issued proceedings, claiming that the defendant was in breach of a contractual term that she would be rendered irreversibly sterile and/or a collateral warranty to that effect, which induced her to enter the contract. It was common ground that the contract was embodied partly in oral conversations and partly in the written consent form, signed by the plaintiff. It was also common ground that the appropriate test as to the nature and terms of the contract was objective, not subjective. This did not depend upon what the plaintiff or the defendant thought were the terms of the contract, but on what the court, objectively considered, the words used by the parties could reasonably be taken to have meant.

The Court of Appeals, per Slade LJ, when analysing the obligations of the doctor to his patient, with whom he had contracted, stated:

"Applying the Moorlock principle, I think there is no doubt that the plaintiff would have been entitled reasonably to assume that the defendant was warranting that the operation would be performed with reasonable care and skill.

106 *Thake v Maurice* (1986) QB 644; (1986) 1 ALL ER 479 (SA).

107 (1996) 1 ALL ER 488.

That, I think, would have been the inevitable inference to be drawn, from an objective standpoint..... The contract did, in my opinion, include an implied warranty of that nature."

In the case of *Johnstone v Bloomsbury Health Authority* [108] the Court of Appeal considered the *Unfair Contract Terms Act* 1977 in deciding whether a clause in an employment contract, providing for the working hours of a doctor under contract with the respondent, was invalid.

The facts, briefly stated, included the following: 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 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. The judge allowed the plaintiff's appeal and set aside the master's order.

Thereafter the plaintiff filed a reply, alleging by paragraph 4(1), that if clause 4(b) of the contract created a contractual obligation to work for 88 hours per week, that term was rendered void by section 2(1) of the *Unfair Contract Terms Act* 1977, alternatively (by paragraph 4(ii), that it was contrary to public policy. In June 1990, the defendants successfully applied to the judge to have the paragraph struck out as being an abuse of process.

Consequently, the court considered the *Unfair Contract Terms Act* Sec 2(1) which provided:

"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." [109]

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108 (1992) C.A. 333.

109 *Unfair Contract Terms Act*, Sec 2(1).

In this regard the court stated that the defendant's liability, if any, was for personal injury resulting from negligence.

Consequently, the court considered Section 13(1) of the Act [110] which provided:

"To the extent that this Part of this Act prevents the exclusion or restriction of any liability it also prevents (a) making the liability or its enforcement subject to restrictive or onerous conditions; (b) excluding or restricting any right or remedy in respect of the liability, or subjecting a person to any prejudice in consequence of his pursuing any such right or remedy and (to that extent) sections 2 and 5 to 7 also prevent excluding or restricting liability by reference to terms and notices which exclude or restrict the relevant obligations or duty."

The court continued:

"Read (the provisions of the 1977 Act) as introducing a "but for" test in relation to the notice excluding liability. They indicate that the existence of the common law duty to take reasonable care ..... is to be judged by considering whether it would exist "but for" the notice excluding liability (at P530). As we have already suggested, if the doctor did not purport to restrict his obligation to the person he is examining, he would, as a matter of law, be held to have undertaken a minimum degree of responsibility qua doctor which would include, for example, advising the person of any significant matters which might affect his health. Consequently, any purported restriction of a doctor's duty, at least as regards this obligation of a minimum degree of responsibility, will be ineffective."

The court found that *"the more the defendants argue that the contract excludes the common law duty of care, the more they have to accept that the Unfair Contract Terms Act 1977 applies."*

The court, per Stuart-Smith L.J. subsequently concluded however, that in this particular matter, it would be better to adjudicate based upon public policy, when he stated:

"I have no doubt that it is a matter of grave public concern that junior doctors should be required to work such long hours without proper rest that not only their own health may be put at risk but that of their patients as well. That is the allegation in this case and it seems to me that for the purpose of a striking out application it must be assumed to be true."

In applying public policy in these types of matters, Stuart-Smith L.J. cautioned:
"But it does not follow from that fact alone that cause or this contract is contrary to public policy. The courts should be wary of extending the scope of the doctrine beyond the well recognised categories: see Fender v St John-Mildmay (1938) A.C. 11-12 per Lord Atkin. They should be even more reluctant to embark upon a wide-ranging enquiry into matters of public debate where it is plain that there are two views bone fide and firmly held, and where complex considerations of capacity of the National Health Service and public funding are involved."

110 *Unfair Contract Terms Act* 1977, S13 (1).

The court per Stuart-Smith concluded:

"For those reasons I am satisfied that a defence of public policy would be unarguable in a court of law, though I would not wish it to be thought that I am in any way detracting from the force of the argument advanced on behalf of the junior doctors generally." [111]

The principle issue of whether a professional person may exclude or restrict his duty of care was also considered by the *House of Lords* in *Smith v Eric S Bush (A firm)*. [112]

In this case, the court had to consider the effect of a disclaimer, in a report compiled by a surveyor, in which he exempted himself from liability, in terms of the *Unfair Contract Terms Act* being operative.

In this case, the plaintiff applied to a building society for a mortgage to assist her in purchasing a house. The building society instructed the defendants, a firm of surveyors and valuators to carry out a visual inspection of the house and to report on its value and any matter likely to affect its value. The defendants' valuator, who carried out the inspection, noticed that two chimney-breasts had been removed, but he failed to check whether the chimneys above had been left adequately supported. His report stated that no essential repairs were necessary.

The mortgage application form and the valuation report contained a disclaimer of liability, for the accuracy of the report, covering both the building society and the valuator. The plaintiff was also informed that the report was not a structural survey and she was advised to obtain independent professional advice. The building society, pursuant to an agreement with the plaintiff, who paid an inspection fee, supplied a copy of the report to her and she relied upon it and purchased the house without any further survey. The chimneys were not adequately supported and one of them subsequently collapsed. The plaintiff claimed damages from the defendants, who relied, *inter alia*, on the disclaimer in the report and the application form, as exempting them from liability to the plaintiff. The plaintiff claimed that the disclaimer did not exclude the defendants' liability and that the defendants were, in any event, precluded by section 2 of the *Unfair Contract Terms Act* 1977 (FN1) from so excluding their liability, since the disclaimer did not satisfy the requirement of reasonableness set out in section 11(3) of the Act.

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111 *Johnstone v Bloomsbury Health Authority* (1992) C.A. 333, 347.

112 (1989) 2 ALL ER 514 (1990) 1 A.C. 831.

The court looked at the common law and found *"the common law imposes on a person who contracts to carry out an operation an obligation to exercise reasonable skill and care."*

The court subsequently looked at the position of a plumber who mends a burst pipe and concludes *"he is liable for his incompetence or negligence whether or not he has been expressly required to be careful."*

The court looked at the legal position and stated *"the law implies a term in the contract which requires the plumber to exercise reasonable skill and care in his calling."*

And further *"the common law also imposes on a person who carries out an operation an obligation to exercise reasonable skill and care where there is no contract."*

The court consequently found *"where the relationship between the operator and a person who suffers injury or damage is sufficiently proximate and where the operator should have foreseen that carelessness on his part might cause harm to the injured person, the operator is liable in the tort of negligence."*

Turning to the duty of a professional man, the court held *"the duty of professional men is not merely a duty to use care in their reports. They have also a duty to use care in their work which results in their reports."*

Moreover, the court subsequently considered the effect of the *Unfair Contract Terms Act* [113] in relation to disclaimer of liability involving negligence. Consequently, the court considered Section 1(1) of the Act which defined `negligence' as 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 ...."*

Section 2 of the Act provided: *"(1) A person cannot by reference to any contract term or to a notice ..... 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."*

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113 *Unfair Contract Terms Act* 1977.

As to what was reasonable, the court consequently looked at Section 11(3) of the Act of 1977 which provided that, in considering whether it was fair and reasonable to allow reliance on a notice which excluded liability in tort, account must be taken of: *"All the circumstances obtaining when the liability arose or (but for the notice) would have arisen."*

Consequently, the court identified the following factors, which the court believed should be considered when determining whether an exemption was fair and reasonable, namely:

(1) The bargaining power of the parties;
(2) Could it have been reasonably practicable to obtain advice from another source?
(3) How difficult is the task being undertaken for which liability is being excluded;
(4) The hardship such exclusion will bring to the party.

The court also considered the fact that the building society, in terms of Section 13 of the *Building Societies Act,* [114] was required, by statute, to obtain a valuation of the property before it advanced any money. The underlying rationale for the requirement was said to be founded *"to protect the depositors who entrust their savings to the building society."* The Court of Appeal, per Dillon and Glidewell L.JJ and Sir Edward Eveleigh, held that the disclaimer was not fair and reasonable and was ineffective under the *Unfair Contract Terms Act* 1997. The award of damages of $4, 379, 97, given by the court a quo, was affirmed.

14.3.1.3 Legal Opinion

The influence of the *National Health Scheme* (NHS) in England has caused the relationship between the hospital and patient, in general, to be regulated in the public domain. Unlike its contempories in countries such as the United States of America and South Africa, in which relationships between hospitals/doctors and patients are controlled by private agreements, (unless one is dealing with State hospitals), in English law, relationships are controlled by medical regulations. [115]

Moreover, several of the English legal writers have suggested that those patients who receive medical treatment under the *National Health Service Scheme* (which represent the majority of patients in England) do not enter into a direct contract with the hospital

114 *Building Societies Act* 1986.

115 Kennedy and Grubb *Medical Law Text with Materials* (1994) 64ff; Nelson-Jones and Burton *Medical Negligence Law* (1995) 26; Kennedy and Grubb *Principles of Medical Law* (1998) 283ff; Jones *Medical Negligence* (1996) 18; Jackson and Powell *Professional Negligence* (1997) 590-591; Giesen *International Medical Malpractice Law* (1988).

himself/herself, nor, with the general practitioner etc.

It has further been suggested that actions brought in medical malpractice cases are, primarily, brought in tort and not founded in contract. [116] For that reason, the English courts are not confronted as, especially the American courts, or in a limited sense, the South African courts, to deal with exclusionary clauses in private agreements, between hospitals and patients or doctors and patients.

But, notwithstanding the fore stated, the English legal writers are *ad idem* that even if one was to hypothesize a scenario that a private agreement may be inferred from the relationship between the hospital/doctor and patient, the implied contractual duty contained in the contract, cannot be excluded or restricted where the hospital or doctor deviates from the exercise of reasonable care. [117]

Strong arguments are advanced, by the English legal writers, why this duty of care cannot be excluded by way of contractual agreements. It is especially the writers *Jackson and Powell*, [118] who advance the ground that; as the duty is based on a moral aspect that accompanies the nature of the work done by the medical practitioner, the high standard of service to the community and the strong sense of responsibility. in the interests of their clients cannot be absolved in any way.

The writer *Jones* [119] relies upon Section 2(1) of the *Unfair Contract Terms Act,* when suggesting that a medical practitioner cannot, by contractual term or by notice, excuse or restrict liability for their actions, where medical practitioners deviate from the exercise of reasonable care.

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116 Nelson-Jones and Burton *Medical Negligence Case Law* (1998) 26; Kennedy and Grubb *Principles of Medical Law* (1998) 287.Jones *Medical Negligence* (1996) 18-19; Jackson and Powell *Professional Negligence* (1997) 594.

117 The legal writers generally agree that the duty of care in contract is identical to the duty of care owed in tort. See in this regard Nelson-Jones and Burton *Medical Negligence Case Law* (1998) 266; Kennedy and Grubb *Principles of Medical Law* (1998) 287; Jones *Medical Negligence* (1996) 20; Giesen *International Medical Malpractice Law* (1988) 14, 24; Jackson and Powell *Professional Negligence* (1993) 2-3.

118 *Professional Negligence* (1997) 2-3ff; See also Giesen *International Medical Malpractice Law* (1988) 14.

119 *Medical Negligence* (1996) 24; See also Jackson and Powell *Professional Negligence* (1997) 68ff who also rely on S2 (1) of the *Unfair Contract Term Act* 1977 in holding it would be unreasonable for a professional person to exclude liability altogether for negligence as it would be contrary to the principles for which the profession stand to allow a professional person to contract out of liability.

In so far as case law is concerned, English law is not rich in pronouncing on the validity of exclusionary clauses in medical and hospital contracts. Unlike other jurisdictions, especially the United States of America, English courts have never pronounced on the validity of exclusionary clauses in medical and hospital contracts. But, notwithstanding the absence of *dicta* expressing the court's views on the validity of exclusionary clauses in hospital and medical contracts, what is significant is the emphasis placed by the English courts towards upholding the exercise of reasonable care and skill by hospitals and medical practitioners. [120]

Post the *Unfair Contract Terms Act* 1977, the English courts have also shown that courts will not uphold contractual clauses or agreements, the aim of which is to exclude or restrict liability for death or personal injury resulting from negligence. [121]

It appears, therefore, very settled that, if a matter concerning hospital contracts, including an exclusionary clause exempting a hospital from liability arising from their negligence, were to appear before an English court, the courts will not uphold such agreements.

14.4.1 UNITED STATES OF AMERICA

14.4.1.1 Legal Writings

It was previously mentioned that, a practice has evolved over the years between the doctor and patient or that of the hospital/other health care provider and patient, that the said parties will include in the contract entered into between them, an exclusionary clause, or waiver in which the hospital/healthcare provider seek to relieve itself from liability for negligence.

The effect of including these types of clauses, in the contracts entered into between the hospital and other health care providers and patients, have formed the subject of debate amongst many of the American legal writers.

As was stated previously, generally, waivers of liability and other attempts at exculpating

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120 See in this regard the very old cases of *Campher v Phipos* (1838) 8 Cand P475; *Rex' v Bateman* (1925) Q 4 LJKB 791; See also the more recent cases of *Thake v Maurice* (1986) QB 644 (1986) 1 ALL ER 479 (SA): *Eyre v Measday* (1996) 1 ALL ER 488 in which it was held that even in the absence of any agreement an implied duty to exercise reasonable care arises.

121 See *Johnstone v Bloomsbury Health Authority* (1992) C.A. 333 in which the court held that any purported restriction of a doctor's duty, at least as regards this obligation of a minimum degree of responsibility will be ineffective. The House of Lords in the case of *Smith v Eric S Bush (a firm)* (1989) 2 ALL ER 514, (1990) 1 A.C. 831 when considering the obligation of a surveyor to exercise reasonable skill and care relied on Section 2 (1) of the Unfair Contract Terms Act 1977 to determine whether an exemption is fair and reasonable considering *inter alia* the bargaining power of the parties, how difficult was the task undertaken, the hardship the exclusion will bring, the court held the disclaimer was not fair and reasonable and therefore ineffective.

hospitals/health care providers from liability are treated with disfavour by the courts. The reason therefore stems from the fact that public interest requires the performance of such duties. Furthermore, because the parties do not stand upon equal footing, the weaker party, usually the patient would be in a disadvantageous position when entering into the contract with the hospital/other health care providers. [122]

Waivers or exculpatory clauses included in agreements between the patient and hospitals or other health care providers, signed at the time of treatment or surgery, are also regarded as unenforceable, being contrary to public policy, even if these clauses are correctly worded and understood by the patient. Public policy is, then, often used in conjunction with public interests to protect the patient against the practise of the deviation from minimum levels of performance or bad medicine. [123]

Avowing that, logic dictates that, any contractual agreement of a patient to assume the risk of injury from negligent conducts of medical practise is void as against the public policy, the legal writer, *Winston-Smith* [124] uses public interests and the duty of care as motivating factors for his opinion when he states:

"There can be no doubt that medical practise is affected with a public interest. The duty which a doctor owes to his patient to apply average qualifications to the transaction does not depend on an implied warranty. Such duty is relational, and arises whenever the physician assumes control of the case, whether the service is gratuitous, or directed toward an unconscious or insane person not able to consent. It is product of tort law but also a creature of public policy, designed to hold those practise the healing art to a minimum level of performance. It would be offensive to policy to permit these safeguards to be destroyed by medical practise under "contract waivers"." [125]

The authors, *Stetler and Moritz*, [126] also rely on the doctor and/or hospital's duty of care, which according to the authors, is an inalienable duty when they state:

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122 Flam "Healthcare 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' Keller and Keller "Waivers of Liability in Personal Injury" *New York Law Journal* October (1992) 3; American Jurisprudence 57A *AM Jury* 2d 121; Reynolds Comments "Torts - Negligence - Exculpatory Clause" *Kentucky Law Journal* Vol. 58 (1970) 583 at 584.

123 Winston-Smith "Antecedent grounds of liability in the practice of surgery" The *Rocky Mountain Law Review* Vol. 14 June (1942) No 4 288 at 288-291.

124 "Antecedent grounds of liability in the practice of surgery" The *Rocky Mountain Law Review* Vol. 14 June (1942) No 4 288 at 288-291.

125 Winston-Smith "Antecedent grounds of liability in the practice of surgery" The *Rocky Mountain Law Review* Vol. 14 June (1942) No 4 288 at 288-291.

126 *Doctor Patient and the Law* (1962) 388.

"Generally, a physician cannot avoid liability for negligence, by having a patient sign in advance or a contract containing an exculpatory clause. The obligation of a physician to possess and exercise reasonable care in treating a patient is imposed by law. The physician who undertakes the treatment of a patient cannot therefore avoid that obligation by contract." [127]

The inalienable duty, with its accompanying tortuous consequences where the duty is deviated from, is used by the legal writer, *Manner,* [128] as a rationale in denouncing waivers or exculpatory clauses in hospital contracts. The position is summarized by him as follows:

"A waiver is an exculpatory agreement that relieves one party of all or part of its responsibility to another. These waivers, usually in the form of an express contractual agreement, touch off a conflict between contract law and tort law is based on the premises that a person should be able to make a binding agreement as they see fit. Tort law, on the other hand, is based on the idea that a party should be held responsible for his wrongful actions that cause injury to others. This conflict has led to some confusion regarding the validity of waiver in situations such as those discussed here." [129]

The writers *Ginsburg, Kahn, Thornhill and Gambardella* [130] with reference to American case law on waivers or exculpatory agreements in hospital contracts, highlight the following overlapping rationales, which serve as basic principles, influencing the American courts in pronouncing on the validity of these types of clauses namely:

"(1) *Any attempts by health care providers to use written contracts to reduce liability for negligence ought to be struck down as they are deemed to be contrary to public policy;*

(2) *Courts have generally not analyzed exculpatory patient/hospital or health care provider agreements in terms of mutuality of bargaining but prefer to look at public intension declaring these types of contracts invalid. More particularly the following overlapping rationales are highlighted namely:*

(a) *Medical care is a necessity of life over which the superior bargaining power of the provider should not prevail;*

(b) *Exculpatory clauses have no place in the practice of the learned profession;*

(c) *Private agreements should not reduce a health care provider's statutory or ethical duties;*

(d) *Health care providers have non-negotiable duty of public service;*

(e) *Health care providers should not be able to violate prevailing standards of care with impunity;*

(f) *Patients cannot be expected to choose among health care providers based on contractual terms affecting the provider's liability for negligence;*

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127 Stetler and Moritz *Doctor Patient and the Law* (1962) 388.

128 "A high price to compete: The feasibility and effect of waivers used to protect schools from liability for injury to athletes with high medical risks" - *Kentucky Law Journal* (1990-1991)867-881.

129 Manner "A high price to compete: The feasibility and effect of waivers used to protect schools from liability for injury to athletes with high medical risks" - *Kentucky Law Journal* (1990-1991) 867-881.

130 "Contractual Revisions to Medical Malpractice Liability Law and Contemporary Problems" Vol. 49 No 2 (1986).

(g) *There is no assurance that other available and comparable health care providers will not impose similar limitations;*

(h) *The disparity of bargaining power between provider and patient is too extreme to give any normative weight to the results of bargaining;*

(i) *The financial risk of personal injury should be borne by a negligent party when that party is in a much superior position and capable of taking measures to prevent or insure against losses."* [131]

The legal effect of exclusionary clauses in hospital contracts, in the United States of America, is summarized as follows by *Burchell and Schäfer,* [132] namely:

"The scope of the redress of the plaintiff against the hospital may be severely curtailed where the latter relies on an exemption clause or as it is referred to in America, an exculpatory clause. The effect of such a clause is inter alia that the hospital will not be liable for any injury, loss or damage of whatever nature suffered by the patient arising out of any treatment or attention received or defect in the premises or instruments of the hospital, whether it is due to the negligence of the hospital or its staff or servants or not."

The writers continue to discuss the criticism levelled, in America, against the effect of the said clauses namely:

"Strong criticism can be levelled at these type of clauses in that, if these exemption clauses are used extensively and relied upon by private hospitals as conditions of admission, would-be patients will be faced with the unenviable choice of signing away their remedies should they suffer as a result of negligence." [133]

14.4.1.2 Case Law

The issue of whether waivers, or exculpatory agreements, between physicians or hospitals and patients, are void as contrary to public policy formed the basis for decision-making in a number of cases in America. One of the leading cases in this regard is that of *Tunkl v Regents of the University of California* [134] decided in the Supreme Court of California. In this matter, Hugo Tunkl brought an action to recover damages for personal injuries alleged to have resulted from the negligence of two physicians, in the employ of the University of California Los Angeles Medical Centre, a hospital operated and maintained by the regents of

131 Ginsburg, Kahn, Thornhill and Gambardella "Contractual Revisions to Medical Malpractice Liability Law and Contemporary Problems" Vol. 49 No 2 (1986).

132 "Liability of Hospitals for Negligence" *Businessman's Law* (1977) 109.

133 Burchell and Schäfer "Liability of Hospitals for Negligence" *Businessman's Law* (1977) 109. The position is set out in "American Jurisprudence" 2d Vol. 40 14 p861 (1969-70) 58 *Kentucky Law Journal* 583 in which it is held that an exculpatory clause will be struck down where public interest requires the performance of duties or the parties do not stand on an equal footing.

134 60 Cal. 2d 92, 32 Cal.RPTR. 37, 383 P 2d 441.

the University of California, as a non-profit charitable institution. Mr Tunkl died after the action had been instituted, and his surviving wife, as Executrix, was substituted as plaintiff.

The University of California, at Los Angeles Medical Centre, admitted Tunkl as a patient on June 11, 1956. The regents maintained the hospital for the primary purpose of aiding and developing a program of research and education in the field of medicine; patients were selected and admitted if the study and treatment of their condition would tend to achieve these purposes. Upon his entry to the hospital, Tunkl signed a document setting forth certain "Conditions of Admission". The crucial condition, number six, read as follows:

RELEASE

> *The hospital is a non-profit, charitable institution. In consideration of the hospital and allied services to be rendered and the rates charged therefore, the patient or his legal representative agrees to and hereby releases the regents of the University of California and the hospital from any and all liability for the negligent or wrongful acts or omissions of its employees, if the hospital has used due care in selecting its employees.*

It was also contended, on behalf of the plaintiff, that the plaintiff, at the time of signing the release, was in great pain, under sedation, and probably unable to read. At trial, plaintiff contended that the release was invalid, asserting that a release did not bind the releaser if, at the time of its execution, he suffered from so weak a mental condition that he was unable to comprehend the effect of his act.

The jury, however, found against plaintiff on this issue. Since the verdict of the jury established that plaintiff either knew, or should have known, the significance of the release, the appeal raised the sole question of whether the release could stand as a matter of law.

Put differently, the court was asked to interpret and decide on the validity of a release from liability for future negligence, imposed as a condition for admission to a charitable research hospital.

Consequently, the Supreme Court of Appeal considered the validity of exculpatory clauses in general and concluded that; although exculpatory clauses, *per se,* were not invalid, nevertheless, where exculpatory provisions involved "the public interest" they would not be held to be valid. In this regard the court relied upon Section 1668 of the *Civil Code*. This section provided:

"..... That an agreement between a hospital and an entering patient affects the public interest and that, in

consequence, the exculpatory provision included within it must be invalid ....." [135]

In placing particular contracts within or outside the cadre of those affected with a public interest, the court, subsequently, designed a test to determine when an exculpatory agreement violated public policy. The test consisted of six criteria, namely:

"(1) the agreement concerns an endeavour of a type generally thought suitable for public regulation;

(2) 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;

(3) such party holds itself out as willing to perform this service for any member of the public who seeks it, or at least for any member of the public coming within certain established standards;

(4) The party seeking the exculpation possesses a decisive advantage of bargaining strength against any member of the public who seeks the services;

(5) in exercising a superior bargaining power, the party confronts the public with a standardized adhesion contract of exculpation and makes no provision whereby those receiving services may pay additional reasonable fees and obtain protection against negligence; and

(6) The person or members of the public seeking such services must be placed under the control of the furnisher of the services, subject to the risk of carelessness on the part of the furnisher, its employees, or its agents." [136]

With reference to the aforementioned factors, and having regard to the public regulation as contained in the *Californian Health and Safety Code,* [137] the court concluded that the hospital/patient contract clearly fell within the category of agreements affecting the public interests. The court also held that the services of the hospital to members of the public, who were in special need of the particular skill of its staff and facilities, constituted a crucial necessity. By insisting that the patient accept the provision of waiver in the contract, the hospital exercised a decisive advantage in bargaining. There was no room for debate regarding the terms of the contract.

The court also concluded that there was no distinction, in the hospital's duty of due care, between paying and non-paying patients. Consequently, the court quoting from *President and Directors of Georgetown College v Hughes* (1942) 76 U.S. App. D.C. 123, 130 F. 2d 810, 827:

"To immunize the hospital from negligence as to the charitable patient because he does not pay would be as abhorrent to medical ethics as it is to legal principle."

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135 Section 1668 of the Civil Code.

136 *Tunkl v Regents of the University of California* 60 Cal 2d 92, 32 Cal. RPTR. 37, 383 P 2d 441.

137 SS 1400-1421, 32000-32508 of the *Californian Health and Safety Code.*

It was also held that the duty of care *"is part of the social fabric, and prearranged exculpation from its negligence must partly rend the pattern and necessarily affect the public interest."* [138]

The landmark decision of *Tunkl v Regents of the University of California* 60 Cal 2d S2, 32 Cal. RPTR, 33, 383 P. 2d (1963) 441 was also followed in a number of medical negligent cases. In these cases, the defendants sought to rely upon exculpatory clauses to escape liability arising from their own negligence. Despite their contentions, the courts have found that, although not all contracts redistributing the risk of liability from one's own negligence, are void, exculpatory provisions may stand only if it does not involve `the public interests'.

One of the first cases in which the principles of the *Tunkl case* were followed was that of *Belshaw v Feinstein*. [139] This was an action, by a patient, against a number of surgeons for malpractice.

Dr Bertram Feinstein and Dr Grant Levin were physicians and surgeons practising in San Francisco and specializing in neurosurgery. Each was one of a very few surgeons, in the West, qualified to perform a specialized type of neurosurgery, known as neoro toxic surgery. Both had had extensive training in this field and were recognized as authorities on the subject. These doctors operated the only neoro toxic centre in San Francisco, with the possible exception of one at the University of California, at the time.

The plaintiff (Appellant) sought advice from Dr Feinstein, who examined him. After various tests and examinations, an operation procedure was suggested by Dr Feinstein. In compliance with the pre-operative requirements, plaintiff and his wife executed two written agreements in the same form (one executed before the first operative procedure and the other before the second). These purported to relieve defendants from liability due to any and all untoward risks, or complications, resulting from the neoro toxic surgical procedures. (Plaintiff and Mrs Belshaw testified that they did not read the documents they signed).
Consequently, besides the aspect of negligence, the Court of Appeal, California, was also asked to rule on the validity of the written release.

The court, consequently, considered the leading authority on the subject of this type of agreement in *Tunkl v Regents of University of California* (1963) 60 CAL. 2d 92, 32 CAL.

138 *Tunkle v Regents of the University of California* 60 Cal. 2d 92, 32 Cal. Rptr 37, 383 P2d 441.

139 258 CAL. APP. 2d 711, 65 CAL. RPTR. 788 (1968).

RPTR. 33 383 P. 2d 441, 6 A.L.R. 3d 693, where the court considered the validity of a release from liability for future negligence, imposed as a condition for admission to a charitable research hospital. After reviewing the authorities, the court in the *Tunkl case* held that such an exculpatory provision will stand only if it does not involve `public interest'. It then held that an exemption from liability is invalid if the transaction exhibits some or all of the following characteristics: (1) It concerns a business of the type generally thought suitable for public regulation; (2) 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; (3) the party holds himself out as willing to perform this service for any member of the public coming within certain established standards; (4) as a result of the essential nature of the service, in the economic setting of the transaction, the party invoking exculpation possesses a decisive advantage of bargaining strength against any member of the public who seeks his service; (5) in exercising a superior bargaining power the party confronts the public with a standard adhesion contract of exculpation, and makes no provision whereby additional reasonable fees may be paid to obtain protection against negligence; (6) as a result of the transaction, the person or property of the member of the public is placed under the control of the party seeking exculpation, subject to the risk of carelessness by that party or his agents. When all or most of these circumstances exist, the Supreme Court in *Tunkl* held, the public policy of this state is violated.

Quoting from the *Tunkl case,* in which it was also held that: *"Since the service involved is one which each member of the public, presently or potentially, may find essential to him, he faces, despite his economic inability to do so, the prospect of a compulsory assumption of the risk of another's negligence. Public policy does not favour `agreements' which shift the risk of negligence from the actor to the victim, where the latter is not in an equal bargaining position."*

The court in the case *in casu* held that:

"Obviously the instant releases concerned physicians and a hospital, all suitable for and subjects of public regulation. Defendants, being the only physicians in this area capable of performing neuro toxic surgery and holding themselves out as willing to perform their services for the members of the public needing them constituted a practical and crucial necessity to those members of the public who had special need of the doctor's specialized treatment. The doctors exercised a decisive advantage in bargaining, and when plaintiff signed the release he placed himself completely in the control of carelessness on the part of defendants."

Consequently the court held that: *"Practically all the reasons given in Tunkl for holding invalid the hospital release agreement apply to the agreements in the case at bench."* And further: *"The cases have consistently held that the exculpatory provision may stand only if*

it does not involve `the public interest'. The exculpatory provisions in the instant case definitely involve the public interest. Hence the agreements are void." [140]

In *Leidy v Deseret Enterprises Inc.,*[141] Mr and Mrs Leidy (the appellants), commenced an action in trespass, and assumpsit, against the appellee, Deseret Enterprises Inc, d/b/a Body Shop Health Spa, for injuries sustained by Mrs Leidy at the Spa.

The appellants alleged that 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, but that the treatment she was, in fact, given was directly contrary to her doctor's instructions to the Spa and resulted in various injuries. The Spa and Ms Robinson opposed the appeal on the basis of a provision in the membership agreement, between Mrs Leidy and the Spa, purporting to release the Spa from liability for injuries resulting from its negligence or that of its employees.

The clause provided:

"Member acknowledges that Body Shop Health Spa has neither made claims as to medical results nor suggested medical treatment to Member. 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 or the premises where the same are located, including those arising from acts of active or passive negligence on the part of Body Shop Health Spa, its servants, agents or employees and Member does hereby expressly forever release and discharge Body Sop Health Spa from all such claims, demands, injuries, damages, actions or causes of action."

To this the appellants contended that the clause, purporting to release the Spa from liability for injuries resulting from its negligence, was unconscionable.

The court consequently considered the general approach by the courts and referred to the case of *Crew v Brandstreet*, 134 Pa. 161, 169, and 19 A. 500 (1890), in which the Supreme Court stated:

"Contracts against liability for negligence are not favoured by the law. In some instances, such as common carriers, they are prohibited as against public policy. In all cases, such contracts should be construed strictly, with every intendment against the party seeking their protection."

Subsequently the court held however: *"Although not favoured, contracts against liability*

140 *Belshaw v Feinstein* 258 CAL. APP 2d 711, 65 CAL. RPTR 788 (1968).

141 252 PA. Super 162, 381 A. 2d 164 (1977).

may nevertheless be valid. Commonwealth v Monumental Properties, Inc, 10 Pa. Cmwlth. 596, 314 A. 2d 333 (1973).Generally stated the contract will 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 ....." (Dilks V Flohr Chevrolet, 411 Pa. 425, 192 A. 2d 682, 687 (1963) and authorities therein cited); (b) "the contract is between parties relating entirely to their own private affairs" (Dilks v Flohr Chevrolet, supra pp. 433, 434, 192 A. 2d 682, p. 687); (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". (Galligan v Arovitch 421 Pa. 301, 304, 209 A. 2d 463, 465 (1966); Employers Liab. Assur, Corp. v Greenville Business Men's Asso'n, 423 Pa. 288, 291-292, 224 A.2d 620, 622-623 (1966)"

Consequently, the court stated:

"Courts have been particularly sensitive to the public interest in considering contracts that involve health and safety."

In instances where *" ..... a policy measure obviously intended for the protection of human life; in such event public policy does not permit an individual to waive the protection which the statute is designed to afford him."*

Relying on public policy and quoting the case of *McCurdy's Estate* 303 Pa. 453, 461, 154 A. 707, 709, in which it was stated:

"Statutes grounded on public policy are those which forbid acts having a tendency to be injurious to the public good. The prime question is whether the thing forbidden is inimical to the public interest. Where public policy requires the observance of a statute, it cannot be waived by an individual or denied effect by courts, since the integrity of the rule expressed by the Legislature is necessary for the common welfare."

Turning to the facts of the case and assessing the nature and scope of the exclusionary provision, 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."

Turning to the *Physical Therapy Practice Act*, Act of October 10, 1975, P.L. 383, No 110, s1, 63 P.W. s 1301 et seq., which the court held, that provision contained therein reflected the legislature's recognition that a physical therapist was, in a sense, part of the medical profession, the therapist's expertise lay in the same realm as the doctor's, and the therapist's errors could do as much harm as the doctor's.

And further:

"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." [142]

The court consequently held the agreement did not relate only to matters of private interest.

The court found that the exculpatory clause was unconscionable and contrary to public policy.

In the case of *Olson v Molzen* [143] the plaintiff engaged the defendant to perform an abortion at defendant's abortion clinic. She signed a form stating, inter alia: *"I release Doctor Molzen and his staff from any present or future legal responsibility associated with performing an abortion on me."* The procedure was performed but some month's later plaintiff gave birth to a child.

The plaintiff subsequently sued the osteopath for negligence. The osteopath, Bob Molzen, consequently pleaded that, *inter alia*, the plaintiff signed an exculpatory contract, resultant in him not being liable for damages. The court of first instance, namely Knox County, dismissed the plaintiff's negligence suit against the defendant, Bob Molzen. The Court of Appeal affirmed the decision and the matter were subsequently held by the Supreme Court of Tennessee. The Supreme Court was consequently asked to decide whether an exculpatory contract, signed by patient as condition of receiving an abortion, was invalid as contrary to public policy and could not be pleaded as a bar to patient's negligence suit.

The court held that, in determining whether exculpatory contracts are invalid, the court considers the factors namely:

"(1) whether the transaction concerns business of a type suitable for public regulation and performing service of importance to the public;

(2) whether a party invoking exculpation, possesses decisive advantage of bargaining strength and, in exercising superior bargaining power whether the public, as a result of the transaction, is placed under the control of the party seeking exculpation of which the inferior party agrees to the risk of carelessness."

142 *Leidy v Deseret Enterprises Inc* 252 Pa. Super 162, A. 2d 164 (1977).

143 558 S.W. 2d 429 (TENN.S.Ct. 1977).

The court consequently stated:

"The courts of Tennessee have long recognised that, subject to certain exceptions, parties may contract that one shall not be liable for his negligence to another ..... "Moss v Fortune 207 Tenn. 426, 340 S.W. 2d 902 (1960)"

The rationale advanced by the court was found in the case of *Trailmobile, Inc v Chazen*, 51 Tenn. App. 576, 370 S.W. 2d 840, 844 (1963) in which it was held that *"the public policy of Tennessee favours freedom to contract against liability for negligence."* 503 S.W. 2d at 190.

But, asserts the court, that, notwithstanding the doctrine of freedom to contract, these types of contracts *"..... do not afford a satisfactory solution in a case involving a professional person operating in an area of public interest and pursuing a profession subject to licensure by the state."*

In drawing a distinction between tradesmen in the market place and professional persons, the court relied on *Williston on Contracts* Para 1751 (3d 1972) in which it is stated:

"[S]some relationships are such that once entered upon they involve a status requiring of one party greater responsibility than that required of the ordinary person, and therefore, a provision avoiding liability is peculiarly obnoxious. (Emphasis supplied)"

Referring to the California Supreme Court judgement of *Tunkl v Regents of University of California* 60 Cal. 2d 92, 32 Cal. RPTR. 33, 383 P. 2d 441 (1963) the court adopted the characteristics laid down in that case when it stated:

"Tunkl correctly states several characteristics that would render an exculpatory agreement void and the present contract has all of them."

Referring to the inequality of bargaining power between the parties, the court associated itself with the writings of Prosser, *Law of Torts* 68, at 442 (4th ed 1971 who recognised this dilemma, namely:

"The courts have refused to uphold such agreements, however, where one party is at such obvious disadvantage in bargaining power that the effect of the contract is to put him at the mercy of the other's negligence."

And *Williston on Contracts* Para 1791 (3ed 1972) for voiding exculpatory agreement in which he stated:

"[A] relation often represents a situation in which the parties have not equal bargaining power; and one of them must either accept what is offered or be deprived of the advantage of the relation."

Consequently the court reasoned *"granted plaintiff could have gone to another doctor, but there is no assurance that any other doctor would not have made a similar demand."* Relying upon "public policy" the court found public policy *"forbids that an exculpatory clause be made a condition of medical treatment."* The court added: *"A professional person should not be permitted to hide behind the protective shield of an exculpatory contract,"* and *"we do not approve the procurement of a license to commit negligence in professional practice."* [144]

In *Emory University v Porubiansky* [145] the Supreme Court of Georgia was faced with the following facts namely:

The respondent, Diane Porubiansky, became a patient at the Emory University School of Dentistry Clinic in 1976. Prior to treatment she was required to execute an "Information-Consent" form. The clinic offered dental services to the public at fees that, on the average, were less than the average price of those of private practitioners. The form explained that patients were accepted, based upon the training needs of the school and that treatment would proceed more slowly than in a private office. There was also a statement that complete dental treatment could not be assured. The last paragraph of this form provided:

"In consideration of Emory University School of Dentistry performing dental treatment, I do hereby expressly waive and relinquish any and all claims of every nature I or my minor child or ward may have against Emory University, its offices, agents, employees, or students, their successors, assignees, administrators, or executors, and further agree to hold them harmless as the result of any claim by such minor child or ward, arising out of any dental treatment rendered, regardless of its nature or extent."

The respondent subsequently had an impacted tooth removed by Dr Haddad, an employee of the dental clinic. She alleged that, as a result of negligent treatment, her jaw was broken during the surgical procedure and filed suit against Emory University and Dr Haddad. The defendants denied any negligent treatment and further asserted that the signing of the

144 *Olson v Molzen* 558 S.W. 2d 429 (1997) 429 at 432 (1977).

145 248 GA 391, 282 S.E. 2d 903 (Supreme Court of Georgia 1981).

information-consent form was a complete bar to the action. The trial court granted summary judgement to the defendants based upon the exculpatory clause in the form.

On appeal, the court was asked to consider whether the exculpatory clause was invalid as against public policy.

The court, firstly, looked at the general position of exculpatory clauses. The court consequently relied upon the doctrine of freedom of contract in their general recognition, when the court stated:

"All people who are capable of contracting shall be extended the full freedom of doing so if they do not in some manner violate the public policy of this state. We agree that Case property follows the rule stated in Phenix Insurance Co v Clay, 101 Ga. 331. 332. 28 S.E. 853 (1897), that: "It is well settled that contracts will not be avoided by the Courts as against public policy, except where the case is free from doubt and an injury to the public clearly appears." In examining this case we also follow the rule that the courts must exercise extreme caution in declaring a contract void as against public policy and should do so `only in cases free from doubt and where an injury to the public interest clearly appears."

The court went on to state:

"Unless prohibited by statute or public policy, the parties are free to contract on any terms and about any subject matter in which they have an interest, and any impairment of that right must be specifically expressed or necessarily implied by the legislature in a statutory prohibition and not left to speculation. Brown v Five Points Parking Ctr. 121 Ga. App. 819, 821, 175 S.E. 2d 901 (1970).

As to when a contract was deemed to be contrary to public policy, the court stated:

"A contract cannot be said to be contrary to public unless the General Assembly has declared it to be so, or unless the consideration of the contract is contrary to good morals and contrary to law, or unless the contract is entered into for the purpose of effecting an illegal or immoral agreement or doing something which is in violation of law. Camp v Aetna Ins Co. 170 Ga. 46, 40, 152 S.E. 41 (1929); Brown v Five Points Parking Ctr. supra at p 921, 175 S.E. 2d 901."

With regard to the position in the State of Georgia, the court held:

"Except in cases prohibited by statute and cases where a public duty is owed, the general rule in Georgia is that a party may exempt himself by contract from liability to the other party for injuries caused by negligence, and the agreement is not void for contravening public policy. Hawes v Central of Fa. R.D. 117 Ga. App. 771, 162 S.E. 2d 14 (1968)"

And continued:

"Historically, our courts have viewed any interference with freedom to contract with considerable caution. In this regard, our Supreme Court has stated:

> *"The power of the courts to declare a contract void for being in contravention of a sound public policy is a very delicate and undefined power, and, like the power to declare a statute unconstitutional, should be exercised only in cases free from doubt ..... The authority of the lawmaking power to interfere with the private right of contract has it limits, and the courts should be extremely cautious in exercising the power to supervise private contracts which the lawmaking power has not declared unlawful."*

It is well settled that contracts will not be avoided, by the courts, as against public policy, except where the case was free from doubt and where an injury to the public interest clearly appeared. *Mut. Life Ins. Co v Durden* Ga. App. 797, 800 (3) 72 S.E. 295 (1911). *"The only authentic and admissible evidence of public policy of a State is its constitution, laws, and judicial decisions."* *Mut. Life Ins. Co v Durden supra* at p800 (3) S.E. 295.

The court consequently looked at the physician/patient relationship and found that the relationship had its foundation in public consideration.

The court also found that, under Georgia law, the practice of dentistry was a regulated profession, licensed by the State, establishing a requirement of minimal standards, and by declaring the malpractice thereof a tort.

With regard to the nature and scope of the requirement of minimum standards, the court concluded:

"The legislature has established a minimum standard of care for the medical profession. A person professing to practise surgery or the administering of medicine for compensation must bring to the exercise of his profession a reasonable degree of care and skill. Any injury resulting from a want of such care and skill shall be a tort for which a recovery may be had."

The court also considered the public interests as factor in invalidating exculpatory clauses and found that:

> *"There can be no doubt that dental care for our citizens is an invested public duty; the relationship of dentist and patient and the care given to the patient is of legitimate public interest in our state, even when such care is administered in a dental clinic designed for training and teaching."*

The court also found:

".....Appellee Emory is engaged in performing a service of great importance to the public, i.e. it provides dental care and educates and trains members of the dental profession."

Relying on the leading California Supreme Court decision in *Tunkl v Regents of University of California* Ga. Cal. 2d 92, 32 Cal RPTS 33 P 2d 441 (1963) the court went on to state:

"A professional person should not be permitted to retreat behind the protective shield of an exculpatory clause and insist that he or she is not then answerable for his or her own negligence. We do not approve the procurement of a license to commit negligence in professional practice..... "

Consequently the court concluded:

"We find that it is against the public policy of this state to allow one who procures a license to practise dentistry to relieve himself by contract of the duty to exercise reasonable care ....."

In the case of *Tatham v Hoke* [146] the plaintiff sued the defendant for negligent performance of an abortion, resulting in her subsequent hospitalisation and surgical treatment. The plaintiff, before treatment, signed an agreement containing an exclusionary clause. Paragraph 13 thereof read as follows:

"INFORMED CONSENT TO TREATMENT, ANAESTHETIC, AND OTHER MEDICAL SERVICES",

executed by plaintiff in North Carolina immediately prior to the abortion:

"13. In the event of any dispute between me and Hallmark, my physician, or other personnel, I agree to make a written claim within thirty (30) days of this date. If such a claim is not timely made I waive any and all rights of recovery such a claim is made, be if for professional liability, personal injury, contract, warranty, or other breach of duty, I agree to submit the claim to binding arbitration. In the event of such arbitration, I understand and agree that Hallmark shall choose one physician arbitrator, I shall choose a second physician arbitrator; a third such arbitrator shall be designated by the American Arbitration Association office in Washington, D.C. The decision of the arbitrators shall be binding upon me without recourse to any other judicial or other tribunal. I further agree that liability shall in no case exceed $15,000.00 and that I shall post in advance a bond to cover the costs of arbitration and the counsel fees of Hallmark Clinic, its physician(s), or other personnel."

Plaintiff subsequently challenged the entire paragraph as an unenforceable adhesion contract, contrary to the public policy of North Carolina. The court consequently considered the general position of exclusionary clauses in North Carolina and held:

146 469 F. Supp 934 (W.D.N.C.) (1979).

"The general rule in North Carolina is that contracting parties may, with a few exceptions, agree to limitations on liability for ordinary negligence, with the agreement being strictly construed against the party relying on the agreement. Hall v Sinclair Refining Co 242 N.C. 707, 8 S.E. 2d 396 (1955). All such otherwise valid limiting agreements are void as contrary to public policy; however when they relate to transactions affected with a substantial public interest or coloured by inequality of bargaining powers."

Relying further on the case of *Hall v Sinclair Refining Co* 242 N.C. 707, 89 S.E. 2d at 398 in which it was held:

"Also, by the weight of authority the general limitation on the contractual right to bargain against liability for negligence embraces the principle "that a party cannot protect himself by contract against liability for negligence in the performance of a duty of public service, or where a public duty is owed, or public interest is involved, or where public interest requires the performance of a private duty."

And further:

"Also, closely related to the public policy test of determining the validity of these exemption clauses is the factor, applied in some decisions, of giving consideration to the comparable positions which the contracting parties occupy in regard to their bargaining strength i.e. whether one of the parties has unequal bargaining power so that he must either accept what it offered or forego the advantages of the contractual relation in a situation where it is necessary for him to enter into the contract to obtain something of importance to him which for all practical purposes is not obtainable elsewhere."

The court with further reference to Annotation - "Validity and Construction of Contract Exempting Hospital or Doctor from Liability for Negligence to Patient" 6*.A.L.R.* 3d 704 (1966) identified factors in which the courts have held before, that exculpatory contracts were unenforceable which included those:

"(a) significantly regulated by public authority;

(b) holds himself out to the public as willing to perform the sort of services subject to such regulation;

(c) purports to be capable of performing those services in conformity with the standard of care established in the community;

(d) provides the services in an atmosphere suggestive of unequal bargaining power; and

(e) subjects the patient to precisely the sort of risk made the subject of the exculpatory agreement."

The court placed great emphasis on the medical services provided by the defendant to the public, which were of public interests.

The court also found that all medical doctors were subject to legislatively mandated licensing requirements, including an established care of professional and personal conduct, which prescribed the standard of care applicable to medical malpractice actions. N.C.G.S.

90-21.12 (CumSupp. 1977)

Referring to the state legislature, who in terms of N.C.G. §90-21.14 (Cum Supp 1977) outlawed the exclusion of liability, when it provided:

"Nothing in this action shall be deemed or construed to relieve any person from liability for damages for injury or death caused by an act or omission on the part of such person while rendering health care services in the normal and ordinary course of his business or profession." [147]

The court concluded that the agreement entered into was unenforceable under North Carolina Law as contrary to public policy.

The Kentucky Court of Appeals, in the case of *Meiman v Rehabilitation Centre,* [148] also considered the validity of exculpatory clauses in medical contracts. The facts of this case included: The plaintiff, as a result of her diabetic condition, had her leg amputated in 1965. Three years later, upon applying to defendant Rehabilitation Centre for instruction in the use of an artificial limb, plaintiff was accepted as a "candidate" for rehabilitation. However, as a condition of her acceptance, she, like all other patients at the Rehabilitation Centre, was forced to sign an exculpatory agreement which released the hospital from liability for its own negligence.

This agreement, *inter alia,* provided:
"I further agree that, I will assume all risks which have been explained to me in detail that result from diagnosis and treatment. I will not assert any claim against the Centre, its employees, or its volunteers that results from unintentional acts or conduct on their part."

After the plaintiff had signed the agreement actual therapy was begun, and during the third treatment her stump was severely damaged by one of the employees of the Centre. The injured leg was later examined by her doctor, who diagnosed that the fracture precluded any possibility of future use of an artificial limb. The plaintiff then instituted action against the Rehabilitation Centre for negligence.

The defendant relied on the exculpatory clause to escape liability. Although the court acknowledged that, generally, a party may contract against his responsibility, this may only be done in instances where the contracting party, seeking to include an exculpatory clause,

147 *Tatham v Hoke* 469 F. Supp 934 (W.D.N.C.) (1979).

148 444 S.W. 2d 81 (KY.1969).

neither owed a public duty nor affected the public interests by his actions. Relying on the landmark Case of *Tunkl v The Regents of the University of California* Ga. Cal. 2d 92, 1, 32 Cal APTR. 33, 36, 393 P.2d 441 444 (1963), the Kentucky Court of Appeal endorsed the twin concepts of public interest and equal footing, to strike down the exculpatory clause.

Turning to the case in casu the court held that: *"..... the exculpatory agreement sought to be enforced, between a dental clinic and its patient, implicates both the States interest in the health and welfare of its citizens, as well as the special relationship between physician and patient and that it would be against public policy to uphold such an agreement."*

The court relied upon the following determining factors in deciding that the agreement was against public policy:

Firstly: *"..... The State's substantial interest in protecting the welfare of all of its citizens, irrespective of economic status, extends to ensuring that they are provided with health care in a safe and professional manner..... "*

In this regard: *".....(The) State carefully regulates the licensing of physicians and other health care professionals and monitors such activities to prevent untoward consequences to the public."*

Secondly, referring to the maintenance of minimum standards of professional care, the court stated: *"A similar concern for the enforcement of established minimum standards of professional care provides the underlying rationale for a cause of action for malpractice in favour of those who have been subjected to substandard care. (See, Pike v Honsinger, 155 N.Y. 201, 49 N.E. 760)."*

Recognising the important role public clinics played in medical and dental care and maintaining minimum standards of professional care, the court stated:

" ..... It cannot serve as a basis for excusing such providers from complying with those minimum professional standards of care which the State has seen fit to establish. It is the very importance of such clinics to the people who use them that would create an invidious result if the exculpatory clause in issue were upheld, i.e. a de facto system in which the medical services received by the less affluent are permitted to be governed by lesser minimal standards of care and skill than that received by other segments of society."

And further: *"There cannot, however, be any justification for a policy which sanctions an agreement which negates the minimal standards of professional care which have been carefully forged by State regulations and imposed by law."*

Turning to the principle of freedom of contract and the welfare of people, the court subsequently attached greater value to the latter by stating:

"That freedom of contract may be said to be affected by the denial of the right to make such agreements, is met by the answer that the restriction is but a salutary one, which organized society exacts for the surer protection of its members. While it is true that the individual may be the one, who, directly, is interested in the making of such a contract, indirectly, the state, being concerned for the welfare of all its members, is interested in the maintenance of the rule of liability and in its enforcement by the courts. Johnson v Fargo, 184 N.Y. 379, 77 N.E. 388."

Turning to public policy considerations, the court subsequently stated:

"The public policy considerations here are buttressed by the independent obligations owed by defendants to plaintiff arising from the physician-patient relationship between them. This relationship imposes upon the health care provider greater responsibilities than that required in the ordinary commercial market place. In the context of that professional relationship "a provision avoiding liability is peculiarly obnoxious." (15 Williston on Contracts (3rd ed. 1972) section 1751)"

Although the court recognized the exculpatory agreements had been upheld, especially, in commercial settings or involved activities such as membership in a private gymnasium, the court expressed its reservations about the validity of the provisions in instances where the contracting parties were in an unequal position, creating a substantial opportunity for abuse. Turning to the case at hand, the court held: *"Because of the crucial importance of clinics, such as defendant, to be the population which they serve, their patients cannot be considered to have freely bargained for a sub-standard level of care in exchange for a financial savings. Rather, they, including the plaintiff herein, use such services because they are the only ones which they can afford. This necessity renders illusory a patient's supposed freely given consent to absolve of liability for negligence those from whom he or she seeks treatment. Thus even aside from the deleterious effect which a decision upholding such an agreement could have on the public at large, the individual responsibility bestowed upon defendants by the physician-patient relationship, in the context of the disadvantageous position from which plaintiff necessarily entered into the agreement, militates strongly against its propriety."*

Following *Emory University v Porubiansky* 248 Ca. 391, 393-394, 282 S.E. 2d 903; *Tunkl v Regents of University of California* 60 Cal. 2d 92, 98-101, 32 Cal. RPTR. 33, 37-38, 383 P. 2d 441, 445-446; *Olson v Molzen* 558 S.W. 2d 429; *Meiman v Rehabilitation Centre Inc* 444 S.W. 2d 78, 80 the court held that *"an exculpatory clause of the type here in issue must be held invalid as a matter of public policy."*

Consequently, the court laid down the following golden rule, namely: *"that in some instances such an agreement may be valid, but that in no event can such an exculpatory agreement be upheld where either:*

(1) The interest of the public requires the performance of such duties; or

(2) *Because the parties do not stand upon a footing of equality, the weaker party is compelled to submit to the stipulation."*

The court subsequently endorsed the principle: *"The general rule is that persons may not contract against the effect of their own negligence and that agreements which attempt to do so are invalid."*

The court concluded by holding: *"The exculpatory contract may not be relied upon as a defence in this action, because it is invalid as being against public policy."* [149]
In a more recent decision in *Ash v New York University Dental Centre* [150] the issue before the court, in a dental malpractice action, was, *inter alia,* the invalidity of an agreement that plaintiff, Arthur Ash, was required to sign as a precondition to him obtaining treatment at defendant, New York University Dental Centre, which prospectively exculpated the various defendants from any liability for negligence in treating plaintiff.

The facts briefly stated include: Plaintiff had previously been a private dental patient of defendant, Dr Charles Lennon. In 1986, while under Dr Lennon's care, plaintiff was informed that he required substantial dental work which would cost over $6,000. When plaintiff indicated that he could not afford such a fee, Dr Lennon recommended that plaintiff obtain services at New York University Dental Centre, where the work could be done for $3,000. Lennon advised plaintiff that other dentists, including students and post-graduate students, worked at the clinic, but, that he, Dr Lennon, who served as an instructor at the school, would oversee all work and would try to be present when plaintiff received treatment.

When plaintiff arrived at the clinic on October 15, 1986, to register prior to receiving treatment, he was required to sign a form containing the following provision:

"In consideration of the reduced rates given to me by New York University, and in recognition of the risks inherent

149 *Meiman v Rehabilitation Centre* 444 S.W. 2d 78 (KY. 1968).

150 164 A.D. 2d 366, 564 N.Y.S. 2d 308 (1990).

in a clinical program involving treatment by students, I hereby release and agree to save harmless New York University, its trustees, doctors, employees and students from any and all liability, including liability for its and their negligence, arising out of or in connection with any personal injuries (including death) or other damages of any kind which I may sustain while on its premises or as a result of any treatment at its Dental Centre or infirmaries."

The plaintiff testified that he believed the signing of this form was an insignificant registration procedure and he was never told, nor did he imagine, that he was relinquishing any of his legal rights. He was not offered an option of paying an additional fee rather than agreeing to receive treatment. On April 6, 1987, while he was being treated by Dr Lennon and by defendant Dr Prestipino, a post-graduate dental student, the alleged malpractice occurred.

The court commenced its analysis of the legal position of exculpatory clauses in general and stated that it was a long-settled general proposition *"that the law frowns upon an agreement intended to exculpate a party from the consequences of its own negligence and requires that such contracts be subjected to close judicial scrutiny. (Gross v Sweet, 49 N.Y. 2d 102, 424 N.Y.S. 2d 365, 400 N.E. 2d 306)"*

And further the court laid down the general approach of the courts, namely:

"Because exculpation provisions are not favoured by the law, they are strictly construed against the party relying on them and must be unambiguously expressed in unmistakable language that is clear and explicit in communicating the intention to absolve from negligence the party seeking to be insulated from liability. (Gross v Sweet, supra; Ciofalo v Vic Tanny Gyms, 10 N.Y. 2d 294, 220 N.Y.S. 2d 962, 177 N.E. 2d 925; Boll v Sharp and Dohme, 281 App. Div. 568, 121 N.Y.S. 2d 20, aff'd., 307 N.Y. 646, 120 N.E. 2d 836)"

As to the general approach by the courts, the court held:

"Judicial scrutiny of such provisions has frequently, as a threshold issue, focused upon the scope and sufficiency of the language of the particular exculpatory clause involved, including some between heath care providers and their patients, and upon finding the subject clause unenforceable by reason of its failure to express an intent to exculpate with sufficient specificity or clarity, exploration of other considerations bearing on the validity of the clause has been unnecessary. (See e.g. Gross v Sweet, supra; Abramowitz v New York University Dental Centre, 110 A.D. 2d 343, 494 N.Y.S. 2d 721; Boll v Sharp and Dohme, Inc 281 App. Div 568, 121 N.Y.S. 2d 20, app. dismd.. 306 N.Y. 669, 116 N.E. 2d 498, aff'd. 307 N.Y. 646, 120 N.E. 2d 836; Valenti v Prudden 58 A.D. 2d 945, 956, 397 N.Y.S. 2d 181; DeVito v New York University College of Dentistry, 145 Misc. 2d 144, 544 N.Y.S. 2d 109; but see Black v New York University, N.Y.L.J. March 6, 1985, p.6, col. 1; Fearns v Columbia University School of Dental and Oral Hygiene, N.Y.L.J. May 15, 1979, p. 10, col. 5)"

Consequently the court stated:

"Parenthetically, it may be noted that agreements which purport to grant exemption for liability for gross negligence or deliberate misconduct, no matter how explicitly expressed, are wholly void. (Gross v Sweet, supra)"

Referring to the influence of public policy in respect of exculpatory clauses, the court stated:

" ..... it has been held that even an agreement that clearly and unambiguously attempts to exempt a party only from liability for ordinary negligence will not be enforced by the courts of this State, if it is found to violate public policy either by way of conflicting with an overriding public interest or because it constitutes an abuse of a special relationship between the parties, or both. (See Ciofalo v Vic Tanney Gyms, 10 N.Y. 2d 294, 220 N.Y.S. 2d 962, 177 N.E. 2d 925)"

But, the court did acknowledge that all exculpatory agreements were not invalid when it stated:

"On the other hand, the courts have permitted exculpatory agreements in other contexts. For example, an agreement between a burglar alarm contractor and its customer was upheld in Florence v Merchants Central Alarm, 51 N.Y. 2d 793, 433 N.Y.S. 2d 91, 412 N.E. 2d 1317, where the Court relied on the fact that the agreement was entered into in a commercial setting and expressly noted that there was no special relationship between the parties. See also, Kalisch-Jarcho v City of New York, 58 N.Y. 2d 377, 461 N.Y.S. 2d 746, 448 N.E. 2d 413." [151]

The validity and enforceability of an exculpatory agreement, executed by a patient before receiving radiation therapy at a hospital in the State of Michigan, also received the attention of the Court of Appeals of Michigan in the case of *Cudnik v William Beaumont Hospital*. [152]

In this case, the plaintiff, Joseph Cudnik, received postoperative radiation therapy, at William Beaumont Hospital, after undergoing surgery for prostate cancer. Before receiving the radiation therapy, Cudnik signed a document that stated, in its entirety, as follows:

"I hereby consent to and authorize the physicians and staff of the Department of Radiation Oncology at William Beaumont Hospital to administer to me such radium, X-ray, Cobalt 60, or other radioisotope therapy as may in their professional judgement deem to be necessary.
I have discussed with my physician in the Department of Radiation Oncology, the course of treatment which has been recommended and planned for me and fully understand the benefit that such treatment may provide for me.
Further, my physician in the Department of Radiation Oncology has fully explained to me the possibilities of reactions and the possible side effects of the treatment.
I further understand that there is no guarantee given to me as to the results of radiation therapy. Understanding all of the foregoing, I hereby release the physicians and staff of the Department of Radiation Oncology and William Beaumont Hospital from all suits, claims, liability, or demands of every kind and character which I or my heirs, executors, administrators (sic) or assigns hereafter can, shall, or may have arising out of my participation in the radiation therapy treatment regimen."

The plaintiff, after receiving radiation treatment, returned to Beaumont Hospital complaining of back discomfort, whereupon he was diagnosed as suffering from a post radiation ulcer

151 *Ash v New York University Dental Centre* 164 A.D. 2d 366, 564 N.Y.S. 2d 308 (1990).

152 207 Mich. App. 378, 525 N.W. 2d 891 (1995).

burn, at the site where he received the radiation therapy.

Both the plaintiff and his wife consequently instituted a medical malpractice action against the defendant hospital. The plaintiff subsequently died, but the case was pursued by his estate. The defendant hospital relied upon the exculpatory agreement executed by the deceased before receiving radiation therapy, precluding the hospital from being liable for inherent risks and unforeseen consequences. The defence was upheld by the court of first instance. In a subsequent appeal, the Michigan Court of Appeals consequently considered the validity and enforceability of exculpatory agreements in hospital contracts.

The appeal court first looked at the general recognition of the doctrine of freedom of contract and the sanctity of contract. Consequently, the court held: *"As a general proposition, parties are free to enter into any contract at their will, provided that the particular contract does not violate the law or contravene public policy. Feldman v Stein Building and Lumber Co 6 Mich. App 180, 184, 148 N.W. 2d 544 (1967); Michigan Ass'n. of Psychotherapy Clinics v Blue Cross and Blue Shield of Michigan 101 Mich. App. 559, 573, 301 N.W. 2d 33 (1980)."*

Analysing the standing of exculpatory agreements or releases, in the eyes of the courts in general, the court recognized:

"In a variety of settings, this Court has upheld the validity of exculpatory agreements or releases that absolve a party from liability for damages cased by the party's negligence. (FN3). See Dombrowski v Omer, 199 Mich.App. 705, 502 N.W. 2d 707 (1993) (festival event); Paterek v 6600 Ltd 186 Mich.App. 445, 465 N.W. 2d, 342 (1990) (softball facility); St Paul Fire and Marine Ins Co v Guardian Alarm Co 115 Mich.App. 278, 320 N.W. 2d 244 (1982) (security alarm company)."

But, recognized the Court of Appeals: *"In other cases, however, this Court has declared such agreements unenforceable as being contrary to this state's public policy. See Stanek v Nat'l Bank of Detriot 171 Mich. App. 734, 430 N.W. 2d 819 (1988) (exculpatory clause in a bank's stop payment order held to be invalid on public policy grounds); Allen v Michigan Bell Telephone Co 18 Mich.App. 632, 171 N.W. 2d 689 (1969) (clause limiting liability for damages resulting from a telephone company's failure to include an ad in its Yellow Pages held invalid, because the parties were not in a position of equal bargaining power)."*

The court, however, laid down a prerequisite which ought to be met before such a clause, generally, would be recognized by the courts, namely: *"There is a corollary rule that an exculpatory clause that seeks to absolve a party from liability for its own negligence must*

be clear and unambiguous. American Empire Ins. Co v Koenig Fuel and Supply Co 113 Mich.App. 496, 499, 317 N.W. 2d 335 (1982)."

After analysing the provisions of the exculpatory clauses in this case, the court held the agreement was not void for ambiguity.

The Court of Appeal, however, turned to public interest in deciding the validity and enforceability of exclusionary clauses in medical/hospital contracts.

Relying upon the influence of other jurisdictions the court stated:

"The overwhelming majority of other jurisdictions that have addressed this question have held that such agreements are invalid and unenforceable because medical treatment involves a particular sensitive area of public interest. (FN4) Tunkl v Regents of the University of California 60 Cal.2d 92, 32 Cal.Rptr 33, 383 P.2d 441 (1963); 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 S.E. 2d 99 (1981); Meiman v Rehabilitation Centre, Inc 444 S.W. 2d 78 (Ky.App.1969). Today we join in the view of these jurisdictions."

Although the Court of Appeals did recognise that an exception to the general rule invalidating exculpatory agreements for medical malpractice did exist, namely; medical malpractice involving experimental procedures, nevertheless, the court held the present case did not involve an experimental procedure.

Recognizing the list of factors enunciated in the *Tunkl case supra* as constituting the "public interest", the court of appeal identified the following factors or relevant characteristics, akin to the Tunkl case, affecting public interest.

Firstly: *"It is clear that hospitals and the medical profession have been thought to be suitable for public regulation. (FN5) M.C.L. 333, 21501 et seq.; M.S.A. 14.15 (21501) et seq.; M.C.L. 333. 17001 et seq.; M.S.A. 14.15 (17001) et seq."*

Consequently the court found that: *"The performance of medical services is of great importance to the public, and is a matter of practical necessity for some members of the public. Defendant hospital holds itself out as willing to perform medical services to members of the public."*

Secondly, the court looked at the unequal bargaining position, especially the patient, occupied in the contractual relationship between the patient and the hospital. The court consequently found:

"Defendant hospital certainly possesses an advantage in bargaining strength against any member of the public who seeks its services. (FN6). Defendant hospital presented plaintiff's decedent with the standardized contract of exculpation, without any provision for some other type of protection against negligence. Finally, it is readily apparent that plaintiff's decedent placed himself under the control of defendant hospital, subject to the risk of carelessness by the hospital or its agents."

The court further rejected the hospitals contention that the provision of medical care should be considered a "private affair". The court took a contrary view in declaring: *"The courts have long recognized that the provision of medical care involves issues of public interest. Lewis v State Bd of Dentistry; 277 Mich. 334, 343, 269 N.W. 194 (1936); People v Cramer 247 Mich. 127, 134, 225 N.W. 595 (1929)."*

Relying on the above, the court consequently found that the exculpatory agreement in this case was contrary to public policy and further: *"The exculpatory agreement constitutes a contract of adhesion. (FN7) and is unenforceable. Tunkl supra at 102, 32 Cal.Rptr 33, 383 P.2d 441."* [153]

14.4.1.3 Legal Opinion

The effects of the inclusion of exclusionary clauses or waivers in hospital contracts, alternatively other healthcare providers attempting to relieve themselves from liability for damages flowing from their negligence, are, by and large, settled in the United States of America. Waivers of liability and other attempts at exculpating hospitals/healthcare providers from liability are treated with disfavour by the courts. The rationale for this approach, by both the American legal writers and the courts, stems from the thinking that public interests dictate the performance of such duties in accordance with pre-defined professional and ethical standards, which cannot be compromised. [154]

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153 *Cudnik v William Beaumont Hospital* 207 Mich. App 378, 525 N.W. 2d 891 (1995).

154 For legal writings see Flamm "Healthcare 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; But it is especially, the writers Stetler and Moritz *Doctor Patient and The Law* (1962) 388 who write: *"Generally, a physician cannot avoid liability for negligence, by having a patient sign in advance or a contract containing an exculpatory clause. The obligation of a physician to possess and exercise reasonable care in treating a patient is imposed by law. The physician who undertakes the treatment of a patient cannot therefore avoid that obligation by contract."* See further Winston-Smith "Antecedent grounds of liability in the practise of surgery" *The Rocky Mountain Law Review* Vol. 49 No 2 (1986). For case law see *Tunkl v Regents of the University of California* 80 Cal 2d 92, 32 Cal, RPTR 37, 383 P24 441; *Belshaw v Feinstein* 258 Cal, App 2d 711 65 Cal RPTR 788 (1968); *Leidy v Deseret Enterprises Inc* 252 Pa. Super 162 A. 2d 164 (1977); *Olson v Molzen* 558 S.W. 2d 429 (1997) 429 at 432 (1977); *Emory University v Porubiansky* 248 Ca 391, 282 S.E. 2d 903

In addition, the thinking includes that, as the hospital/other healthcare providers and the patient do not stand upon equal footing, the weaker party, usually the patient would be in a disadvantageous position when entering into the agreement. [155] For that reason, these types of agreements are regarded as unenforceable, by both the writers and the courts.

Besides the fore stated rationale, public policy is often used as a rationale for denouncing these types of clauses, despite these clauses being correctly worded and understood by the patient. The reason there-for stems from the fact that the patient needs to be protected against the deviation from minimum levels of performance, or what is also expressed as, bad medicine. [156]

Public policy and public interests often overlap and are often used in conjunction with each other, in influencing the American courts in pronouncing on the validity of these types of clauses. [157] The American courts have, however, over and over, denounced waivers or

(Supreme Court of Georgia 1981); *Tatham v Hoke* 469 F. Supp 934 (W.D.N.C.) (1979); *Meiman v Rehabilitation Centre* 444 S.W. 2d 78 (KY); *Cudnik v William Beaumont Hospital* 207 Mich. App 378, 525 N.W. 2d 891 (1995).

155 For legal writings see Flamm "Healthcare 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; See also Ginsburg et al "Contractual Revisions to Medical Malpractice Liability Law and Contemporary Problems" Vol. 49 No 2 (1986) who pronounces *"Medical care is a necessity of life over which the superior bargaining power of the provider should not prevail ....."* See further Prosser *Law of Torts* (1971) 48 at 442. For case law see *Tunkl v Regents of the University of California* 80 Cal 2d 92, 32 Cal, RPTR 37, 383 P24 441; *Olson v Molzen* 558 S.W. 2d 429 (1997) 429 at 432 (1977); *Tatham v Hoke* 469 F. Supp 934 (W.D.N.C.) (1979); *Meiman v Rehabilitation Centre* 444 S.W. 2d 78 (KY); *Cudnik v William Beaumont Hospital* 207 Mich. App 378, 525 N.W. 2d 891 (1995).

156 For legal writings see Winston-Smith "Antecedent grounds of liability in the practise of surgery" *The Rocky Mountain Law Review* Vol. 14 June (1942) No 4 288 at 288-291; Ginsburg, Kahn, Thornhill and Gambardella "Contractual Revisions to Medical Malpractice Liability Law and Contemporary Problems" Vol. 49 No 2 (1986). For case law see *Tunkl v Regents of the University of California* 80 Cal 2d 92, 32 Cal, RPTR 37, 383 P24 441; *Leidy v Deseret Enterprises Inc* 252 Pa. Super 162 A. 2d 164 (1977); *Olson v Molzen* 558 S.W. 2d 429 (1997) 429 at 432 (1977); *Emory University v Porubiansky* 248 Ca 391, 282 S.E. 2d 903 (Supreme Court of Georgia 1981); *Tatham v Hoke* 469 F. Supp 934 (W.D.N.C.) (1979); *Meiman v Rehabilitation Centre* 444 S.W. 2d 78 (KY) (1968); *Ash v New York University Dental Centre* 184 A.D. 2d 366, 584 N.Y.S. 2d 308 (1980); *Cudnik v William Beaumont Hospital* 207 Mich. App 378, 525 N.W. 2d 891 (1995).

157 Winston-Smith "Antecedent grounds of liability in the practise of surgery" *The Rocky Mountain Law Review* Vol. 14 June (1942) No 4 288 at 288-291; Ginsburg, Kahn, Thornhill and Gambardella "Contractual Revisions to Medical Malpractice Liability Law and Contemporary Problems" Vol. 49 No 2 (1986). For case law see *Tunkl v Regents of the University of California* 80 Cal 2d 92, 32 Cal, RPTR 37, 383 P24 441; *Leidy v Deseret Enterprises Inc* 252 Pa. Super 162 A. 2d 164 (1977); *Olson v Molzen* 558 S.W. 2d 429 (1997) 429 at 432 (1977); *Emory University v Porubiansky* 248 Ca 391, 282 S.E. 2d 903 (Supreme Court of Georgia 1981); *Tatham v Hoke* 469 F. Supp 934 (W.D.N.C.) (1979); *Meiman v Rehabilitation Centre* 444 S.W. 2d 78 (KY) (1968); *Ash v New York University Dental Centre* 184 A.D. 2d 366, 584 N.Y.S. 2d 308 (1980); *Cudnik v William Beaumont Hospital* 207 Mich. App 378, 525 N.W. 2d 891 (1995).

exculpatory clauses in hospital contracts as invalid and unenforceable, due to them being contrary to public policy. The Supreme Court of California, as long ago as 1963, in the case of *Tunkl v Regents of the University of California,* [158] designed a test to determine when an exculpatory agreement violates public policy. The criteria formulated include:

> *"(1) the agreement concerns an endeavour of a type generally thought suitable for public regulation;*
>
> *(2) 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;*
>
> *(3) such party holds itself out as willing to perform this service for any member of the public who seeks it, or at least for any member of the public coming within certain established standards;*
>
> *(4) the party seeking the exculpation possesses a decisive advantage of bargaining strength against any member of the public who seeks the services;*
>
> *(5) in exercising a superior bargaining power, the party confronts the public with a standardized adhesion contract of exculpation and makes no provision whereby those receiving services may pay additional reasonable fees and obtain protection against negligence; and*
>
> (6) *The person or members of the public seeking such services must be placed under the control of the furnisher of the services, subject to the risk of carelessness on the part of the furnisher, its employees, or its agents."*

In this case, the court emphasized the fact that, as the treatment of patients was governed by the *California Health and Safety Code* and therefore, subject to public regulation, the hospital-patient contract clearly fell within the category of agreements affecting the public interests. Public interests, on the other hand, according to the court, dictated that, as the public was in special need of medical care, the duty of care was part of the social fabric. The court also considered the unequal bargaining position of the patient in relation to the hospital and found that the hospital exercised a decisive advantage in bargaining, with the patient being given no room for debate regarding the terms of the contract. The court, consequently, held that to immunize the hospital from negligence would be abhorrent to medical ethics and contrary to the regulations, therefore in conflict with public interests. Moreover, the court held that such agreements were contrary to public policy and unenforceable.

The principles of the *Tunkl case* have, since, been followed in the different states of the United States of America, on numerous occasions. In one of the first cases, in the matter of *Belshaw v Feinstein*, [159] the court, in following the principles enunciated in the Tunkl case

158 60 Cal. 2d 92, 32 Cal RPTR, 37, 383 P 2d 441 (1963).

159 258 CAL. App 2d 711, 65 CAL RPTR 788 (1968).

and applying the criteria laid down by the court, held that; as the agreement defined the regulations governing the hospital-patient relationship, the terms of the agreement clearly involved public interest, in that the parties were, in the first place, in an unequal bargaining position, with the hospital being in a stronger position, and secondly, in conflict with public regulations, the hospital being obliged to deliver much needed standard of care and skill to patients. Consequently, the court held that the agreement was void.

In a subsequent case, in the matter of *Leidy v Deseret Enterprises Inc,* [160] the court considered whether a clause purporting to release the Spa from liability for injuries resulting from its negligence was unconscionable. The court attached significant weight to the sensitivity displayed by the courts, to public interest, in considering contracts that involved health and safety. The court also considered the aims of statutory provisions, in the protection of human life and the practice of safe medicine, and, stated acts having a tendency to be injurious to public good, as they were inimical to the public interest. Therefore, where public policy required the observance of a statute, it could not be waived. Because the legislature recognized that a physical therapist was, in a sense, part of the medical profession, the duties of the therapist were akin to that of a doctor, namely; to do, *inter alia,* no wrong to the patient. The exculpatory clause was consequently ruled to be unconscionable and contrary to public policy.

In the case of *Olson v Molzen,* [161] the court, in determining whether exculpatory contracts were invalid, formulated the following factors, namely:

"(1) whether the transaction concerns business of a type suitable for public regulation and performing service of importance to the public;

(2) Whether a party invoking exculpation, possesses decisive advantage of bargaining strength and, in exercising superior bargaining power whether the public, as a result of the transaction, is placed under the control of the party seeking exculpation of which the inferior party agrees to the risk of carelessness."

The court recognized that public policy favoured the utmost freedom to contract, even where it was against liability for negligence. But, asserted the court, notwithstanding the doctrine of freedom to contract, there were certain contracts, which due to public interest, did not fall into the category which favoured the protection of the doctrine of freedom of contract. It was, especially, in contracts involving professional people, subject to licensure

160 252 PA Super 162, 381 A.2d 164 (1977).

161 558 S.W. 2d 429 (Tenn.S.Ct 1977).

by the State, that such protection would not befall the party relying upon an exclusionary clause. The court also drew a distinction between ordinary business transactions and that of professional persons, who, as a result of their status, acquired greater responsibility than that of an ordinary person. Any exclusion, under these circumstances, avoiding liability was obnoxious. Relying, as well, on the inequality of bargaining power between the parties, the court, with reference to the work of Prosser, *The Law of Torts* (1971) 68, at 442 and *Williston on Contracts* (1972) Para 179, held that; where one party was at such obvious disadvantage in bargaining power, but nonetheless because he/she entered into the agreement effect must be given thereto, that would be to put the weaker party at the mercy of the other's negligence. The court, consequently, concluded that a professional person should not be permitted to hide behind the protective shield of an exculpatory contract and thus, procure a license to commit negligence in professional practice.

Subsequent to this case, the Supreme Court of Georgia, in the case of *Emory University v Porubiansky,*[162] also considered whether an exculpatory clause in a dental contract was invalid as against public policy. The court firstly, looked at the American court's general approach in recognizing the doctrine of freedom of contract. The court, consequently, repeated the general approach by the courts, namely, the courts must exercise extreme caution in declaring a contract void as against public policy and should do so only in cases free from doubt and where an injury to the public interest clearly appears. The court also recognized that, in certain instances, statutory prohibitions placed clear restrictions on exemption clauses indemnifying a party from liability arising from his/her own negligence. The court, consequently, looked at the physician-patient relationship and found that the relationship was founded upon public consideration. The court also found that the practise of dentistry was a regulated profession, licensed by the State. The regulations, in turn, laid down minimum standards which had to be observed and exercised. This, the court regarded as a public duty. The court quoted, with approval, the principle adopted in the Tunkl case, namely:

"A professional person should not be permitted to retreat behind the protective shield of an exculpatory clause and insist that he or she is not then answerable for his or her own negligence. We do not approve the procurement of a license to commit negligence in professional practice..... "

Consequently the court concluded:

"We find that it is against the public policy of this state to allow one who procures a license to practise dentistry

162 248 GA 391, 282 S.E. 2d 903 (Supreme Court of Georgia 1981).

to relieve himself by contract of the duty to exercise reasonable care ....."

In the case of *Tatham v Hoke* [163] the court, concerning a medical contract involving an abortion, resulting in subsequent hospitalisation and surgical treatment, considered the validity of an exclusionary clause, exonerating a physician from professional liability arising from his negligence, causing the injuries. The court, with reference to legal writings, identified factors which courts ought to consider before exculpatory contracts were declared unenforceable. The included situations were:

"(a) significantly regulated by public authority;

(b) holds himself out to the public as willing to perform the sort of services subject to such regulation;

(c) purports to be capable of performing those services in conformity with the standard of care established in the community;

(d) provides the services in an atmosphere suggestive of unequal bargaining power; and

(e) subjects the patient to precisely the sort of risk made the subject of the exculpatory agreement."

The court, consequently, held that the medical services provided by the defendant to the public were of public interest. The court also looked at the effect of the licensing requirements, including and established care which medical doctors owed their patients and the public at large. The court held that any breach of such an obligation was contrary to public policy. Moreover, the agreement entered into was unenforceable.

The Kentucky Court of Appeals, in the case of *Meiman v Rehabilitation Centre,* [164] also considered the validity of exculpatory clauses in medical contracts. More particular, the court looked at the standard form contract of a rehabilitation centre, including an exemption clause.

The court acknowledged that, generally, a party may contract against his responsibility, but this may be done neither where neither a public duty was owed, nor where such agreement affected the public interest. The court considered the exculpatory agreement, sought to be enforced, between the dental clinic and patient and found that the service rendered implicated State interest in the health and welfare of its citizens. The court also considered the special relationship between doctor and patient. The court, consequently, held that, in

163 469 F. Supp 934 (W.D.N.C.) (1979).

164 444 S.W. 2d 81 (KY. 1969).

such instances, it was in public interest that medical care was provided in a safe and professional manner. The court also considered the licensing effect, which licensure imposed upon physicians and other health care professionals and concluded that it prevented any untoward consequences to the public, flowing from the conduct of the physician. The court held that minimum standards of professional care had to be observed. Consequently, the court, with reference to standards to be maintained at clinics, held:

"There cannot, however, be any justification for a policy which sanctions an agreement which negates the minimal standards of professional care which have been carefully forged by State regulations and imposed by law."

The court also weighed up the principle of freedom of contract and the welfare of people. Consequently the court, in choosing the latter, stated:

"That freedom of contract may be said to be affected by the denial of the right to make such agreements, is met by the answer that the restriction is but a salutary one, which organized society exacts for the surer protection of its members. While it is true that the individual may be the one, who, directly, is interested in the making of such a contract, indirectly, the state, being concerned for the welfare of all its members, is interested in the maintenance of the rule of liability and in its enforcement by the courts. Johnson v Fargo, 184 N.Y. 379, 77 N.E. 388."

The court also drew a clear distinction between ordinary commercial agreements and agreements governed by professional relationships, when considering whether agreements were contrary to public policy, when it held:

"The public policy considerations here are buttressed by the independent obligations owed by defendants to plaintiff arising from the physician-patient relationship between them. This relationship imposes upon the health care provider greater responsibilities that required in the ordinary commercial market place. In the context of that professional relationship "a provision avoiding liability is peculiarly obnoxious." (15 Williston on Contracts (3rd ed. 1972) section 1751)"

The court, in motivating the denouncement of these types of clauses, held: *"..... thus even aside from the deleterious effect which a decision upholding such an agreement could have on the public at large, the individual responsibility bestowed upon defendants by the physician-patient relationship, in the context of the disadvantageous position from which plaintiff necessarily entered into the agreement, militates strongly against its propriety."*

The court consequently laid down the following golden rule, that in some instances such an agreement may be valid, but that, in no event, can such an exculpatory agreement be upheld where, either:

"(1) the interest of the public requires the performance of such duties; or

(2) Because the parties do not stand upon a footing of equality, the weaker party is compelled to submit to the stipulation."

The court concluded that the exculpatory contract relied upon was invalid as being against public policy.

More recently in the case of *Ash v New York University Dental Centre*, [165] the court was again confronted in dealing with the invalidity of a dental agreement, between the dental patient and the dental centre. The court commenced its assessment of the validity of these types of agreements by stating that; these types of agreements have long been frowned upon and required close judicial scrutiny. The court laid down the general approach by the courts, when it stated:

"Because exculpation provisions are not favoured by the law, they are strictly construed against the party relying on them and must be unambiguously expressed in unmistakable language that is clear and explicit in communicating the intention to absolve from negligence the party seeking to be insulated from liability. (Gross v Sweet, supra; Ciofalo v Vic Tanny Gyms, 10 N.Y. 2d 294, 220 N.Y.S. 2d 962, 177 N.E. 2d 925; Boll v Sharp and Dohme, 281 App. Div. 568, 121 N.Y.S. 2d 20, aff'd., 307 N.Y. 646, 120 N.E. 2d 836)"

Referring to the influence of public policy in respect of exculpatory clauses the court stated: *" ..... it has been held that even an agreement that clearly and unambiguously attempts to exempt a party only from liability for ordinary negligence will not be enforced by the courts of this State, if it is found to violate public policy either by way of conflicting with an overriding public interest or because it constitutes an abuse of a special relationship between the parties, or both. (See Ciofalo v Vic Tanney Gyms, 10 N.Y. 2d 294, 220 N.Y.S. 2d 962, 177 N.E. 2d 925)"*

The validity and enforceability of an exculpatory agreement, executed by a patient before receiving radiation therapy, at a hospital in the State of Michigan, also received the attention of the Court of Appeals of Michigan, in the case of *Cudnik v William Beaumont Hospital*. [166]

The court, firstly, gave recognition to the doctrine of freedom and sanctity of contract when it stated: *"As a general proposition, parties are free to enter into any contract at their will, provided that the particular contract does not violate the law or contravene public policy. Feldman v Stein Building and Lumber Co 6 Mich. App 180, 184, 148 N.W. 2d 544 (1967); Michigan Ass'n. of Psychotherapy Clinics v Blue Cross and Blue Shield of Michigan 101 Mich. App. 559, 573, 301 N.W. 2d 33 (1980)."*

165 164 AD 2d 346, 564 N.Y.S. 2d 308 (1990).

166 207 Mich. App. 378, 525 N.W. 2d 891 (1995).

The court recognised, however, that there were instances wherein courts would rule against the validity of these types of clauses, namely, where they were deemed to be contrary to public policy.

The court, however, laid down a prerequisite, which ought to be met before such a clause, generally, would be recognized by the courts, namely: *"There is a corollary rule that an exculpatory clause that seeks to absolve a party from liability for its own negligence must be clear and unambiguous. American Empire Ins. Co v Koenig Fuel and Supply Co 113 Mich.App. 496, 499, 317 N.W. 2d 335 (1982)."*

The Court of Appeal, however, turned to public interest in deciding the validity and enforceability of exclusionary clauses in medical/hospital contracts. Relying upon the influence of other jurisdictions, the court stated:

"The overwhelming majority of other jurisdictions that have addressed this question have held that such agreements are invalid and unenforceable because medical treatment involves a particular sensitive area of public interest. (FN4) Tunkl v Regents of the University of California 60 Cal.2d 92, 32 Cal.Rptr 33, 383 P.2d 441 (1963); 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 S.E. 2d 99 (1981); Meiman v Rehabilitation Centre, Inc 444 S.W. 2d 78 (Ky.App.1969). Today we join in the view of these jurisdictions."

The court relied upon the list of factors enunciated in the *Tunkl case* and identified the following factors akin to the *Tunkl case* affecting public interest, namely:

Turning to public regulation the court held: *"The performance of medical services is of great importance to the public, and is a matter of practical necessity for some members of the public. Defendant hospital holds itself out as willing to perform medical services to members of the public."*

The court also looked at the unequal bargaining power between the patient and the hospital and consequently found:

"Defendant hospital certainly possesses an advantage in bargaining strength against any member of the public who seeks its services. (FN6). Defendant hospital presented plaintiff's decedent with the standardized contract of exculpation, without any provision for some other type of protection against negligence. Finally, it is readily apparent that plaintiff's decedent placed himself under the control of defendant hospital, subject to the risk of carelessness by the hospital or its agents."

The court further rejected the hospitals contention that the provision of medical care should be considered a "private affair". The court took a contrary view in declaring: *"The courts*

have long recognized that the provision of medical care involves issues of public interest. Lewis v State Bd of Dentistry; 277 Mich. 334, 343, 269 N.W. 194 (1936); People v Cramer 247 Mich. 127, 134, 225 N.W. 595 (1929)."

The court consequently found that the exculpatory agreement, in this case, was contrary to public policy.

14.5 **Adjudication of exclusionary clauses in hospital contracts in present context**

The South African courts' approach to the adjudication of exclusionary clauses in hospital contracts is embraced in the Supreme Court of Appeal judgement of *Afrox Healthcare Bpk v Strydom*. [167] The Supreme Court of Appeal, per Brand JA, as previously discussed, decided the case on a number of grounds, including, the common law and constitutional law. For the present purpose, in embarking on a critical discussion of the dictum, it will be useful to repeat briefly how the court went about assessing whether such a clause is invalid and unenforceable, as advanced by the respondent.

Insofar as the common law is concerned, in assessing whether such a clause is invalid and unenforceable, owing to the clause being contrary to public policy, the court looked at public interest. Whilst the court accepted that, as a general rule, a contractual provision which is unfair on the basis that it is in conflict with the public interest, is legally unenforceable, the court, with reference to a number of cases, [168] nonetheless, cautioned that the power bestowed on the courts to declare contracts contrary to public policy should be exercised sparingly and only in the clearest of cases. The court also emphasized the reason for such an approach lies in the fact that public policy, generally, favours the utmost freedom of contract. The court, in assessing the general use of exclusionary clauses or indemnity clauses in the South African Law of Contract, stated that these types of clauses are valid and enforceable and adds that these types of clauses have become the rule, rather than the exception, in standard contracts. The court, however, did acknowledge that there may be specific exclusionary clauses (without naming any) which may be declared against public interest and therefore unenforceable. The court, consequently, dealt with the three grounds upon which the respondent based his arguments to show that an exclusionary clause, in hospital contracts, is in conflict with public interests. The court, firstly,

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167 2002 (6) SA 29 (A).

168 *Sasfin (Pty) Ltd v Beukes* 1989 (1) SA 1 (A); *Botha (now Griesel) and another v Finanscredit (Pty) Ltd* 1989 (3) SA 773 (A); *Brummer v Corfil Brothers Investment (Pty) Ltd en Andere* 1999 (3) SA 789 (SCA) at 420ff; *De Beer v Keyser and Others* 2002 (1) SA 827 (SCA) at 837C-E; *Brisley v Drotsky* 2002 (4) SA (1).

considered the uneven bargaining position between the hospital and patient. The court found, as a general rule, that even where, on the face of an agreement, it appears that an unequal bargaining position exists between the parties, with the strongest party, been advantaged, it does not necessarily justify a conclusion that the agreement is in conflict with the public interests. But the court does acknowledge that unequal bargaining power is indeed a factor which, together with other factors, can, in certain instances, play a role in considerations of the public interest. But, the court held that no evidence to that effect was led by the respondent in the court a quo.

Turning to the second ground of the respondent's objection, namely, that the hospital and its staff had a duty to provide medical treatment in a professional and careful manner and could, therefore, not indemnify the hospital and its staff from liability for damages arising from negligence, including gross negligence. In this regard, the court held that although there is academic support [169] that the indemnification of a hospital against gross negligence of its nursing staff would be in conflict with the public interest, Brandt JA nonetheless held that in the absence of such allegation in the pleadings, the court could not, *mero motu,* make such a finding. The court, relying on case law, [170] then found that the clause in the contract, providing for indemnification, should be interpreted so as to exclude gross negligence. Also at common law, the court considered good faith as an alternative basis of the respondent's case. The court rejected the argument, advanced on behalf of the respondent, in relying on good faith, reasonableness, fairness and justice. The court concluded that abstract terms such as good faith, reasonableness, fairness and justice should not be used by our courts as an independent or 'free-floating' foundation for the setting aside of contractual provisions. [171] The court also held that, although these abstract considerations represent the foundation of legal rules, but they are not, in themselves rules of law.

The court further dealt with the general defences of misrepresentation and mistake. The court noted the evidence of the respondent, which included, that he signed the admission document without reading it and that the respondent's attention was not drawn to the exclusionary clause. The court also found, as a fact, that the respondent was not aware of the contents of the exclusionary clause contained in clause 2.2 when he entered into the

169 Strauss *Doctor, Patient and the Law* (1991) 305.

170 *Wells v South African Alumenite Company* 1927 (AD) 65.

171 The court referred as authority for this view to the decision in *Brisley v Drotsky* 2002 (4) SA 1 (SCA).

agreement. On the evidence that the respondent conceded that he had full opportunity to read the document, Brandt JA subsequently found that, in these circumstances, the fact that the respondent signed the document without reading it; it does not mean, as a rule, that he is not bound by its contents. [172]

The respondent also relied on the exception to the *caveat subscriptor* rule in that the admissions clerk had a duty to inform him of the contents of clause 2.2 and, the clerk's failure to do so, rendered the exemption clause invalid and inoperative. The respondent conceded, however, that as a general principle, there is no legal duty upon a contracting party to inform the other contracting party of the contents of their agreement. The respondent also contended that a primary duty of the hospital was to supply medical and professional services in a professional manner, it is for that reason that he did not expect that the applicant would try to indemnify itself against the negligence of its own nursing personnel. Although the court found that there were exceptions to the *caveat subscriptor* rule, Brandt JA, nonetheless, found the subjective expectations, of the respondent, concerning what ought to be incorporated into the contract between himself and the applicant, played no role in the question of whether there was a duty, on the admission clerk, to point out the exemption clause in 2.2 to him. What is of relevance here, stated Brandt JA, is whether such an exemption clause, contained in clause 2.2, could reasonably be expected or, if it was objectively speaking, unexpected.

Brandt JA's reply to this was that the indemnity clause contained in clause 2.2, as is the case with many other forms of indemnity clauses, are presently the rule, rather than the exception in standard contracts, these days. For that reason, the court consequently held there was no reason, in principle, to distinguish between private hospitals and suppliers of other services. For that reason, the court held, that, objectively speaking, it cannot be said that the provision of clause 2.2 was unexpected. There was, therefore, no duty, said Brandt JA, upon the admissions clerk to bring the clause to the attention of the respondent.

Now that consideration was given to the court's approach to the common law in deciding the validity of indemnity clauses in hospital contracts, the court's approach to constitutional principles will also be looked at.

To the ground advanced by the respondent that, as the appellant was a provider of medical services, it would generally be impermissible for providers of medical services to add an

[172] Brandt JA in this regard relied on the case of *Burger v Central South African Railways* in which it was held that a person who signs an agreement without reading it does so at his own risk and is consequently bound thereby as though he were aware of its provisions and expressly consented thereto.

exclusionary clause in a standard contract, Brandt JA noted that the respondent did not rely on the fact that clause 2.2 directly violates the constitutional values entrenched in section 27(1) (a) of the Constitution. The court held that, even if it was accepted that section 27(1) (a) is horizontally applicable in terms of section 8(2) of the Constitution, and therefore, binding on private hospitals, nevertheless, clause 2.2 does not prohibit the access of any person to the hospital. For that reason, the court rejected the argument that clause 2.2 was in conflict with the spirit, purport and object of section 27(1) (a) and therefore contrary to the public interest.

Brandt JA also found that, as clause 2.2 was enforceable prior to the Constitution coming into effect on 4 February 1997, it was still applicable, and as the Constitution has no retrospective power. In this regard, the court considered that the agreement between the parties arose on 15 August 1995, prior to the Constitution coming into being. The court found, therefore, that transactions which were valid when the Constitution commenced are, therefore, not rendered invalid retrospectively. Brandt JA also found there was no matching provision in the interim Constitution.

Turning to whether the hospital had complied with the provisions of Section 27(1)(a) of the Constitution, namely, the right to adequate healthcare, Brandt JA held that the exclusionary clause, contained in clause 2.2, did not stand in the way of patients accessing medical services. Concerning adequate healthcare, Brand JA found that the hospital placed reliance on legally acceptable conditions in providing medical services. The court also found that clause 2.2 was not in conflict with the values embodied in section 27(1) (a) and, therefore, not in conflict with public policy. Besides, the court found that the nursing staff was already bound by their own professional code and they were subject to the statutory authority of their professional body, who could discipline them. Brandt JA also found that negligent acts by the appellant's nursing staff would not be in the interests of the appellant's reputation and competitiveness as a private hospital

The court also found that section 27(1) (a) was not the only constitutional value applicable to this case. Consequently, the court quoted the Supreme Court of Appeal's [173] attitude when approaching these types of cases, namely:

"The constitutional values of dignity and equality and freedom require that the courts approach their task of striking down contracts or declining to enforce them with perceptive restraint ..... contractual autonomy is part of freedom. Shorn of its obscene excesses, contractual autonomy informs also the constitutional value of

[173] *Brisley v Drotsky* 2002 (4) SA 1 (SCA).

dignity."

Moreover, Brandt JA, in turn, emphasized that the constitutional nature of contractual freedom embedded the principle of *pacta sunt servanda*. For that reason the court added, contracts freely entered into, by voluntary [174] and competent parties, must in public interest, be enforced. For that reason, the court consequently rejected the argument, by the respondent, that the indemnity clause in the hospital contract was contrary to the public interests. Turning to section 39 of the Constitution, the court rejected the idea that section 39 of the Constitution enjoins every court to develop common law or customary law. In this regard, the court also rejected the broadening of the *stare decisis* rule by invoking section 39(2) of the *Bill of Rights*. Brand JA, in this regard, relied heavily on the thinking of Kriegler JA, in the case of *Ex parte Minister of Safety and Security and Others and in S v Walters and another,* [175] where stated:

"The Constitution enjoins all courts to interpret legislation and to develop the common law in accordance with the spirit, purport and objects to the Bill of Rights. In doing so, courts are bound to accept the authority and the binding force of application decisions of higher tribunals." [176]

The court consequently held:
"High Courts are obliged to follow legal interpretations of the SCA, whether they relate to constitutional issues or to other issues, and remain so obliged unless and until the SCA, itself decides otherwise or this Court does so in respect of a constitutional issue."

Brand JA; consequently, found that a High Court was not empowered by section 39(2) to depart from the decisions of the Supreme Court of Appeal, whether they are pre- or post-constitutional.

But, stated Brand JA, section 39(2) of the *Constitution* must be read in conjunction with section 173. The latter section dealt with the inherent competence of the High Court, together with the Supreme Court of Appeal and the Constitutional Court, to develop the common law. But, despite the competence of the courts to develop the common law, the *stare decisis* held sway before the introduction of the Constitution. But, according to Brand JA, the *stare decisis* rule had not been set aside by the *Constitution* and was still relevant today. The rationale for the retention of the *stare decisis* rule was said, by Brand JA, to lie

174 *SA Sentrale Ko-op Graan Maatskappy Bpk v Shifren en Andere* 1964 (4) SA 761 (A).

175 2002 (4) SA 613 (CC).

176 *Ex parte Minister of Safety and Security and Others: In re S v Walters* 2002 (4) SA 613 (CC).

in the fact that, to deviate from the decisions of the Supreme Court of Appeal would lead to a lack of uniformity and certainty.

Consequently, the court having considered the common law and constitutional court principles and values, held that the respondent was bound to the terms of the clause as if he had read it and expressly agreed to it. The appeal consequently succeeded with costs.

14.6 **Proposed adjudication of exclusionary clauses in hospital contracts**

It is submitted, with the greatest respect, that the decision of the Supreme Court of Appeal in the case of *Afrox* was, for the reasons set out hereunder, wrongly decided. The approach adopted by Brandt JA, in delivering the judgment on behalf of the court, leads one to believe that the Supreme Court of Appeal was reluctant to depart from the antiquated views of the contexts in which the law of contract operates and embrace a new ethos based on fairness, reasonableness and justice and, in so doing, promote the values enshrined in the new constitutional order. Consequently, the discourse surrounding the criticism of this judgement will take place on three frontiers, including medical ethics, the common law and constitutional law.

The doctor/hospital-patient relationship has, historically, governed the behaviour of the parties *inter partes* and continues to do so today. The doctor/hospital-patient relationship has also been central to the practise of medicine and continues to be the position today. One feature of the said relationship is the promotion and maintenance of medical standards in which, *inter partes,* the interests of the patient are advanced. What arises from this relationship is also an obligation and commitment not to deviate from the standard of conduct. This means, they are not to harm the patient in any way. The nature of the relationship between the doctor/hospital-patient has also been shaped by a strong commitment to long-standing principles of medical ethics, in which conscience and the intuitive sense of goodness, public conscience, responsibility, the Hippocratic Oath, the sanctity of life and bodily integrity, play a major role.

The relationship is also said to be founded upon trust and respect and which, together with normative ethics, greatly influence the said relationship. Normative ethics, on the other hand, entail the responsibility of medical practitioners and hospitals to comply with standards of conduct, including moral principles, rules, rights and virtues. [177] Normative

[177] Several writers internationally, (including South Africa) have written extensively about the influence of the doctor/hospital-patient relationship. See Michael A Jones - *Medical Negligence* (1998) 18. Mason and McCall Smith *Law and Medical Ethics* (1991) 14-17 who believe that in the doctor/patient relationship, medical ethics play an important role in that: *"trust and respect continue to influence the relationship."* See further Ficarra

ethics, in the form of codes/regulations, are also viewed as a protective measure of human rights, namely, to do the patient no harm and to act, always, in the best interests of the patient. [178]

What have also emerged, especially during the modern era, are the renewed interests in the fiduciary nature of the doctor-patient relationship. In this relationship, the doctor/hospital has an obligation to their patients to act with utmost good faith and not to allow their

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"Ethics in Legal Medicine" A Chapter dedicated to Sanbar, Gibofsky, Finestone and Leglang *Legal Medicine* (1995) 147ff who states that as medicine operates in an ethical climate *"it is essential that ethical principles be applied to the physician-patient interaction."* See also Skegg *Law, Ethics and Medicine* (1988) 8. Beauchamp and Childress *Principles of Bio-Medical Ethics* (2001) 1-7, 27 hold the view that normative ethics have enjoyed a remarkable degree of continuity from the days of Hippocrates until the 20th century. According to the writers, normative ethics include the responsibility of medical practitioners to comply with *".... standards of conduct, including moral principles, rules, rights and virtues."* A violation of these norms *"..... Without having a morally good and sufficient reason"* constitutes immoral or improper conduct. The writers state that in addition thereto, health professionals and scientists are also given moral direction which comes through *"the public policy process, which includes regulations and guidelines promulgated by government agencies, the aim of which is to govern a particular area of conduct"* which includes *"abstaining from causing harm to others."* The latter thinking, it is submitted, corresponds with the position in South Africa today. The regulations published in the *Government Gazette on the 1st February 1980 No 2948 No 6832* regulate the reasonable degree of care and skill which has to be maintained by private hospitals in maintaining a license held by the licensure. One of the relevant regulations 25(23) requires that: *"All services and measures generally necessary for adequate care and safety of patients are maintained and observed."* Veatch *Medical Ethics* (1997) 21 views the codes regulating the conduct of medical practitioners as a "social contract" between the practitioners and the patients in which the practitioners pledge to *" ..... act to benefit their patients....."* For the nature and scope of ethics see Strauss SA "Ethics in the Treatment of Mental Patients: Some Aspects" in Van Wyk C and Van Oosten H (Eds) Nihil Obstat: *Feesbundel vir WJ Hosten/Essays in Honour of WJ Hosten* (1996) 181. Steyn The Law of Malpractice Liability in Clinical Psychiatry *Unpublished LLM Dissertation Unisa* (2003) 67-68 defines ethics as *"the science of rules of moral conduct which should be followed because they are good in themselves."* According to Steyn (1943) 67 *"ethical considerations can never be excluded from the administration of Justice, which is the end and purpose of all civil law."* With reference to the functions of the Health Professions Council of South Africa Steyn (2003) 68 Strauss opines that *"ethical rules certainly do have a significant degree of enforceability."* Steyn (2003) 68 correctly, it is submitted, points out that the set of standards of practice born from ethics and law are *"reinforcing and enriching"*. See also the very informative writings of Carstens and Pearmain *Foundational Principles of South African Medical Law* (2007) 458ff.

178 Skegg (188) 8 endorse the idea when he states: *"The conduct of doctors is circumscribed by public conscience."* Mason and McCall Smith (1991) 7 attach great value to public conscience and warn that *"the practice of medicine cannot be conducted solely on the basis of the individual conscience; the conduct of doctors is circumscribed by the public conscience ..... "It* is against this ethical background that the validity of exclusionary clauses in hospital contracts will be investigated as means to determine ultimately whether the exclusion of negligence in hospital contracts favours public attitudes. Put differently, whether regulating the relationship with the patient in this way, does not constitute an improper derogation from an area of legitimate public concern. See also 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) 18 *SAPR/PL* 449-451 who, with South Africa's acquired status as a constitutional state, view the role of normative medical ethics in the form of codes/instruments as "a protective measure of human rights" in that "to do no harm" and "to act in the best interest of the patient". In this regard with reference to disclaimers against medical negligence in hospital contracts which forms the core of the research of this thesis. Carstens and Kok (2000) 450 persuasively argue: *"..... disclaimers against medical negligence in hospital contracts would amount to an unreasonable/unfair/unethical acceptance on the part of a patient to contract to the possibility of harm (in the form of personal injury/death resulting from medical malpractice) by an attending medical practitioner (albeit in the hospital setting) who is ethically bound not to harm."*

personal interests to conflict with their professional duty. [179] Instead of embracing the principles enunciated hereinbefore, which have been part of the medical profession, worldwide, for many centuries, the Supreme Court of Appeal, embracing the doctrine of freedom of contract, chose to accentuate the application of exclusion clauses, in, especially, hospital contracts, which seek to protect the medical practitioner/hospital against mishaps occurring in connection with the conduct of the practitioner, the hospital's nursing staff or doctors employed by the hospitals. Accentuating the latter, it is respectfully submitted, is to ignore societal dictates which demand that, in executing his/her profession, the medical practitioner/hospital ought not be allowed to relax the degree of care and skill expected of him/her as a practitioner, alternatively, if it is a hospital, despite the patient consenting thereto. In allowing this, it is submitted, the court ignored the long-standing principles of medical ethics, in which public conscience and the doctor/hospital's responsibility towards the patient play a major role. [180]

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179 What has also emerged in more modern times is a reviewed interest in the fiduciary nature of the doctor-patient relationship in which the said relationship is one of trust and confidence and in which doctors have an obligation to their patients to act with utmost good faith and loyalty and not to allow their personal interests to conflict with their professional duty. See Picard and Robertson (1996) 4 who emphasize the fiduciary nature of the relationship. The Canadian Courts in particular have also emphasized the fiduciary nature of the relationship. In the case of *Norberg v Wynrib* 1992 72 D.L.R. (4th) 448 See McLachlin J deciding on a damages claim arising from sexual exploitation by the doctor and the patient expresses himself as follows: "*The relationship of physician and patient can be conceptualized in a variety of ways. It can be viewed as a creature of contract, with the physician's failure to fulfill his or her obligations giving rise to an action for breach of contract. It undoubtedly gives rise to a duty of care, the breach of which constitutes the tort of negligence. But perhaps the most fundamental characteristic of the doctor-patient relationship is its fiduciary nature. I think it is readily apparent that the doctor-patient relationship shares the peculiar hallmark of the fiduciary relationship - trust, the trust of a person with inferior power that another person who has assumed superior power and responsibility will exercise that power for his or her good and only for his or her good and in his or her best interests. Recognizing the fiduciary nature of the doctor-patient relationship provides the law with an analytic model by which physicians can be held to the high standards of dealing with their patients which the trust accorded them requires."* Academic writers have expressed strong views in favour of the fiduciary aspects of medical practice and in particular its usefulness in providing *"a dynamic tool for reshaping the doctor-patient relationship as means to finding a proper balance in the discourse between patient and doctor."* See Chapman (1984) 140 who describes the fiduciary relationship between the doctor and patient as *"..... One in which the patient's interests are placed first and foremost in the time-honoured traditions of service, duty and honour."* See also Picard and Robertson (1996) 4.

180 The principles founded in medical ethics is said to be influenced by societal dictates in which public conscience is foundational. Skegg (188) 8 endorse the idea when he states: *"The conduct of doctors is circumscribed by public conscience."* Mason and McCall Smith (1991) 7 attach great value to public conscience and warn that *"the practice of medicine cannot be conducted solely on the basis of the individual conscience; the conduct of doctors is circumscribed by the public conscience ..... "It* is against this ethical background that the validity of exclusionary clauses in hospital contracts will be investigated as means to determine ultimately whether the exclusion of negligence in hospital contracts favours public attitudes. Put differently, whether regulating the relationship with the patient in this way, does not constitute an improper derogation from an area of legitimate public concern. The responsibility required of the medical practitioner/hospital takes centre stage in medical ethics. Hans *The Imperative of Responsibility* (1984) 6, 90-95 regards responsibility as the centre of the ethical stage which is borne out by the cliché "he is responsible, because he did it." The significance thereof according to Hans, is the doer must answer for his deed and is thus responsible for its consequences. So strong is his belief in the intrinsic value of responsibility that he argues: *".... responsibility is as unconditional and irrevocable as any posited*

It is further submitted that, as the doctor/hospital stand in a trust position in relation to the patient, in which the doctor/hospital, through his/her/its expert knowledge, dominates the relationship and in which the patient is dependant upon the doctor/hospital's judgement and conduct, societal dictates demand that, in executing his/her/its professional duties, the doctor/hospital ought not be allowed to relax the degree of care and skill expected of him/her/it. It has been said, on many occasions, and needs to be said, over and over again, to allow the relaxing of standards of skill and care would be tantamount to giving the patient the authority to licence the medical practitioner/hospital to deviate from recognized norms and ethics.

Put differently, the court ignored the modern day approach wherein significant value is attached to social and moral values, as well as the constitutionally acquired values founded upon fairness, reasonableness and equity.

It is respectfully submitted that, should the patient be allowed to abandon a potential claim for damages, flowing from the negligent conduct of a doctor or hospital, this will result in the medical practitioner/hospital being given a license to practise negligently. Should this be allowed, the doctor and/or nursing staff of the hospital may, easily, abuse such abandonment of rights by getting the patients to sign exclusionary clauses. To allow such practise, it is submitted further, will result in recognition being given to the breach of the position of trust, which the doctor/hospital occupies, arising from his/her/its expert knowledge.

After all, as was previously stated, members of the public have, throughout decades, expected to be treated in a professional manner and in accordance with the degree of care and skill set for members of that profession. Once the court acknowledges that the health care professionals are ethically obliged, by their professional rules, to take due and proper care and to exercise their professions with diligence, it is unfortunate and regrettable that Brandt JA rejected the argument that clause 2.2 would promote negligent and unprofessional conduct, on the part of the nursing staff, as being built on a *non sequitur*,

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by nature can be ..... "See also Van Niekerk "Ethics for Medicine and Medicine for Ethics" *SAFR J. Philos* 2002 21 (1) 35. It is widely felt that the *Hippocratic Oath* remains a precursor of modern ethical codes. See Teff - *Reasonable Care* (1994) 72 who regards the Oath as *"a powerful symbol of the doctor's responsibility."* The author advocates that its future existence lies in the maintenance of high ethical standards and a sense of obligation to serve the best interests of the patients. See also Giesen *Acta Juridica* (1988) 114. See further Sanbar et al Legal Medicine (1999) 6 who views the *Hippocratic Oath* as the *"touchstone of modern medical ethics."* For a comprehensive discussion see also Mason and McCall-Smith (1991) 439-446; Carstens and Kok (2003) 450.

firstly, because the nursing staff are still bound to observe their professional code of conduct and secondly, because action against an employee of the applicant for negligent acts would adversely impact on its reputation and competitiveness, does not take into account the practical realities of the situation. [181]

It is also submitted that, by allowing the standard of conduct of professional people to be compromised, is tantamount to placing professional people on the same footing as any other provider of services who operates in the commercial terrain. This position, it is respectfully submitted, should never be tolerated, for it would place, for example, a tradesman on the same matrix as a professional person. [182] What needs to be emphasized as well, is the fact that an admission form, in which the patient seeks to obtain medical care and the hospital and its staff/doctor undertakes to treat the patient with due diligence,

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181 Pearmain (2004) 705 when criticizing Brandt JA's approach states: *"Real life, it is submitted, is far more complicated than this. Brandt JA has seized only upon those factual elements within a larger factual matrix, which suit his particular viewpoint irrespective of how they impact on reality upon the other elements of the matrix to produce a result which Brandt JA could not anticipate without more in-depth knowledge of the business of health service delivery than he apparently has."*

182 Pearmain (2004) 702 correctly calls into question the position when he states: *"Members of the public expect to be treated in a professional manner and up to a certain standard when they seek out the services of a registered professional because if they did not, they might as well go to Joe Public for those same services. What would be the reason for seeking out professional help if it meant that the professional in question was not bound to follow certain ethical rules and standards of practice associated with his profession?"*
The writer continues at 709 when she states: *"It is submitted with respect to the Supreme Court of Appeal that entering a hospital for medical treatment and enlisting the services of a plumber to address a household plumbing problem are two extremely different activities on the basis of risk. One cannot thus say that all suppliers of services are the same and that what is good for one is good for all. The nature of the service they render directly affects the nature and extent of the personal risk to the customer represented by that service. The South African courts have distinguished between different levels of risk even within the healthcare environment for instance with regard to the mode of delivery of a medicine - intravenously or per mouth. The effect of this judgement of the Supreme Court of Appeal is that every single private hospital in South African will include such a clause in its admission documentation with the result that, even assuming a patient did have some degree of bargaining power, the chances patients ever having recourse in South Africa against a private hospital for the negligent acts of its employees are now - negligible."* And further at 710: *"The court's failure to recognize the importance of the fact that private hospitals can be distinguished from other suppliers on the basis that the former provide services which are the subject of a constitutional right - a right moreover which seeks to ensure access to those services is also regrettable. The court chose to take a very narrow view of the issue of access holding that the clause did not interfere with access to healthcare services in that it did not have the effect of barring anyone from obtaining healthcare services. It is submitted with respect that this view of access is overly simplistic given the nature of the services one is dealing with. Healthcare services are generally required to promote, maintain or improve the health of a patient. When the courts consider claims in delict on the basis of medical negligence they do not adopt an approach which says that if the patient would in any event have ended up in his final state if there had been no medical intervention then one cannot hold a health professional liable for his negligence in preventing this from happening. In other words the law expects a health professional to act in such a way as to improve the patient's situation. Admittedly the improvement is not guaranteed but that is not the point. The point is that the health professional must cat in the way in which any other reasonable health professional in the position of the health professional would act."*

is not a simple commercial contract or transaction. [183]

A further aspect that is troublesome and regrettable in the judgement is the manner in which the court handled the conduct of the nurses, to justify the validity of clause 2.2, in the admission form. The court, per Brandt JA, in this regard, found that, firstly, the appellant's nursing personnel are already bound by their professional code and they are already subject to the statutory authority of their professional body. Secondly, negligent acts by the appellant's nursing staff would not be in the interests of the appellant's reputation and competitiveness as a private hospital. Thirdly, the respondent's argument comes down, in effect, to that fact that the appellant's nursing staff, due to the existence of clause 2.2, will be purposefully (or otherwise intentionally) negligently - something which by definition amounts to self contradiction. The effect of the reasoning behind the decision in this regard, does not, with respect, make sense. The question, in the first instance, can be begged, namely, why seek professional help if it means that, despite professional standards been set and ethical rules being put in place for centuries, this can simply be ignored. Take for example where the conduct of nurses result in their standards of practise falling below the norm, resulting in patients suffering loss, yet, the patient cannot institute action against them. [184] This surely is an absurdity. This reasoning it is submitted is contrary to the approach taken by many of the courts since 1957, when the principle of vicarious liability, arising from the negligent conduct of health professionals, was first introduced. [185] In the Afrox case, other professional staff employed by a private hospital,

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183 Naude and Lubbe (2005) 122 *SALJ* 444 at 460-463 persuasively argue: *"What is at stake here is not the patient's patrimonial interest (unlike an ordinary commercial contract), but, the patient's bodily inviolability".* And further: *"To allow such an agreement to be put on the same footing as a commercial agreement whilst there is an imbalance between the interests of the parties, would be to allow an improper, unconscionable advantage been gained over the patient."* For other authorities see Jan Hendrik Esser who cares? Reflections on business in Healthcare *Unpublished LLM Thesis University of Stellenbosch* (2001) 72 who writes that a patient in seeking healthcare services looks for virtues like compassion, integrity and trustworthiness. See also Van den Heever "Exemption of Liability of Private Hospitals in South Africa" *De Rebus* (April 2003) 47; Jansen and Smith "Hospital Disclaimers" Afrox Healthcare v Strydom 2003 *Journal for Juridical Science* (2003) 28 (2) 214 at 218; Hawthorne "Closing of the open norms in the Law of Contract" (2004) 67 (2) *THRHR* 294, 299; See further the instructive argument presented by Carstens and Pearmain (2007) 458ff.

184 It is especially Pearmain (2004) 702-703 who correctly points out the flaw in the courts argument when she points out: *"If a nurse's professional indemnity cover takes into account the vicarious liability of her employer and is lower than would have been in case had she been self-employed, then this judgement of the Supreme Court of Appeal may effectively have left patients who are the victims of negligence of nurses without recourse to compensation. A disciplinary hearing by a professional council even assuming any sanction is imposed, is cold comfort to a patient that has lost the ability to work or to function in society or that has experienced considerable pain and suffering and become liable for extra medical expenses as a result of professional negligence. It is submitted with respect that the confidence of the Supreme Court of Appeal that the existence of professional bodies to discipline professionals who do not practice their professions according to acceptable standards is a sufficient deterrent of professional negligence and adequately reduces the attendant risks to patients is naive to say the least."* See also Carstens and Pearman (2007) 462ff.

185 In a number of cases the courts refused to accept the view that the delicts of health professionals who are

operate as an autonomous body, over which the hospital itself or its management has no control. [186] In any event, by the time a nurse, or nursing staff member, is disciplined, it is too late, as the harm is done and the patient is left to suffer the harm. [187]

The second frontier upon which the judgement of the Supreme Court of Appeal in the *Afrox* case may be criticised is at common law. It is generally accepted at common law, that the doctrine of freedom of contract, in which contracting parties are free to negotiate the terms of their contracts and with whom they wish to contract, as well as the sanctity of contract, in which agreements, once entered into, should be held sacred and enforced by the courts, have universally dominated the contractual sphere. [188] The doctrine of freedom of contract

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employed by a hospital should not attract vicarious liability for their employer. See *Esterhuizen v Administrator, Transvaal* 1957 (3) SA 710 (T) and *Dube v Administrator, Transvaal* fn 78 supra. See also the discussion of this subject in *Mtetwa v Minister of Health* 1989 (3) SA 600 (D) and the discussion there of *Lower Umfolosi District War Memorial Hospital v Lowe* 1937 NPD 31 and *St Augustine's Hospital (Pty) Ltd v Le Breton* 1975 (2) SA 530 (D); See also the persuasive argument of Carstens and Pearmain (2007) 460ff.

186 It is for that reason that Pearmain (2004) 706 is forced to remark: *"This judgement almost gives the impression that nurses and other professional staff employed by a private hospital operate fairly independently, almost as contractors, of their employer and that the hospital itself has no authority to supervise them nor does it have any responsibility to control them in the same way that other employers control their employees. The impression is created that the fact that these employees are professionals and therefore subject to the disciplinary powers of their professional body somehow reduces the weight of the public policy considerations that the employer should be held vicariously liable..... "* The writer cautions: *"With regard to the former argument, it is submitted that the frequency with which nurses are disciplined by the South African nursing council and even the relatively lower frequency with which they are found guilty and struck off the roll or their names removed from the register, is such that it gives the lie to this argument. Furthermore, an employer who is not vicariously liable for the negligence of its employees may be less concerned about taking preventive action to preclude professional negligence - even if it takes action to discipline the nurse as an employee after the event. Once a nurse is subject to a disciplinary proceeding, by her professional body it is too late."*

187 It is Pearmain (2004) 707 who points out: *".... that the argument of the Supreme Court of Appeal that there is adequate protection for the patient against the risks of professional negligence of the applicant's employees because the applicant had a reputation and a competitive edge to maintain is based on a fallacy."* See also Carstens and Pearmain (2007) 460ff.

188 Aronstam (1979) 13-14; Atiyah (1995) 9-10. The South African legal position is best illustrated by Hahlo "Unfair Contract Terms in Civil Law Systems" Vol. 98 *SA Law Journal* (1981) 70: *"Provided a man is not a minor or a lunatic and his consent is not vitiated by fraud, mistake or duress his contractual undertakings will be enforced to the letter. If thought inexperience, carelessness or weakness of character, he has allowed himself to be overreached it is just too bad for him, and it can only be hoped that he will learn from his experience. The courts will not release him from the contract or make a better bargain for him. Darwinian survival of the fittest, the law of nature, is also the law of the market place."* The ingredients of the doctrine of freedom of contract comprising unlimited freedom to contract and sanctity of contract were highlighted by the courts quite frequently none better then, the much better quoted English decision of *Printing and Numerical Registering Company v Sampson* (1875) L.R. 19 Eq. 582 in which Sir George Jessel MR stated: *"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. Therefore you have this paramount public policy to consider, that you are not lightly to interfere with this freedom of contract."* The American courts were particularly alive to individualism, private rights free from restrictions and a minimum of legal interference with private rights. This was expressed in very clear and precise terms in the case of *Lochner v State of New York* (1898) 45 US 198 in which Mr Justice Peckham stated: *"There*

and the sanctity of contract has its roots deeply embedded in the classical law of contract and, especially since the advent of standard term contracts, shown little regard for the bargaining strength of the parties concerned, notwithstanding the inequality that a weaker party may face in the contractual relationship. [189] The classical law approach also ignores the unfair and unconscionable result some contractual agreements may bring with them. One of the reasons advanced by the courts is this, to give judges, *carte blanche,* discretion to ignore contractual principles which they regard as unfair and unreasonable, would be in conflict with the rules of practise. They, according to the Supreme Court of Appeal, [190] would be in conflict with the principle of *pacta sunt servanda* and the pronouncements of the enforcement of contractual provisions will ultimately be determined by the presiding judge, who has to determine whether the circumstances of the case are fair and reasonable, or not. The further argument is advanced that the criteria would no longer be the principles of law, but the judge him/herself.

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is no reasonable ground for interfering with the liberty of person or right of free contract, by determining the hours of labour, in the occupation of a baker. There is no contention that bakers as a class are not equal in intelligence and capacity to match other trades or manual occupations, not that they are not able to asset their rights and care for themselves without the protecting arm of the State, interfering with their independence of contract and of action." The judicial ethics of freedom of contract also made its way into the South African courts so much so, that Kotze JP in the case of *Osry v Hirsch, Loubscher and Co Ltd* 1922 CPD 531, remarked: *"The spirit of modern jurisprudence is in favour of the liberty of contract, and there is practical wisdom in the observations of De Villiers CJ, in Henderson v Hamilton, 1903 2d SC 513 at 519."* And further remarking: *"All modern commercial dealings proceed upon the assumptions that binding contracts will be enforced by law."*

189 It is especially, the writer's Kahn (1980) 70 who fully embraces the sanctity of contract with reference to the famous dictum of Jessel in *Printing and Numerical Registering Co v Sampson* (1875) LR EQ 462 or 445 in which he stated: *" ..... 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 Hahlo (1981) 70 following the English law advocates: *Provided a man is not a minor or a lunatic and this contract is not vitiated by fraud, mistake or duress, his contractual undertakings will be enforced to the letter. If, through inexperience, carelessness or weakness of character, he has allowed himself to be overreached, it is just too bad for him, and it can only be hoped that he will learn from his experience. The courts will not release him from the contract to make a better bargain for him. Darwinian survival of the fittest, the law of nature, is also the law of the market place."* Christie (2001) 17 also defend the so-called hands-off approach in stating: *"the whole basis of the law of contract is that the law will enforce their agreement. Intervention by the courts appears to be unreasonable, a form of paternalism inconsistent with the parties' freedom of contract."* The South African courts have also over a century supported the idea of contractual freedom and the sanctity of the enforcement of contracts. This commenced as far back as 1902 in the case of *Eastwood v Shepstone* 1902 TS 294 at 302, continuing with the case of *Wells v South African Alumenite Company* 1927 AD 69 who adopted the principle enunciated in *Printing and Numerical Registering Company v Sampson* (1875) LR EQ 462 and more recently *Olsen v Standaloft* 1982 (2) SA 668 ZS; *Oatorian Properties (Pty) Ltd v Maroun* 1973 (3) SA 779 (AD); *Tamarillo (Pty) Ltd v B.N. Aithken (Pty) Ltd* 1982 (1) SA 398 (AD); *Sasfin (Pty) Ltd v Beukes* 1989 (1) SA 1 (AD) and most recently in the cases of *Brisley v Drotsky* 2002 (4) SA 1 (SCA) and *Afrox Healthcare Bpk v Strydom* 2002 (6) SA 21 SCA.

190 *Afrox Healthcare Bpk v Strydom* 2002 (6) SA 27 (SCA).

The effect of the classical law approach amounted to this; once a contract is freely and voluntarily entered into, it should be held sacred, and should be enforced by the courts; notwithstanding its results. As a general rule it has been accepted, by the legal writers and the courts, that a person who signs a contractual document thereby signifies his assent to the contents of the document. Once a person has signed a contractual document, but it has subsequently turned out that the terms of the contract are not to his/her liking, he/she cannot complain, as he/she has no one to blame but him/herself. The legal effect thereof is that; once a contracting party signs the document, unaware that it contains terms not acceptable to him/her, he/she will, in general, not be permitted to rely on his/her mistake to escape liability. This has come to be known as the *caveat subscriptor* rule. But, despite the *caveat subscriptor* rule, which strengthened the doctrine of freedom of contract and the sanctity of contract, the legal writers and courts do recognise that there are circumstances when a contracting party, despite his/her signing the document, he/she will not be bound to the terms. In those instances, special defences, including the ignorance and handicap of the signatory to whom the contents of the document have been inadequately and inaccurately explained; where a trap has been set for the signatory; where, despite the signatory appending his/her signature to the document without reading the document, the document contained a term or terms which the reasonable man would not expect to find therein.

The other defences to the *caveat subscriptor* rule, recognised by the legal writers and the courts, include, contracts contaminated by fraud, misrepresentation, mistake, illegality, duress and undue influence. Other exceptions to the *caveat subscriptor* rule include; where the contract or provisions of the contract threatens health, the moral welfare or the safety of the public, as well as contracts that are illegal or against public policy.
With the advent of consumer organisations, pressure was been brought to bear, on businesses, to respect the rights of consumers, as a means to curb forms of exploitation. It is especially the standardized contracts which have often come under criticism by legal writers, the courts and consumer organisations, especially in countries such as England and the United States of America. In South Africa, the legal writers have been quite vocal, often calling for law reform. But, the South African courts, until now, have adopted a rather conservative approach. It appears that one of the primary criticisms of standardized contracts is that, in reality, equality rarely exists in standardized agreements.

Other attempts made to curb the unrestricted freedom of contract were to introduce and recognise doctrines, *inter alia,* good faith, public policy, unconscionable-ness and reasonableness.

The recognition of the principle of good faith, has received very mixed reactions in the South African jurisdiction. Whereas the legal writers, generally, viewed and continue to do so today, that the principle of good faith or fairness is a means of curtailing unlimited freedom of contract and the concept of *pactum sunt servanda*, the South African courts have clearly shown a mixed reaction towards recognizing the principle. [191]

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191 Many motivational reasons have been advanced by the different academic writers. In this regard Van Aswegen (1994) 448 at 456 argue that freedom of contract and *pacta sunt servanda* brought with it inequalities which necessitated the introduction of mechanisms such as fairness, justice and good faith in contract to counter substantial injustices in the law of contract. Lotz (1979) 11-12 promotes the utilization of *bona fides* or good faith as a mechanism to advance "honesty in contract and the prohibition of unreasonable promotion of one's own interests". Support for this view is found in the writings of Fletcher (1997) 1 at 2. Christie (2003) 19-20 believes good faith as a mechanism will go a long way to create and enforce moral and ethical values in contract especially, where courts are confronted with "the unfair enforcement of a contract". Support for this view is espoused by Zimmerman (1996) 256. The writer also calls for legislative intervention whereby courts will openly be obliged to perform their duty of policing unfair contract terms. See further Van Aswegen (1994) 458 who finds for the courts to be given an equitable discretion to declare invalid or modify a contract or contractual clause which does not conform to the standard of good faith. The courts as early as 1881 in *Judd v Fourie* (1881) 2 EDC 41 (76) expressed the view that good faith is required in all contracts. The Appellate Division as far back as 1923 in the case of *Neugebauer and Co v Herman* 1923 AD 564 also endorsed the principle that *boni fides* is required from both parties to a contract of sale. It was especially, with the interpretation of contracts where the contracts were ambiguous and capable of more than one construction that the courts adopted a practice to consider good faith as means to seek an answer. This position was recognized in *Trustee, Estate Cresswell and Durbach v Coetzee* 1916 (AD) 14, *Rand Rietfontein Estates Ltd v Cohen* 1937 (AD) 317 in which use was made of equitable construction. The South African courts, including the Appellate Division (as it was then) recognized the principle that all contracts are *bonae fidei*. See *Meskin NO v Anglo American Corporation of SA Ltd and Another* 1968 (4) SA 793 (W); *Savage and Lovemore Mining (Pty) Ltd v International Shipping Co* (Pty) Ltd 1987 (2) SA 149; *Paddock Motors (Pty) Ltd v Igesund* 1976 (3) SA 16 (A); *Tuckers Land and Development Corporation (Pty) Ltd v Hovis* 1980 (1) SA 645 (A). In the latter case the court specifically states the requirement of *bona fides* underlies our law of contract.The curtain was however, drawn on the recognition of *bona fides* as a criterion in contract law and more in particular, that *bona fides* had developed to fulfil the function of the *exceptio doli*. The court continues to make it clear an equitable discretion with our courts, is no part of our law. See however, the Jansen JA minority decision. But the recognition of good faith as a norm in the South African law of contract flared up in a number of cases *inter alia* the minority judgement of Olivier JA in *Eerste Nasionale Bank van Suidelike Afrika Bpk v Saayman NO* 1997 (4) SA 302 (A). The learned Judge argues that there is a close connection between the doctrine of *bona fides* and that of public policy, public interest and suggests that *bona fides* becomes a open norm or free floating defence. Van Zyl in the case of *Janse van Rensburg v Grieve Trust CC* 2000 (1) SA 315 (C) pleaded for the development of good faith as a norm to control unconscionable and unfair contracts. A similar approach was taken by Ntsebeza AJ in *Miller and Another NNO v Donnecker* 2001 (1) SA 928 (C) when following the minority judgement of Olivier JA in *Eerste Nasionale Bank van Suidelike Afrika Bpk v Saayman NO* 1997 (4) SA 302 (SCA). The re-introduction was also pleaded for by Davis J in *Mort NO v Henry Shields-Cheat* 2001 (1) SA 404 (C). Subsequently, the Supreme Court of Appeals when confronted with a golden opportunity to bring about law reform in the South African law of contract, squandered the opportunity in the cases of *Brisley v Drostky* 2002 (4) SA 1 (SCA); *Afrox Healthcare Bpk v Strydom* 2002 (6) SA 27 (A). Instead of infusing the law of contract with equitable principles founded upon constitutional values, the court continued to entrench the doctrines of freedom of contract and the *pactum sunt servanda*. The majority of the court (Harms, Streicher and Brand JJA) subsequently refused to follow the Cape Provincial Division judgements of *Miller and Another NNO v Donnecker* 2001 (1) SA 928 (C) (in which Ntsebeza AJ followed the minority decision of Olivier JA in *Eerste Nasionale Bank van Suidelike Afrika Bpk v Saayman NO* 1997 (4) SA 302 (SCA) wherein the learned Judge found that the principle of *bona fides* is very much part of the modern law of contract in South Africa, it being part and parcel of the moral and ethical values of justice, equity, and decency), as well as *Janse van Rensburg v Grieve Trust CC* 2000 (1) SA 315 (C) (wherein Van Zyl J found justification for an application of good faith in the fact that such an interpretation was consonant with the spirit and values contained in the Bill of Rights); and the *Mort*

It is respectfully submitted that Brandt JA, besides stating that good faith is not a free floating value, was not sensitive enough to public dictates, which have, over a significant period of time, called for fair dealings in contract, especially where a degree of bargaining unfairness is present in concluding agreements. [192] Although Brandt JA held that good faith, *inter alia,* represents the foundation and *raison d'être* for the present legal rules and can also lead to the formulation and alteration of rules of law, the learned Judge makes no attempt to develop good faith as a safety valve to ensure a minimum level of fairness in contracting, which, I submit, is manifestly in keeping with the constitutional values of human dignity, equity and freedom.

It is further submitted that; the acknowledgement and development of good faith, to ensure a minimum level of fairness in contracting, by the Supreme Court of Appeal, would have gone a long way towards embracing the historical justification for recognizing good faith in contract and which has, as its roots, ethics and fairness in law. The historical justification for recognizing good faith is said to have stemmed from the need to protect the public welfare against unfair contracts or contractual terms and from unreasonable hardship. The

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NO v Henry Shields-Chiat 2001 (4) SA 464 (C) case (in which Davis J supported the reasoning of Van Zyl J in *Janse van Rensburg v Grieve Trust (supra)*) that in performing their constitutional mandate the courts could use the concept *boni mores* to infuse our law of contract with the concept of `good faith'. The Supreme Court of Appeal did not support Olivier JA's view in the *Saayman NO* case (referred to above) namely, that *boni fides* ought to be given a more prominent place in the South African Law of Contract. To do so, according to the Supreme Court of Appeal, would be too far reaching. Hence, the court stated the judgement by a single judge, must be approached with great circumspection as Oliver's reasoning is based on shaky grounds. The court agreed with the writer, Hutchison, who is of the view that good faith was not *"an independent, free-floating basis for setting aside or not enforcing contractual principles".* The Constitutional Court in a more recent case of *Barkhuizen v Napier* 2007 (5) SA 323 (CC) 66 acknowledged that *"good faith is not unknown in our common law of contract"* and that *"it underlies contractual relations in our law"*. But warns the court it is not the only value or principle that underlies the law of contracts. The court also states that *"the concepts of justice, reasonableness and fairness constitute good faith".* But it is especially, Sachs J in a minority judgement who advocates a new ethos in assessing standard form contracts. He cautions that courts should be sensitive to economic power in public affairs affecting the general public. Sachs J stresses the legal convictions of the community which seeks fair dealings in business-consumer relationships. Moreover, he finds support for his contention in the preamble to the new *Consumer Protection Bill* published by the Department of Trade and Industry for public comment in March 2006. In this regard the preamble reads:

"The people of South Africa recognize-

That is necessary to develop and employ innovative means to-

(a) fulfill the rights of historically disadvantaged persons and to promote their full participation as consumers;

(b) protect the interests of all consumers, ensure accessible, transparent and efficient redress for consumers who are subjected to abuse or exploitation in the marketplace; and

(c) give effect to the internationally recognised customer rights."

192 In this regard Sachs J calls for the fair dealings in contract and in so doing to *"ensure the basic equity in the daily dealings of the ordinary people".* The legal convictions of the community according to Sachs J regard reasonableness and fair dealings in contract as intrinsic to `appropriate business/consumer relationships in our contemporary society'.

Supreme Court of Appeal, it is respectfully submitted, failed to have regard to the public welfare when it ignored good faith including reasonableness, justice and equity. [193]

Brandt JA, relying on the common law principles, stated that a contractual provision which is unfair, on the basis that it is in conflict with the public interest, is unenforceable. [194] This, it is respectfully submitted, is in line with the South African common law position that agreements contrary to law, morality or public policy are unenforceable, or void. [195]

It is generally accepted that public policy, as a doctrine, places a limitation on contractual freedom or contractual autonomy, as well as the enforcement of contractual agreements once entered into, i.e. the doctrine of *pacta sunt servanda*. [196]

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193 The unfairness and unreasonableness of exclusionary or exemption clauses in medical contracts are highlighted by Carstens and Kok (2005) 78 *SAPR/PL* 450; Veatch (1983) 2-7; Beauchamp and Childress (1994) 3; Mason and McCall-Smith (1991) 4. But it is the legal writer Tladi (2002) 17 *SAPR/PL* 473; 477 who comes out strongly against exclusionary clauses in hospital contracts when he writes that these types of clauses deserve to be dismissed as their acceptance would acknowledge the *"dismissal of the principles of reasonableness, justice, equity and good faith in contract law."*

194 This principle was accepted and applied in *Sasfin (Pty) Ltd v Beukes and Botha (now Griesel) and Another v Finanscredit (Pty) Ltd*. Brandt JA quoted with approval then the dictum of Smalberger JA in the state case where he 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. In the words of Lord Atkin in Fendor 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."* Brandt JA also pointed out that these cautionary words were emphasized more recently in *Brummer v Gorfil Brothers Investments (Pty) Ltd en Andere; De Beer v Keyser and Others; Brisley v Drotsky*. He said that concerning exclusionary or indemnity clauses in South African law the position are that such clauses although valid and enforceable must be restrictively interpreted. He observed that these types of clauses have become the rule rather than the exception in standard contracts and that the limits of such clauses are apparently determined largely by business considerations such as savings in insurance premiums, competitiveness and the possibility of scaring off prospective clients.

195 See Wessels (1951) Par 483-480ff; Van der Merwe et al (2003) 176-178; Joubert (1987) 132-151; De Wet and Van Wyk *Kontraktereg and Handelsreg* 5ed Volume 1 (1978) 89-92; Kerr (1998) 177-183; Christie *Bill of Rights Compendium* (2002) 3H-9-3H-12; 3H-20-3H-21; Hutchinson et al (1991) 431; Joubert et al *LAWSA* Volume 5 Part 1 (1994); 214-216; Kahn (1988) 32; Christie (2001) 398ff; Hawthorne "The End of bona fides" (2003) 15 *SA Merc LJ* 277; Jordaan "The Constitution's impact on the law of contract in perspective" 2004 *De Jure* 59ff; Hopkins "Standard form contracts and the evolving idea of private law justice: A case of democratic capitalist justice versus natural justice" *TSAR* 2003-1 159; Hawthorne "Closing of the open norms in the law of contract' 2004 67 (2) *THRHR* 295 ff; Hawthorne "The principle of equality in the law of contract' 1995 (58) *THRHR* 173; Van Aswegen "The future of South African contract law" 1994 (59) *THRHR* 453.

196 See Wessels (1951) Par 463-480ff; See also Jordaan (2004) De Jure 59-60; Christie *Bill of Rights Compendium* (2002) 3H-20; Van der Merwe et al (2003) 15; See also Kahn (1988) 32. The author expresses the view that: *"Our common law has in a sense encroached on the freedom and sanctity of contract by its condemnation of contracts against public policy."* See further Hutchinson et al (1991) 431 who identifies that need for the exception to the general rule of freedom of contract in the form of public policy as *"the necessity for doing simple justice between man and man."* Joubert *LAWSA* Volume 5 Part 2 (1994) 215.

The rationale for the existence of public policy is said to lie in the broader concept of paternalism, in which the courts protect the weaker party to the contract and determine what is, or not, a matter of public interest and when it is established that a contract, or provision of a contract, offends against public interest, then it ought to be struck down or declared invalid. But, the South African approach, as with the other jurisdictions, including England and the United States of America, has been to adopt a cautious approach when declaring a contract or a term in a contract contrary to public policy and, therefore, unenforceable. It has often been stated that such a discretion should be exercised sparingly and only in the clearest of cases. [197]

The court, in the Afrox case, consequently held that the yardstick used in measuring whether exclusionary clauses are unenforceable as against public policy, is exactly the same as measuring contractual provisions which are, as a result of public policy, unenforceable. The question always remains whether the enforcement of the particular exclusionary clause or other contractual provision would, as a result of extreme unfairness, or as a result of other policy convictions, be contrary to the interests of the community.

The Supreme Court of Appeal, after considering the three grounds relied upon by the respondent to prove that the disclaimer offended public policy, namely:

(1) The unequal bargaining position between the parties;
(2) The nature and extent of the acts of the hospital staff against which the appellant was indemnified;
(3) The fact that the appellant is the provider of healthcare services;

rejected all of these grounds.

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197 See Hawthorne 2004 67 (2) *THRHR* 299; See also Christie *Bill of Rights Compendium* (2002) 3H-10; Hutchinson et al (1991) 431.Joubert *LAWSA* Volume 5 Part 1 (1994) 215. The author endorses the principle that the power to declare a contract contrary to public policy should be exercised sparingly *" ..... only when the impropriety of the contract and the element of public harm are manifest."* Jordaan 2004 *De Jure* 61 identifies the criterion to prove that a contractual provision is *contra* public policy namely when *"substantially incontestable harm to the interests of the public will be caused".* See further Pretorius 2004 69(2) *THRHR* 298-299. Smalberger JA similarly in the case of *Sasfin (Pty) Ltd v Beukes* 1989 (1) SA 1 (A) declared in the most quoted dictum that: *"No court should therefore shrink from the duty of declaring a contract contrary to public policy when the occasion so demands. The powers 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."* The court then quotes with approval 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 pubic is substantial incontestable and does not depend upon the idiosyncratic inference of a few judicial minds."*

As to the unequal bargaining power, the court held that on its own, it is not enough to conclude that the impugned clause offends public policy. The court consequently held that unequal bargaining power is a factor to be considered, with all other factors, in deciding whether public policy was offended. But, the court held that, in this case, the respondent provided no evidence whatsoever that indicated a weaker bargaining position.

As to the second ground, it was argued, on behalf of the respondent, that the disclaimer excluded even gross negligence and that this is against public policy. The court, however, rejected this argument, *inter alia,* because the respondent relied on negligence, *per se,* in his pleadings and not on gross negligence.

The court also held that contractual autonomy, as encapsulated in the common law maxim of *pacta sunt servanda,* forms part of the value of freedom and is thus protected in the Constitution.

Although the court correctly laid down the test used to measure whether exclusionary clauses are unenforceable as against public policy, namely, to determine whether the enforcement of the particular exclusionary clause would, as a result of extreme unfairness, or as a result of other policy convictions, be contrary to the interests of the community the criteria needs to be developed. But, despite the court laying down the correct test, the Supreme Court of Appeal paid lip service to the principles of fairness and public interests, when Brand JA pronounced that exclusionary clauses in hospital contracts, excluding the hospital and/or its staff from liability arising from negligence, are not unfair nor, do they violate public interests. The court's approach in this regard should, with respect, be criticised.

It is, respectfully, submitted that the practise of medicine and all its associated protocols, practises, ethical codes and standards, is affected with public interests. The duty, which the doctor/hospital owes to his/her/its patient, to apply the defined standards of care and skill in accordance with the average qualification or standard in the class of profession to whom they belong, alternatively, standards set for the hospital, is a product of tort law but also a creature of public policy, designed to maintain that practise to a minimum level of performance. It is, therefore, submitted that it will be offensive to public policy to permit these safeguards to be destroyed by a medical practise designed by contract law, under what is known as, contract waivers. Foundational to this principle is the value that a doctor/hospital's duty of care is an inalienable duty. The obligation of the doctor/hospital to maintain and exercise reasonable care in treating a patient, imposed by law cannot,

therefore, be avoided by contract. The rationale for the recognition of the principle, it is respectfully submitted, is founded on the fact that medical care is a necessity of life, in which the patient's welfare is of paramount importance and from which a relational duty arises, to treat the patient with the utmost diligence and care, which duty is inalienable. Healthcare providers have, therefore, a non-negotiable duty of public service, in respect of which the prevailing standards of care ought not to be violated. It is, further, submitted that exclusionary clauses in medical contracts have no place in the practise of medicine and any private agreements which compromise, or reduce the health providers statutory or ethical duties ought to be struck down, as they impact on public interest [198] and any attempt by a

198 It is submitted that the regulations published in the *Government Gazette* on the 1st February *1980 No 29449 No 6832* which regulates the reasonable degree of care and skill which is conditional to private hospitals obtaining and maintaining their licenses to operate is clearly a public regulation. One of the relevant regulations 25(23) requires that: *"All services and measures generally necessary for adequate care and safety of patients are maintained and observed."* Any contract aimed at exculpating the performance of a service which is of great importance to the public would therefore affect public interest. Medical ethics have and continue to play a very influencing role in public interests matters. It is submitted that any conduct which negatively affects ethical practices or codes impacts on public interests. It is especially, the writings of Carstens and Kok (2005) 78 *SAPR/PL* 430 who put a premium on medico-legal considerations in assessing the validity of disclaimers in hospital contracts. Referring to the *Hippocratic Oath*, the *Declaration of Geneva*, the *International Code of Medical Ethics and the Declaration of Helsinki* as well as domestic *Medical Codes*, the writers persuasively argue that medical ethics have its roots in the highest order that cannot be compromised. For that reason healthcare providers including hospitals are first and foremost required `to do no harm' and to act in the best interests of the patient. See also Roth "Medicine's Ethical Responsibility in Veatch (ed) *Cross Cultural Perspectives in Medical Ethics* (1983) 150 wherein the writer opines at 153 that *"medical ethics have, over years, acquired a rather philosophical character ..... it has its roots in a societal concept of summum bomun, which interesting modifications such as that expressed in the repeated maxum primun non nocere"* which means medical ethics have its roots in the highest order which cannot be compromises. Beauchamp and Childress of Biomedical Ethics (1994) 3.Turning to societal moral dictates the writers Carstens and Kok argue that: *" ..... disclaimers against medical negligence in hospital contracts would amount to an unreasonable/unethical acceptance on the part of a patient to contract to the possibility of harm in the form of personal injury/death resulting from medical malpractice by an attending medical practitioner (albeit in the hospital setting) who is ethically bound not to do harm." By ignoring medical ethics and the accompanying standards of care is contradictory it is submitted to the very values of Afrox Healthcare website: (htp://www.afroxhealth.co.za/) is a document entitled "Core Values". It reads:*

Core values

Organizational values are principles or qualities considered worthwhile by an organization. At Afrox Healthcare there is a fundamental commitment to these values throughout the entire organization - merely posting them on a bulletin board and paying them lip service is not tolerated! `Living" these values in our day-to-day business activities provides us with the foundation of what is important to us - namely, providing world-class patient care.

Accountability

We ensure employees know what they are responsible for and are empowered to deliver.

Collaboration

We maximise that visible problems can be solved and that informed people make better decisions.

Stretch

We continuously push the boundaries of performance.

Quality

Afrox Healthcare quest is to maintain world-class quality standards at all its hospital facilities - to the benefit of its patients, employees, supporting medical practitioners and funders. A world-class quality management process. We believe that our unique process of managing quality standards in our hospitals matches and probably exceeds the best to be found anywhere in the world today.

See also the writings of Carstens and Pearmain (2007) 465.

doctor/hospital/other healthcare provider to use written contracts to reduce liability for negligence, in whatever form, ought to be struck down as they are deemed to be contrary to public policy.

It is further, respectfully, submitted that the regulation which governs the licensing of private hospitals and calls for the maintenance of a standard of care and skill in treating a patient, is grounded on public policy. It, forbids acts which has the tendency to be injurious to the public good. Where public policy requires the observance of a statute or regulation, no court should fail in its duty to denounce an attempt to waive a hospital/doctor/or other health carer's liability for negligence as invalid and unenforceable and against public policy. In this regard, a professional person should not be permitted to retreat behind a protective shield of an exculpatory clause and insist that he/she/it is not answerable for his/her/its own negligence.

It is further submitted that the Supreme Court of Appeal, in the *Afrox case,* failed in its constitutional obligation to develop the common law, including the principles of the law of contract.

It is submitted that, instead of taking a principled approach, using objective criteria, such as fairness, reasonableness and conscionable-ness in contract, to ensure standards of fairness and reasonableness are achieved, especially, when dealing with standard form contracts, the Supreme Court of Appeal chose to entrench the traditional approach, by denouncing fairness and reasonableness as a yardstick to measure the validity of standard form clauses. [199]

[199] Brand JA quotes with approval the much highlighted dictum of Smalberger JA in *Sasfin (Pty) Ltd v Beukes* 1989 (1) SA 1 (A) in which the Supreme Court of Appeal held: *"No court should therefore shrink from the duty of declaring a contract contrary to public policy when the occasion so demands. The powers 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."*The court then quotes with approval the words of Lord Atkin in Fender v St John-Mildway 1938 AC 1 (HL) at 12: *"The doctrine should only be invoked in clear cases in which the public is substantially incontestable and does not depend upon the idiosyncratic inferences of a few judicial minds."* Insofar as judicial thinking is concerned Stratford CJ in *Jajbhay v Cassim* 1839 AD 537 at 544 spoke of "public policy should properly take into account the doing of simple justice between man and man." In a more recent judgement of the Supreme Court of Appeal Cachalia AJA writing for the unanimous court also relied upon this feeling of fairness and justice in contract when he stated: *"..... 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 case cited above make clear, is offence to one's sense of justice and is inimical to the public interest."* More recently the Constitutional Court in the case of *Barkhuisen v Napier* 2007 (5) SA 323 (CC) 66 per Ngcobo J delivering the majority judgement emphasized that the enforcement of an unreasonable or unfair time limitation clause will be contrary to public policy. The court also stressed that *"notions of fairness, justice and equity and reasonableness cannot be*

The suggested approach is very much in line with some of the judicial thinking, [200] which has spanned over a long period, backed by scholarly opinion amongst academic writers, [201] as well as the South African Law Commission. [202] In this regard, courts should not enforce

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separated from public policy." The court also accepts that public policy takes into account the necessity to do simple justice between themselves.

200 *Lorimar Productions Inc and Others v Sterling Clothing Manufactures (Pty) Ltd; Lorimar Productions Inc and Others v OK Hyperama Ltd and Others; Lorimar Productions Inc and Others v Dallas Restaurant* 1981 (3) A 1129 (T) at 1152-3; and *Schultz v Butt* 1986 (3) SA 667 (A) at 679B-E quoted with approval in *Barkhuizen v Napier* 2007 (5) SA 323 (CC) 66.

201 There has been a united effort amongst writers in South Africa to advocate for the courts to refuse on public policy to enforce contracts, or contractual terms that are unfair or unconscionable. See Woolfrey "Consumer Protection -a new jurisprudence in South Africa" (1989-1990) 11 *Obiter* 109 at 119-20. See generally Aronstam (1979) 14; McQuoid-Mason "Consumer law: the need for reform" (1989) 52 *THRHR* 32; Lewis (2003) 120 *SALJ* 330; Bhana and Pieterse (2005) 122 *SALJ* 865 and articles quoted therein. Contractual fairness, equity and reasonableness based on social, ethical and moral values have been foundational to some academic writers denouncing the validity of exclusionary clauses or the so-called "contracting out of liability" clauses. See Gordon, Turner, Price (1953) 153ff, who as long ago as 1953 persuasively argue with reference to the so-called "contracting out" of liability cases that: *"any attempt by a practitioner to contract out of liability for malpractice may be considered at least probable, that the courts would declare such a contract void as against public policy, leaving the patient's right to sue for damages unimpaired."* And further: *"Society cannot allow a medical practitioner to take such an advantage of his patient in regard to whom he stands in a position of such power."* The writers Strauss and Strydom (1967) 317ff in a similar view and relying upon societal dictates as well as the trust position the medical practitioner occupies in relation to the patient convincingly argue that a medical practitioner ought not compromise his/her expert knowledge and relax the degree of care and skill even where the patient consents thereto. To allow this, so it is argued by the learned authors would be tantamount to giving the practitioner a license to operate negligently which is contrary to medical norms and ethics. This conduct is considered, according to the learned writers, to be against public policy and so-called *bona mores*. It is especially, the writings of Carstens and Kok (2005) 78 *SAPR/PL* 430 which put a premium on medico-legal considerations in assessing the validity of disclaimers in hospital contracts. Referring to the *Hippocratic Oath*, the *Declaration of Geneva*, the *international Code of Medical Ethics and the Declaration of Helsinki* as well as domestic *Medical Codes*, the writers persuasively argue that medical ethics have its roots in the highest order that cannot be compromised. For that reason healthcare providers including hospitals are first and foremost required `to do no harm' and to act in the best interests of the patient. See also Roth (1989) 150 which the writer opines at 153 that *"medical ethics have, over years, acquired a rather philosophical character ..... it has its roots in a societal concept of summum bomun, with interesting modifications such as that expressed in the repeated maxim primun non nocere"* which means medical ethics have its roots in the highest order which cannot be compromised. Beauchamp and Childress *Principles of Biomedical Ethics* (1994) 3. Turning to societal moral dictates the writers Carstens and Kok (2005) *SAPR/PL* 430 argue that: *"..... disclaimers against medical negligence in hospital contracts would amount to an unreasonable/unfair/unethical acceptance on the part of a patient to contract to the possibility of harm in the form of personal injury/death resulting from medical malpractice by an attending medical practitioner (albeit in the hospital setting) who is ethically bound not to do harm."* But, it is the legal writer Tladi (2002) 17 *SAPR/PL* 473, 477 who comes out strongly against exclusionary clauses in hospital contracts when he writes that these types of clauses deserve to be dismissed as their acceptance would acknowledge the *"dismissal of the principles of reasonableness, justice, equity and good faith in contract law."*

202 The South African Law Commission in their investigation into standard form contracts "unreasonable stipulations in contracts and the rectification of contracts" Project 47 (April 1998) at Para 1.44 stated that: *"Public policy ..... is more sensitive to justice, fairness and equity than ever before".* The Commission 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*

a clause if it would result in unfairness, or would be unreasonable, as this represents the general sense of justice of the community, the *boni mores*, manifested in public opinion.

The court, in the *Afrox case,* also, regrettably, chose to entrench the principle of freedom of contract, when Brand JA cautioned against relaxing the doctrine *pacta sunt servanda*. [203] It is submitted that this approach by the Supreme Court of Appeal, in this regard, is totally (out of step with the approach adopted by the courts and academic writings in, especially, recent decades. Whereas the pure doctrine of freedom of contract was not, particularly, interested in the consensual approach to contract and the equality in the bargaining power between contracting parties, especially, when standard form contracts have been used, modern day thinking, under the mast of consumer orientations, have placed a greater emphasis on restoring a truly consensual approach and have highlighted that the premise from which classical law theorists have argued, namely, that both parties to a contract are bargaining from equal strength, is incorrect. The ethos of pure freedom of contract has, thus, been questioned and criticized, especially by the academic writers, the courts, as well as consumer organisations. The ethos of pure freedom of contract has, on numerous occasions, been called into question, against the backdrop of the advent and influence of standardized contracts.

In so far as the consensual aspect in contract is concerned, it is one of the fundamental requirements in any contractual agreement, that the parties reach consensus in respect of the terms of the agreement. Several South African legal writers have held that an exemption clause may fail for lack of consensus, if there is no consensus. The clause will therefore 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. [204] It is especially where the parties stand in an unequal bargaining position, that consensus is not always possible. What happens often, in those situations, is that the weaker contracting party has no chance in making contributions in orchestrating the parties reaching agreement. Instead the weaker contracting party is often exploited in entering into the contract on a *"take-it-or-leave-it"* basis.

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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."

203 The court cautions against relaxing the doctrine *pacta sunt servanda*, Brand JA stated: *"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 cancelled by restrictions on that freedom."* (Para 9).

204 Van der Merwe et al *Contract - General Principles* (2003) 275.

Brand J in the *Afrox case* found that, despite the respondent signing the admission document without reading it, and thus, no true consensus coming into being, as the patient was not familiar with the contents of the exclusionary clause contained in clause 2.2, it did not matter as the patient had a full opportunity to read the document. It does therefore not lead as a rule, that he is not bound by the contents of the contract entered into... It is respectfully submitted that, once again, the Supreme Court of Appeal ignored the consensual requirement. In any event, it is difficult to see how a patient, who is admitted to hospital for a serious illness, trauma or even elective surgery, would be in a position to reach consensus with the hospital authorities.

The same holds sway for family members, who often have to sign on their behalf. Often they are traumatized and highly stressed, resulting in them signing anything, without really considering the consequences. [205] It is further submitted that when the hospital and patient

205 Van den Heever *De Rebus* (April 2003) 47-48 opines that any patient who is admitted to hospital for serious illness, trauma or even for elective surgery (the cause of which often results in the patient believing that he or she has no choice but to undergo the requisite treatment) is not in an equal bargaining position with the hospital, as he or she will often be incapable of negotiating the terms of his or her admission under these circumstances. The same hold thus for family members (signing on behalf of a patient) who, under such stressful and traumatic circumstances, are more concerned about their loved ones receiving the assistance they need than worrying about the fine print. See also Jansen and Smith (2003) *Journal for juridical science* (28) 2 210, 218. The importance of the parties reaching true consensus especially in a position where power imbalances between the parties are present is highlighted by Ngcobo J in *Barkhuizen v Napier*. Sachs J in the minority judgement in *Barkhuizen v Napier* is particularly critical of standard form contracts which is drafted in advance and presented to the consumer on a take-it-or-leave-it basis stifling the opportunity for arm's length negotiations. They often contain onerous terms (such as exemption clauses excluding the supplier of services from liability) often couched in obscure legalize and incorporation as that of the 'fine print' of the contract in the commercial world we live in. Sachs J points out that it would be impractical for ordinary people in their daily commercial activities to enlist the advice of a lawyer. Most consumers therefore simply sign or accept the contract without knowing the full implications of their act. Contracting parties conclude the contract on the basis of a printed document which process often results an imposition of will rather than mutual consent to an agreement. See also Collins *The Law of Contract* (1997) 2-3. A further issue arising from these types of contracts in a commercial sense which further serves as criticism to the Afrox dictum, is the fact that a large proportion of the South African population is seldom, if ever, exposed to commercial contracts. This factor, occupied with language difficulties, implies that many South Africans would not expect to encounter such a clause (let alone understand the implications thereof). See Naude and Lubbe (2005) 122 *SALJ* 444 at 460-463 quoting the authority Jan Hendrik Esser who cares? Reflections on business in Healthcare Unpublished LLM Thesis, University of Stellenbosch (2001) 72 who writes that a patient in seeking healthcare services looks for virtues like compassion, integrity and trust worthiness. See also Van den Heever *De Rebus* (April 2003) 47; Jansen and Smith (2003) *Journal for Juridical Science* (2003) 28 (2) 214 at 218; Hawthorne (2004) 67 (2) *THRHR* 294, 299. Sachs J in a minority judgement in the *Barkhuizen matter* with regard to the consensual aspect in contracts remarked: "*The potential unreasonableness in the eyes of the community, leading to a possible finding of violation of public policy, lies in holding a person to one-sided terms of a bargain to which he or she apparently did not actually agree, in respect of which there is nothing to indicate that his or her attention was drawn and the legal import of which a reasonable person in his or her position could not be expected to be aware.*" In this regard Naude and Lubbe (2005) 122 *SALJ* 444 suggest the parties could therefore not modify the consequences of a contract in a manner opposed to the naturalia of the contract itself. The naturalia of the contract is founded in the duty to take care which arises from the relationship between the medical caregiver and the patient. The legal writers persuasively argue to allow a medical service provider to exempt the degree of

enter into the agreement that the hospital will treat the patient, with the necessary care and skill, that serves as the naturalia of the contract itself. It has, correctly, been pointed out, by our legal writers, that to allow a hospital to exempt the degree of skill expected of it, which is part of the primary or essential obligation undertaken by it, would be counter to the very essence of why the contract was concluded between the parties. [206] It is, respectfully, submitted it just does not make sense.

But, it is especially the inequality of bargaining power in standardized contracts which has had to endure the greatest criticism. The main arguments advanced include, firstly, the argument that both parties to a contract, are bargaining from positions of equal strength, is incorrect, especially when dealing with standardized contracts. In reality, so it is argued by the legal writers and the courts alike, equality in the relationship between two contracting parties rarely exists. Often the weaker contracting party is exploited by the stronger party. [207]

In a medical context, involving contracts entered into between the hospital/other healthcare providers and patients, certain types of clauses, especially exculpatory clauses, also known as indemnity clauses, alias exemption clauses, alias waivers, in which the hospital/other healthcare providers seek to relieve themselves from liability for negligence, have been criticized. The main reason advanced is that the parties do not stand upon equal footing, the weaker party, usually the patient, would be in a disadvantageous position when entering into the contract with the hospital/other healthcare providers. It is particularly in the United States of America, that academic writer's and the courts alike have treated these types of clauses as unenforceable, being contrary to public policy. [208] It is regrettable

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skill expected of him/her/it and which is part of the primary or essential obligation undertaken by him/her/it, would be contrary to the essence of the basic contractual purpose of the parties to such a contract.

206 In this regard Naude and Lubbe (2005) 122 *SALJ* 444 suggest the parties could therefore not modify the consequences of a contract in a manner opposed to the naturalia of the contract itself. The naturalia of the contract is founded in the duty to take care which arises from the relationship between the medical caregiver and the patient. The legal writers persuasively argue to allow a medical service provider to exempt the degree of skill expected of him/her/it and which is part of the primary or essential obligation undertaken by him/her/it, would be contrary to the essence of the basic contractual purpose of the parties to such a contract.

207 The writers Aronstam (1979) 14 and Hawthorne (2003) 277 identify social and economical inequalities as factors influencing the domination and exploitation; With regards to the courts approach during the classical period Atiyah (1995) 8-9 presents the position as follows: *" ..... during the classical period the court of freedom of contract took no account of social and economic pressures which in many circumstances might virtually force a person to enter into a contract."* The writer also expresses the view that *"classical law of contract paid little attention to inequalities between the contracting parties."* One of the factors which have influenced the change in mindset to curb the domination and exploitation is that of morality. The effect of the change is described by Atiyah (1995) as *"The moral principle that one should abide by one's agreements and fulfil one's promises is being increasingly met by another moral principle, namely that one should not take advantage of an unfair contract which one has persuaded another party to make under economic or social pressure."*

208 Flamm "Healthcare provider as defendant ", a chapter published in Legal Medicine American College of *Legal*

that the Supreme Court of Appeal in the *Afrox case* chose to ignore the principles adopted in other countries, including the United States of America.

Although the court considered the uneven bargaining position between the hospital and patient, the court, as previously discussed, found, as a general rule, that even where on the face of an agreement it appeared that an unequal bargaining position existed between the parties with the strongest party been advantaged, it did not necessarily justify a conclusion that the agreement was in conflict with the public interests. But the court does acknowledge that unequal bargaining power is, indeed, a factor which, together with other factors, can, in certain instances, play a role in considerations of the public interest. But the court held that no evidence to that effect was led by the respondent in the court a quo.

It is, respectfully, submitted that the court conveniently chose to find that, as no evidence had been led as regards the bargaining position of the hospital, as opposed to the patient, the court could not find that the patient was in a disadvantageous position. It is known by all and ought to be known to the courts that a patient, in a hospital contract, is in a

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Medicine (1991) 127; Furrow et al (1995) 256 Annotation "Validity and Construction of correcting the exempting of 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 "Torts - Negligence - Exculpatory Clause" *Kentucky Law Journal* Vol. 58 (1970) 583 at 584. The writers Ginsburg et al "Contractual provisions to medical malpractice liability law and contemporary problems" Vol. 49 No 2 (1986) highlights certain overlapping rationales which influence the American courts in pronouncing on the validity of these type of clauses *inter alia*: *"..... The disparity of bargaining power between provider and patient is too extreme to give any normative weight to the results of bargaining: ....."* In the leading case of *Tunkl v Regents of the University of California* 60 Cal 2d 92, 32 Cal, RPTR 37, 383 P. 2d 441 the Supreme Court of California included in the test to determine when an exculpatory agreement violates public policy *inter alia* the criteria:*" ..... in exercising a superior bargaining power, the party confronts the public with a standardized adhesion contract of exculpation and makes no provision whereby those receiving services may pay additional reasonable fees and obtain protection against negligence; and the person or members of the public seeking such services must be placed under the control of the furnisher of the services, subject to the risk of carelessness on the part of the furnisher, its employees, or its agents."* In a succeeding case of *Belshaw v Feinstein* 258 Cal. App 2d 711, 65 Cal RPTR 788 (1968) the court with reference to the *Tunkl case* also held: *"Since the service involved is one which each member of the public, presently or potentially, may find essential to him, he faces, despite his economic inability to do so, the prospect of a compulsory assumption of the risk of another's negligence. Public policy does not favour `agreements' which shift the risk of negligence from the actor to the victim, where the latter is not in an equal bargaining position."* In a more recent judgement in the case of *Cudnik v William Beaumont Hospital* 206 Mich App 378, 525 N.W. 2d 891 (1995) the Appeal Court of Michigan looked at the unequal bargaining position especially, the patient, occupied in the contractual relationship between the patient and the hospital. The court consequently found: *"Defendant hospital certainly possesses an advantage in bargaining strength against any member of the public who seeks its services. (FN6) Defendant hospital presented plaintiff's decedent with the standardized contract of exculpation, without any provision for some other type of protection against negligence. Finally, it is readily apparent that plaintiff's decedent placed himself under the control of defendant hospital, subject to the risk of carelessness by the hospital or its agents."* The court further rejected the hospitals contention that the provision of medical care should be considered a 'private affair'. The court took a contrary view in declaring:*"The courts have long recognized that the provision of medical care involves issues of public interest. Lewis v Stated Bd of Dentistry: 277 Mich 334, 343 N.W.194 (1936); People v Cramer 247 Mich 127, 134, 225 N.W. 595 (1929).*

disadvantageous position. Several South African legal writers have, over the years, argued that, in so far as the effect of exclusionary clauses in hospital contracts are concerned, as a patient is in a disadvantageous position, when entering into agreements, with the hospitals, containing exclusionary clauses, from a public policy view point, therefore, the validity of exemption clauses is an undesirable feature. [209]

It is also unfortunate and regrettable that the court saw fit not to distinguish between suppliers of healthcare services and the typical commercial contracts, when this was, with respect, clearly indicated. [210]

Another common law ground relied on in opposing the validity of exemption clauses in contracts, is that an exemption clause is seen as constituting a *pactum de non petendo in*

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209 See in this regard the traditional writings of Strauss (1991) 305; Claassen and Verschoor (1992) 103. The more modern writers have also expressed strong views against exemption clauses in broad terms where the parties to the contract stand in an unequal bargaining position. Van der Merwe (2003) 274 writes: *"Exemption clauses have become the object of suspicion, in as much as they are said to enable contractants who are in a strong bargaining position to exploit the weaker co-contractants."* The writers Bhana and Pieterse (2005) 822 *SALJ* 865 at 888 are especially critical of the Supreme Court of Appeal's abstract approach in determining both the existence and effect of the unequal bargaining power between contracting parties. In this regard the writers correctly argue that the court failed to take proper account of the normative considerations of good faith, fairness and equality that were in play in the circumstances. The writers also convincingly argue where the contracting parties stand in an unequal bargaining position, the weaker party cannot contract out of his fundamental rights as set out in the Bill of Rights. The legal writer Tladi (2002) 17 *SAPR/PL* 473, 477 also expresses very strong views 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."* And further: *"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. The Court confidently assumes that the use of scope of indemnity clauses can be curbed by business considerations (at 8). This laissez-faire attitude ignores the reality that most hospitals (if not all) have such indemnity clauses in their admissions forms. The result of this is that a patient cannot decide to hop on to another hospital if he or she is dissatisfied with the contractual arrangement. One of the reasons for the need to `constitutionalise' the common law is to protect the weak and the exploited. The clause complained of exploits the lack of bargaining power of patients to escape a duty of care owed under the common law.*"

210 Naude and Lubbe "Exemption Clauses - A Rethink occasioned by Afrox Healthcare Bpk v Strydom" (2005) 122 *SALJ* 444 at 460-463 quoting the authority Jan Hendrik Esser who cares? Reflections on business in Healthcare *Unpublished LLM Thesis, University of Stellenbosch* (2001) 72 who writes that a patient in seeking healthcare desperately looks for virtues like compassion, integrity and trust worthiness. The legal writers Naude and Lubbe rightfully support the idea that an agreement to obtain medical care is not a simple commercial contract or transaction. What is at stake here is not the patient's patrimonial interest (unlike an ordinary commercial contract), but, the patient's bodily inviolability. It is, persuasively argued by the writer that to allow such an agreement to be put on the same footing as a commercial agreement whilst there is an imbalance between the interests of the parties, would be to allow an improper, unconscionable advantage been gained over the patient.

For similar views see also Van den Heever *De Rebus* (April 2003) 47; Jansen and Smith (2003) *Journal for Juridical Science* (2003) 28 (2) 214 at 218; Hawthorne (2004) 67 (2) *THRHR* 294, 299. It is this distinction between medical health service and ordinary commercial contracts for Pearmain (2004(709 to remark that *" ..... entering a hospital for medical treatment and enlisting the services of a plumber to address a household plumbing problem are two extremely different activities on the basis of risk. One cannot thus say that all suppliers of services are the same and that what is good for one is good for all. The nature of the service they render directly affects the nature and extent of the personal risk to the customer represented by that service."*

anticipando, whereby the parties envisage the commission of an unlawful act. In such an event, the aggrieved party agrees not to institute an action which he/she would otherwise have enjoyed. [211]

The third frontier, upon which Brandt JA's, much criticised, dictum may, with respect, be attacked, is along constitutional lines. The court's failure to recognize certain constitutional principles is disturbing and also regrettable.

After all, since the *Constitution of the Republic of South Africa* [212] is the supreme law of the Republic, all law, be that the common law; be that the statutory law is subordinate to the Constitution. [213]

The Constitution is also said to affect, not only the relationship between the State and other government structures and its citizens, but also private relationships between business enterprises and their clients. It includes the relationship between hospitals and patients.

Insofar as the relationship between the Constitution and the Law of Contract is concerned, the same values, that underlie the Bill of Rights and which affect the spheres of law in general, also affect the law of contract. As was stated before, the Constitution permeates all law in South Africa, including the common law that regulates the enforcement of contracts. Whereas the freedom of contract, and its corollary of *pacta sunt servanda,* in the pre- constitutional dispensation played a significant role, in the new constitutional order, although the courts leave space for the doctrine to operate, the courts, at the same time, are able to decline to enforce contractual terms that are in conflict with the constitutional

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211 It is especially Van den Heever *De Rebus* (2003) 47-48 who holds the view that *"It is difficult to accept that the exemption which the hospital enjoys could be indusive to the maintenance or promotion of acceptable medical standards."* Cronje-Retief The Legal Liability of Hospitals *Unpublished LLD Thesis University of the Free State* (1997) 474 and Van den Heever submit that for reasons of public policy and the fact that hospitals should take responsibility for sub-standard negligent provision of services, organizational failures and systemic defects, an exemption clause in that regard would be a *pactum de non petendo*.

212 Act No 108 of 1996.

213 Currie and De Waal *The Bill of Rights* 5ed (2005) 708 note that *"the Constitution, in turn, shapes the ordinary law and must inform the way legislation is drafted by the legislators and interpreted by the courts and the way the courts develop the common law."* They also state that *"any law or conduct that is not in accordance with the Constitution, either for procedural or substantive reasons, will therefore not have the force of law."* See also the *Executive Council of the Western Cape Legislature v President of the Republic of South Africa* 1995 (4) SA 877 (CC) Para 62.

values, even though the parties may have consented to them. [214] Factors such as unfairness and unreasonableness have begun to play a significant role with the courts. [215] For that reason, it is respectfully submitted, that Brandt JA, when assessing the validity of exclusionary clauses in hospital contracts, should have given greater weight to communal values as opposed to the personal autonomy of hospitals, influenced by the doctrine of *pacta sunt servanda*. The principle of *pacta sunt servanda*, it is respectfully submitted, is subject to constitutional control and the principle cannot trump over, *inter alia,* the values of equality and dignity. Also, the fact that a patient stands in an unequal bargaining position to that of a medical practitioner/hospital causes the contractual liberty of a contracting party to be scrutinized against the values that animate the *Constitution*. To this end, it is submitted, that freedom of contract, when abused by the stronger party, resulting in unreasonable and unjust contracts, as is the case of exclusionary clauses in hospital contracts, undermines the values of equality and dignity and ought to be found to be inconsistent with the values enshrined in the Constitution and the Bill of Rights. This, it is respectfully submitted, Brandt JA, chose to ignore.

What is, further, regrettable is the fact that Brandt JA downplayed the importance of the right to healthcare services. Instead, Brandt JA placed private hospitals, the suppliers of healthcare services, on the same footing as suppliers of other services. In so doing, the learned Judge ignored the fact that the hospital provided services which are the subject of a constitutional right, a right, moreover, which seeks to ensure access to those services. [216] Instead of placing a premium on access healthcare services and the accompanying

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214 *Barkhuizen v Napier* 2007 (5) SA 323 (CC) 66.The Constitutional Court per Ngcobo J delivering the majority judgement, stated: *"I do not understand the Supreme Court of Appeal as suggesting that the principle of contract pacta sunt servanda is a sacred cow that should trump all other considerations."* The court continues: *"All law, including the common law of contract, is now subject to constitutional control. The validity of all law depends on their consistency with the provisions of the Constitution and the values that underlie our Constitution. The application of the principle pacta sunt servanda is, therefore, subject to constitutional control."*

215 The court in the *Barkhuizen case* also held: *"While it is necessary to recognize the doctrine of pacta sunt servanda, courts should be able to decline the enforcement of a time limitation clause it would result in unfairness or would be unreasonable."* See also the comment of Sachs J in a minority judgement who confirms that the jurisprudential pedestal, on which the maxim *pacta sunt servanda* had once occupied, has been singularly narrowed in the great majority of democratic societies.

216 Section 27 of the Bill of Rights provide:
"Healthcare, food, water and social security
27(1) Everyone has the right to have access to-
(a) Healthcare services, including reproductive healthcare:
.....
(b) The State must take reasonable legislative and other measures, within its available resources, to achieve the progressive realization of each of these rights.
(3) No one may be refused emergency medical treatment."

guarantee given to the right to access healthcare services, as provided for by section 27 of the *Constitution,* the court chose to take a very narrow view of the issue of access, finding that the exclusion clause did not interfere with access to healthcare services, in that it did not have the effect of barring anyone from obtaining healthcare services. What is also important is that; besides the patient having access to the healthcare services, the nature of the services include that the hospital and its staff are ethically obliged, by professional rules or codes and by virtue of statutory regulations, to take due and proper care and act with diligence. [217] In turn, the general public have the expectation that when they are treated by a medical practitioner and/or hospital or staff, that they be treated in a professional manner and with professional standards which will not cause them harm. The ethical conduct and the professional standards they are obliged to uphold in treating patients, or when conducting surgery, in furthering access to healthcare services, cannot, it is submitted, be compromised in any way, nor can they, it is further submitted, validly be excluded, in contract form. The doctor or nurses cannot escape their responsibility after the patient had signed a contract that contained an indemnity clause, which is generally couched, as such, to exclude a medical practitioner and/or hospital from liability arising from their own negligence. This was clearly the position in Afrox. [218]

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217 In so far as statutory controls are concerned, the regulations published in the *Government Gazette* on the 1st February *1980 No 2948 No 6832* control the reasonable degree of care and skill which has to be maintained by private hospitals in securing a license granted to them. Regulations 25(23) of the regulations so published requires that "*all services which are reasonably, generally and necessary for adequate care and safety of patients, are maintained and observed."* Besides the regulations controlling the professional standards of private hospitals, the conduct of nurses and the setting of professional standards for nurses as reflected in the *Nursing Act*, 1978 (Act No 50 of 1978). Section 29(1) (c) of the Act makes provision for the removal from the register of registered nurses and midwives following on a disciplinary inquiry by the South African Nurses Control.

218 See in this regard Pearmain (2004) 710-711. The writer suggests that an attempt to compromise the standard of conduct defeating the object of the Constitutional right to access to healthcare is contrary to public policy or to the legal convictions of the community as expressed in the *boni mores*. The writer emphasizes this aspect, especially, where the contracting parties is also in an unequal bargaining position. The writer goes on to state: *"It is extremely difficult to see why the broader community, as opposed to the business community with which the Supreme Court of appeal seemed primarily concerned in this case, would prefer the right to freedom of contract to the right of access to effective and properly delivered healthcare services. It is submitted that the Supreme Court of Appeal demonstrates not only in this case but also in others such as Carmichele a surprising and unfortunate reluctance to take opportunities to align the more traditional common law principles with the Constitution and that within this court, judicial inertia is the order of the day."* Brand D in `Disclaimers in Hospital Admission Contracts and Constitutional Health Right: Afrox Healthcare v Strydom *ESR* Review Vol. 3 No 2 September 2002 published by the Socio-Economic Rights Project, University of the Western Cape also gave great consideration to Brand JA's recognition of the exemption of healthcare services and critically states: *"The Court's judgement puzzles. The Court's finding that there was equality of bargaining power ignores the self-evident inequality inherent in the contractual relationship. It is submitted that the nature of the service at stake created an unequal bargaining position. One cannot do without healthcare services, which are a fundamental constitutional right. Since all private and public hospitals in South Africa use indemnity clauses, it is clear that the respondent had no bargaining power regarding the indemnity clause - if he objected to it he had nowhere else to go and would not have gained access to healthcare services. The Court's reasoning on the clash between the indemnity clause and constitutional values is equally suspect. The Court concluded that, in the absence of the threat of action for damages, disciplinary*

It has also been persuasively argued that such a right to access to healthcare services cannot be waived or limited, such right being inalienable. [219] It is submitted, with respect, that to accept otherwise, is to contradict the long established principles of the common law, as well as the *Constitution*.

Although Brandt JA acknowledged the important role which public interest (often used inter-changeably with public policy) plays to denounce the validity of a contractual provision, [220] it is respectfully submitted that, once again, the Supreme Court of Appeal showed its reluctance to unshackle the ethos of contractual freedom and the sanctity of contracting, and to place greater impetus on other values which influence public policy. The values, it is suggested, include fairness, dignity and equality. [221]

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action by professional bodies and concern for a hospital's reputation ensure that hospitals avoid negligent conduct. The Court's reasoning ignores the fact that the respondent litigated precisely because of negligence that incurred despite these `sanctions' and that caused the respondent damage, for which he cannot now be compensated." The writer continuous: *"In addition, the case seemed significant because it concerned the indirect horizontal application of a socio-economic right. It allowed the Court an opportunity to demonstrate its regard for constitutional values. However, the judgement raises doubt as to the extent to which the Court considers these values. This observation is most evident in the consideration of whether the indemnity clause offends public policy. This consideration comes down to a balancing of the individual interests of the contracting parties and the general, constitutional interests of the public. The Court opted for the protection of the individual (commercial) interests while ignoring almost completely the fact that the service the parties bargained about was a constitutional right. With regard to the scope of the limits engendered by an indemnity clause, the Court held that those limits should be defined by business considerations such as saving in insurance premiums and competiveness. The Court missed an opportunity: it again insulated that common law, from constitutional infusion."*

219 Insofar as inalienable rights are concerned Hopkins (2001) 122 at 137 persuasively argues that contracts whose enforcement would entail the violation of a right in the Bill of Rights are unenforceable because they are contrary to public policy. Enforcement of such a contract (waiver) so it is further argued by Hopkins would mean in effect, the limitation of a contracting party's constitutional right. The writer further suggests that this can only be done if the reason for the limitation is reasonable and proportionate to the benefit obtained. It is suggested that the right to the access to healthcare, falls into this category of rights which cannot be limited, for such right is inalienable.

220 Brand JA quoted the well-known case of *Sasfin (Pty) Ltd v Beukes* 1989 (1) SA 1(9) dictum of Smalberger JA in the former where he 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. 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."

221 It is especially, the court's approach in the Afrox case that has elicited strong criticism in its use of public policy standards. In this regard Naude and Lubbe (2005) 441 at 443 advances the view that as regard the public policy standard, the court fell back on the elementary principle, virtually elevated into a constitutional value, namely that *"public interest requires the enforcement of contracts freely and earnestly entered into."* What the authors do

It is respectfully submitted, that the Supreme Court of Appeal in the *Afrox case* also failed to include, in its considerations in determining the effect of public policy on exclusionary clauses in hospital contracts, the unequal bargaining position of the parties, unjust and unreasonable results in contract, as well as good faith in contractual dealings. [222]

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advocate however, are broader policy considerations *inter alia* the maintenance of a standard of care and medical ethics. The writers Jansen and Smith (2003) 210 at 217 is also critical of Brand JA in not considering foreign law when considering whether exclusionary clauses in hospital contracts were invalid or not. In this regard the writers suggest that had the court considered foreign law, they would surely, have followed England, America and Germany in pronouncing that such clauses are contrary to public policy. Tladi (2002) 17 *SAPR/PL* 473 is particularly critical of the Supreme Court of Appeal in the Afrox case for relying on freedom of contract for its conclusion. The court noted that freedom is one of the values underlying the Constitution. Relying on the *Brisley v Drotsky* case, the court decided that the freedom of contract is in fact a constitutional value as it forms part of freedom. The writer in this regard, suggests that freedom of contract may promote constitutional values in some cases, but not in all. In instances where there is an unequal bargaining power between contracting parties this can lead to `obscene excesses'. It is for that reason that *Tladi* suggest at 477 that freedom as a constitutional value has to be balanced with other values underlying the Constitution, namely *"fairness, dignity and equality"*. The writer suggests that public policy dictates that considerations of unequal bargaining power of the parties, unjust or unreasonable clauses, contracts contrary to good faith ought to be considered when deciding contractual provisions or contracts to be unenforceable.

222 Support for the development of the open norms of the South African common law to include bona fides, public policy and *boni mores* in accordance with the Constitutional mandate, is also promoted by Hawthorne (2003) 15 *SA Merc LJ* 271 at 277. The writers Carstens and Kok (2002) also convincingly argues that the Supreme Court of Appeal made too much of contractual autonomy which is not explicitly recognised in the *Bill of Rights*. Moreover, the writers suggest that contractual autonomy must yield to enhancing access to professional healthcare services. Hopkins "Standard-form contracts and the evolving idea of private law justice: A case of democratic capitalist justice versus natural justice" *TSAR* 243-1 150 at 157 also persuasively argue that although public policy is a very useful and resourceful body of doctrine, all law in South Africa (including the common law), must promote the value that underlie the Bill of Rights. The values suggested by Hopkins, include, openness, dignity, equality and freedom. But, cautions the writer, whereas the common law once valued sanctity of contract as epitomizing contractual justice, it is no longer the case. Sanctity of contract must now also be constitutionally scrutinized against the values that animate the Constitution. The Bill of Rights according to Hopkins is a guarantee to all South Africans that their fundamental rights will be protected against infringement. An area of concern, raised by the writer, are contracts, often entered into, between contracting parties where there is a huge disparity in their bargaining power, for example, in standard-form contracts. Such contracts ought to receive different treatment from the courts, especially, in those where there is no radical difference in bargaining power. A solution suggested by Hopkins is that as public policy is already entrenched in our common law and in particularly the law of contract wherein contracts contrary to public policy are declared unenforceable, the Bill of Rights should itself provide for an exceptionally reliable statement of seriously considered public opinion. This solution according to Hopkins is compatible with the rationale behind Section 39(2) of the Bill of Rights - that the common law be developed so as to be made compliant with the values that underlie the Constitution. To this end, it is argued that any standard-form contract that contains a clause that conflicts with the provisions of the *Bill of Rights* is *prima facie* unenforceable, unless, good cause is shown by the contracting party relying on the clause. Hopkins also persuasively argues that the enquiry by the judges in adjudicating these matters ought no longer to be restricted to judicial precedent, contractual capacity and the legality of the transaction. Instead, they will have to grapple with issues such as fairness and reasonableness as well. See also Christie "The Law of Contract and the Bill of Rights" *Bill of Rights Compendium* (1997) 3H-7. In a groundbreaking decision in the case of *Archaize v Napier* 2007 (5) SA 323 (CC) 66 the Constitutional Court per Gobo J who gave the majority judgment, emphasizes the importance of public policy when he stated: *"Public policy represents the legal convictions of the community; it represents those values that are held most dear by the society."* The court goes on to state: *"Determining the content of public policy was once fraught with difficulties. It is no longer the case. Since the advent of our constitutional democracy, public policy is now deeply rooted in our Constitution and the values which underlie it."* The court added: *"..... The founding provisions of our Constitution make it plain: our constitutional democracy*

Although it was not specifically pleaded in the *Afrox case*, the court also ignored one of the rights enshrined in the *Bill of Rights* that reflects the foundational values that underlie our constitutional order and also constitute public policy, such as the right of access to court in terms of s34 of the *Constitution*. [223] It is a guaranteed right, founded upon the emphasized values in the new South African constitutional order;[224] it has as a pedestal constitutionalism, bolstered by the entrenched rule of law. The rule of law, in turn, in terms of section 34 of the Constitution, gives expression to a foundational value, namely, guaranteeing to everyone the right to seek the assistance of a court and further, guaranteeing orderly and fair resolutions of disputes by courts or independent and impartial tribunals. [225]

Exclusionary clauses, by their very nature, it is respectfully submitted, run counter to the foundational value in guaranteeing to everyone the right to seek the assistance of the courts, in that, exemption clauses prevent a potential plaintiff from suing a potential

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is founded on, among other values, the values of human dignity, the achievement of equality and the advancement of human rights and freedoms, and the rule of law. And the Bill of rights, as the Constitution proclaims, "Is a cornerstone" of the democracy; "it enshrines the rights of all people in our country and affirms the democratic (founding) values of human dignity, equality and freedom." The court consequently considered the role of public policy when it stated: *"What public policy is and whether a term in a contract is contrary to public policy must now be determined by reference to the values that underlie our constitutional democracy as given expression by the provisions of the Bill of Rights. Thus a term in a contract that is inimical to the values enshrined in our Constitution is contrary to public policy and is, therefore, unenforceable."* The court also suggested: *"The proper approach to the constitutional challenges to contractual terms is to determine whether the term challenged is contrary to public policy as evidenced by the constitutional values, in particular, those found in the Bill of Rights. This approach leaves space for the doctrine of pacta sunt servanda to operate, but at the same time allows courts to decline to enforce contractual terms that are in conflict with the constitutional values even though the parties may have consented to them."*

223 To this end the authors Currie and De Waal the Bill of Rights Handbook (2005) 704 states that *"a fundamental principle of the rule of law is anyone may challenge the legality of any law or conduct."* The authors also emphasize the fact that the purpose of Section 34 has as its grounding the higher value of the rule of law in that *" ..... It promotes the peaceful institutional resolution of disputes and to prevent the violence and arbitrariness that results from people taking matters in their own hands"* and further *"..... By insisting on the resolution of legal disputes by fair, independent and impartial institutions [it] prohibit the resort to self-help"*. What this Section does according to Currie and De Waal is to provide *"access, independence, impartiality and fairness."*

224 In *Archaize v Napier* op cit the Constitutional Court emphasized the right of access to the courts when it stated: *"This is fundamental to the stability of an orderly society. It is indeed vital to a society that, like ours, is founded on the rule of law. Section 34 gives expression to the foundational value by guaranteeing to everyone the right to seek the assistance of a court."* (Para 31). And further at Para 33: *"Section 34 therefore not only reflects the foundational values that underlie our constitutional order, it also constitutes public policy."* The court consequently laid down the following test in Para 36: *"The proper approach to this matter is, therefore, to determine whether clause 5.2.5 is inimical to the values that underlie our constitutional democracy, as given expression to in section 34 and thus contrary to public policy."*

225 Section 34 of the Constitution Act 108 of 1996 under the heading `Access to Courts', provides:
"Everyone has the right to have any dispute that can be resolved by the application of law decided in a fair public hearing before a court or, where appropriate, another independent and impartial tribunal or forum."

defendant, in a court of law, or in any other tribunal, or forum. To enforce an exemption clause in a contract has the effect that the doors of the courts are, effectively, closed to an injured party. [226]

Although the Constitutional Court has not been asked to pronounce on the validity of hospital contracts containing exemption clauses, in which the patient indemnifies or exonerates a hospital from liability, notwithstanding the negligence of the hospital's staff, it is respectfully submitted that, if the court was to be confronted with this legal question, the

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226 The legal writer Hopkins in a most recent publication "Exemption clauses in contracts" *De Rebus* June 2007 22 at 24 suggests that if one were to take the proposition seriously that the Bill of Rights is an accurate statement of public policy *" ..... then it follows that contracts which violates provisions of the Bill of Rights (if enforced) without good reason should be deemed unconstitutional and therefore in violation of public policy with the result that they should be unenforceable."* The author is critical of the approach adopted by the Supreme Court of Appeal in the cases of *Afrox Healthcare Bpk v Strydom supra* and *Johannesburg Country Club v Stott* 2004 (5) SA 511 (SCA) which involved exemption clauses. The writer suggests that in these cases the question of exemption clauses were not adequately tested against the constitution. He also holds the view that the legal team for the patient in Afrox case selected the wrong right when challenging the unconstitutionality of the contractual provisions. Whereas in Afrox, the writer reasons, the exemption clause could never have resulted in the limitation of the right to access to health, in the Stott case, he argues, the SCA wrongly implicated the right to life clause. For that reason the writer argues *"It is crucial to determine, upfront, exactly what right is limited if the contract is upheld"*. In other words, one has to ask the right questions: What right will be limited if the contract is allowed to stand? The answer lies in the nature and scope of exemption clauses - "Exemption clauses according to Hopkins page 29 "*prevent a potential plaintiff from suing a potential defendant in a court of law or in any other tribunal or forum."* They are devices which limit the right to access to court as provided for in terms of Section 34 of the *Constitution*. For courts to enforce exemption clauses in a contract, effectively closes the doors of the courts to injured parties. This Hopkins adds, is contrary to the provisions of Section 34 of the Constitution. The second part of the enquiry is whether or not the limitation of the constitutional right should nevertheless be allowed to stand because it is reasonable and justifiable? For a right to be limited in the particular circumstances s36 of the *Constitution* needs to be invoked that a person's constitutional rights may be limited where it is `reasonable and justifiable' to do so in a free and open democracy based on human dignity, equality and freedom. (s36) Although exemption clauses in contracts will always amount to a limitation of the Constitutional right contained in section 34, it does not according to Hopkins at page 25 mean that all exemption clauses are unconstitutional and therefore in violation of public policy. The answer lies in whether the limitation of a constitutional right can be justified? Here Hopkins at page 29 correctly draws a distinction between exemption clauses prevalent in some industries which are justified and others which can quite simply never be justified.

Hopkins also suggests that the basis for deciding the validity of exemption clauses could no longer be decided under the traditional sanctity of contract, but, will always be a constitutional call. It will therefore be up to the party seeking to exclude itself from liability to justify to the court why, in that particular case, there is a reasonable and justifiable basis for having the exemption clause in the contract. More recently the Constitutional Court considered section 34 as a constitutional value. In *Barkhuizen v Napier* Ngcobo J delivering the majority judgement emphasized the value of Section 34 of the Constitution which *"not only reflects the foundational values that underlie our constitutional order, it also constitute public policy"*. The court consequently considered the common law position of an aggrieved person's right to seek the assistance of a court of law and whether the time-bar clause 5.2.5 was contrary to public policy and unenforceable? As to the nature of the clause, the court stated: *"What is also apparent from the clause is that it does not deny the applicant the right to seek judicial redress; it simply requires him to seek judicial redress within the period it prescribes failing which the respondent is released from liability. It is in this sense that the clause limits the right to seek judicial redress."* The court also weighed up the principle of freedom of contract and the need to ensure access to the courts and concluded: *"In approaching this question, a court will bear in mind the need to recognize freedom of contract but the court will not let blind reliance on the principle of freedom of contract override the need to ensure that contracting parties must have access to courts."* (Para 55).

court would rule that such clauses or contracts fall into the category of contracts which violate provisions of the Bill of Rights, more especially section 34, without any good reason. It is further submitted, that the court would declare such an agreement to be unconstitutional and therefore in violation of public policy and unenforceable.

What also emerged from the *Afrox case,* it is respectfully submitted, is the lack of initiative and insight shown by Brandt AJ to adapt the common law to reflect the changing social, moral and economic fabric of our society, in developing the law of contract, especially, the impact which exclusionary clauses always had on society and the unjust and unreasonable results they often brought with them. More especially, the wrongs that exemption clauses in hospital contracts, bring with them, often results in the suffering of the patients. [227]

In this regard Brandt JA, it is respectfully submitted, disappointingly, ignored the aide at the Supreme Court of Appeal's disposal, namely section 39 of the *Constitution*. Section 39, it is submitted, has been designed as an aide, where necessary, to develop the common law, in our new constitutional order, to reflect the spirit, purport and objects of the Bill of Rights. By using section 39, judges have the opportunity to develop the common law, where no law exists, or law reform is necessary, i.e. where the competing rights conflict with the values in the *Constitution*. [228] Despite the reluctance shown by certain judges to develop

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227 Hopkins (2007) 25 unlike Brandt JA in the *Afrox case* persuasively argue that no matter how highly we value the sanctity of contract rule, the freedom to contract can never serve as a justification for enforcing a private agreement that has the purpose and effect of unreasonably limiting the other party's constitutional rights especially, a potential litigant's right of access to court contained in S34 of the *Constitution*.

228 Judges have shown reluctance however, to use these aides though available to them. It is especially the writer De Vos "Pious wishes or directly enforceable human rights? Social and economic rights in South Africa's 1996 Constitution" *South African Journal on Human Rights* (1999) who equate the roll which judges choose to take in the new Constitutional Order akin to the pre Constitutional Period. In this regard De Vos holds the view that it seemed the same road which some of the Constitutional Court judges had also walked. He uses several dicta of the Constitutional Court to support his view namely: In *S v Zuma* 1995 (4) BCLR 401 (SA) (CC) Kentridge AJ, while admitting that general language does not have a single `objective' meaning, nevertheless warns that the main task of the judiciary should remain the interpretation of a written instrument and that a less rigorous approach may entail the danger that the Constitution may be taken to mean whatever one wishes it to mean (at 412F-G); Also in *S v Makwanyane* 1995 (6) SA 665 (CC) where Kriegler J remarks: *"In answering the question the methods to be used are essentially legal, not moral or philosophical. The incumbents are Judges, not sages; their discipline is the law, not ethics or philosophy and certainly not politics"* (at 747F-748A).
For an extensive discussion on the jurisprudence of the Constitutional Court, see Alfred Cockrell `Rainbow Jurisprudence' (1996) 12 *SAJH* R 1-38. Cockrell argues that the judges of the Constitutional Court had by and large failed to go beyond the formulation of formal reasons for their decisions and had not engaged in the moral and political reasoning required when making the difficult decisions about matters of political morality. But, notwithstanding some of the judges' hesitancy to move with the times, some of the judges changed their mindset. It was Kentridge AJ in *Du Plessis v De Klerk supra* who quoted with approval the Canadian dictum in *R v Saliture* (1992) 8 CRR 2d 173 (1991) 3 SCR 654 wherein it was stated: *"Judges can and should adapt the common law to reflect the changing social, moral and economic fabric of the country. Judges should not be quick to perpetuate rules whose social foundations have long since disappeared. Nonetheless there are significant constraints on the*

the common law, nonetheless, certain judges, especially in the Constitutional Court, made use of section 39 of the *Constitution* by making use of recognized international and foreign law authorities. [229] It is respectfully submitted that, had Brandt JA relied upon international

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power of the judiciary to change the law. In a constitutional democracy such as ours it is our legislature and not the courts which have the major responsibility for law reform. The judiciary should confine to show incremental changes which are necessary to keep the common law in step with the dynamic and evolving fabric of our society."

229 Chapter 2 of the Bill of Rights provides as follows:

"Interpretation of Bill of Rights"

39. (1) When interpreting the Bill of Rights, a court, tribunal or forum:

(a) must promote the values that underlie an open and democratic society based on human dignity,equality and freedom;

(b) must consider international law; and

(c) may consider foreign law.

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

When interpreting the Bill of Rights, a court, tribunal or forum must therefore consider international law. See Blake "The world's law in one country: the South African Constitutional Court's use of public international law" 1998 *SALJ* 668; Botha "International law in the Constitutional Court" 1995 *SAYIL* 668 as quoted in Christie *Bill of Rights Compendium* (2002) 1A-21. According to the learned author the rule is peremptory, but, except where international agreements and international law are law in South Africa, a court is not obliged to apply international law, it must merely consider it. The learned author relies on ss231, 232 and 233 of the Constitution which indicate that the Constitution *" ..... is the primary source of the protection of human rights in South Africa, in principle, international agreements become part of South African law only after they have been enacted as Acts of parliament and customary international law is law in the Republic unless it is inconsistent with the Constitution or an Act of parliament. See LS v AT 2001 2 BCLR 152 (CC), 2001 1 SA 1171 (CC0 par [27]."*

A number of the High Courts in South Africa have considered and recognized international and foreign law authorities which they expressed to be useful and instructive in incorporating in their judgements. Some of the cases include but are not restricted to the following: See *S v Scholtz* 1997 (1) BCLR 103 (NMS); *S v Mathebula and Another* 1997 (1) BCLR 123 (W); *Fraser v Children's Court, Pretoria North and Others* 1997 (2) BCLR 153 (CC); *Chinamora v Angwa Furnishers (Pty) Limited and Another (Attorney-General intervening)* 1997 (2) BCLR 189 (ZS); *Du Preez v Attorney-General of the Eastern Cape* 1997 (3) BCLR 329 (E); *Fose v Minister of Safety and Security* 1997 (7) BCLR 851 (CC); *Coetzee and Others v Attorney-General, Kwazulu Natal and Others* 1997 (9) BCLR 989 (C); *S v K* 1997 (9) BCLR 1283 (C); *S v Coetzee and Others* 1997 (4) BCLR 437 (CC); *Du Preez and Another v Truth and Reconciliation Commission* 1997 (4) BCLR 531 (A); *Elliott v Commissioner of Police and Another* 1997 (5) BCLR 670 (ZS); *President of the Republic of South Africa and Another v Hugo* 1997 (6) BCLR 708 (CC); *S v Naidoo and Another* 1998 (1) BCLR 376 (E); *S v J* 1998 (4) BCLR 424 (SCA); *National Coalition for Gay and Lesbian Equality and Others v Minister of Justice and Others* 1998 (6) BCLR 726 (W); *New National Party of South Africa v Government of RSA and Others* 1999 (4) BCLR 457 (C); *National Media Ltd and Others v Bogoshi* 1999 (1) BCLR 1 (SCA). In the case of *Carmichele v Minister of Safety and Security* 2001 (4) SA 938 at 954ff the Constitutional Court relied heavily on foreign law to develop the common law in particular in the field of delictual liability by extending the general duty of care in accordance with spirit, purport and objects of the Bill of Rights as intended in Section 39(2) of the Constitution. In this case the court found the prosecution and the police had a duty imposed on them not to perform any act infringing on the dignity, equality and freedom of citizens but rather to provide appropriate protection to everyone through and structures designed to afford such protection. Where such rights are infringed, the court held there is no ground for immunity of public officials from delictual causes by the public. This case is filled with foreign law cases ranging from Canadian Law, English Law and American Law and the European Court of Human Rights. The said cases pioneered the Constitutional Court in developing the common law. In the first instance the court supported the dictum of Tacobucli J in the Canadian decision of *R v Saliture* (1992) 8 CRR (2d) 173 (1991) 2 GCR 654 quoted with approval in *Du Plessis v De Klerk* 1996 (3) SA 850 (CC) 1996 (5) BCLR 658 at pares [15] - [24] wherein the iudex discussed the role judges should

law and/or foreign law, the following contractual jurisprudence in South Africa would have emerged. From a common law perspective, the court would have followed the United States of America's authorities to keep the common law in step with the dynamic and evolving fabric of our society. Moreover, the court would have relied on the following factors in denouncing exclusionary clauses or exculpatory clauses, otherwise known as waivers in which the hospital/other healthcare providers relieve themselves from liability for negligence, as unenforceable as against public policy.

Firstly, that although all exclusionary clauses or exculpatory clauses are not, *per se,* invalid and therefore, unenforceable, where they are found to involve public interest, they will not be held to be valid. The following factors, in turn, influence public interest. The medical profession and medical practise affect public interests. The existence of the medical profession and medical practises are governed by public regulations that involve health, safety and welfare, as well as ethical codes which, in turn, set certain standards of conduct or behaviour, which are expected of hospitals and other healthcare professionals, which they need to show towards their patients in discharging their duties. These standards of conduct or behaviour manifest themselves in standards of care and diligence, which hospitals and other healthcare providers have to uphold. The hospital and/or other healthcare providers' standards of care and diligence are derived from its/his/her statutes or ethical duties. As the prevailing standards affect public safety, health and welfare, any attempt to violate prevailing standards will impact on the public interests. For that reason, it is said that hospitals and/or other healthcare providers have a non-negotiable duty of public service. Private agreements, in the form of exculpatory clauses which aim to reduce a hospital or other healthcare provider's statutory or ethical duties, should, therefore, not be tolerated. Any attempt by a healthcare provider, including hospitals, to use written contracts to limit or reduce liability for negligence, have been struck down by the American courts, as contrary to public policy as it affects the public interest. The American courts have also, on numerous occasions, held that, as the services of, especially, hospitals to members of the public, constitute a crucial necessity, the hospital and its staff's duty of care is, therefore, part of the social fabric and any compromise of such a duty affects the

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play in adopting the common law. In this regard the iudex held: *"Judges can and should adapt the common law to reflect the changing social, moral and economic fabric of the country. Judges should not be quick to perpetuate rules whose social foundation has long since disappeared. Nonetheless there are significant constraints on the power of the Judiciary to change the law. In a constitutional democracy such as ours it is the Legislature and not the courts which have the major responsibility for law reform. The Judiciary should confine itself to those incremental changers which are necessary to keep the common law in step with the dynamic and evolving fabric of our society."* The court also relied on International Law considered consistent with the rights enshrined in our Constitution aimed at the wellbeing of the South African population. The court consequently looked at the provisions of the *European Convention on Human Rights (Convention*).

public interests.

Another factor which weighs heavily against acknowledging the validity of exclusionary clauses in hospital contracts, in the United States of America, is that of the unequal bargaining position between that of the hospital and patient.

Between public interest and the unequal bargaining position of the patient, the American courts have designed a test to determine whether exculpatory clauses in hospital agreements are valid. Consequently, the court considers the following factors when pronouncing on exculpatory clauses namely:

"(1) whether the transaction concerns business of a type suitable for public regulation and performing service of importance in the public; [230]

(2) Whether a party invoking exculpation, possessive decisive advantage of bargaining strength and, in exercising superior bargaining power whether the public, as a right of the transaction, is placed under the control of the party seeking exculpation of which the inferior party agrees to the risk of harm or carelessness." [231]

The American courts have continuously held that a hospital and/or another healthcare provider and the patient stand in an unequal bargaining position, because the hospital and/or other healthcare provider are of crucial importance to the general public. It is respectfully submitted that, had the Supreme Court of Appeal, in the *Afrox case,* followed the American common law, the court may, very well, have followed the leading case of *Tunkle v Regents of University of California*.

Besides foreign law, the Supreme Court of Appeal in the *Afrox case* also chose to ignore international law, when it was otherwise indicated. The court could so easily have relied upon English legislation and the legislation enacted in South American countries, as well as European countries, in an attempt to develop the much needed contractual jurisprudence in South Africa. [232]

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230 *Olson v Molzen* 558 California S.W. 2d 429 (Tenn.S.Ct.1977).

231 The Kentucky Court of Appeal in the case of *Meiman v Rehabilitation Centre* 444 S.W. 2d 881 (KY 1969) describes public policy considerations as follows: *"The public policy considerations here are buttressed by the independent obligations owed by defendants to plaintiff arising from the physician-patient relationship between them. This relationship imposes upon the healthcare provider greater responsibilities that that required in the ordinary commercial market place. In the context of that professional relationship "a provision avoiding liability is peculiarly obnoxious." (15 Williston on Contracts (3eds ed 1972) section 1751)"*

232 In so far as international legislation is concerned it is especially the *Unfair Contract Terms Act* 1977 and Art 3 of the *European Council Directive on Unfair Terms in Consumer Contracts Council Directive* 93/13/EEC OJL 095/29 (5 April 1993) 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."* Sachs J in the minority judgement in *Barkhuizen v Napier* also refer to the development in South American countries when he states:
"It appears that a number of South American countries have also enacted legislation since 1990 providing for

Such an attempt, it is respectfully submitted, would have helped to curb the uncertainty, which the South African courts have brought about, when pronouncing on standard form contracts. In this regard, specific emphasis is placed on the controversial dictum of Brandt JA in the Afrox case. What has emerged, from the research undertaken in this thesis, is that there are contracts, in South Africa, which are, in their entirety, alternatively partially, unfair, unreasonable, unconscionable or oppressive. This may arise when agreements are executed, including the intention of exemption or exculpatory clauses in contracts or when their terms are enforced.

Although the South African courts have, on occasions, tried to control agreements contrary to law, morality or public policy, often denouncing certain contracts or contractual terms to be unenforceable or void, our courts, it is respectfully submitted, have not done enough to deal with contracts which are unfair, unreasonable, unconscionable or oppressive. This has caused academic opinion, over the years, to call for reform in contract law. The majority of these writers have united in their efforts in calling for the courts to ensure that they refuse, on grounds of public policy, to enforce contracts, or contractual terms, which were unfair or unconscionable. [233] Because of the South African courts' reluctance, or inability, in not

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consumer protection against unfair contracts similar to legislation existing in so-called first world countries. According to the SALRC these statues were heavily influenced by the Mexican Consumer Protection Law of 1974 and the Brazilian Consumer Protection Code of 1990, as well as Spanish and French consumer protection law." In illustrating the value section 39(1) of the *Constitution* brings when guidance is sought from international practices, Sachs J puts the position as follows: *"In considering the standards of contractual behaviour required by public policy in South Africa, attention should be paid to the manner in which standard form contracts are being dealt with in other open and democratic societies."* The idea of limiting and in some cases to take away entirely, the right to rely on exemption clauses in certain situations, was given a boost in South Africa in 1988. During this year, the South African Law Commission under Chairpersonship of Mr Justice Olivier and influenced greatly by legislative interventions in Scandinavian countries such as Denmark, Sweden, Norway as well as the European countries such as France, the Federal Republic of Germany, the Netherlands, England and Australia, decided upon legislative intervention for South Africa, by proposing statutory control under the *Unfair Contractual Terms Bill*. South African Commission - Report on Unreasonable Stipulations in Contracts and the Rectification of Contracts Project 47 April 1982. By proposing the introduction of the *Unfair Contractual Terms Bill* it heralded in a new ethos in exercising statutory control where contracts and contractual terms are unjust or unconscionable and to denounce such contracts or contractual terms so as to avoid the injustices which would otherwise ensue. The Commission received a broad spectrum of representations, which varied from objections to broadening of the courts' authority; to support for the courts to be given the power to strike down unconscionable clauses in contract; to upholding freedom of contract; to social control over private volition in public interests. Ultimately, the Commission adopted the fairness criteria as applied in the foretasted foreign countries by concluding:
"Despite various critics lodging various objections to the fairness criteria to be included in the proposed legislation the Commission nevertheless recommends that unreasonableness, unconscionability or oppressiveness be the yardstick to be applied in determining fairness in contracts."

233 This has caused Sachs J in his minority judgement in *Barkhuizen v Napier* with reference to the writings of Aronstam *Comsumer Protection, Freedom of Contract and The Law* (1979); Woolfrey "Consumer Protection - A New Jurisprudence in South Africa (1989-1990)" *Obiter* 103 at 119-20; McQuoid-Mason "Consumer law: the need for reform" (1989) 52 *THRHR* 32; Lewis *Fairness in South African Contract Law* (2003) 120 SALJ 330; Bhana and Pieterse "Towards a Reconciliation of Contract Law and Constitutional Values: Brisley and Afrox Revisited" (2005) 122 *SALJ* 865 and articles quoted therein to remark: *"It must be granted that it would be self-referential and inconclusive to take the views of academics as to what the legal convictions of the community are,*

always satisfactorily dealing with contracts or contract terms which are unfair, unreasonable or oppressive, [234] strong calls have gone out, amongst certain academic writers, that comprehensive legislation be introduced to curb the, often, unscrupulous exploitation of weaker contracting parties at the hands of corporations and monopolies. [235] Although the receiving of other practises, including legislative provisions, from different jurisdictions ought to be executed with care and, often, circumspection because of the different social and economic development and experiences, it does not follow that comparative research must be ignored.

Nor does it follow that the law reformer, in a specific jurisdiction, seeking reform, should not have regard to tested models and ideas and adapt them to the local environment. [236] It is respectfully submitted that, despite the different social and economic development of the

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as evidence of what actually constitutes these convictions. Nevertheless, taken with the other indices mentioned in this part of the judgement, I believe that the near-unanimity of scholarly opinion on the need for fairness in contracts, at the very least reinforces the approach that I am developing, and is manifestly in keeping with the constitutional values of human dignity, equality and freedom."

234 Kotz "Controlling unfair contract terms: Options for legislative reform" *SALJ* (1986) 405 at 407 expresses the view that although the courts have adopted a number of techniques including rules of interpretation to invalidate a term in a standard-form contract which is found to be abusive, no attempt has been made by any of the courts to strike down a contract as a whole. Nor have the courts prepared to say openly that they were striking down the contractual provision on the sole ground that it was unfair in all the circumstances or was harsh or unconscionable. That remains the position today. The only court that has mooted this to be the correct approach is Sachs J in the minority judgment of *Archaize v Napier*.

235 One of the first calls for the regulation of unfair, unreasonable, unconscionable or oppressive contracts as well as the uncontrolled use of exemption clauses in all types of contracts came from Delport "Exemption clauses: The English Solution" *De Rebus* (Dec 1979) 641. Influenced by legislative reforms in countries including Germany, Denmark, Sweden, Norway, France, Australia and England, those in favour of legislative reform have advocated that specific legislation directed at specific abuses in specific types of contract is to be preferred over the existing order which breed ambiguity and uncertainty and triggered wasteful litigation. The other main motivational feature for advocating legislative reform include the following: Despite the principle of freedom of contract been widely recognised, internationally, social control mechanisms, especially in the form of legislation, have been introduced over decades to address the ills of specific types of contract and certain kinds of unfair contractual provisions. See also Kotz "Controlling Unfair Contract terms: Options for legislative reform" *The South African Law Journal* (1986) 405, 406ff; South African Law Commission - Report on unreasonable stipulation in contracts and the rectification of contracts Project 41 1998 17.

236 Van Loggerenberg "Unfair Exclusion Clauses in Contracts: A Plea for Law Reform" (1987) 7 after analyzing the legislative reform in countries such as England, Germany, the United States of America and Holland, concludes that as our legal system is closely related to some of the legal systems, our legal philosophy in South Africa ought to resemble that of the other jurisdictions, namely, *"unfair contractual terms can only be controlled effectively by adopting reasonableness as a general criterion of control with bona fide as its under carriage."* Delport (1979) 641 at 642-643 relying heavily on the English law reform with their promulgation of the *Unfair Contract Terms Act* 1977 states: *"the English solution is not wholly without its difficulties, nevertheless it does offer certain answers to a rather complicated problem."* He does venture to suggest that some of the provisions of the English legislation may serve as a basis for drafting similar legislation in South Africa.

different jurisdictions, there is commonality in the philosophy amongst consumers in the different jurisdictions, namely, to limit the unfair practises which have been adopted by big business enterprises and often monopolies, to the detriment of the consumers. [237] But, consumer protection is not restricted to the commercial practises proper, but includes, it is submitted, the relationship between healthcare providers, including hospitals, and their patients, in which legislative intervention is desperately sought. [238]

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237 To this end strong calls have also been made for the enactment of legislation for the protection of consumers and to regulate the inclusion of particular types of terms in contracts. See in this regard the writings of Hahlo "Unfair Contract Terms in Civil Law Systems" (1981) 98 *South African Law Journal* 70; Van der Merwe et al (2003) 216; Christie (1996) 15-17; Steyn (2004) 16 *Merc LJ* 106 at 112; Carstens and Kok (2003) 18 SAPR/PL 430 at 455; Van den Heever; *De Rebus* April 2003 47 at 48; Strauss (1994) 305; Aronstam "Unconscionable Contracts" The South African Solution?" (1979) 2 at 42; Fletcher "The Rule of Good Faith in the South African Law" (1997) *Responsa Meridiana* 1 at 12-13; Van der Walt "Aangepaste Voorstelle vir 'n stelsel van voorkomende beheer oor kontrakteervryheid in die Suid-Afrikaanse Reg" 1993 (56) *THRHR* 65 at 66; Van Aswegen "The Future of South African Contract Law" (1994) 67 *THRHR* 458-459; Hawthorne "The Principle of Equality in the Law of Contract" 1995 (58) *THRHR* 157 176. But the most significant attempt to protect and promote consumerism came from the South African Law Reform Commission in 1998 when the commission relying on other foreign jurisdictions stated that *"public policy ..... is more sensitive to justice, fairness and equity than ever before. The commission 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."* See also SALRC "Unreasonable Stipulations in Contracts and the Rectification of Contracts" *Project 47* (April 1998) at Para 1.44 quoted by Sachs J in Barkhuizen v Napier 2007 this moves Sachs J Para 184 to remark: *"Given the scale of injustice in our past, it is not surprising that the theme of consumer protection has not roomed as large in this country as it has in other parts of the industrialized world.* What is also significant is that even the South African courts, more especially, the Constitutional Court in the case of *Du Plessis v De Klerk and Another* 1986 (3) SA 850 (CC) 1996 (5) BCLR 658 Para 61 quotes with approval the Canadian case of *R v Saliture* in which the court remarked *"Judges can and should adapt the common law to reflect the changing social, moral and economic fabric of the country. Judges should not be quick to perpetuate rules whose social foundation has long since disappeared. Nonetheless there are significant constraints on the power of the judiciary to change the law..... In a constitutional democracy such as ours it is the legislature and not the courts which have the major responsibility for law reform..... The judiciary should confine itself to those incremental changes which are necessary to keep the common law in step with the dynamic and evolving fabric of our society."*

238 Strauss (1991) at 305 as long ago as sixteen years ago suggested that the legislative should step in to protect patients against the unfairness and oppressiveness that arise from exemption clauses in hospital contracts. The stance adopted by Strauss has in more recent times been supported by various South African legal writers. See in this regard Naude and Lubbe (2005) 462; Carstens and Kok (2003) 455. It is Cronje-Retief (1997) 440-441 who comes out strongly against the use of exemption clauses in hospital contracts when she writes: *" ..... big institutions, corporations or other groups with unrestricted financial resources and adequate insurance exempt themselves from liability of such contracts, are effectively contra bonos mores, against public policy and/or public interest and should be declared invalid by our courts."* Support for Cronje-Retief's contention is found in Van den Heever *De Rebus* (April 2003) 47-48 in which it is stated: *"Hospitals should take responsibility for sub-standard negligent provision of services, organizational failure and systemic defects ..... The present untenable position in which a victor of a medical accident finds himself should in the public interest and with due regard to considerations of public policy be appropriately addressed either by the court, legislature or the hospitals themselves."*

I am, respectfully, of the view that legal reform is urgently required in the law of contract in South Afica and the introduction of legal entrenchment is much preferred. Our courts, it is submitted, are loathe to create new and equitable rules and to find just solutions to problems experienced in respect of fairness, unreasonableness, unconscionability and oppressiveness. This is clearly; it is submitted, illustrated in the Supreme Court of Appeal in the cases of *Brisley v Drotsky*, [239] *De Beer v Keyser and Others*, [240] and *Afrox Healthcare Bpk v Strydom*. [241]

In the abovementioned cases, the Supreme Court over-emphasized contractual autonomy, at the expense of reasonableness and equity. This clearly ignored the values one may derive from the Constitution. The courts, it is submitted, in relying upon the Constitution, have a general jurisdiction not to enforce unfair contracts or contractual provisions. This is strengthened by societal calls for consumer protection and the recognition of business and medical ethics.

14.7 Summary and Conclusions

It is evident from the scope of this chapter that exclusion clauses, or, as they are otherwise known, exculpatory clauses or waivers, have found their way into hospital contracts and other contracts between healthcare providers and patients. For that reason, exclusionary, or exculpatory, or indemnity clauses have, for many years, especially in the jurisdiction of the United States of America and South Africa, been widely included in admission forms, used by hospitals and other healthcare providers.

It is also evident from this chapter that much controversy surrounds the circumstances under which a contract, containing an exculpatory clause, is signed and the legal effect thereof. What is called into question is the aim of the hospital and healthcare provider in including an exclusionary or exculpatory clause, in such a contract. The aim, as seen from this thesis, is to escape liability, which often has a far-reaching effects on the plaintiff, more specifically, denying him the opportunity of suing the hospital or healthcare provider for the personal injury and/or damages which the patient suffered as a result of the former's negligence.

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239 2002 (4) SA 1 (SCA).

240 2002 (1) SA 829 (SCA).

241 2002 (6) SA 27 (SCA).

The position with regard to the legitimacy of exclusionary clauses in medical contracts is well settled in the United States of America. Most legal writers are against them and most courts in the United States of America have struck down, or severely limited, attempts by hospitals and other healthcare providers, to use written clauses containing exclusionary, to exclude or to reduce their liability for negligence.

The courts', as well as the legal writers,' reasoning have ranged from, these types of contract are offensive to public policy; they violate public interests etc. The rationale is founded in the protection of the patient against the practise of medicine where, minimum levels of performance are being compromised. The hospital's/other healthcare provider's duty of care, so it is found, is inalienable, for, to hold otherwise, would result in the hospital/other healthcare provider being given a license to practise negligently, which in turn, will result in the standards not being upheld.

From the scope of this chapter, it is also evident that a strong argument is that; as the patient does not stand upon equal footing with the hospital/other healthcare provider, the patient is regarded as the weaker party, who is in a disadvantageous position, when entering into the contract with the hospital/other healthcare provider. This impacted heavily, in the United States of America, on the legitimacy of exclusionary clauses.

From the content of this paragraph, it appears that the position in England is also fairly settled. Although there are no legal writings on hand, nor has there been judicial pronouncement on the legitimacy of exclusion clauses in the medical contracts, it has been argued that the health system in England does not encourage the creation of private hospitals, where these types of agreements are promoted. Besides, even if a clause was to be inserted in a hospital/other healthcare provider contract with a patient, excluding liability for personal injury and damages arising from the hospital/healthcare provider's negligent conduct, English legislative measures in the form of the Unfair Contract Terms Act, 1977, protect the patient, in that, the clause will be pronounced unenforceable. In this regard, the Act places a prohibition on the exclusion or restriction of liability for death or personal injury, resulting from negligence, ensuring that a claim for damages under these circumstances remains an inalienable right.

But, despite certainty being reached, in the jurisdictions of the United States of America and the United Kingdom, with regard to the legitimacy of exclusion clauses, it is evident, from the scope of this chapter that the South African legal system is in a marshland of uncertainty. It is also evident, from the scope of this chapter that no other dictum has

received the magnitude of criticism than that of Brandt JA, in the case of *Afrox Healthcare Bpk v Strydom*.

It is, respectfully, submitted that, given the consumer welfarism drive and the international movement away from the traditional ethos of contractual freedom and sanctity of contract, (including the strong views recently expressed by the South African legal writers and academics) to a more value laden approach, including standards of fairness, reasonableness and equity, the approach adopted by Brandt JA is out of step with such movement.

From the scope of this chapter, it is also evident, that the Afrox case was wrongly decided. The discourse surrounding the criticism of this dictum was staged on three frontiers, in this chapter. The three frontiers include, medical ethics founded on the doctor/hospital and patient relationship, the common law and constitutional law.

It is evident, from the discourse in this chapter that medical ethics in the doctor/hospital-patient relationship have, for many centuries, played a significant role. This continues to be the position in modern medical practise. It was seen from the discourse, that the core feature of the relationship is founded in the promotion and maintenance of medical standards, in which, *inter partes*, the interests of the patient are advanced. This places an obligation on the hospital/healthcare provider not to deviate from the standard of conduct expected of him/it or its staff. To this end, medical ethics, in which conscience and the intuitive sense of goodness, public conscience and responsibility towards the patient, play a major role should be respected and promoted. Akin to that is the trust position the doctor/hospital/other healthcare provider occupies in relation to the patient. Instead of embracing the principles enunciated hereinbefore ,which have been part of the medical profession, worldwide, for many centuries, the Supreme Court of Appeal, embracing the doctrine of freedom of contract, chose to accentuate the application of exclusion clauses in, especially, hospital contracts, which seek to protect the medical practitioner/hospital against mishaps occurring, in connection with the conduct of the practitioner, the hospital's nursing staff or doctors employed by the hospitals. Accentuating the latter, it is respectfully submitted, is to ignore societal dictates which demand that, in executing his/her profession, the medical practitioner/hospital ought not be allowed to relax the degree of care and skill expected of him/her as a practitioner, alternatively, if it is a hospital, despite the patient consenting thereto. In allowing this, it is submitted, the court ignores the long standing principles of medical ethics, in which public conscience and the doctor/hospital's responsibility towards the patient play a major role.

It is also submitted that; allowing the standard of conduct of professional people to be compromised, is tantamount to placing professional people on the same footing as any other provider of services, who operate in the commercial terrain. This position, it is respectfully submitted, should never be tolerated, for it would place, for example, a tradesman on the same matrix as a professional person. What needs to be emphasized, as well, is the fact that an admission form, in which the patient seeks to obtain medical care and the hospital and its staff/doctor undertakes to treat the patient with due diligence, is not a simple commercial contract or transaction.

It is also evident, from the discourse in this chapter, that, at common law, the court placed too much emphasis on the doctrine of freedom of contract and the sanctity of contract. The doctrine of freedom of contract and the sanctity of contract had its roots deeply embedded in the classical law of contract and, especially since the advent of standard term contracts, has shown little regard for the bargaining strength of the parties concerned, notwithstanding the inequality that a weaker party may face in the contractual relationship. The classical law approach also ignores the unfair and unconscionable result some contractual agreements may bring with them. One of the reasons, advanced by the courts, is this, to give a judge the, *carte blanche,* discretion to ignore contractual principles which they regard as unfair and unreasonable, would be in conflict with the rules of practise. They, according to the Supreme Court of Appeal, would be in conflict with the principle of *pacta sunt servanda* and the pronouncement of the enforcement of contractual provisions will, ultimately, be determined by the presiding judge, who has to determine whether the circumstances of the case are fair and reasonable, or not. The further argument is advanced that the criteria would no longer be the principles of law, but the judge him/herself.

It is further submitted that the court wrongly ignored the principle of good faith when deciding the validity of exclusionary clauses in the hospital contract.

It is, respectfully, submitted that Brandt JA, besides stating that good faith is not a free-floating value, was not sensitive enough to public dictates which have, over a significant period of time, called for fair dealings in contracts, especially where a degree of bargaining unfairness is present in concluding agreements. Although Brandt JA held that good faith, *inter alia,* represent the foundation and *raison d'etre* for the present legal rules and can also lead to the formulation and alteration of rules of law, the learned Judge makes no attempt to developing good faith as a safety valve, to ensure a minimum level of fairness in contracting, which, I submit, is manifestly in keeping with the constitutional value of human dignity, equity and freedom. It is, further, submitted that the acknowledgement and

development of good faith to ensure a minimum level of fairness in contracting, by the Supreme Court of Appeal, would have gone a long way towards embracing the historical justification for recognizing good faith in contract and which has, as its roots, ethics and fairness in law. The historical justification for recognizing good faith is said to have stemmed from the need to protect the public welfare against unfair contracts or contractual terms from unreasonable hardship. The Supreme Court of Appeal, it is respectfully submitted, failed to have regard to the public welfare, when ignoring good faith including reasonableness, justice and equity.

Although the court acknowledged that contractual provisions which are unfair, on the basis that they are in conflict with public interests, the court, regrettably, did not regard the exclusionary clause in the hospital contract as being one in conflict with public interests. In this regard, it is respectfully submitted, the Supreme Court of Appeal paid lip service to the principles of fairness and public interests. Moreover, as the practise of medicine and all its associated protocols, practises, ethical codes and standards, is affected with public interests, it is difficult to comprehend how Brandt JA would allow the duty of care, which ought to be regarded as an inalienable duty, to be compromised. It is further submitted that exclusionary clauses in medical contracts have no place in the practise of medicine and any private agreement which compromises or reduces the health providers statutory or ethical duties ought to be struck down, as they impact on public interests and any attempt by a doctor/hospital/other healthcare provider to use written contracts to reduce liability for negligence, in whatever form, ought to be struck down as they are deemed to be contrary to public policy.

It is further, respectfully, submitted that the regulation which governs the licensing of private hospitals and which calls for the maintenance of a standard of care and skill in treating a patient, is grounded on public policy. One of the aims of the regulation is that it forbids acts which have the tendency to be injurious to the public good. Where public policy requires the observance of a statute or regulation, no court should fail in its duty to denounce an attempt to waive a hospital/doctor/or other health carer's liability for negligence, as invalid and unenforceable and against public policy. In this regard, a professional person should not be permitted to retreat behind a protective shield of an exculpatory clause and insist that he/she/it is not answerable for his/her/its own negligence.

It is further submitted that the Supreme Court of Appeal, in the *Afrox case,* failed in its constitutional obligation to develop the common law, including the principles of the law of contract.

It is submitted that, instead of taking a principled approach, using objective criteria such as fairness, reasonableness and conscionableness in contract, to ensure standards of fairness and reasonableness are achieved, especially when dealing with standard form contracts, the Supreme Court of Appeal chose to entrench the traditional approach, by denouncing fairness and reasonableness as a yardstick to measure the validity of standard form clauses. The suggested thinking, it is respectfully submitted, is that courts should not enforce a clause if it would result in unfairness or would be unreasonable.

By clinging to the ethos of freedom of contract, the Supreme Court of Appeal, in the Afrox case, ignored, it is respectfully submitted, the lack of consensus which often arises when contracting parties enter into standard form contracts. It is especially where the parties stand in an unequal bargaining position that consensus is not always possible. The weaker of the contracting parties often has no chance of making any input in reaching agreement. Instead, the weaker contracting party is often exploited in entering into the contract on a *"take-it-or-leave-it"* basis. Brandt JA, in the Afrox case, found that, despite the respondent signing the admission document without reading it and thus, no true consensus coming into being, as the patient was not familiar with the contents of the exclusionary clause contained in clause 2.2, it did not matter, as the patient had a full opportunity to read the document. It does therefore not lead as a rule, that he is not bound by the contents. It is respectfully submitted that once again the Supreme Court of Appeal ignored the consensual requirement.

The Supreme Court of Appeal, in the *Afrox case,* also failed along constitutional lines to recognise some values that underlie the *Bill of Rights*. For that reason, it is respectfully submitted, Brandt JA, when assessing the validity of exclusionary clauses in hospital contracts, should have given greater weight to communal values, including fairness and reasonableness, as opposed to the personal autonomy of hospitals, which is greatly influenced by the doctrine of *pacta sunt servanda*. Unlike the historical past, the principle of *pacta sunt servanda* is no longer placed on a pedestal, but is, very much, subject to constitutional control and contractual liberty now has to be scrutinized against the values that animate the *Constitution*.

From a constitutional angle, Brandt JA also, with respect, downplayed the importance of the right to healthcare services. Instead, private hospitals were placed on the same footing as suppliers of other services by the court, ignoring, it is submitted, that private hospitals supply healthcare services, which are guaranteed by the *Constitution*. The court, it is

respectfully submitted, took a very narrow view in finding that exclusionary clauses in hospital contracts do not interfere with access to health care services. To exclude healthcare services by way of exclusionary clauses, it is submitted, is to ignore normative ethics and statutory regulations designed to protect expected professional standards of medical practise and, more especially, the duty of care and skill which ought to be exercised in the interests of the patients.

Although it may not have been specifically pleaded in the *Afrox case*, the court was also silent on suggesting that section 34 of the *Constitution,* which guarantees a potential litigant a right of access to court, could be used as a measure to invalidate exclusionary clauses in hospital contracts. It is, respectfully, submitted that section 34, which gives expression to one of the foundational values, namely, guaranteeing to everyone the right to seek the assistance of a court ought, albeit obiter, to have been considered. Exclusionary clauses, by their very nature, it is submitted, run counter to this foundational value in guaranteeing to everyone the right to seek the assistance of the courts.

Exemption clauses, by their very nature prevent a potential plaintiff from suing a potential defendant in a court of law. To enforce an exemption clause in a hospital contract, it is submitted, has the effect that the doors of the courts are effectively closed to an injured party. Although the Constitutional Court has, thus far, not pronounced on the validity of hospital contracts, containing exemption clauses in which the patient indemnifies or exonerates a hospital or its staff from liability, notwithstanding the negligence of the hospital staff, judging by the attitude adopted by the court in the case of *Barkhuizen v Napier,* it is respectfully submitted that the court may, very well, use section 34 to invalidate such clauses in hospital contracts.

From a constitutional view-point, what disappoints, with respect, as well, is the Supreme Court of Appeal's lack of initiative and insight in making use of section 39 of the Constitution in developing the South African common law in our new Constitutional Order, to reflect the spirit, purport and objects of the *Bill of Rights*. Section 39, it is submitted, has been incorporated in the *South African Constitution* and designed to assist with the development of the common law, by making use of foreign law and/or international law. Where no law exists or law reform is necessary, i.e. where the competing rights conflict with the values in the Constitution. In the Afrox case, it is respectfully submitted, the competing rights i.e. freedom of contract and the sanctity of contract clearly conflicted with the values of the Constitution i.e. the right to equality and dignity, as well as aspects such as fairness and reasonableness. But, despite this glaring conflict between competing

rights with the values of contracts in the Constitution, Brandt JA, with respect, ignored this challenge by ignoring recognized international and foreign law authorities.

Had Brandt JA relied upon international law and/or foreign law, the following contractual jurisprudence in South Africa may, very well, have emerged. From a common law perspective, the court, it is submitted, would have followed the United States of America authorities to keep the common law in step with the dynamic and evolving fabric of our society. The following factors, it is submitted, would have prompted the court to develop the common law, namely, the medical profession and medical practise affects public interests. As the medical profession and medical practices are governed by public regulations, which involve health, safety and welfare, as well as ethical codes which, in turn, set certain standards of conduct or behaviour in motion, hospitals and other healthcare provisions are expected to maintain such standards instead of compromising or limiting them by way of exclusion. This clearly violates public interests and should not be tolerated.

The unequal bargaining position between the hospital/other healthcare provider and patient is also a factor which holds sway, in the United States of America, in denouncing exclusionary clauses in hospital contracts. It is, respectfully, submitted that had the Supreme Court of Appeal, in the Afrox case, followed the American common law, the court may, very well, have followed the leading case of *Tunkl v Regents of University of California,* in denouncing such a clause in hospital contracts.

On the other hand, the Supreme Court of Appeal, with respect, also chose to ignore international law, when it was otherwise indicated. Moreover, the court had, at its disposal, the benefit of legislation passed in countries such as the United Kingdom, European countries such as France, Spain, Italy and South American countries such as Brazil, from which the courts have, at times developed aides to limit or curb certain contracts or contractual terms, deemed to be unenforceable or void, for example, the *contra proferentum* rule, much can be learnt from other jurisdictions on how they control contractual provisions or contracts which are unfair, unreasonable or oppressive. Because the courts have not always been willing to invalidate contracts or contractual terms that are unfair or unconscionable, strong calls have been made by, especially, the South African academic writers, that comprehensive legislation be introduced in South Africa to curb the, often, unscrupulous exploitation of weaker contracting parties.

Judging from the experiences of the other jurisdictions, and given the different social and economic development of the different jurisdictions, nonetheless, there is commonality, in

the different jurisdictions, to limit unfair practises. Strong feelings of consumerism and the concern that, especially the weaker contracting parties should not be exploited by the stronger parties have driven people to advocate for legal reform.

It is clear that unless the South African courts are prepared to depart from the antiquated views, which the courts have expressed and maintained over decades, accentuating the traditional ethos of contractual freedom and sanctity of contract, to a more value-laden approach, including standards of fairness, reasonableness and equity, the introduction of legislation is greatly preferred. Legislative measures, it is respectfully submitted, will go a long way in bringing consistency in the South African courts' approach in controlling contracts or contractual provisions tainted with unfairness. It is, especially, in hospital/other healthcare provision contracts, containing exclusionary clauses, that legislation will provide a much needed regulatory framework in controlling the relationship between private individuals, who occupy a weaker position and entities, such as hospitals, who exploit their position of strength by excluding their obligation to provide healthcare services, at predefined standards, in using exemption clauses.

14.8 **Conclusions and Recommendations concerning exclusionary clauses in medical contracts**.

The legal position regarding exclusionary clauses in the law of contract is presently far from ideal in South African law. The challenge presented is not so much that the concept of a contract as a binding agreement between two parties is, in itself, problematic;[242] it is, however, the antiquated approach of the South African courts to this area of law that is called into question. Although it is, unquestionably, so that exclusionary clauses have, and will continue to play, a significant role in contracts entered into in the commercial world, provided of course, consideration is given to the principles which are highlighted hereinafter. What has emerged, from the research undertaken with this thesis, is that the courts, when dealing with contractual issues, have not kept pace with sociological and commercial developments within South African society. Nor have the courts paid due regard to the shift in balance of power, brought about by major commercial enterprises. It is especially in medical contracts, and more specifically, hospital contracts, that the courts have ignored the fact that a patient stands in a weaker position to that of a hospital and its staff. In including an exclusionary clause in the admission form, the hospital, in effect, exploits the weaker position the patient occupies, to his/her detriment. This, in turn, leads to unfair, often, harsh results. Another area of concern is that the courts view this type of agreement on the same level as a general commercial contract, whereas, in reality,

242 Pearmain (2004) 1386.

it is otherwise indicated. An agreement regulating the providing of health care services can never be compared with, for example, the supply of goods etc. Worst of all, when analyzing the courts' approach hitherto, there is still an almost complete failure to incorporate constitutional principles and values into the law of contract.[243] In areas such as health care services, where the circumstances and the nature of the item of trade, in and of themselves, make it quite obvious that there is an unacceptable imbalance of power, that should be rectified in order to avoid injustices. But, it is the Supreme Court of Appeal, in the *Afrox* case, that remarked that it cannot see the difference between providers of health care services and any other service provider. What has also emerged, from the research undertaken, is the South African courts' passionate clinging to the age-old doctrines of freedom of contract and the sanctity of contract. The South African courts, throughout many decades, were loathed to part with this philosophy. The consequence is that South African law of contract appears to remain trapped within a judicial mindset that would be at home in the Victorian era[244].

The areas of concern within the South African law of contract have not gone unnoticed. The South African Law Reform Commission, in a working paper[245] entitled 'Unreasonable stipulations in contracts and rectification of contracts,' highlighted the philosophy of consumer welfarism and its rise in the early seventies. Since then it became the generally acceptable view, in most first world countries, that legislative action was required to deal with contractual unconscionable-ness. The Commission noted that South African proponents of granting such power of review to the courts, support legislation that will introduce the doctrine of unconscionable-ness and the concomitant review power of the courts[246]. What is seriously needed in South Africa is a paradigm shift, in which the courts could play a more active role in ensuring that contracting parties, who do not

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243 See especially the approach of the Supreme Court of Appeal in *Afrox Healthcare v Strydom* 2002 (6) SA 21 (SCA); See however the new course of direction taken by the Constitutional Court in *Barkhuizen v Napier* 2007 95) SA 323 (CC).

244 See the writing of Pearmain 92004) 1387 who quotes the writings of Matlala D "The Law of Contract: When the Supreme Court of Appeal Fails to Act, Senior Lecturer, University of Venda http://wwwserver.law.wits.ac.za/workshop03/WWLSMatlala.doc points out that, in the case of the law of contract, the courts are still happy to follow a statement made by Chief Justice Innes a century ago in Burger v Central South Africa Railways 1903 TS 571 to the effect that it is as 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' even which he does not understand (*Mathole v Mothle* 1951 (1) SA 256 (T) or that a signatory who cannot read or write any language is held bound by a document written in English which she did not understand and which was apparently misrepresented to her (*Khan v Naidoo* 1989 (3) SA 724 (N)).

245 Discussion Paper 65 (project no 47) (1998).

246 Pearmain (2004) 1387. Support for this view can also be found amongst a host of South African legal writers *inter alia* Carstens and Pearmain (2007) 288; Carstens and Kok (2003) 430; Jansen and Smith (2003) 210; Bhana and Pieterse (2005) 865.

occupy an equal bargaining power, would be protected against prejudice by those in a stronger bargaining position. There are many things the courts could do to ensure that the law of contract reflects and upholds the principles and values of the Constitution[247]. From the discourse in this thesis, various themes were identified which also permeate other fields of law, *inter alia,* public interest, *bona fides* or good faith, public policy, reasonableness and fairness. There can be no doubt that these themes have a clearly recognized mandate, in terms of the Constitution, to develop the common law[248]. The Constitution, it is submitted, is the supreme law of the Republic and any law or conduct inconsistent with it, is invalid. In this regard, one does not have to look further than section 8 of the Constitution and its provision that the Bill of Rights applies to all law, including, the law of contract. Another enabling provision in the Constitution is that of Section 2 of the Constitution, which provides that any conduct inconsistent with the Constitution is invalid. In this regard, it can be argued that, to deprive a person from gaining access to a court of law or tribunal to have a dispute adjudicated upon would be inconsistent with the Constitution and therefore invalid. The South African courts have, for many decades, also adjudicated upon the validity of certain contracts or contractual provisions, including exclusionary clauses in contract, by looking purely at the stereo-type principles in the law of contract. Artificial conceptual boundaries were created and enforced by the courts. The traditional principles in the law of contract and the conceptual boundaries have, as their aim that commercial transactions ought not to be unduly trammelled with. This often resulted in no simple justice between man and man and no fair dealings in contract being attained. As stated previously, no attempt has previously been made, where foundational principles of contract law, medical law and ethics, the law of delict and statutory law in the context of the Constitution are integrated, say, in finding an answer to the assessment of the validity of exclusionary clauses in medical contracts. An integrated approach, especially under the value-driven Constitution may very well have yielded another result than that achieved in the *Afrox case*.

14.8.1 Recommendations to the key issues surrounding exclusionary clauses in medical contracts.

Since the judiciary has, unquestionably, failed consumers in the context of contracts for private health service delivery, notwithstanding the fact that exclusionary clauses in

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247 See the dictum of *Ncqobo J, in Barkhuizen v Napier* 2007 95) SA 323 (CC), as well as, the minority judgment of Sachs J in the same case.

248 See the view of Ackerman and *Goldstone JJ in Carmichele v Minister of Safety and Security and Another Centre for Applied Legal Studies interviewing*) 2001(7) SA 938 (CC)

medical contracts, generally viewed, are unreasonable, unfair and unconscionable. When courts continue to enforce unreasonable clauses, even when they is so unreasonable, or applied unreasonably, as to be unconscionable, notwithstanding the adoption of the Constitution, it gets to this point that one can, unreservedly, conclude that exemption clauses operate against the public interest in many cases, especially in medical contracts, so much so, that there is a need for statutory regulation. It is submitted that in the absence of legislation to maintain fairness and equity in contracts, individuals, especially, the weak, the foolish, the illiterate and thoughtless, from imposition and oppression are likely to continue to be exploited and disrespected. Such continued practice will run counter to the constitutional ideals. The introduction of statutory regulation to protect consumers will not be without precedent. Post constitutionally, various pieces of legislation have found their way into the statute books, which promote the idea of consumer welfarism. Moreover, the *Housing Consumer Protection Measures Act*[249] aims to protect the interests of the Housing consumer. In this regard section 13 provides inter alia:

"……

(2) The agreement between a home builder and a housing consumer for the construction or sale of a home shall be deemed to include warranties enforceable by the housing consumer against the home builder in any court, that-

(a) the home, depending on whether it has been constructed or is to be constructed-

(i) is or shall be constructed in a workmanlike manner;

(ii) is or shall be fit for habitation; and

(iii) is or shall be constructed in accordance with-

(aa) the NHBRC Technical Requirements to the extent applicable to the home at the date of enrolment of the home with the Council; and

(bb) the terms, plans and specifications of the agreement concluded with the housing consumer as contemplated in subsection (1);

……"

From the said legislation it can, clearly, be deduced that housing, like health care services, is subject to a constitutional right[250]. It is submitted that, in recognizing the need for

249 Act No 95 of 1998.

250 Section 26 of the Constitution stipulates that everyone must have access to adequate housing and that the state must take reasonable legislative and other measures, within its available resources, to achieve the

statutory protection in housing, arguably, there should be no bar to the introduction of similar legislative regulations, with regard to health care services, to protect the consumer, the health care recipient, against unfair or unconstitutional practices by the providers of such services.

In so far as legislative regulations concerning health services is concerned, section 47 of the National Health Act[251] provides -

"(1) All health establishments must comply with the quality requirements and standards prescribed by the Minister after consultation with the National Health Council.

(2) The quality requirements and standards contemplated in subsection (1) may relate to human resources, health technology, equipment, hygiene, premises, and the delivery of health services, business practises, safety and the manner in which users are accommodated and treated.

(3) The Office of Standards Compliance and the Inspectorate for Health Establishments must monitor and enforce compliance with the quality requirements and standards contemplated in subsection (1)."

Similarly, regulations governing the licensing and maintaining reasonable degree of care and skill in order to promote the welfare and safety of patients in private hospitals are set out in the publication of the Government Gazette on the 1st February 1980[252]. The relevant regulation is 25(23), which provide: *"All services and measures generally necessary for adequate care and safety of patients are maintained and observed."* It is submitted that the above legislative provisions and regulations will provide sufficient powers, to the Minister of Health, to ensure that exculpatory or exclusionary clauses, in private hospitals contracts, are largely harmless to patients, if they are permitted at all.[253]

It is also submitted that the *Consumer Affairs (Unfair Business Practises) Act* 254 could also afford a measure of assistance. In terms of this Act, "business practice" includes –

(a) any agreement, accord, arrangement, understanding or undertaking, whether legally enforceable or not, between two or more persons;

(b) any scheme, practice or method of trading, including any method of marketing or distribution;

(c) any advertising, type of advertising or any other manner of soliciting business;

(d) any act or omission on the part of any person, whether acting independently or in

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progressive realization of this right.

251 Act 61 of 2003.

252 See Government Gazette No 2948, R6832.

253 See the persuasive argument of Pearmain (2004) 1385 which need to be supported.

concert with any other person;

(e) any situation arising out of the activities of any person or class or group of persons, but does not include a practice regulated by competition law

And

'Unfair business practice' means any business practice which, directly or indirectly, has or is likely to have the effect of-

(a) harming the relations between businesses and consumers;

(b) unreasonably prejudicing any consumer;

(c) deceiving any consumer; or

(d) unfairly affecting any consumer.

....."

It is evident from the provisions of the Act that the *Consumer Affairs Act* provides mechanisms for the investigation of unfair business practises and their prohibition[254]. Regard being had to the introduction of this legislation, which reveals the modern approach of consumerism and considerations such as unreasonableness, good faith and fairness in contract.

More recently, under the auspices of the Department of Trade and Industry, the said Department published, for public comment, in the Government Gazette 2862 GN R489, on the 15th March 2006, a draft bill, namely the Consumer Protection Bill. In this regard the preamble provides.

"The people of South Africa recognise-

That is necessary to develop and employ innovative means to-

(a) fulfil the rights of historically disadvantageous persons and to promote their full participation as consumers;

(b) protect the interests of all consumers, ensure accessible, transparent and efficient redress for consumers who are subjected to abuse or exploitation in the marketplace; and

(c) give effect to the internationally recognised consumer rights."

Section 3(1) goes on to provide that-

"The purpose of the Act is to promote and advance the social and economical welfare of consumers in South Africa by-

(a) establishing a legal framework for the achievement and maintenance of a consumer market that is fair, accessible, efficient, sustainable and

254 Act 71 of 1988.

responsible."

In Chapter 2, which deals with fundamental consumer rights, special attention is given to the question of notice to the Consumer of clauses which provide for exemption from liability, Section 50(1) provides that any provision in an agreement, in writing, that purports to limit, in any way, liability of the supplier is of no force and effect unless:

"(a) the fact, nature and effect of that provision are drawn to the attention of the consumer before the consumer enters into the agreement;

(b) the provisions is in plain language; and

(c) if the provision is in a written agreement, the consumer has signed or initialled that provision indicating acceptance of it."

This proposed legislation, it is submitted, needs to be supported. It is the first attempt, since the discussion paper 65 (project No 47) (1998) and proposed *Unfair Contractual Terms Bill* (1998) to control exclusionary clauses. It is evident, from the proposed legislation, that exclusionary clauses, *per se,* are outlawed, unless, the supplier can show that the effect of the provision is drawn to the attention of the consumer, the provision must be in plain language and the consumer must have signified his/her acceptance. There is, therefore, a clear shift in onus away from the consumer, toward the supplier of goods or services.

14.9 In Conclusion

The law, as it relates to exclusionary clauses, is a very complex and voluminous topic, which encompasses various fields of law, especially, when one is to consider exculpatory or exclusionary clauses in medical contracts. During the climbing of this mountain and the course the research of this thesis took, it became evident that, as exclusionary clauses in medical contracts affects public interests; it is a worthy subject of study, research and discourse. When embarking on this course, it was important to find a factual solution to the question of whether exclusionary clauses in medical contracts ought to be declared invalid and what kind of mechanism should be put in place to control the abuse of these types of clauses, where attempts are made to exclude liability for negligence, even professional liability. Finding practical solutions averts unrealistic answers in the abstract, far removed from the real world. It is when one contextualises the law relating to exclusionary clauses in contract, for instance, in the area of medical contracts, that one realises how important it is to find a balance between competing sets of values, namely, freedom of contract which emphasizes the need for stability, certainty, and

predictability. But, it is equally important to realize that these values are not absolute and there comes a point where they face a serious challenge, especially, where these types of clauses are abused, to the detriment of the consumer. Exclusionary clauses in contracts are an internationally recognised practice. It was, therefore, necessary to do an analytical study of the principles of the law of contract as they are applied, in the different jurisdictions chosen for the research undertaken in this thesis. From the discourse in this thesis, it is evident that, while exclusionary clauses in the commercial world aide the free flow of transactions, nonetheless, in certain types of contracts, including exclusionary clauses in medical contracts, restrictions ought to be placed on the freedom to contract, as these types of contractual provisions affect public policy. A distinction ought, therefore, to be drawn between ordinary commercial contracts and medical contracts. Considerations of public policy, of which the law expressly takes cognisance, as is clear from the examination, in this thesis, of international, constitutional, delictual, medical law and ethics, contractual and statutory law, play a role in assessing the validity of exclusionary clauses in medical contracts. Just as there is tension, within International Law, with regard to, for example, trade rights as opposed to International Human Rights, so, in exclusionary clauses, there is tension between curbing these type of clauses from a humanitarian point of view, to the need for free and unrestricted trade. One of the significant factors influencing the validity/invalidity of these types of clauses in medical contracts is that of medical ethics, that, quite possibly, has no other parallel in any other area of human activity. Since the time of Hippocrates emphasis has been placed on medical ethics, which determines the standards of care and skill to be observed by health care providers. In turn, the patient not only has an expectation to be treated in that way, the patient has an inalienable right to such standards of care. Medical ethics, it is submitted, influence the *boni mores* or public policy.

Exclusionary clauses in medical contracts is an area of many legal interfaces, such as the interface between the law of contract and medical law and ethics, or that between constitutional law and the law of contract, or between foreign and international law and constitutional law. The Constitution underpins them all. The five areas of law that were chosen for the research undertaken with this thesis are considered, not only in terms of their own content, but, also, in terms of their interaction with one another. A study of same makes the concept of a legal system, within the different jurisdictions, more meaningful. It is especially the role which the Constitution plays, in South Africa, which gives one a greater understanding of the principles and values, expressed in the Constitution and how they impact on the use of exclusionary clauses in the law of contract. What also emerged during the research undertaken in this thesis is the fact that

the law is capable of refinement, growth and development. Herein lies hope for the positive change and growth and the possibility of remedying the flaws, often hardship, which exclusionary clauses brought with them. The time for change is now!

BIBLIOGRAPHY

A

Alton W.G. *Malpractise* (1977)
American College Legal Dynamics of Medical Encounters *Legal Medicine* (1991)
Amundsen D.W. "The Liability of the Physician in Roman Law" *International Symposium on Society, Medicine And Law* (edited by Karplus) (1973) 17
Aronstam P. *Freedom of Contract, Consumer Protection and the Law* (1979)
Aronstam P. "Unconscionable Contracts the South African Solution?" 1979 42 *THRHR* 18
Arterburn N.F. "The Origin and First Test of Public Callings" *University Of Pennsylvania Law Review* Vol. 75 (1927) 4111
Atiyah P.S. *An Introduction to the Law of Contract* 2d ed. (1995)
Atiyah P.S. *The Rise and fall of Freedom of Contract* (1979)

B

Beale K. "Unfair Contract terms Act 1977" *British Journal of Law And Society* Vol. 5 No 1 (1978) 114 at 115
Beatson J. *Anson's Law of Contract* (2002)
Beatson J. and Friedman D. *Good Faith and Fault in Contractual Law* (1995)
Benatar S.R. "The changing doctor-patient relationship and the new medical ethics" *SA Journal of Continuing Medical Education* Vol. 5 April (1987)
Berkhouwer C. and Vorstman L.D. *De Aansprakelijkheid van de Medicus voor Beroepsfouten door Hem en Zijn Helpers Gemaakt* (1950)
Bertolet M.M. and Goldsmith L.S. Hospital Liability Law and Practice (1987)
Beauchamp T.L. and Childress J.F. *Principles of Biomedical Ethics* (1994)
Bhana N. and Pieterse J.M. "Towards a reconciliation of contract law and Constitutional values: Brisley and Afrox Revised 2005 123 *SALJ* 865
Bianco E.A. and Hirsh H.L. "Consent to and refusal of medical treatment" Published in American College of Legal Medicine - *Legal Medicine* (1991)
Bisbin S.B. McMenamin J.P. Granville R.L. "Competency, Capability and Immunity" Published in American College of Legal Medicine - *Legal Medicine* (1991)
Black H.C. *Black's Law Dictionary* (1979)
Blake "The World's Law in one County: The South African Constitutional Court's use of International Law" 1998 *SALJ* 668
Boberg P.Q.R. "A Chapter of Accidents", Businessman's Law June (1976) 183-184
Boberg P.Q.R. *The Law of Delict* (1984)
Boberg P.Q.R. "Liability for omissions" 1982 11 *BML* 194
Bohlen "Consent as Affecting Civil Liability to Breaches of the Peace" 1924 *Col. L. Rev* 819
Bohlen F.H. "Voluntary Assumption of Risk" 1910 20 *Hard. L Rev* 20
Bolger R.R. "The Contract of Adhesion: A Comparison of Theory And Practice" 20 *AM J Comp* 53 (1972)
Borrie G. "Legislative and Administrative Controls Over standard forms of contract in England" *JBL* (1978) 317

Botha H. "International law in the Constitutional order" 1995 *SAYIL*

Botha H. "The values and principles underlying the 1993 Constitution" 1994 9 *SAPL* 233

Botha and Carpenter "The Constitutional attack on Private Law: Are the fears well founded?" 1996 *THRHR* 126

Bouvier *Law Dictionary* 1958 613

Brand D. "A Review of Important cases and International Developments relating to economic and social rights" *ESR Review* Vol. 1, No 1 March 1998

Brand D. "Disclaimers in hospital admission contracts and constitutional Health right: Afrox Healthcare v Strydom" *ESR Review* Vol. 3 No 2 September 2002 University of Western Cape

Brazier M. *Medicine, Patients and the Law* (1992)

Brazier M. *Street on Torts* (1993)

Brownsword R. Adams J.N. "The Unfair Contract Terms Act: A decade of discretion" 1988 *Law Quarterly Review* 1

Braxton De Legibus Anglia 1250-1258 A.D.

Buckland *Textbook of Roman law from Augustus to Justinian* (1950) 556

Burns R. *Legacies in Ethics and Medicine* (1997)

Burchell J.M. & Schaffer R.P. "Liability of Hospitals for Medical Negligence" 1977 *BML* 109

Burton S.J. *Contract Law Selected Source Materials* (1995) 4ff

Brownword R. Contract Law: Themes for the twenty century. (200)

C

Calamari J.D. Perillo J.M. *The Law of Contracts* (1987) 429

Carmi A. *Hospital Law* (1988)

Carstens P.A. "The Locality Rule in Medical Malpractice" 1990 *De Rebus* 421

Carstens P.A. "Die Strafregtelike en Deliktuele Aanspreeklikheid van die Geneesheer op Grond van Nalatigheid" (Unpublished LLD Thesis, University of Pretoria, 1996)

Carstens P.A. & Kok A. "An Assessment of the use of disclaimers by South African hospitals in view of constitutional demand, foreign law and medico-legal considerations" (2003) 18 *SAPR/PL* 430 18

Carstens P.A. "Prophylaxis against medical negligence: A practical approach" 1988 *De Rebus* May 345

Carstens P.A. and Pearmain D. *Foundational Principles of South African Medical Law* (2007)

Castiglioni *Medicine* (1975)

Chapman C.B. *Physicians, Law & Ethics* (1984)

Chaskalson M., Kentridge J., Klaasen J., Marcus G., Spitz D., Woolman S. *Constitutional Law in South Africa* (1996)

Chaskalson A. "The Impact of Seven Years of Constitionalism on Law and Government in South Africa" http/kas/org/za/publications/seminar reports/constitution.co.zo and % law % co.za/chaskalson. pdf

Chaskalson M. "Human dignity as a foundational value of our constitutional order" (2000) 16 SAJHR 193

Chaskalson et al *Constitutional Law in South Africa* (1996)

Cheadle M. and Davis D. "The Application of the 1996 Constitution in the

Private Law Sphere" 1997 *SAJHR* 44
Cheadle et al — *South African Constitutional Law: The Bill of Rights* (2002) 698
Cheshire G.C., Fifoot C.H.S. and Furmston M.P. — *Law of Contract* (1996)
Chitty — *Chitty on Contracts* (1999) Par 1018
Christie R.H. — *The Law of Contract in South Africa* (2007)
Christie R.H. — *The Law of Contract and the Bill of Rights Bill of Rights Compendium* (1997)
Cilliers H.S. and Benade M.L. — *Company Law* (1982)
Claassen C.J. — *Dictionary of Legal Words and Phrases* Vol. 2 D-I (2003)
Claassen C.J. & Verschoor T. — *Medical Negligence in South Africa* (1992)
Coote B. — *Exception Clauses* (1964)
Cockerell A. — "Rainbow jurisprudence" 1996 *SAJHR* 1
Cockerell A. — "Private Law and the Bill of Rights: A Threshold Issue of horizontality" *Bill of Rights Compendium* (1997)
Collins H. — *The Law of Contract* (1997)
Corbin A.L. — "Corbin on Contracts" 872 12 *AM Jur.* Contracts 683
Corder H. — *Judges at work: The Role and attitudes of the South African Appellate Judiciary* 1910-50 (1984)
Cronje-Retief M. — "The Legal Liability of Hospitals" (Unpublished LLD Thesis, Orange Free State University (2000)
Curran W.J. — *Health Law* (1998)
Currie I. — "Bill of Rights Jurisprudence" 1999 Annual Survey of South African Law 54
Currie I. and De Waal J. — *The Bill of Rights Handbook* 5ed (2005)

D

Dada M.D & McQuiod-Mason D.J — *Introduction to Medico-legal Practice* (2001)
Davis D. — *Democracy and Deliberation: Transformation and the South African Legal Order* (1999) 162
Delport H. — "Exemption Clauses: The English Solution" 1979 *De Rebus* 641
Dimatteo L.A. — Equitable Law of Contracts: Standards And Principles (2001) 168
Deutsch, S. — *Unfair Contracts* (1977)
Devenish, G.E. — *Interpretation of Statutes* (1992)
Devenish, G.E. — *A Commentary on the South African Constitution* (1998)
De Vos P — "Pious wishes or directly enforceable human rights?" Social Justice and economic rights in South Africa's Constitution 1997 *SAJHR* 67
De Vos P — "A Bridge too far? History as context in the interpretation of The South African Constitution" 2001 17 *SAJHR* 1
De Wet, J.C. and Swanepoel, H.L. — *Die Suid-Afrikaanse Strafreg* (1985)
De Wet, J.C. and Van Wyk, A.H. — *Die Suid-Afrikaanse Kontraktereg en Handelsreg* (1992)
Dimatteo L.A. — *Equitable Law of Contracts: Standards and Principles* (2001)
Dönges T.E. — *The Liability for Safe Carriage of Goods in Roman Dutch Law* (1928) 112
Dugard J. — *International Law: A South African Perspective* (2000)
Dugard J. — *Human Rights and the South African Legal Order* (1978)
Dugard J. — "The role of international law in interpreting The Bill of Rights" (1994) *SAJHR* 20
Dugdale A.M. and Stanton K.M. — *Professional Negligence* (1989) 90

Du Plessis L.M. "Good Faith and Equality in the Law of Contract" (2002) *THRHR* 397

Du Plessis L.M. "A History of Remissio Mercedes and Related Legal Institutions" A doctoral thesis Erasmus University Rotterdam (2003)

E

Edelstein A. *Legacies in Ethics and Medicine* (1977)

Esser J.H. "Who cares? Reflections on Business in Healthcare" (Unpublished LLM Thesis, University of Stellenbosch (2001)

F

Farlam I. and Hathaway *the textbook on the South African law of contract* (1979)

Ficarra, B.J. "Ethics in Legal Medicine" A Chapter in Sanbar et al (1995) 147 *Legal Medicine*

Fitzherbert *Natura Brevium* (1534)

Flamm M.B. "Healthcare Provider as a Defendant" A Chapter published in American College of Legal Medicine *Legal Medicine* (1995) 119

Flemming, J.E. *The Law of Torts* (1992) and (1997)

Fletcher, A. "The Role of Good Faith in the South African Law" (1997) *Responsa Meridiana* 1

Forsyth C.F. *In danger of their talents: A study of the Appellate Division of the Supreme Court of South Africa* From 1950-80 (1985)

Frier B.W. *A Casebook on the Roman law of Delict* (1967)

Fuller L.L. and Eisenberg M.A. *Basic Contract Law* (1981)

Furrow B.R. et al *Health Law: Cases, Materials and Problems* (1997)

Furmston M.P. *Law of Contract* (1999)

Fridman G.H.L. The Law of Contract in Canada (1999)

G

Gane *The selective Voet being the Commentary on the Pandects* (1955-1958)

Giesen D. *International Medical Malpractice Law* (1988)

Giesen D. "From Paternalism to Self-determination to shared decision-making" (1988) *Acta Juridica* 107

Ginsburg N.H., Thornhill M.C. and Gambarella S.C. Kahn S.J. "Contractual Revisions to Medical Malpractice Liability" *Law of Contemporary Problems* (1986) 253

Glover G.B. "Good Faith and Procedural Unfairness in Contract" 1998 *THRHR* 328

Gordley J. *The Philosophical Origin of Modern Contract Doctrine* (1991)

Gordon, Turner and Price *Medical Jurisprudence* (1953)

Grasswell R. and Swart A. *Foundations of Contract Law* (1994) 15

Green "Assumed risk as a defence" 1961 LA.L. Rev 77

Grové N.J. Kontraktuele Gebondenheid, die vereiste van die Goeie Trou, Redelikheid en Billikheid 1998 *THRHR* 687 at 685-689

Grove N.J. "Die Kontraktereg, Altruisme, Keusevryheid en

Die Grondwet" (2003) *De Jure* 134
Grubb "A Survey of Medical Malpractice Law in England: Crisis? What Crisis? (1985) 1 J *Contemp. Health Law and Policy*

H

Hahlo H.R. "Unfair Contract Terms in Civil Law Systems" 1981 *SALJ* 720
Hahlo H.R. and Kahn E. *The South African Legal System and its Background* (1968)
Harpwood V. *Principles of Tort Law* (1997)
Hawthorne L. "The End of bona fides" (2003) *SA Merc LJ* 271
Hawthorne L. "Closing of the open norms in the law of contract" 2004 *THRHR* 294
Hawthorne L. (1999) *THRHR* 157
Hawthorne "Public Policy and Micro-Lending - Has The Unruly Horse Died? (2003) *THRHR*
Hefer J.J.F. "Billikheid in die Kontraktereg volgens Die Suid-Afrikaanse Regskommissie" 2000 *TSAR* 142
Henry Sidgewick *Elements of Politics* (1879) 82ff
Hepple B.A. and Matthews M.H. *Tort: Cases and Materials* (1985)
Hill H.F. and McMenamin J.P. "Contracts, agency and partnership" A Chapter in American College of Legal Medicine - *Legal Medicine* (1991) 62-63
Hillman R.A. *The Richness of Contract Law* (1997)
Hillman R.A. "An Analysis of the cessation of contractual relations" *Com Law Review* 69 (1983) 617
Hoffman A.C. "Torts" Published in the American College of Legal Medicine - *Legal Medicine* (1991) 41
Hoffman A.C. "Medical Malpractice" *A Chapter in American College Of Legal Medicine* (1991) 132
Holder A.R. *Medical Malpractice Law* (1978)
Hopkins K. "Exemption clauses in contracts" (2007) *De Rebus* 22
Hopkins K. "Standard form contracts and the evolving idea of private Law justice: A case of democratic capitalist justice versus Natural justice" (2003) *TSAR* 150
Hopkins K. "Constitutional rights and the question of waivers: How fundamental are fundamental rights?" (2001) *SAPR/L* 122
Hunter H.O. *Modern law of contracts* (1999)
Hunter; Macaulay, Sidwell and Whitford "Contracts" *The Law in Action* (1995) 7
Hutchinson D. "Non-variation clauses in contract: any escape from the Shifren Straightjacket?" 2001 *SALJ* 720
Hutchinson D., Van Heerden B., Visser D.P. And Van der Merwe C.G. *Wille's Principle of South African Law* (1991)
Holdsworth W. *History of English Law* VIII (1923)

I

J

Jackson R.M. and Powell J.L. *Professional Negligence* (1997) and (2002)
Jaeger W.H.E. *A Treatise on the Law of Contracts* (1957)
James "Assumption of Risk" *Yale Law Journal* (1952)
Jansen R.M. and Smith B.S. "Hospital Disclaimers: Afrox Healthcare v Strydom" 2003 *Journal of Juridical Science* (2003) 210
Jonas A. *The Imperative of Responsibility in Search of An Ethics for the Technological Age* (1984)
Jones *Hippocrates* (1923) 291
Jones M.A. *Medical Negligence* (1996)
Jones and Burton *Medical Negligence Case Law* (1995)
Jordaan D.W. "The Constitution's impact on the Law of Contract in Perspective" 2004 *De Jure* 58
Joubert W.A. *The Law of South Africa* Volume Vol. 8 (1987)
Joubert W.A. *The General Principles of the Law of Contract* (1987)
Joubert W.A., Harms and Rabie *Law of South Africa* Volume 5 Part 1 (1994)

K

Kahn E. *Contract and Mercantile Law* (1988)
Kahn E. "Standard-form Contracts" 1971 *BML* 49-50
Kahn E. "Imposed terms in ticket and notices" *Businessman's Law* (1974) 159
Keeton "Assumption of Risk in Products Liability Cases" 1961 22 *LA L. Rev*
Kelner J. and Kelner R.S. "Waivers of Liability in Personal Injury" 1992 *New York Law Journal October* 3
Kennedy I *Treat me right - Essays in Medical Law and Ethics* (1988)
Kennedy I and Grubb A *Principles of Medical Law* (1998)
Kennedy I and Grubb A *Medical Law, Text and Materials* (1994) and (2000) 3rd Cumulative Supplement
Kerr A.J. *The Principles of the Law of Contract* (1998) and (2002)
Kessler "Contracts of Adhesion - Some thoughts about Freedom of contracts" (1943) *Columbia* LR 629-631
Klare K. "Legal Culture and Transformational Constitutionalism (1998) 4 *SAJHR* 146
Koffman L. and MacDonald E. *The Law of Contract* (2004) 337
Kötz H. "Controlling Unfair Contract terms: Options for Legislative Reform 1986 405 *SALJ*
Kramer C. and Kramer D. *Medical Malpractice* (1983)

L

Lambiris M.A. "The exceptio doli generalis, an obituary" (1988) 105 *SALJ* 644
Laubscher *The Law of South Africa* Volume 6 (1981)
Lawson F.H. *Exclusion Clauses* (1990)
Lee R.W. *Commentary on the Jurisprudence of Holland By Hugo Grotius*
Lee R.W. and Honoré A.M. *The Law of Obligations* (1950)

Lenhoff A. "Contracts of Adhesion and the Freedom of Contract: A Comparative Study in the Light of American And Foreign Law 1962 *Tulane Law Review* 482

Lenhoff A. "Legislative and Administrative controls over Standard terms of contract in England" (1995) 317

Lens "American Jurisprudence" 2d Vol. 40 14 861 1969-70 58 *Kentucky Law Journal*

Lewis J. "Fairness in South African Contract Law" 2003 *SALJ* 330

Lewis J. *Medical Negligence - A Plaintiff's Guide* (1988)

Lewison K. *The Interpretation of Contracts* (1977)

Llewellyn "What Price Contract" 140 Yale LJ 704 (1931) 37 *Columbia Ref* 248

Llewellyn *The Common Law Tradition* (1960) 675

Lotz J.G. "Caveat subscriptor" Striking down exemption clauses" *SALJ* (1974) 421

Lotz J.G. "Die Billikheid in Suid-Afrikaanse Kontraktereg" (Unpublished inaugural lecture Unisa 1979)

Loubser *The Law of South Africa* (1995)

Louisell and Williams *Medical Malpractice* (2001)

Lubbe G.F. and Murray C.M. *Farlam and Hathaway Contract Cases, Materials and Commentary* (1988)

M

Maine Ancient Law: Its connection with the early history of society and its relation to modern ideas (1861)

Markesinis B.J. and Deaken S. *Tortuous Liability of Statutory Bodies* (1999)

Mann A. "A high price to compete: The feasibility and effect of Waivers used to protect schools from liability for Injury to athletes with high medical risks" *Kentucky Law Journal* (1990-1991) 867

Martin C.R.A... *Norton's Ethics in Medicine and Law* (1980

Martin C.R.A. *Law Relating to Medical Practice* (1979)

Mason J.K. and McCall-Smith R.A. *Law and Medical Ethics* (1994)

McClaren "Contractual Limitation of Liability For Negligence" *Harvard Law Review* (1914-1915) 550

McClellan F.M. *Medical Malpractice: Law, Tactics and Ethics* (1983) 31

McKendrick E. *Contract Law Text, Cases and Materials* (2003)

McCoid "The care required of medical practitioners" 1959 *Van der Bilt. Law Review* 549

McHale J. and Fox M. and Murphy J. *Healthcare Law: Text and Materials* (1997)

McKerron R.G. *The Law of Delict* (1971)

McQuoid-Mason D.J. and Strauss S.A. "Medicine, Dentistry, Pharmacy, Veterinary Practice and Other Health Professions" *The Law of South Africa* (ed. Joubert WA and Scott TJ) 1983 135-260

McQuoid-Mason D.J. "Consumer law: The need for reform" 1989 *THRHR* 32

Midgley J.R. "Ethical and legal duties" 1990 *De Rebus* 525

Milner M.A. "Negligence in Modern Law" 1955 *SALJ* 233

Milton D. and Burchell J. *South African Criminal Law and Procedure* Vol. 1 (1983)

Moore T.A. and Kramer D. *Medical Malpractice: Discovery and Trial* (1990)

Morris K.C. and Moritz A.R. *Doctor, Patient and the Law* (1971)

Murray G. and Lubbe C. *Farlam & Hathaway Contract, Cases, Materials, Commentary* (1988) 37

N

Nassar	Sanctity of Contracts Retried - A study in the theory and Practice of long-term international commercial Transcriptions (1995)
Nathan P.C.	*Medical Negligence* (1957)
Naude T. and Lubbe G.	"Exemption Clauses - A Rethink occasioned by Afrox Healthcare Bpk v Strydom" 2005 *SALJ* 441
Neels J.L.	"Die Aanvullende en Beperkende werking van Redelikheid en Billikheid in die Kontraktereg" 1999 *TSAR* 684
Neethling J, Potgieter JM and Visser P.J.	*The Law of Delict* (1996)
Nelson L, Jones K. and Burton F.	*Medical Negligence Case Law* (1995)
Norton	"Ethics in medicine and the law: Standards and Conflict" Med Trial Technique Quart (1980) 376
Nyuk-Yin C.	Excluding liability in contracts (1985)

O

O'Brien P.H.	"The Legality of Contractual Terms Exempting a Contractant From Liability Arising from His Own or His Servant's Gross Negligence or Dolus" 2001 *TSAR* 597
O'Sullivan J. and Hillard J.	*The Law of Contract* (2004)

P

Page W. and Keeton	Prosser and Keeton on the Law of Torts (1984)
Pound R.	"Liberty of Contract" (1908-9) 18 *Yale Law Journal*
Pearmain D.L.	"A Critical Analysis of the Law on Health Service Delivery In South Africa" (unpublished LLD Thesis, University Of Pretoria (2004)
Peden J.	*The Law of Unjust Contracts* (1982)
Percy	Charlesworth on Negligence (1977)
Peters J.D., Fineberg H.S., Kroll D.A.	*The Law of Medical Practice in Michigan* (1981)
Peterson	"The Joker in the Federal Employers Liability Act", 80 *Central Law Journal* (1915)
Picard E.I. and Robertson G.B.	*Legal Liability of Doctors and Hospitals In Canada* (1996)
Pieterse M.	"Beyond the welfare state: Globalization of the neo-liberal Culture and the protection of social and economic Rights in South Africa" 2003 *Stell LR* 3
Pollock F.	*The Principles of Contract Law* (1950)
Poole J.	*Textbook on Contract Law* (2004)
Porter R.	*The Greatest benefit to Mankind* (1999)
Pothier R.J.	*Trite Des Obligations* Translated by Evans (1802)
Powell J.L.	*Professional Negligence* (1992)
Pozgar G.D. and Pozgar N.S.	*Legal Aspect of Healthcare Administration*
Pretorius C.J.	"Individualism, collectivism and the limits of good faith" 2003 *THRHR* 638
Pretorius C.J.	"The Basis of Contractual Liability In South African Law (1)" 2004 *THRHR* 179

Prosser W.L. *Handbook of the Law of Torts* 2ed (1955)
Prosser W.L. *Law of Torts* (1971)
Prausnitz R. The Standardization of Commercial Contracts In English and Continental Law (1937)

Q

R

Ramsden W.A . "The meaning of mutual mistakes & Exemptions Clauses" *SALJ* (1975) 139
Rautenbach I.M. "The Bill of Rights applies to private law and binds private Persons" 2000 *TSAR* 296
Rautenbach I.M .and Van der Vyver I.W. "Volenti non fit iniuria en Grondwetlike Waarborge" 1993 *TSAR* 637
Reynolds B.M. "Comments-torts-negligence-exclusionary clauses" *Kentucky Law Journal* Vol. 58 (1970) 583
Rheingold and Davey *Standard of care in medical malpractice cases* (1975)
Rhodes P. *An Outline History of Medicine* (1985)
Robinson G.O "Rethinking the allegation of medical malpractice Risks between patients and practitioners" 1986 *Law & Contemporary Problems* 173
Robertson J. "Informed Consent to Medical Treatment" (1981) 97 L.Q.R. 102
Rogers W.V.H. *Winfield and Jolowicz on Tort* (1989)
Roth "Medicine's ethical responsibility" in *Veatch Cross Cultural Perspectives in Medical Ethics* (1989) 150
Restatement Restatement of the Law of Contracts as adopted and promulgated by The American Law Institute; American Law Institute Publishers, St Paul, 1932

S

Sanbar S.S., Gibofsky A., Firestone M.H. and Leblang T.R. *Legal Medicine* (1995)
Sayton "The unequal bargain doctrine: Lord Denning in Lloyd's Bank v Bundy" (1976) 22 MC Gill LJ 94
Scheiber H.N. *The State and Freedom of contract* (1998)
Scott W. *General Practitioner and the Law of Negligence* 1995 91
Scott T.J. "Die Reël Imperitia Culpae Adnumeratur as Grondslag vir die Nalatigheidstoets vir Deskundiges in die Deliktereg" in *LC Steyn Gedenkbundel* (Ed. Joubert WA) (1981) 124-162
Scott R.E. and Krause J.S. *Contract Law and Theory* (2002) 579
Schwär T.G., Loubser J.A. and Olivier J.D. *Die ABC van Geregtelike Geneeskunde* (1984)
Shorter and Plant *The Law of Medical Malpractice* (1959)
Sidley N.J. *Law & Ethics* (1985)
Silver T. "One Hundred Years of Harmful Error: The Historical Jurisprudence Of Medical Malpractice" 1992 *Wis. L Rev* 1193
Skegg P.D.G. *Law Ethics and Medicine* (1988)
Slawson W.D. "Standard-form Contracts and Democratic Control of Lawmaking Power" *Harvard Law Review* Vol. 84 (1971) 529

Smit P.C. "Die Geneeskunde en die Reg" 1976 *De Jure* 107

Snyman C.R. *Strafreg* (2002)
Southwick A.F. and Slee D.A. *The Law of Hospital and Healthcare Administration* (1988)
Southwell "Working for Progressive Change in South African Courts" (1995) *CILSA* 261
Springman and Osborne "Du Plessis is not dead: South Africa's 1996 Constitution and The Application of the Bill of Rights to Private disputes" 1999 *SAJHR* 25
Statsky W.P. *Legal Thesaurus/Dictionary* (1983)
Stetler and Moritz *Doctor, Patient and the Law* (1962) 388
Steyn C.R. "The Law of Malpractice Liability in Clinical Psychiatry" (Unpublished LLM dissertation, Unisa 2002)
Stone R. *The Modern Law of Contract* (2003)
Stone R. *Principles of Contract Law* (1998)
Strauss S.A. "Ethics in the treatment of mental patients: Some aspects" Van Wyk and Van Oosten (EDS) Nihil obstat: Feesbundel vir WJ Hosten/Essays in honour of WJ Hosten (1996)
Strauss S.A. *Doctor, Patient and the Law: A Selection of Practical Issues* (1991)
Strauss S.A. *Legal Handbook for Nurses and Health Personnel* (1992)
Strauss S.A. "Toestemming tot Benadeling as Verweer in die Strafreg en die Deliktereg?" (Unpublished LLD Thesis, Unisa, 1961)
Strauss S.A. "Geneesheer, pasient en die Reg: 'n delikate driehoek 1987 *TSAR* 1
Strauss S.A. "Duty of care of doctor towards patient may arise independent of contract" 1988 *SAPM* 18
Strauss S.A. and McQuiod-Mason D. *LAWSA* 1983 Vol. 17 Par 151
Strauss S.A. and Strydom M.J. *Die Suid-Afrikaanse Geneeskundige Reg* (1967)
Street H. *The Law of Torts* (1955)
Strydom "The private domain and the Bill of Rights" 1995 *SAPL* 52
Summers R.S. "The General Duty of Good Faith - its recognition and conceptualization" 67 Cornell L Rev 810, 812 (1982)
Summers R.S. and Hillman R.A. *Contract and Related Obligation: Theory, Doctrine And Practice* (1987)
Swarthout A.M . "Validity and Construction of Contracts Exempting Hospitals or Doctors from Liability For Negligence to Patients" Annotations 1966 6 *ALR* 3d 704

T

The South African Law Reform Commission "Unreasonable Stipulations in Contracts and the Rectification of Contracts" 1998 (Project 47)
Taylor J.L. *Medical Malpractice* (1980)
Teff H. *Reasonable Care: Legal Perspectives on the Doctor-Patient Relationship* (1994)
The American Medical Association *Principles of medical ethics* (1957)
Tillotson J. *Contract law in perspective* (1995)
Tladi D.D. "Breathing Constitutional Values into the law of Contract: Freedom of Contract and the Constitution" 2002 *De Jure* 306
Tladi D.D. "One step forward, two steps back for constitutionalising the common Law: Afrox Healthcare v Strydom" 2002 *SAPR/PL* 473
Treitel G. *The Law of Contract* (2003)
Tulane Law Review (1962) Vol. XXXN 482
Turpin C.C. "Contracts and Imposed Terms" 1956 *SALJ* 144

The Law Commission and the Scottish Law Commission "Exemption clauses" *Second Report* (No 69 1975) 4 4-15

U

V

Van Aswegen A. "Professional liability" (unpublished LLD Thesis, Unisa, 1966)
Van Aswegen A. "The Future of South African Contract Law" 1994 (57) *THRHR* 448
Van Aswegen A. "Freedom of Contract and Constitutional Rights: A Noteworthy Decision of the German Constitutional Court "1995 *THRHR* 696
Van Aswegen A. "The Implications of a Bill of Rights for the Law of Contract and Delict" 1995 *SAJHR* 40
Van der Heever P. "Exemption of liability of private hospitals in South Africa" 2003 *De Rebus* 47
Van den Heever P. "The Application of the Doctrine of Res Ipsa Loqitur to Medical Negligence Cases: A Comparative Survey (Unpublished LLD Thesis, University of Pretoria 2002)
Van den Heever Aquilius "Immorality and Illegality in Contract" (1941) (58) SALJ 337-354
Van der Merwe N.J. and Olivier P.J.J. *Die Onregmatige Daad in die Suid-Afrikaanse Reg* (1989)
Van der Merwe S. and Van Huyssteen L.F, Reinecke M.F.B., Lubbe *Contracts - General Principles* (2003)
Van der Poel "Omissions and a Doctor's Legal duty To warn Identifiable Sexual Partners Of HIV Patients" *Responsa Meridiana* (1998) 21
Van der Walt A.J. "Tradition on trial: A critical analysis of civil law Tradition in South Africa property law" 1995 *SAJHR* 191
Van der Walt C.F.C. "Aangepaste voorstelle vir 'n stelsel van voorkomende beheer oor kontrakteervryheid in die Suid-Afrikaanse Reg" 1993 *THRHR* 65
Van der Walt C.F.C. "Kontrakte en beheer oor kontrakteervryheid in 'n nuwe Suid-Afrika" 1991 *THRHR* 367
Van der Walt J.C. *Delict: Principles and Cases* (1979)
Van der Walt J.C. "Die Toekoms van die onderskeid tussen publieke Reg en Privaatreg in die lig van die horisontale werking van die Grondwet (Deel 1)" 2001 *TSAR* 416
Van der Walt J.C. and Midgely J.R. *Delict: Principles and Cases* (1997)
Van Dokkum N. "Medical malpractice in South African Law" 1996 *De Rebus* 792
Van Dokkum N. "Should doctor-patient communications be privileged? 1996 *De Rebus* 748
Van Dokkum N. "Hospital Consent Forms" 1996 *Stell L.R.* 255
Van Dorsten J.L. "The Nature of a Contract and Exemption Clauses" 1986 (49) *THRHR* 189
Van Dorsten J.L. "The Burden of Proof and Exemption Clauses" 1984 (47) *THRHR* 36
Van Dyk "Die Bewys van boni mores" 1975 *THRHR* 383
Von Hippel E. "The Control of Exemption Clauses - A Comparative Study" 1967 *International and Comparative Law Quarterly* 591
Van Loggenberg C. "Unfair exclusion clauses in contracts: A Plea for law reform" *Emeritus Presentation* University of Port Elizabeth (1987)
Van Niekerk A. "Ethics for Medicine and Medicine for Ethics"

SAFRJ. Philos 2002 21(1) 35
Van Oosten FFW "Professional Medical Negligence in South African Practice" 1986 *M@L* 17
Van Oosten FFW "The Doctrine of Informed Consent in Medical Law" (Unpublished LLD Thesis, Unisa, 1989)

Van Oosten FFW "Medical Law - South Africa" in *International Encyclopaedia Of Law* (ed. Blanpain R) (1996)
Van Wyk E. and Van Oosten F. Nihil obstat: Feesbundel vir W.J. Hosten-Essays In Honour of W.J. Hosten (1996) 181
Van Zyl D.H. *Beginsels van Regsvergelyking* (1981)
Van Zyl D.H. *History and Principles of Roman Private Law* (1983)
Veatch R.M. *Medical Ethics* (1989)
Visser P.J. "A Successful invasion of the Private Law" 1995 *THRHR* 745
Visser P.J. & Vorster J.P. *General Principles of Criminal Law through the Cases* (1990) 186
Voight L.B. "Physician-Patient relationship" A chapter published In the American College of *Legal Medicine* 1991 208

W

Waddams S.M. "Unconscionability in Contracts" *The Modern Law Review* (July 1976) No 4 369 at 371
Waddams S.M. *The Law of Contracts* (1977)
Wade "The Place of Assumption of Risk in the Law of Negligence" (1961) 22 *LA. L. Rev* 5
Walker "Caveat Subscriptor: How care full can we expected to be?" (2003) 15 *SA. Merc LJ* 109 et 110
Waltz J.R. and Inbau F.E. *Medical Jurisprudence* (1971)
Werthman *Medical Malpractice Law* ( )
Wessels J.W. *The law of contract in South Africa* (1951)
West Group *Corpus Juris Secundum* (1999) 67
Wheeler S. and Shaw J. *Contract Law Cases, Materials and Commentary* (1994) 474-475
Wille G. and Millen P. *Mercantile Law of South Africa* (1984)
Williston S. 1936 with 1965 Cumulative supplement Vol. 6 Para 1750
Williston S. *Williston on Contracts* (1972)
Williston S. *A Treatise on the law of contracts* (1975)
Winfield and Jolowicz *edited by Walter HE Jaeger Winfield on Torts* (1955)
Winston-Smith P. "Antecedent Grounds of Liability in the Practice of Surgery" 1947 *The Rocky Mountain Law Review*
Woofrey D. "Consumer Protection - A New Jurisprudence in South Africa" (1989-1990) 11 *Obiter* 109
Woodleine K. De Legibus Angliae Ed (1942)
Wright F *Medical Malpractice* (1993)

X

Y

Yates D. *Exclusion Clauses in Contracts* (1982)
Yates D. and Hawkins A.J. *Standard Business Contracts Exclusions And Related Devices* (1986)

Z

Zimmerman R. "Good Faith and Equity" *in Southern Cross - Civil Law & Common Law in South Africa* (Eds. Zimmerman R and Visser C) (1996)
Zimmerman R. *The Law of Obligations Roman Foundations Of the Civil Tradition* (1990)

TABLE OF CASES (South Africa)

A

B

C

Khoza v Minister of Social Development	2004 (6) SA 505 (CC)
King's Car Hire (Pty) Ltd v Welling	1970 (4) SA 640 (N)
Knight v Hemming	1959 (1) SA (EC)
Knox D'Arncy Ltd v Shaw	1996 (2) SA 651 (W); 1995 (12) BCLR (CC) 1702
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Layton & Layton v Wilcox & Higginson	1944 SR 48
Lawrence v Kondotel Inns (Pty) Ltd	1989 (1) SA 44(D) 53D-54F
Lee v Schönnberg	(1877) 7 Buch.136
Lillicrap; Wassenaar & Partners v Health	1989 (3) SA 600 (D)
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Mafikeng Mail (Pty) Ltd v Centiner (No 2)	1995 (4) 607 (W)
Magna Alloys & Research (SA) (Pty) Ltd v Ellis	1984 (4) SA 874 (A)
Magware v Minister of Health	1981 (4) SA 472 (Z)
Maise v Greater Germiston Transitional Local Council	2001 (4) SA 491 (CC)
Malan v Van Jaarsveld	1972 (2) SA 243 (C) 246A-247F

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Maritz v Pratley	(1894) SC 345
Mathole v Mothle	1951 (1) SA 256 (T)
Matinkinca and Another v Council of State, Ciskei and another	1994 (1) BCLR (CK)
McGeary v Kruger & Joubert	(1991) (W) Unreported
Meskin No v Anglo American Corporation Of SA Ltd and another	1968 (4) SA 793 (W)
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Mohamed v President of South Africa	2001 (3) SA 893 (CC)
Mohlenu v Minister of Defence	1996 12 BCLR 1559 (CC); 1997 (1) SA 124 (CC)
Morrison v Anglo Deep Gold Mines Ltd	1905 (TS) 975
Mort NO v Henry Shields-Cheat	2001 (1) SA 464 (C)
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Mutual and Federal Insurance Co Ltd v Oudtshoorn Municipality	1985 (1) SA 419 (A)
Mukheiber v Raath and another	1999 (3) SA 1065 (SCA)
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National Chemsearch SA (Pty) Ltd v Borrowman and Another	1979 (3) SA 1092 (T)
National Coalition for Gay and Lesbian Equality and Others v Minister of Justice And Others	1998 (6) BCLR 726 (W); 1999 (1) SA 6 (CC)
National Media Ltd and Others v Boloske	1999 (1) BCLR 1 (SCA)
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Rand Bank Ltd v Rubenstein	1981 2 SA 207 (W)
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S v Boesak	2001 (1) SA 912 (CC)
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S v Bhulwana	1996 (1) SA 388 (CC)
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S v Coetzee and Others	1997 (4) BCLR 437 (CC)
S v Collett	1978 (2) SA 206 (RAD)
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S v Jordaan and Others (Sex workers Education and advocacy task force and Others as amici curiae).	2002 (6) SA 642 (CC)
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S v Kruger	1976 (3) SA 290 (0)
S v Lavkengwa	1996 (2) SALR 453 (W)
S v Mahlalela	1966 (1) SA 226 (A)
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S v Mamambolo	2001 (3) SA 409 (CC)
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S v Sikunyana	1961 (3) SA
S v Thebus	2003 (6) SA 505 (CC)
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Sanderson v Attorney-General Eastern Cape	1998 (2) SA 38 (CC)
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Santos Professional Football Club v Ingesund	2003 (5) 73 (C)
Sasfin (Pty) Ltd v Beukes	1989 (1) SA 1 (A)
Savage and Lovemore Mining Ltd v International Shipping Co (Pty) Ltd	1987 (2) SA 149 (AD)
Seef Commercial and Industrial Properties (Pty) Ltd v Silberman	2001 (3) SA 952 (SCA) 958
Shepherd v Farelo's Estate Agency	1921 TPD 62
Shifren & Others v SA Sentrale Ko-op Graan Maatskappy Beperk	1964 (2) SA 343 (O) 346
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Shifren and others v SA Sentrale Ko-op Graan Maatskappy Beperk	1964 (2) SA 343 (0) at 346
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Shoprite Checkers v Bumpers Schwarmas CC	(2002) 244 SA 588 (C) 600
Silke v Goode	1911 (TPD) 989
Silva's Fishing Corporation (Pty) Ltd v Maweza	1957 (2) SA 264 (A)
Silver v Premier, Gauteng Provincial Government	1998 (4) SA 569 (WLD)
Sissors v Lloyd	(1) SA 367
Smit v Rondalia Versekeringskorporasie Van SA Bpk	
Solar (Pty) Ltd v Divwatt (Pty) Ltd	2002 (4) SA 681 (SCA)
Sonap Petroleum (SA) (Pty) Ltd v Pappadogianis	1992 SA 234 (A)
Soobramoney v Minister of Health, Kwazulu Natal	1998 (1) SA 765 (CC)
Soumbabis v Administrator of the Orange Free State	1989 (0) (Unreported)
South African Railways and Harbors v Conradie	1921 (AD) 132,147
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Soteriou v Retco Poyntons (Pty) Ltd	1985 (2) SA 922 (A) at 931
Spes Bona Bank Ltd v Portals Water Treatment SA (Pty) Ltd	1983 (1) SA
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Strydom v Afrox Healthcare Ltd	(2001) 4 ALL SA 618 (T)

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TABLE OF CASES (Foreign)

A

Acme Transport Limited v Bitts	(1981) RTR 190
Ark Potatoes Ltd v Taylor Boynson Garrett	(1995) 4 ALL ER 695 disapproved
A Schroeder Music Publishing Co Ltd v Macauley	1874 (3) ALL ER 616 116 723
Abramowitz v New York University Dental Centre, College of Dentistry	110 A.D. 2d 843, 494 NYS 2d 721 (1985)
Adkins v Ropp	14 NE 2d 727 Ind. (1938)
AE Fair Ltd v Admiralty	(1953) 1 WLR 965
Alex Lobb (Garages) v Total Oil (Great Britain) Ltd	(1985) 1 WLR 173
Ailsa Craig Fishing Co Ltd v Malvern Fishing Co Ltd	(1983) WLR 964
Allan v Snow Summit Inc	51 Cap. App 42 1358-59 CPTR 2d 813 (1996)
Allan Bros and Co v James Bros & Co	(1897) 3 comm. 10, 12
Allcard v Skinner	(1889) 36 CHD 145 AC
Alden v Provincial Hospital	383 F 2d 163 (DC 1963)
Alexander v Rayson	(1936) 1 KB 169
American Health Fitness Centre of Fort Wayne Inc v Wagner	694 NE Ed 957 (1998)
Anderson et al v Blair	202 A1d 209, 80 So 31 (1918)
Armstrong v Svoboda	49 Cal RPTR 707, Cal (1966)
Ash v New York University Dental Centre	164 A.D. 2d 366 564 NYS. 2d 308 (1990)
Attorney General of Commonwealth of Australia v Adelaide Steamship Co	(1913) AC 781 797
Atlas Express Ltd v Kafco (Importers & Distributors Ltd)	(1989) 1 ALL ER 64
Austin Instrument Inc v Coral Corporation	29 NY 2d 124 272 NE 2d 533 324 NYS 2d 22
Austin v Manchester, Sheffield & Lines Ry	(1852) CB 454

B

B&S Contracts and Design Ltd v Victor Green Publications Ltd	(1984) 1 QB 419
Baltimore Trust Co v Holland	32 OEL OH 307 86 A 2d 367
Banbury v Bank of Montreal	(1918) AC 626
Bank Credit Inc v Bethed	68 NJ Super 64 172 2d 10
Banfield v Louis Cats Sports Inc et al	589 So 2d 441, 16 Flo (1991)
Bantree v Watson	(1834) 3 MY & K 339, 341
Barclays Bank PLC v Coleman	(2000) 3 WLR 405
Bardessono v Michels	91 Cal RPTR 760
Barnes v Gardner	9 NYW 2d 785 NY 1939
Barnett v Chelsea and Kensington HML	(1968) ALL ER
Barton v Armstrong	(1976) 1 AC 104
Barton v Country NatWest Ltd	(1999) Lloyd's Rep 408
Bauer v Otis	284 P 2d 133; Cal 1955
Baxter v Snow	(UTAH) 2 Pal (2nd) 257, 1931-35 M.L.C. 241
Bell & Lever Bros Ltd	(1932) A.C. 161 at 217
Bell v Schweitzer	149 SE 2d 565 NO 1966
Belew v Griffins	249 Ark 589 460 S.W. 2d 80 (1970)
Belshaw v Feinstein	(1955) 258 Cal App 2d 711 65 Cal Rptr. 788 (1968)
Berry v Robotka	9 Ariz. 461 453 P2d 372

Benson v Dean	133 NE 125, NY 1921
Benson Paint Co v Williams Construction Co	128 Ga. App 47 195 Se 2d 671(1973)
Benyon v Nettleford	(1850) 3 MAC 94
Bethlehem Steel Corporation et al v United States Shipping Board Merchant Fleet Corporation	315 US 289 62 S.CT 581
Binswanger Glun Co v Beers Construction Co	141 Ga. App 715 254 St 2d 365
Bisset v Wilkinson	(1927) AC 177
Blackburn, Low & Co v Vigors	(1887) 12 App Can 531
Blackford v Chinsham	(1829) 1 KNAPP 73
Bloom v American Swiss Watch Co	1915 AD 100
Bloom et al v Franklen Lfe. Insurance Co	(1884) WL 57 27 (Ind.)
Blutch v Central of Georgia Railway Co	122 Ga. 711 50 SE 945 (1905)
Blyth v Bloomsbury Health Authority	(1993) 4 Med L.R. 151
Bisset v Wilkinson	(1927) AC 177
Boland v Field	75 Mo App 594, Mo 18 1898
Bolam v Friern Hospital Management Committee	(1957) 2 ALL E.R. 118 1 W.L.R. 582
Boastaney v Pigott	(1995) 69 P @ CR 298 Privy Council
Bost v Riley	44 NO App 638
Boyd v Smith	372 Pa 306 94 A2d 44 (1953)
Bowater v Rawley Regis Corporation	(1944) KB 476
Bowman v Croffroth	55 Pa 15
British Crane Hire Corporation Ltd v Ipswich Plant Hire Ltd	1975 (1) QB 303 (CA)
British Homephone Ltd v Kunzi	(1952) 152 LT 589 at 593
British Waterways Board v Norman	(1994) 26 HCR 232
Brockman v Harpole	444 P2d 25, ORE 1968
Brune v Belinkoff	235 NE 2d 783 (Mass)
Buckingham Savings Bank v Rafoul	124 UT 427 209 A2d 738
Buckley v Tutty	(1971) 46 ALIR 23
Bullock County Hospital Association v Fowler	183 SE 2d 586, 67 1971
Batson-Look Co v Georgia Marble Setting Co	112 Ga. App 226 229 So 144 So 2d 547 (1965)
Burton @ Co v English @ Co	(1885) 12 QB 218
Brown v Gould	(1972) CH 53, 56

C

Carter V Boehme	3 Bund 1905, 1970
Caldwell v Missourie State Life Insurance Co	230 S.W. 566 Ark 1921
Cameron v Eynon	3 A 2d 423 Pa 1939
Canada Steamship Lines Ltd v Regen	(1952) 1 ALL ER 305 (PC) 310
Cananth v Allen	(Tex Civ. App) 368 SW 2d 672
Capital and Countries (Pty) v Hampshire CC	(1997) 2 ALL ER 865 (CA)
Carsello v Touchton	231 Ga. 204 SE Ed 589 (1974)
Cartwright v Barthlomew	64 SE 2d 323 App 1951
Cassidy v Minister of Health	(1951) 1 ALL ER 574; (1951) 2 KB 343 (CA); (1951) W.L.R. 147
Causey v Deon	280 So. 2d 251 (LA. 1973)
Central Alarms of Tucson v Garnem	16 A2 74 567 P2d 1203 (1977)
Charrin v Methodist Hospital	482 S.W. 2d 572 (Tex. App 1968)
Chatterson v Gerson	(1981) QB 432
Chazen v Trial Mobile215 Tenn. 87 384 S.W. 2nd 1 (1964)	
Checkley v Illinois Central Railway Co	257 ILL 491 100 NE 941 (1915)

Chesterfield v Jansen	(1751) 2 Ves. Sen. 125, 28 ER 82
Chicago & North Western Railway Company v Davenport et al	205 F2d 589
Chicago's Great Western Railway Company v Farmers Produce Company	164 F Supp 532 (1958)
Chicago and NWR Co v Davenport et al	285 F2d 589 (1953)
Clark v Kirsner	196 ME 52, 74A 2d 830
Co & Truck Insurance Exchange	1845 Supp 98 (1960)
Chen Trust et al v Stern and Merit Financial Corporation	297 ILL App 3d 229, 696 NE 2d 743 231 III Dec 441 (1998)
Coleman v III Life Ins. Co	82 S.W. 616 26Ky Law Rep 900
Colorado Milling & Elevator Co v Chicago R1 & PR Co	382 F2d 834 (Tenth Cir 1967)
Columbian Nat L Inc N Co v Black	35 F2d 571 (CCA10) 71 ALR 128
Childs v Weis	440 S.W. 2d 104
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Chin Keom v Government of Malaysia	.....
Ciofalo v Vic Tannery Gyms	10 N.Y. 2d 294 220 NYS 1845 Supp 98 (1960)
City Pipe Line Co et al v Harding Glass Co	283 U.S. 253, 515
City of Syrause v Jarkison Brothers Inc et al	87 AD 20984
Clark v Sir William Arnoldt Co Ltd	1974 S.Ct. 90 92
Clements v Yiweta	81 N.Y. 285
Clifford Davis Management Ltd v W.E.A Records Ltd	(1975) 1 WLR
Coates v Newhall Land & Farming Inc	(1987) 191 Ga. App 3d 1, 8 236 Cal RPTR 181
Coburn v Moore	68 NE 2d (ASI) (1946)
Cox v Prentice	(1815) M & S 344
Coggs v Bernard	(1703) 92 ER 107
Collins v Hertfordshire County Council	(1947) KB 598
Commercial Bank of Australia v Amalio	(1983) 151 Cir 447
Contrast Woolmer v Denver Price Ltd	(1955) 1 QB 291
Continental Illinois National Bank and Trust Co of Panai Co v Foreign	(1986) 2 Lloyd's Rep 441, 444
Crawford v Buchner	839 S.W. 2nd 784 (1992) 754
Cross v Guthery	2 Root 90 (C.WORN 1794)
Cudnick v William Beaumont Hospital	207 Mich. App 378 525 N.W. 2d 891 (1995)
Cundy v Lindsay	(1878) 3 App Cas. 459
Craig Fishing Co Ltd v Malvern Fishing Co Ltd (1983)	1 WLR 964

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DSDN Subsea Ltd v Petroleum Geo-Service ASA	(2000) BCR 530
Davies v London & Provincial Marine Insurance Co	(1878) 8 CH.C 469
Decker v Decker	324 111 457 155 NE 349
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Deserit Seed Co et al v Drew Farmers Supply Inc	248 Ark 858 454 S.W. 2d 307
Diamond Match Co v Roeber	106 N.Y. 475. 13 NE 419 (1887)
Darling v Charleston Community Memorial Hospital	200 NE 2d 149, 33 ILL 2d NR 2d 253 (1965)
De Lancy v Rosenthal	196 NE 2d 878 MAS 1964
De May v Roberts	1881 46 Mich. 160, 9 N.W. 146
De Vaux v Connolly	(1849) 8 C.B. 640 at 659
Dann v Hamilton	(1939) 1 KD 509
Dendoas v Yackel	(1980) 109 D.L.R. (3d) 45 (B.C.S.C.)
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Hearne v Central of Georgia Railway Co	22 Ga. App 195 S.E. 368 (1918)
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Henderson v Merret Syndicates Ltd	(1999) 2 AC 145 (HL)
Herman v Mutual Life Ins Co	108 F2d 678 (CCA3)
Hermingsen v Bloomfield Motors	MC 32 NJ 358 161 A 2nd 768 1960
Hertz Corp v David Klein Mfg Inc	636 So 2d 628 634 (Fla. 1st DCA 1991)
Hewat v Rendel	1925 TPD 679
Hillier v Rambler Motors (A.M.C.) Ltd	(1972) 2 QB 71
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Howard Marine and Dredging Co Ltd v Oden and Sons (Excavations) Ltd	(1978) QB 574
Howard v Shirlstar Container Transport Ltd	(1990) 3 ALL ER 366
Hoyte v Hoyt	213 Tenn.117 372 S.W. 2d 300 (1963)
Hudson Structural Steel Co v Smith & Rumery Co	110 ME 125, 85A
Hunter v American Rental Inc	189 Kan. 615, 371 P2d 131 (1932)
Hunter v Hanley	1955 SC 200, 204-5

I

Ingelis v Perkins	33 N.M. 269 263 P. 761 (1928)
Ivedt v Haugen	70 ND 338
Ivy Plants Inc v FMC Corp	282 So 2d 205 208 (Fla. 4th DCA1973)

J

Janson v Driefontein Consolidated Mines Ltd	1902 A.C. 484
James Archdale & Co Ltd v Confenices Ltd	(1954) W.L.R. 459
Jennings v Lee	105 Ariz. 167 461 P2d 161 (1969)
Jenson v Mayo Clinic	691 F. 2d 405 (8th Cir 1982)
John Hopkins Univ. v Thulton	488 F2d 912 (4th Cir 1973)
Johnson and Another v M????	1980 AC 39
Johnson v Bloomsbury MA	(1992) QB 537 346
Johnson v Fargo	98 AD 436 90 NYS 725 (App Div 1904) ??? 184 NY 379 77 NE 388 (1906)
Johnson v Misericordia Community Hospital	99 WIS 2d 708
Jones v Brenel	Colo. 623 P 2d 330 376 (1981)
Jones v Malloy	412 N.W. 2d
Jones v Manchester Corporation	(1952) QB 852; (1957) 2 ALL ER 125
Jones v Fry	(1865) 4f AL F 5 25
Jordan v Guerra	23 2d 469 144 P2d 349
Joseph Travers & Sons Ltd v Coopers, Supra, Ashley Tolhurst	(1957) 2 KB 242
Josie E Smith v Edouard Simpson JR	

K

Kaplan v Kaplan	35 11 2d 181 182 NE 2d 706
Kaplan v Scoher	254 Man 180 150 NE 9 42 ALR 1142
Karp v Cooley	349 F.Supp. 827 (S.D. Tex 1972) Aff. 1 493 F 2d 408
Karsalers (Harrow) Ltd v Wallis	(1956) 2 ALL ER 866
Keates v Lord Ladoyen	(1851) 10 C.B. 591
Kennie v Westbrook (ME)	254 A 2d 39
Kennedy v Panama ET v Royal Mail Co	(1867) L.R. 2 QB 980
Kennedy v Parrot	243 NC 355
Keuchler v Volemann	180 Wisc. 192 (1923)
Kirstenbaum v General Outdoor Adv Co	258 N.Y. 495 180 N.E. 247
King v Murphy	424 So 2d 547 (Miss 1983)
Klein v Williams	12 SO 2d 421 (SCT Miss 1943)
Kleiner v Walker	256 A2d 777 (DCCA) 256 A2d 779
Kozan v Camstock	270 F 2d 839, 844 (5 Cir 1959)
Krohnert v Yacht Systems Hawaii Inc	4 Haw App 150 684 P2d 738 (1983)
Kurashige v Indian Diner Inc	(1988) 200 Cal App 3d 606 612 246 Cal RPTR
Kutsche v Ford	272 Mich. 442 192 NW 714
Kuzmak v Brookchester Inc	33 NJ Super 495 111 A 2nd 495 111A 2d 425 1955
Kuzmak v Brookchester Inc	33 N.J. Super 575 111 A 2d 425

L

LTN Cash and Carry Ltd v Gallacher Ltd	(1994) 4 ALL ER 714
Labarre v Duke University	393 (Tex App San Antonio)
Lafrens v Lake County Fair Board	172 Ind. App 389 393 360 NE 2d 605 608 (1977)
Lambert v Lewis	(1982) A.C. 225 at 262-3
Lampher v Phipos	(1838) 8 CP 475
Lamport & Holt Lines Ltd v Combro & Serniton (M&C) Ltd	(1982) 2 Lloyd's Rep 42 45 47 51
Landu v Werner	(1961) 105 SJ 1008
Langford v Kosterlitzo	290 PAL 80, Cal 1930
Lansen v Yelle	310 Minn. 521 246 WW 2d 841 (1976)
Largess v Tatem	211 A. 2d 398 VT, 1972
Lawford v Charing Cross Hospital	(1994) J. Med. L.R. 437
Lazenby v Universal Underwriters Insurance Company	214 Tenn. 639 383 S.W. 2d (1964)
Leaf v International Galleries	(1950) 2 KB 86
Leaper et al v Beltranni	54 2d 195 347 F2d 12, 1 Cal RPTR 12
Leidy et al v Mescht Enterprises Inc d/b/a Body Shop Health Spa	252 So Super 162 381 A.2d 164
Leidy v Deseret Enterprises Inc	252 Pa Super 153 381 A.2d 164 (1977)
Leighton v Sargeant	27 NH 460 (S.Ct. NH 1853)
L'estrange v Braucob	(1934) 2 KB 394
Levine et al v Shell Oil Company	28 NY 2d 205, 269 NE 2d 799 321 N.Y.S 2d 81 1971
Levison v Patent Steam Carpet Cleaning Co Ltd	(1978) Q.B. 69
Lewis v Averay	(1972) 1 Q.B. 198
Lee (John) & Son (Gramtham) Ltd v	

M

N

Society v Steed (No 2)	(1993) 1 ALL ER 530
Norwich City Council v Harvey	(1989) 1 W.L.R. 828

O

Ochs v Woods	221 NY 335 338 117 NE 305 306
O'Brien v Cunard S.S. Co	1891 154 Mass 272, 28 N.E. 266
Occidental Worldwide Investment Corp v Skibs A/S Avanti	(1976) Lloyds Rep 293
Occidental Life Insurance Co v Bob Le Boy's Inc	413 F2d 819 (CA5)
Odorezzi v Bloomfield School District	246 Cal 2d 123, 131
Officer Angels Ltd v Rainer-Thomas & O'Connell	(1991) I.R.I.R 214 at 221
Olson v Molzen	558 S.W. 2d 429 (Tenn. S. Ct 1977)
Orthopedic Clinic v Hanson	415 P 2d 991 Okla. 1966
Oscar Chess Ltd v Williams	(1957) 1 WLR 370
Osman v United Kingdom	29 EHHR 245
Otis Elevator Co v Maryland Casualty Co	99 Colo. 99, 33 FED 974
Owens v Brimmel	(1977) 2 W.L.R. 943

P

Pan Atlantic Insurance Co Ltd v Pine Top Insurance Co Ltd	(1995) 2 A.C. 50
Parker v Hensel	242 NC 211 87 SE 2d 201
Parkinson v College Ambulance	(1925) 2 KB 1
Pao Ou v Lau Yiu Long	(1979) 3 WLR 435
Paschimbanga Khitmazdoor Samity and Others v State of West Bengal	(1996) AIR SC 24 26
Pasko v Trila	153 NEB 759 46 NW 2d 139
Pearce v Brooks	(1866) LREX 213
Pearson & Son Ltd v Dublin Corporation	(1907) A.C. 361
Peyo v Hudson	225 NY 602 612 122 NE 635 638
Pfizer Corp v Minister of Health	1965 AC 512
Phillips Products Ltd v Myland	(1987) 1 W.L.R. 649 666
Phillips v Brooks Ltd	(1919) 2 K.B. 243
Photo Production Ltd v Securicor Transport Ltd	(1980) AC 827
Pike v Honsinger	49 N.E. 760 New York (1898)
Pippen v Shepherd	1822 ER 400, 409
Pope v St John	862 S.W. 2d 657 661 (Text App Austin 1993)
Porubiansky v Emory University	156 Gs App 602, 275 S.E. 2d 163 (1980)
Potts v North West Regional Health Authority	(1983) as discussed by Harpwood Principles of Tort Law (1987) 388
Powers v Peoples Community Hosp Authority	455 NW 2d 371 (Mich. App 1990)
Printing & Numerical Registering Co v Sampson	(1875) L.R. 19 EQ 462, 465

Q

R

R v Bateman	(1925) 94 L.J. KB 791
R v Cambridge Health Authority, Ex Parte B	(1994) ALL ER 129 Ca
R v Saliture	(1992) 8 CRR 2d 173 (1991) 3 SCR 654
Raffies v Wichelhams	2 H & C 906 (1864)
Ramberg v Morgan	218 N.W. 492 (S. CT Iowa 1928)
Randas v YMCA of Metropolitan Los Angele	(1993) 17 Cal App 158 at 162 (21 Cal RPTR 2d 245)
Ranger v G.W.Ky. Co	(1854) H.L.C. 72, 94-95
Redgrave v Hurd	(1881) 20 Ch. O 1
Reed v Church	8 SE 2d 285 1 LA (1940)
Regan v Custom Craft Homes Inc	170 Colo. 562 463 464 (1976)
Reiss v Wintersmith	241 Ky. 470 44 S.W. 2(d) 609 613
Reyes v Wyeth Labs	498 F. 2d 1264 5th Cir 1974
Rexford v Phillippi	337 MO 389 84 SW 2d 628
Richardson v Mellish	(1824) Bing 239 at 252
Richton v Sargent	27 NH. 460 (S. CT.NH 1853)
Ritter v Mutual Life Ins. Co of New York	169 U.S. 139 18 Sct. 300
Robins v Finestone	127 NE 2d 330 NY 1955
Roe v Minister of Health	(1954) 8 QB 66
Rogers v Whitaker	(1993) 67 ALJ 1247
Roley Bank of Scotland P/L v Etridge (No2)	(2002) UKHL 44; (2002) 2 AC 773
Roos v Kimel et al	55 Cal App 46 673 64 Cal Rptr. 2d 177 (1997)
Roscorla v Thomas	(1842) 3 QB 234
Rosenberger v Livingston	166 Kan 259 200 P2d
Rossie v Douglass	203 MD 190 192 100 A2d 3 7 (1953)
Roy Scott Trust Ltd v Rogemon	(1991) 2 QB 297
Rowe v Colorado & SR Co Text Oil	Civil. App. 205 SW 73
Rucker v Tietz	(Okla.) 374 P2d 341
Rutken v Reenfeld	229 Fed 248 (CAS)
Ruff v Jarrett	94 ILL 475
Rule v Cheeseman	317 P 2d 472 Kans 1957
Runell v Marting	88 So 2d 315 (1956)
Ryan v Griffin	199 V.A. 891, 103 SE 2d 246 (1958)
Rytkonen v Lojacano	269 Mich. 270 (1934)

S

Salt v Marquis of Northampton	(1892) A.C. 1 18-19
Sander v Geib, Elston, Frost Professional Association	506 N.W. 2d (SD 1993)
Saunders v Anglin Building Society	(1971) AC 1004
Scarzella v Saxon	436 A 2d 358 DC App 1981
Schultz v Feigal	142 NW 2d 84 Minn. 1966

Schneider v Revici	817 F.2d 987 (2d Cir 1987)
Schroeder Music Publishing Co Ltd v McCall	(1974) 3 ALL E.R. 616
Sellars v Grant	196 F 2d 677 (CA5)
Schroeder v Ely and Ely	161 NEB 252, 73 N.W. 2d 165
Shirk v Richards	13 Pet (US) 26 106 Ed 42
Shoglun Finance Ltd v Hudson	(2001) EWCA Civ. 1000 (2002) QB 834
Shorter v Drury	103 Wash 2d 645, 695 P 2d 116 (1985)
Sidaway v Bethlem Royal Hospital Governers	(1985) AC 871 (1985) 1 ALL ER 643 (AC)
Singer (UK) Tees & Hartepool Port Authority	(1988) 2 Lloyd's Rep 164 166
Siragusa v Swedish Hospital	60 Wash 2d 310, 373 P.2d 767 (1962)
Skanskal v Al-Kistaine	(2001) 2 ALL ER (Comm.) 60
Skeate v Beale	(1841) 11 AD at E803
Slade v Slade	310 11 App 77 NE 2d 951 17A Am Jur.
Slater v Baker & Stapleton	(1767) 95 ER 860
Smith v Baker	(1891) AC 325
Smith v Chadwick	(1884) 9 App Cans 187
Smith v Hospital Authorities Of Walker, Dade & Catoosa Cos	160 Gs App 387, 287 S.E. 2d 89 (1981)
Smith v Hughes	(1871) 6 QB 597, 607
Smith v McCullough et al	270 US 456 46 Sct. 338
Smith New Court Securities Ltd v Scimgeor Vickers (Asset Management) Ltd	(1997) AC 254
Smith v Seaboard Coastline Railroad Company	639 F.2d 1235 (1981)
Smith v Simpson and Lampert	224 2d 585 (1969)
Smith v Morrison	49 Tenn. 290
Smith v Richards	13 PET (US) 26 106 Ed 42
Smith v Tunbridge Wells Health Authority	(1994) 5 Med. L.R. 334
Smith v Whitman	39 NJ 337 189 A 2d 15
Solle v Butcher	(1950) 1 KB 671
South Australia Asset Management Co v York Montage Ltd	(1997) AC 191 at 200
Spice Girls Ltd v Aqilia World Service B.V.	(2000) EA LR 478
St John Shipping Corporation v Joseph Bank	(1957) 1 QB 267
Stevens v Illinois Central R.Co.	234 F2d 562
Stewart Oil Co v Sophie Petroleum Co	202 F.Supp. 952 (Ed 111)
Stewart v Muven	139 Cal. App 2d 769
Stohlman v Davis	220 NW 247 Neb 1928
Stokes v Guest, Keen & Nettlefold (Bolts and Nuts)	(1968) 1 WLR 1 776, 783
Stone v Stone et al	176 SW 2d 464 468
Stone et al v William Steiner MFO Co	N.J. Misc 353, 39A 2d 241
Strickland v Turner	(1852) 3 EX 208
Styles v Lyon	87 Conn 23, 86 A. 564 (1913)
Sparking v Bradshaw	(1956) 2 ALL ER 121 at 125
Spencer v West	(Ca App) 126 S 2d 423
Stewart v Rudna	84 NW 2d 816 (Mich. 1957)
Suburban Hospital Association v Mewhinney	187 A 2d 671 Md. 1963
Sullivan v O'Conner	(1973) 296 NE 2d 183 (Cal Sup Ct)
Sullivan v Constable	(1932) 49 T.L.R. 369
Swisse Atlantique Societe d'Armonant Maritime SA v N.V. Rotterdamsche Kolen Centrale	(1967) 1 A.C. 361

T

Tai Hing Cottin Mill Ltd v Lin Chong Hing Bank Ltd	(1986) A.C. 80,104-105
Tatham v Hoke	489 F.Supp. 914 (W.D.N.C.) (1979)
Thake v Maurice	(1986) QB 644 (N)
Twin Forks Ranch v Brooks	130 NM 832 907 P2d 1013
Thomas Witter Ltd v TBS Industries	(1996) 2 ALL ER 573 at 598
Thompson v Smith Ship Repairers (North Shields) Ltd	1953 the Times 8 December 1953
Thornton v Shoe Lower Parking Ltd	(1971) 2 QB 163 (1971) 1 ALL ER 686
Thoroughgood v Cole	(1582) 1 129, 2 Ca
Tiller v Atlantic Coast Line Ry. Co	318 U.S. (1943) 49
Tinsky v Milligan	(1894) 1 AC 340 355
Tisdale v Pruitt	394 SE 2d 857 (S.C. App 1990)
Toomey v Eagle Star Insurance Co Ltd (No 2)	(1995) 2 Lloyds Rep 88 at 91-92
Trail Mobile Inc v Chazen	App 576, 370 S.W. 2d 840, 849 (1963)
Tunkl v Regents of University of California	60 Cal 2d 92, Cal RPTR 37 383 P2d 441 (1963)
The First Bank of Cincinnati v Pepper et al	454 F2d 626
Trustee of Jem Parker Williams v Nisbet	91 Ga. 821, 145 Erid. 64
Tveldt v Haugen	294 NW 183 ND 1940

U

United Dominions Trust Ltd v Western	(1976) QB 515, 343
United States v Bethlehem Steel Corp	315 U.S. 289 301 62 S.Ct. 581 L.Ed. 855
United States v Castillo	120 F Supp 522 (DCD NM)
Universe Tankships Inc v International Transport Worker's Federation, The Universe Sentinel	(1983) 1 AC 366
Upton v Tribilock	91 US 45 23 L. Ed 203

V

Viita v Dolan	132 Minn. 128 155 NW 1077 (1916)

W

Walker v American Family Mutual Insurance Co	340 N.W. 2d 599 (1983)
Walker v Boyle	(1982) 1 W.L.R. 475
Walters v Morgan	(1961) 3 De GF & J718
Walton v Bank of California National Association	218 Cal App 5 27 32 Cal D Rptr. 856
Weaver v American Oil Co	257 458 276 NE 2d 144 (Supreme Court of Indiana)
Weaver v University of Michigan	

LIST OF STATUTES

A

Alienation of Land Act 66 of 1981

B

Brazilian Consumer Protection Code of 1990

C

Californian Health & Safety Code
Child Care Act 74 of 1983
Children's Act 1989
Choice on Termination of Pregnancy Act 92 of 1996
Constitution of the Republic of South Africa Act No 108 of 1996
Congenital Disabilities (Civil Liability) Act 1976
Credit Agreement Act 75 of 1980
Criminal Procedure Act 57 of 1977
Consumer Protection Bill 2006

D

Declaration of Geneva (1968)
Declaration of Helsinki

E

European Convention on Human Rights
European Council Directive on Unfair Terms in Consumer Contracts Council Directive 93/13/EEC OJL

F

G

Geneva Declaration 1908
Government Gazette 1980 No 2948 No 6832 Published 1st February 1980

H

Health Act 63 of 1977
Hippocratic Oath
Human Tissue Act No 56 of 1983
Human Rights Act 1998

I

Interim Constitution (Act 200 of 1993)
International Code of Medical Ethics and the Declaration of Helsinki (Revised 2000)
Insurance Act 27 of 1943

J

K

L

M

Medical, Dental and Supplementary Health Services Act 6 of 1974
Magistrate's Court Act 32 of 1944
Mental Health Act 18 of 1973
Mental Health Act 1983
Mexican Consumer Protection Law of 1974

N

National Health Services Act 1992
Nursing Act, Act 50 of 1978

O

P

Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000

Q

R

S

Sterilization Act No 44 of 1998
Supply of Goods and Services Act 1982

T

The Right to the highest attainable standards of Health UN Doc E/C 12/2000/4 2000

U

Unfair Terms Act 1977
Unfair Contractual Terms Bill 1998
Unfair Terms in Consumer Contracts and Regulations 1994
Uniform Commercial Code (1952)
Usury Act 73 of 1968

V

W

X

Y

Z

OTHER SOURCES

Corpus Iuris Civilis
Corpus Juris Secundum Volume 17 (1999)
Digesta D.47.10.1.5
De Groot 3.35.8
Health Professionals Council of South African Rules of Conduct for Medical Practitioners and Dentists
Medical Association of South Africa Guidelines for the Management of HIV/AIDS (1992) 4
Moorman 6.1.3.3
National Code of Conduct: South African Medical Research Council's (MRC) Guidelines on Ethics for Medical Research (1993)
Sandton Medi-Clinic Admission Form
South African Medical and Dental Council "The Management of Patients with HIV infection or Aids (Revised guidelines) (1992) 10
St George's Hospital Admission Form
Suid-Afrikaanse Regskommissie Eutanasie en Die Kunsmatige Instandhouding van Lewe Projek 56 (1994)
Voet 2.14.9, 2.14.18 translated by Gane

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