

Chapter 4

Law of Contract: Health Service Delivery

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4.1 Introduction

This chapter, together with chapters five and six, deals with the subject of the law of contract as it relates to health service delivery. The fundamental legal concepts relating to health service delivery in the law of contract are dealt with in this chapter four while chapter five deals with the case law involving contracts for health service delivery in the public sector and chapter six deals with the case law involving such contracts in the private sector. The material was too voluminous to include it all in a single chapter and in any event it was felt that it might be useful to structure the case law in this way so that the cases involving the two different sectors are grouped together for ease of reference and comparison.

The law of contract as it relates to the delivery of health care services is not very well informed in South Africa due largely to the fact that, of the few cases that have been decided with regard to health care services, most of the later ones have been decided on the basis of the law of delict even where the claim was couched in terms of the law of contract and only in the alternative, in terms of the law of delict. The public sector

is capable of entering into contractual relationships for the delivery of health care services, as evidenced by some of the cases discussed in this chapter, but whether or not it in fact does so as a matter of course is far from clear. *Administrator Natal v Edouard*¹, discussed below, a relatively recent case involving a contractual claim for health services against the state, was decided on the basis of the law of contract because it was not open to the plaintiffs to claim in delict rather than because the law of contract was the preferred basis of the claim. Furthermore, the contract was for a sterilisation – an elective procedure which centres around a highly specific result or outcome – and is therefore in many ways distinguishable from most other contracts for the delivery of health care services in terms of which a ‘cure’ or a particular outcome is seldom guaranteed. Some of the reasons for the lack of clarity as to whether health care services are delivered by public sector providers in terms of a contract as opposed to some other basis are:

- the fact that payment of fees is often required in terms of regulations which prescribe the terms and conditions of payment;
- that the state provides health services to the indigent from whom no payment is required;
- that there is a constitutional obligation upon the state to ensure the progressive realisation of the right of access to health care services that is not shared by private sector providers; and
- that the intention of a body such as the state to contract is often very difficult to establish in the absence of hard evidence to this effect.

The private sector, by contrast generally delivers health care services on a contractual basis as evidenced by the standard documentation that is used by medical practitioners and other health professionals and private hospitals. However even in the private sector, issues can become complicated by the fact that:

- many patients are funded by medical schemes which themselves may have entered into contracts with providers for the delivery of health care services to scheme members;

¹ *Administrator Natal v Edouard* 1990 (3) SA 581 (A) discussed below

- the fees charged by large providers such as private hospitals are usually negotiated between medical schemes and such hospitals as opposed to the hospitals and their individual patients;
- the patient often does not have much of a say in which private hospital he is treated if he desires to have the services of a particular medical specialist since the specialists tend to restrict their practices to one or two private hospitals;
- the medicines prescribed for patients by doctors are usually priced in terms of industry based standards such as Maximum Medical Aid Price (MMAP) which is the maximum price that medical schemes are generally prepared to pay for a particular medicine or the 'Blue Book Price' which is the maximum price that retail pharmacists are prepared to pay for medicines; and
- the patient generally has no say in the price or the nature of the medicines that are prescribed for him or her.

From the point of view of the patient in the private sector, the market for health services is anything but free. It is dominated in the hospital sector by three large hospital groups, it is dominated in the medical schemes sector by an industry association called the Board of Healthcare Funders, as well as a few large scheme administrators, and more and more medical practitioners are joining so-called independent practitioners associations which are collectives designed to even the balance of power between individual medical practitioners and their suppliers and also between medical practitioners and medical schemes. Late in 2003 and at the beginning of 2004, the Competition Commissioner conducted an investigation and found the South African Medical Association, the Hospital Association and the Board of Healthcare Funders guilty of restrictive horizontal practices. At the time of writing the former two have paid settlement orders whilst the latter wanted to contest the matter in the Competition Tribunal.

Historically, the law of contract developed in the context of commerce and trade. In such an environment, competition for goods and resources is the norm. Parties can capitalise on superior knowledge, inside information, expertise and skill and use these attributes to gain a competitive advantage over others with whom they contract and compete. Suppliers and their customers have competing interests. The former wishes

to sell their services and products for the highest possible prices whilst the latter wishes to purchase them at the lowest possible prices. In the course of the bargaining process, all other things being equal, they tend to meet somewhere in the middle. In the commercial environment, one party is generally not obliged to place the interests of the other party before its own. Although there are contracts in which the parties stand in fiduciary relationships to one another, such as contracts of insurance, these are the exception rather than the norm. All contracts in South Africa must be in good faith but this does not mean that the contractants always stand in a fiduciary relationship towards one another. The law of contract protects contracting parties against clauses which are contrary to public policy but it does not expect a party to give away any advantages he may have in terms of superior or more comprehensive knowledge about the circumstances or context in which the contract will operate². Business people are allowed to have trade secrets and a competitive edge. They are permitted to protect and claim exclusive rights to relevant trade and other knowledge especially to the exclusion of those with whom they contract and their competitors. These broad principles, it is submitted, do not sit well in the health care context for a number of different reasons not least of which is that the market for health care services is widely recognised as economically abnormal in terms of the manner in which the laws of supply and demand operate³. The health care provider is obliged, in

² Christie RH *The Law of Contract* 4th ed observes at p 321 that in contracts of sale there is a duty on the seller to disclose latent defects of which he is aware, the extent of the duty having been settled by the Appellate Division in *Van der Merwe v Meades* 1991(2) SA 1 (A) but what little authority there is indicates that a buyer is entitled to remain silent when he, not the seller is aware of facts that substantially increase the value of the merx. After referring to the cases of *Van Niekerk and Van der Westhuizen v Weps and Morris* 1937 SWA 99 where a seller who knew that water on the farm was unwholesome but did not inform the buyers that the tests they carried out were insufficient to reveal its unwholesome nature was held liable and *Joseph v Parkes* 1906 EDC 138 where a buyer of a farm knew there were diamonds on it was held entitled to remain silent, Christie states: "The reason for thus distinguishing between buyers and sellers may perhaps be that the seller's silence in *Van Niekerk* caused the buyers to suffer a loss, whereas the buyer's silence in *Joseph* merely deprived the seller of the opportunity of making a fortuitous profit."

³ *Clement D 'Beyond Supply and Demand: The reasons for increased health care costs go beyond simply supply and demand and solutions are tougher than they seem' Fedgazette May 2002* notes that even the Economist magazine, a free market advocate if ever there was one, conceded that "there remain some genuine problems that limit the ability of unfettered markets to deal well with health care." These problems, he says, stem from market imperfections or failures that result in a less than socially optimal allocation of resources. He noted that the problems fall into several categories: those inherent to insurance, those resulting from imperfect information, those due to too few players buying or selling health care services and those caused by unequal access to healthcare. It has been observed that: "Health care is replete with widespread, systematic market failure (Plain R, Professor of economics at the University of Alberta quoted by McMaster G in the article referred to below) and that: "The crucial distinction between health care and other markets is that the consumer is not adequately informed and must rely on professionals to diagnose problems and advise treatment, all the while acting ethically and with the patient's best interests at heart." McMaster G 'Critics Wary of Health Care Recommendations' *ExpressNews* January 9 2002. (<http://www.expressnews.ualberta.ca>)
Rice T, Professor of Health Services, University of California, Los Angeles School of Public Health, states in 'Market Failure in Health Care: Still Common After All These Years' that: "Regrettably there is no real solution to market failure in health care. Consumers would need to know as much as physicians or physicians would have to act as perfect "agents" for their customers. Neither is likely to happen. Rather, one needs to recognize that these failures are part of what makes health care different from most other goods and services. Thus, rather than trying to push government out, we need use government – perhaps even more than we do now- to obtain efficient and equitable outcomes. Admittedly, governments are subject to failure just as are markets. According to Charles Wolf government faces a number of challenges. Some of these include: it is often hard to define and measure outputs; by its nature, government is monopolistic and doesn't face the discipline of having to adhere to a "bottom line" of profits and losses; and it is

terms of the standards of disclosure for informed consent, to disclose the information that the reasonable patient would require as opposed to what he or she thinks the patient should know. This allows very limited scope for the existence of trade secrets and other competitive information, as would usually be the case between two contracting parties in the commercial context. Ethically and legally, the healthcare provider is not permitted to exploit superior knowledge for its own advantage at the patient's expense. The reason why a patient consults a health care provider in the first place is to gain access to the expertise of the latter in order to benefit therefrom. Secondly in relation to competing health professionals there are limits imposed by their ethical and professional rules as regards competitive behaviour⁴. The position is somewhat different in the case of private hospitals and similar institutions. They do tend to compete against each other both in terms of the 'hotel' services they provide and in terms of the technology they use or make available to the medical specialists operating within their facilities. However, they are still subject to the same standards for informed consent as are medical practitioners and other health professionals. In the private sector, the professional health services rendered by hospitals centre almost exclusively around nursing care by nurse employees. In the public sector most if not

overseen by politicians who tend to prefer quick fixes rather than long-term solutions. As a result, one often sees government operate inefficiently and, in addition, inequitably since it is often beholden to special interests who contribute in one way or another to the politicians and political parties. Nevertheless when one looks at outcomes from health care systems – quality, access and satisfaction weighted against costs – it is difficult to conclude that the more market-like system emblematic of the United States is indeed superior. Government and markets can and should work together since each is subject to its own particular failures, but there is little evidence to indicate that there should be a sea-change towards greater reliance on markets. So long as market failure permeates the health care sector, market-based solutions will be inadequate." (http://worldbank.org/hnp/hsd/ViewPoint_RiceFebruary2003)

In 'Strained Mercy: The Economics of Canadian Health Care' Evans RG, Professor of Economics at the University of British Columbia notes that: "The general theme of the story is that the nature of health care as a commodity, its intrinsic peculiarities discussed above, leads to certain distinctive forms of "market failure." Such "failure" means that the organization of health care production and distribution through unregulated private markets – purely voluntary exchange processes – governed by the price mechanism, leads to unsatisfactory outcomes. Resources are not allocated to or used in health care production, and/or the care produced is not distributed among users, in a way which most of the members of society find acceptable. Accordingly various forms of intervention, institutional responses, arise in both the public and the private sectors, which either supplement or supplant private market relationships. These interventions – regulation, public subsidy, insurance, private charity, etc. – are anticipated to lead to patterns of resource allocation and/or output distribution in the health care sector which are more generally acceptable to the wider society. But these responses have the problems common to therapy in other fields – they have harmful side effects. Furthermore, multiple therapies for multiple problems result in interactions which often accentuate these side effects. Side effects give rise, in turn, to further institutional responses which have their own strengths and weaknesses, and thus the system evolves through time... What does seem clear, however, is that the market failure problem and the process of institutional evolution are an interactive totality. Theoretically optimal "solutions" to the specific problems of uncertainty, externalities, or asymmetry of information, analysed in isolation from other sources of market failure whether intrinsic or derivative, provide few useful guides to policy. There is little point in controlling the patient's arthritis with a therapy which induces a bleeding stomach ulcer, or even of controlling that by contributing to kidney failure." (http://frisch.ecn.ulaval.ca/guy/11160/Manuel/Strained_Mercy/)

⁴ The Ethical Rules of the Health Professions Council state for instance that disciplinary steps can be taken for-
"Supercession

(17) In cases where he or she is or should be aware that a patient is under treatment by another practitioner, superseding such other practitioner without taking reasonable steps to inform the practitioner originally in charge of the case.

(18) Impeding a patient, or someone acting on behalf of a patient, from obtaining the opinion of another practitioner or from being treated by another practitioner.

Professional reputation of colleagues

(19) Unjustifiably casting reflection on the probity or professional reputation or skill of a person registered under the Act."



all health professionals are usually employees⁵. However, the public sector is not nearly as competitive as the private sector as the former does not have the same profit motives as the latter and there are many other significant drivers for the delivery of health care in the public sector not least of which is the state's constitutional obligation to ensure access to health services – particularly for the indigent. Although the Supreme Court of Appeal does seem to have allowed a private hospital to exploit its position of power relative to that of the patient in the *Afrox* case⁶ discussed elsewhere in this chapter, it will be argued, however, that this decision was constitutionally, and for other reasons, incorrect. Patients are not ordinary consumers. They cannot be treated in the same manner, legally speaking, as other consumers. Health professionals may not use secret remedies⁷. Treatment methods used by health professionals must have some level of general acceptance and recognition within their profession if they are to successfully defend claims of professional negligence. Furthermore in the health care context, innovation is a highly complex topic that raises a number of problems for ordinary health professionals and medical researchers alike. In other sectors, innovative products, methods of doing business and services often give a supplier a competitive edge. In many cases, secrecy is a critical factor since not every innovation can be the subject of legally recognised intellectual property rights. A health professional who is too innovative could fall foul of a number of legal, ethical and professional rules⁸. Medicines have to be registered before they may be sold in South Africa. They have to be tested in clinical trials that follow accepted and recognised scientific and ethical methodologies before they can be registered. There is provision in the National Health Bill, currently awaiting signature by the President, for the regulation of health technology and equipment and

⁵ Some health professionals in the private sector do session work in the public sector.

⁶ *Afrox Healthcare v Strydom* 2002 (6) SA 21 (SCA)

⁷ See the Ethical Rules made in terms of section 49(2) of the Health Professions Act which state in Rule 25 that disciplinary steps can be taken against a professional for making use in the conduct of his or her practice of (a) any form of treatment, apparatus or technical process which is secret or is claimed to be secret (b) any apparatus which proves upon investigation to be incapable of fulfilling the claims made in regard to it; and

Rule (33) "Subject to the provisions of section 52 of the Act –

- (a) participating in the manufacture for commercial purposes, or the sale, advertising or promotion of any medicine as defined in the Medicines and Related Substances Control Act, 1965 (Act No. 101 of 1965), or any other activity which amounts to trading in medicines;
- (b) engaging in or advocating the preferential use or prescription of any medicine, if any valuable consideration is derived from such preferential use or prescription: Provided that the provisions of this subparagraph shall not prohibit a practitioner from owning shares in a listed public company manufacturing or marketing medicines, or, subject to the provisions of the Pharmacy Act, 1974, from being the owner or part-owner of a pharmacy, or, whilst employed by a pharmaceutical concern in any particular capacity, from performing such duties as are normally in accordance with such employment."

(The rules are available on the Council's website at www.hpcs.co.za) See also the Health Professions Council's Policy Document on Undesirable Business Practices.

⁸ See footnote 7 *supra*

there is also provision in the Medicines and Related Substances Control Act⁹ for the regulation of medical devices. A complete regulatory system for health technology is likely to be developed consistently with the implementation of the certificate of need provisions of the National Health Act¹⁰. Health professionals can patent medical devices of their own invention and use them on or in their patients but the regulatory authorities are taking an increasingly proactive stance against perverse incentives and, for example an orthopaedic surgeon who sells to colleagues an artificial hip of his own devising for use in their patients may run the risk of being called to account, if not legally then in terms of the professional and ethical rules¹¹.

4.2 Fundamental Concepts

It is necessary to discuss in more detail certain concepts that impact directly on the law of contract as it relates to health care services. These concepts are cross cutting and have relevance in other areas of law such as the law of delict, constitutional law and administrative law as well as the law of contract. They illustrate the importance of a synergistic as well as an analytical approach to law and the importance of underlying commonalities that promote and create consistency and cogency within the legal system as a whole.

4.2.1 Public Interest

The term ‘public interest’ takes on a new meaning for the state in the light of the obligation imposed upon the state by section 7 (2) of the Constitution which requires that the State must “respect, protect, promote and fulfil the rights in the Bill of Rights”. It is submitted that this provision brings within the scope of the phrase ‘public interest’ the Bill of Rights and its application in all of its diversity and complexity. In *Ex Parte North Central and South Central Metropolitan Substructure*

⁹ Medicines Control Act No 101 of 1965

¹⁰ National Health Act No 61 of 2003

¹¹ For instance, the professional and ethical rules of the HPCSA referred to in fn 7 *supra* state *inter alia* that disciplinary steps can be taken against a health professional for accepting commission from a person or another practitioner in return for the purchase, sale or supply of any goods, substances or materials used by him or her in the conduct of his or her professional practice (Rule 6)

*Councils of the Durban Metropolitan Area and Another*¹² Moloto J canvassed the meaning of the phrase 'public interest' in some depths¹³ observing that "this is a very elusive concept which is used to mean many differing (and sometimes conflicting) things but is rarely the subject of any attempt at clear definition." He said that in arriving at what is in the public interest, the courts compare the deprivation of some private convenience with the benefit that is likely to result therefrom for the general public or part thereof. It is submitted that the public interest is a concept that straddles the public/private law boundary¹⁴ as it is a feature of constitutional, administrative and

¹² *Ex parte North Central and South Central Metropolitan Substructure Councils* 1998 (1) SA 78 (LCC)

¹³ The *dicta* of Moloto J in *Ex Parte North Central* (fn 12 *supra*) are quoted here in full as they canvass some of the jurisprudence on the subject as at that date. "In examining whether the settlement agreement complies with the requirements of ss (6) of s 34, it is necessary to investigate the concept 'public interest'. This is a very elusive concept which is used to mean many differing (and sometimes conflicting) things but is rarely the subject of any attempt at clear definition. It is assumed to be generally understood and is not defined in the Act. No argument was placed before the Court on the concept of public interest because the matter was settled. However, the Court conducted independent research into the meaning of the concept. A number of interpretations have been gleaned from various authorities, amongst which a few are mentioned hereunder: The *New Shorter Oxford English Dictionary* vol 2 (1993) defines 'public interest' simply as 'the common welfare', which phrase is itself just as wide and situational as the phrase 'public interest'. The phrase is used in a number of cases in South African law without being defined. What is clear, however, is that in arriving at what is in the public interest, the Courts compare the deprivation of some private convenience with the benefit that is likely to result therefrom for the general public or part thereof. In this regard the Court said the following in the *Clinical Centre* case: 'Looking at the subsection broadly, the intention seems to be that the Court shall consider the whole matter objectively, deciding in that way whether the requirements of the premises can be said to be "reasonably necessary in the interest of the public", and then considering whether the private hardship which will be caused to the lessee is so severe as to outweigh the considerations of public interest.' In a more recent case involving a review of the refusal by the liquor board to grant a liquor licence in a township of some 1939 inhabitants served by no other licensed bottle store, on the grounds, *inter alia*, that there were three bottle stores in the town centre 2-3 kilometres away, Nicholson J said the following about the meaning of 'public interest':

- (a) It does not mean that the public whose interest is to be served is necessarily to be widely representative of the general public.
- (b) It means that the public would be better served if the applicant were granted the licence than that the existing state of affairs was to continue.
- (c) It is not the national interest that is intended but that of the inhabitants in the areas for which the licence is sought or visitors to that area.'

The learned author W du Plessis also refers to a weighing of interests in determining the public interest, and adds that there is an objective as well as a subjective side to the test. She then continues: 'Die belange van die een individu word teenoor dié van 'n ander afgeweg om te bepaal of enige regte aangetas is (subjektiewe sy). Hiermee word egter nie volstaan nie, want daar moet ook 'n objektiewe oordeel gevel word om te bepaal of die skending van die betrokke belange met die gemeenskap se oordeel strook of nie.'

The learned author then proceeds to state that it is not always possible to define the concept. She refers to Flathman's definition of 'the public interest' which is as follows: 'a general commendatory concept used in selecting and justifying public policy. It has no general or descriptive meaning applicable to all policy decisions, but can be determined for particular cases.' She then mentions some special aspects which she uses to define the concept. These aspects are (i) State security; (ii) economic interests; (iii) individual interests as collective interests; (iv) legal interests; (v) administrative interests and (vi) strategic interests. After discussing each of these aspects the learned author offers the following definition of the 'public interest': 'Die versamelnaam vir 'n aantal histories uitgekristalliseerde, beskermingswaardige Staatsveiligheids-, ekonomiese, strategiese, administratiewe, sosiale and regsbelange wat op 'n gegewe moment subjektief en objektief bepaalbaar is en in 'n gemeenskap die balans tussen die botsende belange van individue onderling en individue in verhouding tot die Staat handhaaf'...

Finally, I reiterate that the meaning to be given to the concept of the public interest in s 34 was not argued before us. Whilst I was satisfied that the settlement in this matter was, in the particular circumstances, in the public interest, this judgment is not intended to be conclusive as to the meaning to be ascribed to the term."

¹⁴ For examples in the law of contract see *Afrax Healthcare Bpk v Strydom* (fn 6 *supra*). It was held that the elementary and 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. The respondent's contention that a contractual term in terms of which a hospital could exclude liability for the negligent conduct of its nursing staff was not in the public interest could accordingly not be supported; *Shoprite Checkers (Pty) Ltd v Bumpers Schwarmas CC And Others* 2002 (6) SA 202 (C): "An examination of the content of the consensus prompts a consideration of the concept of *bona fides* which underpins contractual relationships. The concept of *bona fides* has proved to be somewhat elusive with regard to its definition and scope. See in particular Lubbe GF 'Bona Fides, Billikheid en die Openbare Belang in die Suid Afrikaanse Kontrakte Reg' 1990 *Stellenbosch Law Review* 7. Whatever the uncertainty, the principle of good faith must require that the parties act honestly in their commercial dealings. Where one party promotes its own interests at the expense of another in so unreasonable a manner as to destroy the very basis of consensus between the two parties, the principle of good faith can

contract law as well as the law of delict. The public interest is a flexible concept that changes with changing conditions and circumstances. The question as to who is the final arbiter of what is in the public interest, e.g. the executive or the judiciary, is a matter of statutory interpretation and the application of administrative and constitutional law principles to the particular circumstances under discussion. In the broad sense, health legislation *is* public interest legislation. The many different statutes administered by the national department of health regulate:

- the manner in which various health professionals are trained and conduct their professions in order to protect the public interest;¹⁵
- the manner in which foodstuffs, cosmetics and disinfectants are stored, sold, handled and processed in order to protect the public interest;¹⁶
- the importation, sale, storage, composition, efficacy and marketing of medicines in order to protect the public interest;¹⁷
- the location and establishment of hospitals, clinics and other kinds of health establishment, the manner of their construction and their staffing requirements in order to protect the public interest¹⁸;

be employed to trump the public interest inherent in the principle of the enforcement of a contract.”; *Oos-Transvaalse Kodoperasie Bpk v Heyns* 1986 (4) SA 1059 (O): An agreement not to report a crime to the appropriate authorities in consideration for compensation is contrary to the public interest, irrespective of whether or not it is an offence to conclude such an agreement; *Sibex Engineering Services (Pty) Ltd v Van Wyk and Another* 1991 (2) SA 482 (T): In general it is contrary to public interest to enforce unreasonable restriction on person’s freedom to trade; *Basson v Chilwan and Others* 1993 (3) SA 742 (A): “The public interest must be the touchstone for deciding whether the Courts will enforce the restraint clause or not.... Where public interest is the touchstone, and where public interest may change from time to time, there can be no *numerus clausus* of the circumstances in which a Court would consider a restraint on the freedom to trade as being unreasonable.”; See also *Magna Alloys and Research (SA) (Pty) Ltd v Ellis* 1984 (4) SA 874 (A); *Roffey v Catterall, Edwards & Goudre (Pty) Ltd* 1977 (4) SA 494 (N); *National Chemsearch (SA) (Pty) Ltd v Borrowman and Another* 1979 (3) SA 1092 (T); *Barnard v Barnard* 2000 (3) SA 741 (C); *Kleyenstrüber v Barr and Another* 2001 (3) SA 672 (W); *Coin Sekerheidsgroep (Edms) Bpk v Kruger en ’n Ander* 1993 (3) SA 564 (T). For examples in the law of delict see *Benson v Robinson & Co (Pty) Ltd and Another* 1967 (1) SA 420 (A): The immunity accorded to the use of defamatory words on so-called privileged occasions, rests on a foundation of public interest; *Neethling v Du Preez and Others*; *Neethling v The Weekly Mail and Others* 1994 (1) SA 708 (A): “...reference may usefully be made at this stage to the observations to be found (albeit in a different context) in regard to the concept of ‘the public interest’ in the recent judgment of this Court in *Financial Mail (Pty) Ltd and Others v Sage Holdings Ltd and Another* 1993 (2) SA 451 (A). In delivering the majority judgment Corbett CJ said (at 464C-D): ‘(1) There is a wide difference between what is interesting to the public and what it is in the public interest to make known...The media have a private interest of their own in publishing what appeals to the public and may increase their circulation or the numbers of their viewers or listeners; and they are peculiarly vulnerable to the error of confusing the public interest with their own interest....’”; See also *Kemp and Another v Republican Press (Pty) Ltd* 1994 (4) SA 261 (E); *Financial Mail (Pty) Ltd and Others v Sage Holdings Ltd and Another* 1993 (2) SA 451 (A). For examples in administrative law see *Maharaj v Chairman, Liquor Board* 1997 (1) SA 273 (N); *Bulk Deals Six CC and Another v Chairperson, Western Cape Liquor Board, and Others* 2002 (2) SA 99 (C); *Reitner Pharmaceuticals (Pty) Ltd v Registrar Of Medicines and Another* 1998 (4) SA 660 (T): In all these circumstances any alleged harm the applicant may suffer as a result of the enforcement of the provisions of the Act is outweighed by the public interest and the interest of the respondents; *Financial Services Board and Another v De Wet NO and Others* 2002 (3) SA 525 (C): “I have little doubt that it was thought by the Legislature to be in the public interest that such supervisory powers and duties should be conferred on the Registrar. Many members of the public would belong at some stage or another to pension funds and the security of their pensions would be of vital importance to most of them. It is in the public interest that the administration of pension funds should ensure that members are fairly dealt with and that the receipt of their pensions is not placed in jeopardy.”

¹⁵ Health Professions Act No 56 of 1974, the Allied Health Professions Act No 63 of 1982, the Nursing Act No 50 of 1978, the Dental Technicians Act No 19 of 1979, the Pharmacy Act No 53 of 1974

¹⁶ The Foodstuffs, Cosmetics and Disinfectants Act No 54 of 1972

¹⁷ The Medicines and Related Substances Control Act fn 9 *supra*



- the places in which tobacco products may be used in order to protect the public interest;¹⁹
- the handling, storage and disposal of hazardous substances such as radioactive and biological materials in a manner that seeks to ensure the health and wellbeing of the general public;²⁰
- the payment of compensation for occupational diseases in mines and works²¹.

It is submitted that acts performed in terms of this legislation must generally be done in a manner that best serves the public interest since this is the basis for the legislation itself.

Actions that are contrary to the interests of the community are contrary to public policy and an agreement is contrary to public policy if it is opposed to the interests of the state, or of justice, or of the public²². Agreements which are clearly inimical to the interests of the community, whether they are contrary to law or morality or run counter to social or economic expedience, will accordingly on the grounds of public policy not be enforced²³. Christie²⁴ notes that since the Constitution came into

18 The Health Act No 63 of 1977 soon to be repealed by the National Health Act which is presently not yet operational.

19 The Tobacco Products Control Act No 83 of 1993

20 The Hazardous Substances Act No 15 of 1973

21 The Occupational Diseases in Mines and Works Act No 78 of 1973

22 See generally Christie *fn 2 supra* p 398-417

23 See *Magna Alloys and Research (SA) (Pty) Ltd v Ellis* 1984 (4) SA 874; *Sasfin v Beukes* 1989 (1) SA 1 (A); Aquilius 1941 SALJ p 346 states: "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." Kerr AJ *The Principles of the Law of Contract* p 175. Lubbe GF and Murray C *Farlam & Hathaway Contract – Cases Materials & Commentary*, Van der Merwe S, Van Huyssteen LF, Reinecke MFB, Lubbe GF and Lotz JG, *Contract: General Principles*, state at p 139 that: "Often agreements will be said to be illegal because they are contrary to good morals (*contra bonos mores* in the strict sense) or public interest or policy...Such an expression does not introduce an additional criterion which takes the notion of illegality outside the realm of the law: the *boni mores*, public interest and public policy are only relevant in this context in so far as they provide the basis upon which a decision on the question of illegality is made *in law*. The law does not enforce morals simply because they are morals, but it does to some extent absorb moral content into legal doctrine and even specific rules...The distinction between *boni mores*, public interest and public policy is not at all clear. In practice the expression *boni mores* as it is employed with regard to illegality is mostly reserved for agreements which relate to the everyday morals or standards of conduct set by society, such as the norms governing sexual morals and honest and proper conduct. On the other hand, agreements which are to the detriment of the state, which obstruct or defeat the administration of justice, or which restrict the freedom to act or to be economically active, are usually said to be contrary to public interest. In the final instance that which is in the public interest would include that which is in accordance with good morals, although an agreement which is not immoral as such may for reasons of economic or other expedience nevertheless be against the public interest. An appraisal of the public interest is not limited to the wider interest of society in general but may include the individual interests of the parties to a particular agreement. So, for instance, a contractual term which restricts freedom to trade may seem acceptable when only the general interest of society is considered but may be so unreasonable when the relative interests of the contractants are taken into account that it is against the public interest after all. Determining the public interest is particularly difficult in a heterogeneous society: should one have regard (only) to the interests and customs of a particular section of that society or (only) to the interests of the society as a whole? The guiding principle should be that sectional title interests must be evaluated within the context of the wider interests of the society as a whole: sections of a society have an interest in upholding the general interests of the society whilst society itself has an interest in maintaining sectional interests. In a given case it may therefore be in the public interest to place the main emphasis on specific section interests and customs before the interests and customs of the wider community. By the same token the public interest will often be determined by individual interests."

operation it has affected the enforceability of contracts. He states that the Bill of Rights defines the constitutional rights and that a contract that infringes any of these rights will generally be unenforceable. Christie uses the word ‘generally’ because the Constitution does not simply order the courts to condemn outright any act such as a contract which infringes a provision of the Bill of Rights. Instead it requires the courts to proceed with more care by first investigating whether the constitutional right is applicable to the situation, taking into account the nature of the right and the nature of any duty imposed by the right. Christie states that 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 unenforceable²⁵.

4.2.2 Bona Fides or Good Faith

Good faith is a central principle of the South African law of contract²⁶. In *Eerste Nasionale Bank van Suidelike Afrika Bpk v Saayman NO*²⁷, Olivier JA held in a

²⁴ Christie fn 2 *supra* p 402-403

²⁵ Christie fn 2 *supra* points out at p 411-412 that the law would be hopelessly self-contradictory if it treated a contract to commit an unlawful act as enforceable, as it would be approbating and reprobating the same act, blowing hot and cold. He notes that contracts while not purporting to bind the parties to the commission of an unlawful act, might encourage them to do so, may also fall foul of the law on grounds of public policy but here it is very necessary to maintain a sense of balance. An unadorned rule that a contract tends to encourage the commission of an unlawful act is void, or any rule expressed in similar general terms, would lead to endless trouble because the tendency could not be discerned in many contracts that have been found in practice to be not only harmless but actively beneficial in the business world. The courts have therefore tended to look at a number of types of contract in which the tendency to encourage the commission of an unlawful act can be traced and when the tendency rises to a dangerous level say “Thus far and no further”. He points out that exemption clauses raise the same question of public policy as insurance contracts: knowledge of the protection given by an exemption clause may encourage the unlawful behaviour from liability for which it gives protection. A limit has therefore had to be placed on the extent of such protection. At p 210-211 he explores the permissible limits of exemption clauses with reference to the dicta of the courts in *Morrison v Angelo Deep Gold Mines Ltd* 1905 TS 775, *Wells v Alumentite Co* 1927 AD 69; *Goodman Brothers (Pty) Ltd v Rennies Group Ltd* 1997 (4) SA 91 (W) and *Republic of South Africa v Fibre Spinners & Weavers (Pty) Ltd* 1978 (2) SA 794 (A). Christie observes that the basis on which the courts decide what is and is not permissible is public policy (Grotius 3 1 42; Voet 2 14 16). Innes CJ stated in *Morrison supra*: “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. “ Mason J in the same case stated at 784-785: “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 recognize 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 statutory law, or that it is necessarily to the prejudice of the interests of the public.”

²⁶ See for instance *Shoprite Checkers (Pty) Ltd v Bumpers Schwarmas CC and Others*, fn 14 *supra*, where Davis J observed at p 215-216: “The concept of *bona fides* has proved to be somewhat elusive with regard to its definition and scope. See in particular Lubbe G ‘Bona Fides, Billikheid en die Openbare Belang in die Suid Afrikaanse Kontrakte Reg’ 1990 *Stellenbosch Law Review*. Whatever the uncertainty, the principle of good faith must require that the parties act honestly in their commercial dealings. Where one party promotes its own interests at the expense of another in so unreasonable a manner as to destroy the very basis of consensus between the two parties, the principle of good faith can be employed to trump the public interest inherent in the principle of the enforcement of a contract. This concept of good faith is congruent with the underlying vision of our Constitution (the Constitution of the Republic of South Africa Act 108 of 1996) to the extent that our Constitution seeks to transform our society from its past, it is self-evident that apartheid represented the very opposite of good faith. Concepts which were employed during apartheid lacked any form of integrity. Our Constitution seeks to develop a community where each will have respect for the other and in which

minority judgment for the respondent that *bona fides* was an aspect of the broader principle of public interest²⁸. Christie²⁹ states that there is every reason to hope that when the opportunity arises the Supreme Court of Appeal will apply Olivier JA's reasoning, harnessed to the concept of public policy in the context of the unfair enforcement of a contract. He notes that the foundation has long since been laid by the Appellate Division's recognition that in South African law the concept of good faith is applicable to all contracts and its acceptance of the principle that in deciding whether public policy forbids the enforcement of a contract the circumstances existing at the time enforcement is sought must be taken into account. In *Brisley v Drotzky*³⁰ Olivier J referred with approval to an article by Hutchison D entitled 'Good faith in the South African Law of Contract'³¹ and then went on to lament the fact that the operation of the principle good faith has for a long time not been completely explored and given content and that it will take much time and many judgments before this is achieved. Christie expresses the hope that when this task is finally complete a new framework and thought pattern will exist in the law of contract. Davis J in *Mort No v Henry Shields-Chiat*³² observed that like the concept of *boni mores* in the South African law of delict, the concept of good faith is shaped by the legal convictions of the community. He noted that while Roman-Dutch law may well supply the conceptual apparatus for South African law, the content with which concepts are filled depends on an examination of the legal convictions of the community - a far more difficult task. He said that this task requires that careful account be taken of the

integrity in government as well as in the exercise of power will be of paramount concern. To rely on the strict written words of a contract and to ignore an underlying oral agreement which not only shaped the written agreement but which forms part of the essential consensus would be to enforce the very antithesis of integrity and good faith in contractual arrangements."

27 *Saayman* 1997 (4) SA 302 (SCA)

28 See discussion under public policy below.

29 Christie fn 2 *supra* at p19

30 *Brisley* 2002 (4) SA 1 (SCA)

31 Brownsword R, Hird NJ and Howells G, *Good Faith in Contract: Concept and Context* 213 p 230 - 1. The article states: "What emerges quite clearly from recent academic writings, and from some of the leading cases, is that 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, content and field of application and provides them with a moral 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* is an expression." On this view of things, which seems to be correct, 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 doctrinal 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."

32 *Mort* 2001 (1) SA 464 (C) at p 474-475



existence of the constitutional community, based as it is upon principles of freedom, equality and dignity and that 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 cause contractual litigation to mushroom and the expectations of contractual parties to be frustrated. Davis J comments, however that 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. He says that the task is not to disguise equity or principle but to develop contractual principles in the image of the Constitution and that the constitutional state introduced in 1994 mandates that all law should be congruent with the fundamental values of the Constitution. Consequently, says Davis J, oppressive, unreasonable or unconscionable contracts can fall foul of the values of the Constitution. In accordance with its constitutional mandate the courts of the South African constitutional community can employ the concept of *boni mores* to infuse the law of contract with this concept of *bona fides*³³. In terms of the law of delict the principle of *bona fides* relates to the state of mind of the person who caused the harm³⁴. It is related to the principle of reasonableness³⁵. A reasonable person does not act in bad faith.

³³ Davis J in *Mort* (fn 32 *supra*) referred in this regard to *Janse van Rensburg v Grievs Trust* CC 2000 (1) SA 315 (C) at 325 - 6. Davis J notes at p 475 of the judgment: " It appears that the South African Law Commission, in its report dated April 1998, sought to solve this difficulty through legislation. Howsoever these developments are implemented it is clear that our highest Court has given the green light in the direction of the development of a concept of good faith in our law of contract which would render the body of contract law congruent with the values of our constitutional community. Nevertheless, an important development of our law must be grounded upon the appropriate factual matrix. To trump the principle of the enforceability of a contract, the offending clauses require more than a treatment which seeks ambiguity where none exists. The very content of the contract and the manner in which the parties created their contractual relationship and hence their legitimate expectations viewed within the context of the enforcement of the contractual provisions must be carefully scrutinised. From this inquiry the question of the unreasonable promotion can be evaluated and hence trumping the principle of enforceability can be appropriately considered."

³⁴ In *Frankel Pollak Vinderine Inc v Stanton* NO 2000 (1) SA 425 (W), Wunsh J referred to the dicta of Ogilvie-Thompson JA in *Grant and Another v Stonestreet and Others* 1968 (4) SA 1 (A) in which he stated: "In general, the Act insists on the holder's honesty. The measure of a holder's good faith is therefore whether he had a certain subjective state of mind when he acquired the instrument. The question is not whether he should have had knowledge of a certain fact but whether he did in fact have such knowledge. The doctrine of constructive knowledge, which attributes knowledge of certain facts to a holder in circumstances where a reasonable man would have made enquiries, does not apply to negotiable instruments. This measure of good faith, it is said, would impair the rapid negotiation of bills and would be detrimental to commerce. Consequently, it is accepted that a holder who has acquired a bill through carelessness, negligence or ignorance cannot by reason only of his state of mind be disqualified as a holder in due course. A holder can be dishonest without having knowledge of specific defects of title. His acquisition might be in bad faith if he merely suspects that something is wrong. He would also be in bad faith should he suspect something untoward about the bill. It has been said: "Notice and knowledge" means not merely express notice, but knowledge, or the means of knowledge to which the party wilfully shuts his eyes - a suspicion in the mind of the party, and the means of knowledge in his power wilfully disregarded." The word "suspicion" is not entirely apt, because a suspicion may exist that is not based on specific facts. The distinction to be made here is between honest ignorance and a dishonest state of mind - a reluctance to ascertain the true facts. If the holder suspects that something is wrong but chooses to remain ignorant of the true state of affairs, he is not in good faith. To determine the holder's state of mind one has to consider the facts known to him, and

Public entities are obliged to act in good faith³⁶ and in some cases the relevant statute goes so far as to confer immunity upon them for acts done in good faith in the exercise of their statutory obligations³⁷.

4.2.3 Public Policy (Boni Mores)

Contracts that are contrary to public policy are generally not enforceable³⁸. In *Friedman v Glicksman*³⁹, the facts of which will be more fully canvassed below, the

evaluate those apparently suspicious circumstances that call for enquiry. These facts and circumstances help to determine whether the holder did, subjectively, act in good faith.”

Wunsh J observed: “A person who is a *bona fide* possessor or occupier because he or she believes that he or she is lawfully entitled to possession or occupation does not lose that status because there are not ‘reasonable or probable grounds’ for his or her belief (*Banjo v Sungrown (Pty) Ltd* 1969 (1) SA 401 (N) at 406A - G). As pointed out by Milne JP in that case: ‘That an alleged belief is based on a mistaken view of the law may possibly, in certain circumstances, be a reason for doubting the existence of the belief, but that is, I suggest, another matter: and the absence, otherwise, of reasonable grounds for belief may, indeed, provide cogent evidence that the belief did not exist. *Grant and Another v Stonestreet and Others* 1968 (4) SA 1 (A) at 21H. But the existence or otherwise of an honest belief remains a question of fact.’ A person who is doubtful as to his or her right to possess because of fear of an adverse claim is not a bona fide possessor or occupier (*George v Shimwell Bros* 1910 TPD 890 at 894; *BC v Commissioner of Taxes* 1958 (1) SA 172 (SR) at 179A - E; *Grobler NO v Baikhutsong Business Undertaking (Pty) Ltd and Others* 1987 (2) SA 547 (B) at 569G - H). Scholtens says in this regard: ‘Actual knowledge will also be denied to exist when on the facts known to the possessor no reasonable man could continue to consider himself to be entitled to the thing.’ (1958) 75 SALJ 282 at 291”.

35 Wunsh J noted in *Frankel* (fn 34 *supra*): “If it looks to you that advice given to you could possibly be wrong, your professed belief that you are acting lawfully because it is on the strength thereof will not be *bona fide* if you refrain from questioning it (*S v Waglines (Pty) Ltd and Another* 1986 (4) SA 1135 (N) at 1146F - G). But the question is one of the accused’s state of mind. In all the examples I have given, where knowledge is essential, there is a common thread. What is required is actual knowledge. Where a person has a real suspicion and deliberately refrains from making inquiries to determine whether it is groundless, where he or she sees red (or perhaps amber) lights flashing but chooses to ignore them, it cannot be said that there is an absence of knowledge of what is suspected or warned against. In the absence of direct evidence, a court has to determine the existence of knowledge as an inference from the established facts and circumstances. If a person’s professed ignorance is so unreasonable that it cannot be accepted that he or she laboured under it, evidence of the ignorance will not be believed in the absence of some acceptable explanation. But this amounts to a finding of actual, subjective knowledge made when a person wilfully precludes himself or herself from acquiring it.”

36 *Premier, Eastern Cape, and Others v Cekeshe and Others* 1999 (3) SA 56 (TK); *Dews And Another v Simon’s Town Municipality* 1991 (4) SA 479 (C). See also the Promotion of Administrative Justice Act No 3 of 2000.

37 Thus section 25 of the Medicines and Related Substances Act, fn 9 *supra*, states: “The council or a committee appointed under section 9 (1), 22G (1) or 24 (1) or any member of the council or of any such committee shall not be liable in respect of anything done in good faith under this Act.” Section 62 of the Medical Schemes Act No 131 of 1998 states that: “The Minister, the Council, a member of the Council or of the Appeal Board, the Registrar, Deputy Registrar or other staff member of the Council shall not be liable in respect of any bona fide exercise of a discretion in the performance of any function under this Act. See also *Inkatha Freedom Party and Another v Truth and Reconciliation Commission and Others* 2000 (3) SA 119 (C); In *Soobramoney v Minister of Health, KwaZulu-Natal* 1998 (1) SA 765 (CC) the court said 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.”

38 *Administrator, Natal v Edouard* fn 1 *supra*; *Ryland v Edros* 1997 (2) SA 690 (C); *Coetzee v Comitits And Others* 2001 (1) SA 1254 (C); *ABSA Bank H/A Bankfin v Louw en Andere* 1997 (3) SA 1085 (C): An agreement whereby a party waives beforehand and in its entirety the protection of the Prescription Act 68 of 1969 is contrary to public policy and thus invalid; *Nuclear Fuels Corporation of SA (Pty) Ltd v Orda AG* 1996 (4) SA 1190 (A); *Miller and Another NNO v Dannecker* 2001 (1) SA 928 (C); *De Beer v Keyser and Others* 2002 (1) SA 827 (SCA); *Citibank NA, South Africa Branch v Paul NO and Another* 2003 (4) SA 180 (T); In *Maseko v Maseko* 1992 (3) SA 190 (W) the court held: “While there is no *fraudem creditorum* without proof of actual prejudice (see *Hockey v Rixom & Smith* 1939 SR 107), it is my view that an agreement designed to mislead creditors is immoral and against public policy even if it has not yet served its purpose (cf *Schuster v Guether* 1933 SR 19).”; *De Klerk v Old Mutual Insurance Co Ltd* 1990 (3) SA 34 (E): The fact that the clause in question sought to limit the plaintiff’s entitlement to commission which had fallen due by the date of termination of his employment where the latter was terminated before the plaintiff had completed five years’ continuous service, did not render the provisions of that clause plainly improper and unconscionable, or inimical to the interests of the community, and that it was therefore not contrary to public policy; See also *Mufamadi and Others v Dorbyl Finance*

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.

The role of public policy and bona fides was canvassed by the court in *Eerste Nasionale Bank van Suidelike Afrika Bpk v Saayman NO*⁴⁰. The case is of particular relevance to the field of health care services not because it dealt directly with a contract for health care services but because of the question of the contractual capacity of one of the parties and the relevance of bona fides and the public interest to the law of contract. In that case, Mrs Malherbe had been 85 years old, hard of hearing and almost blind when she was asked to sign the documents in question. At the time she had often been confused and disoriented⁴¹. The court founds that she had clearly been persuaded by her son to sign one utterly prejudicial document after the other while under the impression that she was merely making the shares available to him, without any prejudice to her rights, and that she needed only to ask for their return in order to get them back. She had signed the documents without having their import explained to her and without having read them. The court referred to the requirements for contractual capacity⁴² and came to the conclusion that Mrs Malherbe did not have

(Pty) Ltd 1996 (1) SA 799 (A); *Standard Bank of SA Ltd v Essop* 1997 (4) SA 569 (D); *Goodman Brothers (Pty) Ltd v Rennies Group Ltd* 1997 (4) SA 91 (W); *Berlesell (Edms) Bpk v Lehae Development Corporation BK en Anders* 1998 (3) SA 220 (O); *Traco Marketing (Pty) Ltd v Commissioner for the South African Revenue Service: In re Commissioner for the South African Revenue Service v Traco Marketing (Pty) Ltd* 1998 (4) SA 1002 (SE); *Theron v Phoenix Marketing (Pty) Ltd (Heyman Intervening)* 1998 (4) SA 287 (W); *Venter and Others v Credit Guarantee Insurance Corporation of Africa Ltd and Another* 1996 (3) SA 966 (A)

39

Friedman 1996 (1) SA 1134 (W)

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Saayman fn 27 *supra*

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The court observed at p 313 of the judgment: "Dr Von Delft het getuig dat, oor die 20 jaar wat hy mev Malherbe ken, daar 'n verswakking in begripsvermoë, oordeel en insig ingetree het. Na sy mening is dit 'hoogs onwaarskynlik dat sy op haar hoë ouderdom en met inagneming van haar kroniese serebrale siektetoestand rasioneel opgetree het toe sy onder invloed van ander partye sekere borgskappe en sekuriteite vir banklenings gegee of gelewer het' Dr Quail het met mev Malherbe gekonsulteer op twee geleenthede, naamlik op 29 Maart en 29 April 1993. Op nie een van die geleenthede kon hy betekenisvolle besonderhede van haar bekom ten aansien van die dokumente wat sy geteken het nie. Hy is van mening dat mev Malherbe aan pseudo-demensie ly. 'n Persoon wat aan pseudo-demensie ly, toon as gevolg van depressie die simptome van 'n persoon wat aan demensie ly. Sy mening het hy onder andere gebaseer op die feit dat haar kognitiewe funksionering wesenlik verskil het op die twee geleenthede wat hy haar gesien het. Hy het getuig dat, met die inligting tot sy beskikking, dit onmoontlik was om te sê of dit ook die geval was toe sy die gewraakte dokumente onderteken het. Hy het wel ook getuig dat sy moontlik reeds in 1989 aan demensie gely het maar het dit betwyfel."

42

See p 314 of the judgment where it stated: "Die regsposisie is soos volg uiteengesit deur Innes AR in *Pheasant v Warne* 1922 AD 481 op 488: '(A)nimus is an essential element in contractual obligations. In ordinary cases the *animus* is deduced, and can only be deduced, from the outward manifestation of intention whether spoken or written. But once it is clear that the necessary intelligence is wanting then there can be no *animus* or consenting mind. . . . (I)t is now recognised that persons may be of such mentality as to require special protection and control, even though they might not be accurately described as *mente capti* in the sense in which that term is used in the books. . . . And a court of law called upon to decide a question of contractual liability depending upon mental capacity must determine whether the person concerned was or was not at the time capable of managing the particular affair in question - that is to say whether his mind was such that he could understand and appreciate the transaction into which he purported to enter.'"

the contractual capacity to enter into the contract at the time. In his minority judgment Olivier JA stated that he disagreed with the majority of the court that it had been shown that Mrs Malherbe had not had the capacity to contract at the relevant time. He then went on to consider the role of the public interest and bona fides in the law of contract and noted that:

“Die funksie van die bona fide-begrip (ook genoem die goeie trou) was eenvoudig om gemeenskaps opvattinge ten aansien van behoortlikheid, redelikheid en billikheid in die kontraktereg te verwesenlik.”

Olivier JA then canvassed some of the history of the application of the *bona fides* concept⁴³ and stated that the problem with the assertion of the court in McDuff’s case that equitable principles are only of force insofar as they have become authoritatively incorporated and recognised as rules of positive law was that it apparently originates from a static, closed system and so if fairness is not already a rule of positive law then *caedit questio*. Referring to the dictum of Innes J in *Blower v Van Noorden*⁴⁴ where he said:

“There come times 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”

⁴³

At p 319 of the judgment he noted: “Reeds vroeg in hierdie eeu het juis hierdie Hof die voortou geneem om die bona fide-beginsel te erken en te verwesenlik. *Neugebauer & Co Ltd v Hermann* 1923 AD 564 is ’n vroeë voorbeeld. Daar is beslis dat ’n afslaer nie verplig is om ’n bod, wat gemaak is deur een van ’n groep bidders wat saamgespan het om nie teen mekaar te bieder, te aanvaar nie. Volgens die Engelse reg sou die afslaer die bod moes aanvaar het; volgens die Amerikaanse reg egter nie. Innes HR verklaar op 573: ‘Our law accords, in my opinion, more with the American than with the English view. It is not so much a question of public policy as of the requirements of good faith. The principle is fundamental that bona fides is required from both parties to a contract of sale.’ Net in die volgende jaar het hierdie Hof weer van die beginsel gebruik gemaak om ’n grondslag vir die leerstuk van fiktiewe vervulling van ’n voorwaarde te identifiseer en wel in *MacDuff & Co Ltd (in Liquidation) v Johannesburg Consolidated Investment Co Ltd* 1924 AD 573. Beide Innes HR (op 589) en Kotzé AR (op 610) beroep hulle op die bona fide-beginsel. Die tendens word voortgesit in 1925 in *Weinerlein v Goch Buildings Ltd* 1925 AD 282 waar rektifikasie van ’n kontrak op die bona fide-beginsel gebaseer word. Wessels AR verklaar op 292: ‘The commentators put it thus: As a general proposition your claim may be supported by a strict interpretation of the law, but it cannot be supported in this particular case against your particular adversary, because to do so would be inequitable and unjust, for it would allow you, under the cloak of the law, to put forward a fraudulent claim . . . 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. This inherent equitable jurisdiction of the Roman Courts (and of our Courts) to refuse to allow a particular plaintiff to enforce an unconscionable claim against a particular defendant where under the special circumstances it would be inequitable, dates back to remote antiquity and is embodied in the maxim “*summum jus ab aequitate dissidens jus non est*”. Die eerste klanke van ’n enger siening tref mens juis in bogenoemde uitspraak aan en wel by Kotzé AR. Alhoewel hy die ‘doctrine of equity’ in ons gemenerereg erken, verklaar hy op 295: ‘Our common law, based to a great extent on the civil law, contains many an equitable principle; but equity, as distinct from and opposed to the law, does not prevail with us. Equitable principles are only of force insofar as they have become authoritatively incorporated and recognised as rules of positive law.’”

⁴⁴

Blower 1909 TS 890 at p 905

Olivier JA noted that it was echoed in the judgment of the court in *Bank of Lisbon and South Africa Ltd v De Ornelas and Another*⁴⁵. He also referred to the case of *Meskin NO v Anglo-American Corporation of SA Ltd and Another*⁴⁶ where it was held that:

“It is now accepted that all contracts are *bonae fidei* (some are even said to be *uberrimae fidei*). This involves good faith (*bona fides*) as a criterion in interpreting a contract (Wessels (op cit para 1976)) and in evaluating the conduct of the parties both in respect of its performance (Wessels para 1997) and its antecedent negotiation. Where a contract is concluded the law expressly invokes the dictates of good faith, and conduct inconsistent with those dictates may in appropriate circumstances be considered to be fraud;”

and

“It may, perhaps be questioned whether these criteria do not go further in applying ethical considerations in *contrahendo* than our authorities recognise. On the other hand 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. On the assumption (without deciding) that the ultimate test suggested by Millner correctly reflects the present state of our law, there is a striking resemblance between that test and eg ‘die algemene regsgevoel van die gemeenskap’ mentioned above in regard to *delict generally*.”

After considering a few other cases⁴⁷, Olivier J went on to hold that in his opinion it could rightly be said that the *bona fides* concept is a part of the generally applicable

⁴⁵ *Bank of Lisbon* 1988 (3) SA 580 (A)

⁴⁶ *Meskin* 1968 (4) SA 793 (W)

⁴⁷ See page 321-323 of Saayman's case (fn 25 *supra*) in which Olivier observed: “In ander uitsprake van hierdie Hof is die grondliggende waardes van die goeie trou, billikheid en openbare belang in die kontraktereg ook beklemtoon; veral wat betref die afdwing van kontrakte wanneer dit teen die regsgevoel skrei. So, bv het Hefer AR in *Benson v SA Mutual Life Assurance Society* 1986 (1) SA 776 (A) gekonstateer dat 'n hof die diskresie het om nie spesifieke nakoming van 'n kontrak te gelas nie. Hierdie diskresie, so is verklaar op 783C-E: ‘. . . 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, eg, 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. . . .’ In verband met die afdwing van ooreenkomste wat die handelsvryheid beperk, het die Howe self 'n verreikende bevoegdheid om beperkinge op sodanige ooreenkomste te plaas, ontwikkel en wel op grond van openbare belang. In *Magna Alloys and Research (SA) (Pty) Ltd v Ellis* 1984 (4) SA 874 (A) het Rabie HR op 891H-I gesê: ‘Omdat opvatting 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 ook 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.’ En op 893G: ‘i.e. opvatting dat 'n persoon wat 'n beperking wil afdwing nie die las dra om te bewys dat dit redelik inter partes is nie, bring nie mee dat oorweging van die redelikheid of onredelikheid van 'n beperking nie van belang is of kan wees nie.’ En op 895D-E: ‘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.’ D ie opvatting dat alle kontrakte in ons reg *bonae fidei* is, dws deur die goeie trou beginsel beheers word, is ook deur hierdie Hof erken onder andere in *Paddock Motors (Pty) Ltd v Igesund* 1976 (3) SA 16 (A) op 28; *Magna Alloys and Research (SA) (Pty) Ltd v Ellis* (*supra* op 893C ev); *Mutual and Federal Insurance Co Ltd v Oudtshoorn Municipality* 1985 (1) SA 419 (A) op 433B-C; *LTA Construction Bpk v Administrateur, Transvaal* 1992 (1) SA 473 (A) op 480D-E; *Sasfin (Pty) Ltd v Beukes* 1989 (1) SA 1 (A) op 71 ev en weer 8C-D; *Botha (now Griessel) and Another v Financredit (Pty) Ltd* 1989 (3) SA 773 (A) op 782J ev. ie *bona fides*, wat weer gebaseer is op die redelikeheidsopvattinge van die gemeenskap, speel dus 'n wye en onmiskenbare rol in die kontraktereg. Zimmermann in sy bydrae ‘Good Faith and Equity’ in Zimmermann en Visser (reds) *Southern Cross - Civil Law and Common Law in South Africa* (1996) op 217-60 toon oortuigend aan dat gemelde beginselkompleks onderliggend is aan bekende regsinstellings soos estoppel, rektifikasie, onskuldige wanvoorstelling, die kennisleer, onbehoorlike beïnvloeding en dat dit 'n belangrike rol speel by die uitleg van kontrakte, die inlees van stilswyende en geïmpliseerde bedings, die openbaringsplig by kontraksluiting, fiktiewe vervulling van 'n voorwaarde en die erkenning van repudiëring as 'n vorm van kontrakbreuk. Dit blyk ook dat daar 'n innige verband bestaan tussen die begrippe *bona fides*, openbare belang, openbare beleid en *justa causa*. Dit blyk uit die analise van Smalberger AR in *Sasfin (Pty) Ltd v Beukes* (*supra* op 71-8G); uit die woorde van Hoexter AR in *Botha (now Griessel)*

public interest principle. The *bona fides* principle is applied, he said, because the public interest requires it⁴⁸ and observed at page 326 of the judgment that:

“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 regstelsel wat gevoelig is vir die opvattinge van die gemeenskap, wat die uiteindelijke skepper en gebruiker van die reg is, met betrekking tot die morele en sedelike waardes van regverdigheid, billikheid en behoortlikheid.”

The interconnections between public interest, *bona fides* (good faith), public policy, the *boni mores* and reasonableness, fairness and propriety or due process, are clear in this statement.

Despite such enlightened judgments such as those in *Sasfin* and *Saayman* in which the courts were prepared to apply the concepts of public policy and *bona fides* in such a way as to achieve a just result, it is unfortunate that this is not an approach which South African courts apparently universally adopt. Not all judges appear to be ready to embrace such a progressive approach to the development of the common law. There are still some judges who apparently prefer to compartmentalize the law within concrete, leadlined pigeonholes that prevent any form of ‘contamination’ of one branch of law by the other⁴⁹. A case in point is that of *Afrox HealthCare Limited v*

and Another v Financscredit (Pty) Ltd (supra op 783A–B) dat openbare belang gerig is op die noodsaaklikheid dat simple justice between man and man gedoen moet word, en uit wat gesê is in Magna Alloys and Research (SA) (Pty) Ltd v Ellis (supra). (Sien ook Zimmermann Southern Cross op 259 voetnoot 326.)”

⁴⁸ See *Saayman* fn 27 *supra* at p322. Olivier JA dismissed the idea that the court in *Bank of Lisbon and South Africa Ltd v De Ornelas and Another* intended that the *bona fides* principle, along with the *exceptio doli generalis*, no longer played a role in practical terms although acknowledging that the judgment in *Bank of Lisbon* could be read this way. He said it was apparent that the court itself, without always using the term *bona fides*, still applied the underlying principle. In view of this, Olivier JA observed: “Ek voel myself dus vry om die beginsels van openbare belang, wat die *bona fide*-beginsel insluit op die onderhawige feitestelsel toe te pas net soos wat dit in *Sasfin (Pty) Ltd v Beukes (supra)* en *Botha (now Griessel) v Financscredit (Pty) Ltd (supra)* en die ander genoemde uitsprake gedoen is. Ek hou in gedagte die vermaning dat daardie beginsel oordeelkundig en versigtig toegepas moet word. Dit is belangrik om weer die woorde van Smalberger AR in *Sasfin (Pty) Ltd v Beukes (supra op 9B–C)* te herhaal: “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-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 upon the idiosyncratic inferences of a few judicial minds” (see also *Olsen v Standaloff* 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. Dit sê iets van die instinkiewe gevoel van versigtigheid waarmee borgkontrakte bejeën word, dat die uitsprake wat in die meer moderne tye die *bona fide*-beginsel die sterkste beklemtoon en toegepas het, juis met borgkontrakte en die beweerde aanspreeklikheid van borge handel.”

⁴⁹ Pretorius DM “The Defence of the Realm: Contract and Natural Justice” 2002 *SALJ* 119 p 374 notes that “...it is surprising that it is still asserted in some decisions that the rules of natural justice have no application in the field of contract. Oblivious to the subtle nuances of the principles set out above, and blinded by their single-minded and tenacious faith in the idea that *pacta sunt servanda*, come hell or high water, these decisions seek to defend the realm of contract against invasion by principles of judicial review and – heavens forbid! – notions of fairness. It is gratifying to know that South African law is more sophisticated than these decisions suggest is the case.” (footnotes omitted. See cases and articles cited in footnotes 45 and 46 on p 381)

*Strydom*⁵⁰, the facts of which are discussed in the section relating to the private sector. In that 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 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. He said that this was contrary to the public interest. The court refused to accept the respondent's argument 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 and that the relevant clause conflicted with the spirit, purport and object of section 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 with the principle of *bona fides* or good faith. The court nonetheless ruled in favour of the applicant.

⁵⁰ *Afox* fn 6 *supra*

In *BOE Bank Bpk v Van Zyl*⁵¹ the court had to consider the question of proper consent to suretyship agreement concluded between a Bank and the father of a principal party to the main agreement whose husband, to whom she was married in community of property, had entered into the agreement. In giving judgment for the applicant the court held that an overarching ground of avoidance based on the absence of *bona fides* or the improper procurement of consensus was not recognised. It said that there was no authority for it in the decisions of the Supreme Court of Appeal, and that it was not for the court to depart from settled rules without proper direction from that source. It also stated that there was also no authority for the statement that the distinctions between duress, misrepresentation and undue influence as well as the recognised requirements for these concepts had to be dispensed with. The court held that, even if the existence of a single overarching ground for avoidance based on equity were to be accepted, it was nevertheless clear that the respondent's invocation thereof had to fail. His pleadings did not leave room for it, and it was in any event not open to him, in circumstances in which he had 'nailed an unsuccessful defence to the mast of duress', to argue on the same pleadings that the requirements of that defence had to be altered on grounds of equity.

4.2.4 Reasonableness

The concept of reasonableness in South African law is deserving of a thesis of its own and only the basic elements will be canvassed here sufficiently for the purpose of showing that it is another core element of the legal system that is not confined to a particular branch or area of law.

Reasonableness is a key principle in the law of contract. It is used to assess the legality of restraint of trade agreements⁵², the time allowed for performance⁵³ and evidence of misrepresentations inducing contract⁵⁴.

⁵¹ *BOE* 2002 (5) SA 165 (C)

⁵² *Nursing Services of South Africa (Pty) Ltd v Clarke* 1954 (3) SA 394 (N); *Savage and Pugh v Knox* 1955 (3) SA 149 (N); *Hermer v Fisher and Others* 1960 (2) SA 650 (T); *Super Safes (Pty) Ltd and Others v Voulgarides and Others* 1975 (2) SA 783 (W); *Roffey v Catterall, Edwards & Goudré (Pty) Ltd* 1977 (4) SA 494 (N); *National Chemsearch (SA) (Pty) Ltd v Borrowman And Another* 1979 (3) SA 1092 (T); *David Wuhl (Pty) Ltd and Others v Badler and Another* 1984 (3) SA 427 (W); *Drewtons (Pty) Ltd v Carlie* 1981 (4) SA 305 (C); *Bonnet and Another v Schofield* 1989 (2) SA 156 (D); *Humphrys v Laser Transport Holdings Ltd and Another* 1994 (4) SA 388 (C); *CTP Ltd and Others v Independent Newspapers Holdings Ltd* 1999 (1) SA 452 (W); *Kleyenstrüber v Barr and Another* 2001 (3) SA 672 (W)

⁵³ *Nel v Cloete* 1972 (2) SA 150 (A)

It is also a concept that is central to the law of delict⁵⁵. The standard test for negligence is that of the reasonable person, what he or she would have done in the circumstances in which the defendant found him or herself and how the defendant's actions measure up against this standard⁵⁶. The conduct of the reasonable man is in

⁵⁴ *Orville Investments (Pty) Ltd v Sandfontein Motors* 2000 (2) SA 886 (T). The court held that even though the objective test need not have been applied in determining materiality where the misrepresentation had been made fraudulently, the test of reasonableness did not fall away altogether. A further element to be established was inducement - had the misrepresentation induced the contract? This was a question of fact. But, in determining whether the plaintiff had been so induced to enter into the contract, a court would, at least to some extent, base its decision on what a reasonable person in the position of the misrepresentee would have done. Thus the reasonableness of the misrepresentee's behaviour in relying on the misrepresentation was of evidential value.

⁵⁵ In *Zysset and Others v Santam Ltd* 1996 (1) SA 273 (C) Scott J held that it was doubtful whether the distinction between benefits received by a plaintiff from a third party which must be deducted from the plaintiff's damages for patrimonial loss and those which may not be on the grounds that they are *res inter alios acta* can be justified on the basis of a single jurisprudential principle. In the past the distinction has been determined by adopting an essentially casuistic approach. He noted that whatever the true rationale may be, if indeed there is one, the enquiry must inevitably involve, to some extent, at least, considerations of public policy, reasonableness and justice. In *Van Wyk v Santam Bpk* 1998 (4) SA 731 (C) the court held that the distinction between deductible and non-deductible benefits could not be justified on the basis of a single jurisprudential principle. The inquiry inevitably involved considerations of public policy, reasonableness and justice. In *McNally v M & G Media (Pty) Ltd and Others* 1997 (4) SA 267 (W) the court held, with regard to a second possibility in terms of which the exception sought to place the onus of proving unlawfulness on the plaintiff and that it entailed the acceptance of a general standard of reasonableness as the test for unlawfulness where the plaintiff was a public official and the published matter constituted 'free and fair political activity', that these propositions were contrary to what had been held in *Neethling v Du Preez and Others; Neethling v The Weekly Mail and Others* 1994 (1) SA 708 (A), and that the Court was similarly bound by that judgment. In *Road Accident Fund v Sauls* 2002 (2) SA 55 (SCA) the court said that there is no general 'public policy' limitation to the claim of a plaintiff for damages for the negligent causation of emotional shock and resultant detectable psychiatric injury, other than a correct and careful application of the well-known requirements of delictual liability and of the onus of proof. It is not justifiable to limit such a claim, as has been offered as one solution, to a defined relationship between the primary and secondary victims, such as parent and child, husband and wife, etc. In determining limitations a court will take into consideration the relationship between the primary and secondary victims. The question is one of legal policy, reasonableness, fairness and justice, ie was the relationship between the primary and secondary victims such that the claim should be allowed, taking all the facts into consideration. As regards the class of persons to whom a duty may be owed to take reasonable care to avoid inflicting psychiatric illness through nervous shock sustained by reason of physical injury or peril to another, it is sufficient that reasonable foreseeability should be the guide.

⁵⁶ See *McMurray v H L & H (Pty) Ltd* 2000 (4) SA 887 (N) in which the court canvassed the characteristics of the reasonable man as follows: "What qualities and characteristics does the notional reasonable man have? One knows that the reasonable man generally expects and is entitled to expect reasonableness rather than unreasonableness, legality rather than illegality, from others. (*Solomon and Another v Musset and Bright Ltd* 1926 AD 427 at 433; *Moore v Minister of Posts and Telegraphs* 1949 (1) SA 815 (A) at 826.) The reasonable man certainly does not in general regard himself as obliged to take steps to guard against recklessness or the gross negligence of others. (*South African Railways and Harbours v Reed* 1965 (3) SA 439 (A).) Obviously this also applies to the criminal conduct of others. It goes without saying that this notional reasonable man generally complies with the law and always acts reasonably. We know that the reasonable man is not a timorous faintheart, always in trepidation lest he or others suffer some injury; on the contrary, he ventures out into the world, engages in affairs and takes reasonable chances." He takes reasonable precautions to protect his person and property and expects others to do likewise (per Van den Heever JA in *Herschel v Mrups* 1954 (3) SA 464 (A) at 490F). A further characteristic of the reasonable man is that he is conservative in his approach to a situation which *Herschel v Mrups* 1954 (3) SA 464 (A) could be described as *res nova*. He does not readily consider that he is in such a situation obliged to prevent harm to others and thus acts wrongfully if he does not. (*Natal Fresh Produce Growers' Association and Others v Agroserve (Pty) Ltd and Others* 1990 (4) SA 749 (N) at 754B - C.) The reasonable man generally minds his own business. He does not in general regard it as his duty to behave as the good Samaritan or to be his brother's keeper. (*Minister van Polisie v Ewels* 1975 (3) SA 590 (A) at 596H; *Herschel v Mrups* (*supra*) at 490E.) Where the reasonable man owns property he, as a general rule, considers that he is entitled to use his property as he sees fit in the process of advancing his own reasonable interest (cf *Vanston v Frost* 1930 NPD 121; *Neethling*, *Potgieter JM* and *Visser PJ Law of Delict* 3rd ed at p 17). The reasonable man does not consider himself to be under a general duty to prevent loss to others by positive conduct, nor to prevent pure economic loss. He would consider that such duties would probably place too heavy a burden on the community. (*Law of Delict* (*op cit* at 55).) The reasonable man does, however, recognise that he is sometimes under a duty to prevent loss to others by positive conduct or to prevent pure economic loss. In deciding when such a duty arises, he is guided by the legal convictions of the community. Sometimes, for example, where the reasonable man happens to be a policeman who sees a person being assaulted, he would recognise that according to the legal convictions of the community he is under a legal duty to take reasonable steps to prevent the assault. (*Ewel's case supra* at 597H.) The reasonable man would also realise that he is according to the legal convictions of the community obliged to regulate his conduct so as to prevent pure economic loss which he foresees as a likely result of his conduct if he could reasonably do so. (Compare *Coronation Brick (Pty) Ltd v Strachan Construction Co (Pty) Ltd* 1982 (4) SA 371 (N).) Where the reasonable man is a landowner or occupier upon whose land a source of danger exists which is reasonably foreseeable could result in harm to his neighbour, he would

turn informed by the legal convictions of the community⁵⁷. The legal convictions of the community, the *boni mores*, are informed by the Constitution⁵⁸ and are a part⁵⁹ of public policy. This last is ultimately informed by the Constitution as previously stated. Reasonableness is also a well-established principle of administrative law. In *Mafongosi and Others v United Democratic Movement and Others*⁶⁰ the court held that the reasonableness required for administrative actions taken by such functionaries

recognise that there is a duty upon him to take reasonable steps to avoid the harm. (*Regal v African Superslate (Pty) Ltd* 1963 (1) SA 102 (A) (slate waste); *Moubray v Syfret* 1935 AD 199 at p 203 (ferocious animal); *Minister of Forestry v Quathlamba (Pty) Ltd* 1973 (3) SA 69 (A) at 82E - F (fire).) Where the reasonable man has himself, either personally or through employees, created the danger, for example lit a fire, he would accept that the duty to take reasonable steps to prevent the fire from spreading to his neighbours is a high one. (*Van Wyk v Hermanus Municipality* 1963 (4) SA 285 (C) at 330D; *Steenberg v De Kaap Timber (Pty) Ltd* 1992 (2) SA 169 (A) at 181A.) Even where he is not responsible for lighting the fire, the reasonable landowner would accept that he is obliged to take such steps once he becomes aware of the fire on his property. (Quathlamba's case *supra* at 82E - F.; See also *Government Of The Republic Of South Africa v Basdeo And Another* 1996 (1) SA 355 (A); *Kritzinger v Steyn En Andere* 1997 (3) SA 686 (C); *Barnard v Santam Bank Bpk* 1997 (4) SA 1032 (T); *Grootboom v Graaff-Reinet Municipality* 2001 (3) SA 373 (E)

57 In *McMurray* fin 54 *supra* Booysen J observed: "As I have pointed out, the reasonable man is guided by the legal convictions of the community. The learned authors of *Law of Delict* (op cit at 37 and 38) state: "The general norm or criterion to be employed in determining whether a particular infringement of interests is unlawful, is the legal convictions of the community: the *boni mores*. The *boni mores* test is an objective test based on the criterion of reasonableness. The basic question is whether, according to the legal convictions of the community and in light of all the circumstances of the case, the defendant infringed the interests of the plaintiff in a reasonable or an unreasonable manner."

(Authors' emphasis.) This statement is fully supported by the decisions quoted by the learned authors in support of it, *inter alia* the Ewel's case *supra* at 597; *Universiteit van Pretoria v Tommy Meyer Films (Edms) Bpk* 1977 (4) SA 376 (T) at 387; *Coronation Brick* case *supra* at 380; *Natal Fresh Produce* case *supra* at 753 - 4; *Clarke v Hurst NO and Others* 1992 (4) SA 630 (D) at 651 - 3; *Administrateur, Transvaal v Van der Merwe* 1994 (4) SA 347 (A) at 358 and 364. The learned authors of *Law of Delict* (op cit) state at 46: ". . . (The general *boni mores* test is seldom applied directly to establish wrongfulness because more precise methods have been developed to determine the legal convictions of the community. In other words, the determination of wrongfulness - the investigation into the legal convictions of the community - finds practical application or expression in specific legal norms and doctrines with the result that it is necessary to investigate the legal convictions of the community directly only in exceptional cases. Two examples of the practical application of the *boni mores* yardstick are to be found in the view that wrongfulness amounts to the infringement of a subjective right or the non-compliance with a legal duty to act.' (Authors' emphasis.) The learned authors of *Law of Delict* point out further that the *boni mores* test for wrongfulness functions 'at most at a supplementary level, because the convictions of the community concerning what good conduct should be regarded as reasonable or unreasonable for the purposes of the law of delict, have over time found expression in many common law and statutory norms, grounds of justification and certain theoretical legal methods whereby wrongfulness may be established. Consequently it is seldom necessary to apply the general *boni mores* test directly.' They state further that there are two main ways in which the general *boni mores* or reasonableness criterion is applied as a supplementary test for wrongfulness: 'Firstly, the *boni mores* test is applied as a test for wrongfulness in cases where either the wrongfulness of the defendant's conduct does not appear from the violation of an existing delictual norm, or the lawfulness thereof does not appear from the presence of a recognised ground of justification' (at 47) and, secondly, 'recourse to the general reasonableness test becomes imperative for purposes of refinement, especially in assessing wrongfulness in borderline cases (at 49). This is a case in which the wrongfulness of the defendant's conduct does not appear from the violation of an existing norm, nor is it clear that the lawfulness of the conduct appears from the presence of a recognised ground of justification. It is thus a case in which the *boni mores* criterion represented by the convictions or feelings of the community has to be applied."

58 *Minister Of Safety and Security v Van Duivenboden* 2002 (6) SA 431 (SCA) at p 444 where Nugent JA stated: "In applying the test that was formulated in *Minister van Polisie v Ewels* the 'convictions of the community' must necessarily now be informed by the norms and values of our society as they have been embodied in the 1996 Constitution. The Constitution is the supreme law, and no norms or values that are inconsistent with it can have legal validity - which has the effect of making the Constitution a system of objective, normative values for legal purposes."

59 See *Dersley v Minister van Veiligheid En Sekuriteit* 2001 (1) SA 1047 (T) where van Dyk J stated at p1055 "Met die deurlaes van hierdie artikel en latere beslissings wat ek nagegaan het, het dit my getref dat die basiese toets verander het en dat dit vandag daarin geleë is dat 'n judisiële waarde-oordeel uitgespreek moet word of die eiser se betrokke aangetaste belang in die omstandighede en tipe situasie wat voor die hof op die feite sou dien, ooreenkomstig die *boni mores* (dit wil sê, die regsopvatting van die gemeenskap) beskermingswaardig is al dan nie; en indien wel, is daar inderdaad 'n regsplig op sodanige persoon wat hy nie mag nalaat nie. Andersins is daar geen regsplig op 'n verweerder om die regte van die eiser te beskerm nie. In 'n verdere uiteensetting het mnr Havenga daarop gewys dat wanneer die *boni mores* maatstaf aanvaar word dit bestaan uit die regsdoelstelling van die gemeenskap en nie noodwendig 'n sedelik, of 'n sosiale, of 'n moderne morele maatstaf is nie. Hy verwys na onder andere die saak van *Minister van Polisie v Ewels* 1975 (3) SA 590 (A) op 596 waarna mnr Bolt, wat namens die verweerder verskyn het, inderdaad ook die Hof verwys het."

60 *Mafongosi* 2002 (5) SA 567 (TKH)

is the same as the reasonableness required for decisions by organs of state. In other words there is a single set of standards for administrative justice. In terms of section 33 of the Constitution everyone has the right to administrative action that is lawful, reasonable and procedurally fair.

4.2.5 Fairness

The concept of fairness, like that of reasonableness, is too complex to explore fully in this thesis. It is sufficient for present purposes to note that it is a well-recognised principle of contract law, the law of delict and administrative law⁶¹ in South Africa. That fairness is a concern of the law of contract is evidenced by the decisions of the courts in cases such as *Standard Bank of SA Ltd v Essop*⁶² *Lubbe v Volkskas Bpk*⁶³ *Thompson v Scholtz*⁶⁴ and *Bouygues Offshore and Another v Owner of the MT Tigr and Another*⁶⁵. The courts in the context of the law of contract speak of “simple justice between man and man”. It is submitted that this phrase is just another way to express the need for fairness in contract⁶⁶. The phrase was used in *Jajbhay v Cassim*⁶⁷ and

⁶¹ “With regard to the concept of fairness in relation to section 33 of the Constitution Mokgoro J and Sachs J in their minority judgment commented in *Bel Porto School Governing Body And Others v Premier, Western Cape, And Another* 2002 (3) SA 265 (CC): “The theme of fairness must be seen as governing the manner in which the four enumerated sections must be interpreted. The words themselves have no fixed and self-evident meaning. Unless animated by a broad concept of fairness, their interpretation can result in a reversion to what has been criticised as the sterile, symptomatic and artificial classifications which bedevilled much of administrative law until recently. Undue technicality and artificiality should be kept out of interpretation as far as possible; the quality of fairness, like the quality of justice, should not be strained. There are at least three respects in which the concept of fairness should be seen as animating s 33. The first is to provide the link between the four enumerated aspects so that they are not viewed as separate elements to be dealt with mechanically and sequentially, but, rather, as part of a coherent, principled and interconnected scheme of administrative justice. Secondly, the interpretation of each of the individual subsections within the framework of the composite whole must be informed by the need to ensure basic fairness in dealings between the administration and members of the public. Thirdly, the appropriate remedy for infringement of the rights must itself be based on notions of fairness. [153] The jurisprudence of transition is not unproblematic. This Court has emphasised the need to eradicate patterns of racial discrimination and to address the consequences of past discrimination which persist in our society. This relates to substantive fairness, which focuses on the effect or impact of government action on people. This Court has also emphasised the obligation upon the government to exhibit procedural fairness in decision-making. A characteristic of our transition has been the common understanding that both need to be honoured. The present case highlights a particular aspect of that complex process, in which a Court may be called upon to examine both the procedural fairness of the decision and substantive fairness, or fairness of the effect or impact, and in that examination these two aspects may to some extent become intertwined. It is necessary to determine the circumstances in which a Court, looking at a scheme that as a whole passes the test of constitutional fairness, can and should detach a detail which, viewed on its own would be constitutionally unfair.” (footnotes omitted)

⁶² *Essop* 1997 (4) SA 569 (D)

⁶³ *Lubbe* 1991 (1) SA 398 (O)

⁶⁴ *Thompson* 1999 (1) SA 232 (SCA)

⁶⁵ *Bouygues* 1995 (4) SA 49 (C)

⁶⁶ In *Henry v Branfield* 1996 (1) SA 244 (D), Levinsohn J observed: “For the purposes of this alternative claim the plaintiff accepts that the contract in question was illegal and unenforceable and therefore the rule in *pari delicto potior est conditio defendentis* applies. The strict application of this rule prevents a party from recovering any money or property delivered pursuant to such illegal contract. However, the plaintiff contends that the *pari delicto* rule ought to be relaxed in this case in accordance with the principles set forth in the leading case of *Jajbhay v Cassim* 1939 AD 537. Stratford CJ at 544 put it as follows: “Thus I reach my third conclusion, which is that Courts of law are free to reject or grant a prayer for restoration of something given under an illegal contract, being guided in each case by the principle which underlies and inspired the maxim. And in this last connection I think a Court should not disregard the various degrees of turpitude in delictual contracts. And when the delict falls within the category of crimes, a civil court can reasonably

subsequently in *Sasfin (Pty) Ltd v Beukes*⁶⁸ and *Botha (Now Griessel) and Another v Finanscredit (Pty) Ltd*⁶⁹ in which the court stated 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 man⁷⁰. The phrase 'simple justice between man and man' has also been used in the context of the law of delict⁷¹.

The application of the principle of fairness in the law of delict is evidenced in the law of defamation in particular in which fair comment is a defence. Significantly, what is fair is in general ascertained by reference to the convictions of the community (*boni mores*)⁷². In *Southern Insurance Association Ltd v Bailey No*⁷³ the Appellate Division noted that it had never attempted to lay down rules as to the way in which the problem

suppose that the criminal law has provided an adequate deterring punishment and therefore, ordinarily speaking, should not by its order increase the punishment of the one delinquent and lessen it of the other by enriching one to the detriment of the other. And it follows from what I have said above, in cases where public policy is not foreseeably affected by a grant or a refusal of the relief claimed, that a Court of law might well decide in favour of doing justice between the individuals concerned and so prevent unjust enrichment.' Earlier in this judgment the learned Chief Justice dealt with the case of *Brandt v Bergstedt* 1917 CPD 344 and said in relation to that case at 543: 'In the first the reasoning implies that the learned Judge considered himself bound by the authorities he quoted to refuse relief to the plaintiff, whereas I respectfully suggest that he should have approached the matter from the more fundamental point of view as to whether public policy was best served by granting or refusing the plaintiff's claim. If the learned Judge had so approached the case and had considered that as an equitable Judge he was free (as I think he was) to order the restoration of the cow, I cannot doubt that he would have granted the relief prayed. Indeed the facts of that case afford a typical example which called for a decision on which side public policy is best served. It may be said that contracts of that nature are more discouraged by leaving the bereft plaintiff unhelped and the doubly delinquent defendant in possession of his ill-gotten gains. I cannot agree with this view, which I think would not so much discourage such transactions but would tend to promote a more reprehensible form of trickery by scoundrels without such honour as even thieves are sometimes supposed to possess, and public policy should properly take into account the doing of simple justice between man and man.' In the same case *Watermeyer JA* (as he then was) at 550 said: 'The principle underlying the general rule is that the Courts will discourage illegal transactions, but the exceptions show that where it is necessary to prevent injustice or to promote public policy, it will not rigidly enforce the general rule. The real difficulty lies in defining with any degree of certainty the exceptions to the general rule which it will recognise.'"

67 *Jajbhay* 1939 AD 537 at 544

68 *Sasfin* 1989 (1) SA 1 (A)

69 *Botha* 1989 (3) SA 773 (A)

70 See also *Pangbourne Properties Ltd v Nitor Construction (Pty) Ltd And Others* 1993 (4) SA 206 (W); *Mufamadi And Others v Dorbyl Finance (Pty) Ltd* 1996 (1) SA 799 (A); *Brisley v Drotzky* 2002 (4) SA 1 (SCA) and *Mccain Frozen Foods (Pty) Ltd v Beestepan Boerdery (Pty) Ltd* 2003 (3) SA 605 (T) in which the court said: "It seems that, if the matter cannot be sorted out by the parties, which I might add I believe could have been done, simple justice between man and man and the preservation of the situation in order to cause the least damage is called for. ...if one would have to accede to the argument as presented by Mr Bergenthuin that *ante omnia* the principles must apply irrespective of what the surrounding circumstances might indicate (as I understand his argument) then I am afraid it would be to sacrifice substance, common sense and simple justice between man and man on the altar of formalism. I believe I cannot ignore the surrounding circumstances of the case when considering whether there was a duty to communicate acceptance of the offer to the respondent or not." In *Eerste Nasionale Bank Van Suidelike Afrika Bpk v Saayman No* (fn 27 *supra*) Olivier J stated that: "Dit blyk ook dat daar 'n innige verband bestaan tussen die begrippe bona fides, openbare belang, openbare beleid en *justa causa*. Dit blyk uit die analise van Smalberger AR in *Sasfin (Pty) Ltd v Beukes* (*supra* op 71-8G); uit die woorde van Hoexter AR in *Botha (now Griessel) and Another v Finanscredit (Pty) Ltd* (*supra* op 783A-B) dat openbare belang gerig is op die noodsaaklikheid dat simple justice between man and man gedoen moet word, en uit wat gesê is in *Magna Alloys and Research (SA) (Pty) Ltd v Ellis* (*supra*). (Sien ook D Zimmermann *Southern Cross* op 259 voetnoot 326.)"

71 In *Rousseau and Others NNO v Visser and Another* 1989 (2) SA 289 (C) the court held: "In the present case the parties are not in *pari delicto* but, even if they are, the principles enunciated in *Jajbhay v Cassim* 1939 AD 537 lead one to the conclusion that the requirements of justice and the interests of public policy demand that the question as to whether those who bought activators from the company have a valid claim for the refund of the purchase price the matter based on the *condictio ob turpim vel justam causam* be answered in their favour."

72 See Neethling, Potgieter *Visser Law of Delict* p 347. Also *Yazbek v Seymour* 2001 (3) SA 695 (E); *Neethling v The Weekly Mail and Others* 1994 (1) SA 708 (A)

73 *Bailey* 1984 (1) SA 98 (A)

of an award of general damages should be approached. It said that the accepted approach is the flexible one described in *Sandler v Wholesale Coal Suppliers Ltd*⁷⁴, namely: “The amount to be awarded as compensation can only be determined by the broadest general considerations and the figure arrived at must necessarily be uncertain, depending upon the Judge's view of what is fair in all the circumstances of the case.”⁷⁵

Concerning administrative law, in *Bel Porto*⁷⁶ the minority judgement held that there are circumstances where fairness in implementation must outtop policy and that fairness in dealings by the government with ordinary citizens is part and parcel of human dignity. Mokgoro J and Sachs J in their minority judgment observed that the objective of judicial intervention under section 33 of the Constitution is to secure compatibility with fundamental notions of fairness in relation to the exercise of administrative power. They said that in some circumstances fairness may require a setting aside of a whole scheme so as to enable a significant part to be revisited, in others the scheme can go ahead in general with a part being re-examined and necessary adaptations made and noted that if this were not so the interest of minority groups could always be overridden by invoking the principle that what matters is the greatest good for the greatest number. Alternatively and conversely, they said, it could mean that the majority could be made to suffer unfairly in order to accommodate the interest of the minority. It is particularly important when a proposed measure is likely to have a disproportionate impact on a certain group that such group be given a meaningful opportunity to intervene and have its interests considered in a balanced way. The majority of the court in this case held, however that substantive unfairness has never been a ground for judicial review. The unfairness has to be of such degree that an inference can be drawn from it that person who made decision erred in respect that would provide grounds for review. This inference, said the court, was not easily drawn.

4.2 Formation of a Contract

⁷⁴ *Sandler* 1941 AD 194 at 199

⁷⁵ *Carstens NO v Southern Insurance Association Ltd* 1985 (3) SA 1010 (C); *Reyneke v Mutual and Federal Insurance Co Ltd* 1991 (3) SA 412 (W); *Van der Berg v Coopers & Lybrand Trust (Pty) Ltd and Others* 2001 (2) SA 242 (SCA)

⁷⁶ *Bel Porto School Governing Body and Others* fn 61 *supra*

If the relationship between a public provider and a patient is contractual in nature then it is necessary to establish the manner and grounds upon which such contract is formed. In the South African public health sector at present, although indigent patients, or patients who fulfil certain criteria in terms of a means test are treated free of charge in state owned health facilities, this does not apply to everyone. There are tariffs in place in terms of which people who do not meet the criteria set by the means test are obliged to make some payment for the health services they receive⁷⁷. Whilst this tariff may not necessarily cover the cost of the treatment, it constitutes some form payment for services rendered. In South African law, however, consideration is not in any event an essential requirement for the existence of a contract as it is in English law⁷⁸. It is the intention of the parties that is paramount. In the context of public health service delivery it is not easy to establish the nature of the parties' intentions. If there is a constitutional or other legislative obligation to provide health care services, the existence of an intention to contract becomes questionable.

The fact that no-one may be refused emergency medical services in terms of section 27(3) of the Constitution by implication tends to suggest that other health care services may be refused. The ability to refuse to treat a patient could be evidence of the fact that the state has a choice as to whether or not to enter into a relationship with a patient which in its turn suggests that the relationship could be contractual in nature. However the apparent distinction in the Constitution between emergency health care services and other types of health care services seems not to be as broad as the structuring of section 27 might at first sight suggest. As the Durban High Court

⁷⁷ See for instance Regulations on Fees for Health Services in the Free State, Free State Provincial Gazette No 64 of 01 October 2002 Notice No 140 of 2002; Regulations on Ambulance Fees in the Free State, Free State Provincial Gazette No 64 of 01 October 2002, Notice No 141 of 2002; Regulations Relating To The Administration, Management and Control of Provincial Hospitals, Services and Institutions, Established in Terms of Section 4 of the Provincial Hospitals Ordinance, 1961 (Ordinance No 13 of 1961): Amendment KwaZulu-Natal Provincial Gazette No 6134, Notice No 405 of 24 October 2002; Hospitals Ordinance No 14 of 1958 :Amendment Regulations Relating To The Classification of And Fees Payable By Patients At Provincial Hospitals, 2003 Gauteng Provincial Gazette No 659 Notice No 659 of 05 March 2003; Regulations Relating To The Uniform Patient Fee Schedule For Health Care Services Rendered By The Department of Health: Western Cape For Externally Funded Patients, Western Cape Provincial Gazette No 5977 Notice No 21 of 29 January 2003;

⁷⁸ In *Conradie v Roussouw* 1919 AD 279 the Appellate 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 licita ac honesta*." See Christie fn 2 *supra*, p10 to12 for further discussion. Although the doctrine had subsequently been discussed in South African cases this position remains unchanged. See for instance *Adams v SA Motor Industry Employers Association* 1981(3) SA 1189 (A) where the court stated at p1198 "We are not encumbered by the technicalities of the doctrine of consideration and in our law a novation is not presumed: the intention of the parties is the decisive factor (cf *Smit v Rondalia Versekeringsskorporasie van SA Bpk* (*supra* at 346H))."



pointed out in *Soobramoney*⁷⁹ the state cannot be expected to provide even emergency medical services beyond its available resources. This would not be reasonable or feasible and the state, can only be required to do what is reasonable. The section 27(3) prohibition does not distinguish between the private and public sectors.

Christie states that the most common and normally helpful technique for ascertaining whether there has been agreement is to look for an offer and an acceptance of that offer⁸⁰. However, he immediately sounds a warning in the words of Caney J in *Godfrey v Paruk*⁸¹ that the phrase 'offer and acceptance' is not to be applied as a talisman revealing by a species of esoteric art, the presence of a contract. Contracts can be entered into without offer and acceptance. It is submitted that a statutory requirement, whether express or implied, to enter into a contract does not necessarily negate the contractual nature of a transaction or a relationship. It merely restricts or specifies the legal mechanism in terms of which that relationship arises or the transaction is effected⁸². If an express statutory requirement that a contract is entered into does not alter the nature of the transaction as being contractual despite the fact that the intentions of the parties to contract are in such situations largely replaced by a legal requirement to contract then it is submitted that the absence of full freedom to contract also does not *per se* negate the possibility of a contract's arising. Thus even if a public sector provider is constitutionally obliged to provide health care services to a

⁷⁹ *Soobramoney v Minister of Health, Kwazulu-Natal* 1998 (1) SA 430 (D)

⁸⁰ Christie, fn 2 *supra* at p31. He refers to *Reid Bros (SA) Ltd v Fischer Bearings Co Ltd* 1943 AD 232 where the court stated at p 241 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 532E 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." At 88 Christie observes, however, that in exceptional cases offer and acceptance can either not be identified at all, or only with the most artificial reasoning and that the point is that it is not necessarily correct to argue that because there is no offer and acceptance, there is no contract. He gives a number of examples of circumstances in which a contract unquestionably comes into being without any offer and acceptance except 'sheer fictions'. These include the imposition of territorial limits on distributors or 'sole agents'; the restriction of tenants in a block of shops from carrying on businesses similar to those of other tenants; the imposition of restrictive covenants in a township. He notes that the common characteristics of all these situations are that a scheme is set up and a number of participants enter into contracts with the originator of the scheme and although not expressly contracting with each other, they participate in the expectation that all other participants will obey the rules of the scheme. He points out at p90 that another type of contract without offer and acceptance that should not be overlooked is a contract created by statute and cites section 65(2) of the Companies Act 61 of 1973 as an example.

⁸¹ *Godfrey* 1965 (2) SA 738 (D) at 743C

⁸² For example section 20 of the State Information Technology Agency Act No 88 of 1998 requires that "A business agreement to regulate the relationship between individual participating departments or organs of state and the Agency must be concluded." Section 42 (1)(b) of the National Heritage Resources Act No 25 of 1999 with reference to heritage agreements states: "Such a heritage agreement must be in the form of a binding contract." National Student Financial Aid Scheme Act No 56 of 1999 section 19(3) states that: "A written agreement must be entered into between the NSFAS and every borrower or bursar." It may also introduce an element of administrative law as stated in section 2 of this chapter.

patient, this does not preclude the possibility of a contractual relationship between them.

If health services are provided by way of a contractual relationship that is not restricted or specifically addressed by any other law then can a public provider refuse to treat a patient? If so, in what circumstances? It is submitted that the nature of the provider is relevant in determining how it must behave in this regard since the state is obliged in terms of the Constitution to respect, protect, promote and fulfil the rights in the Bill of Rights. A public provider will not be able to arbitrarily refuse to treat a patient. There will have to be a reason for such refusal which is in accordance with constitutional principles and values. Section 27 gives the answer as to what kinds of reasons for refusal might be acceptable. They relate largely to the availability of resources.

The private sector is in a somewhat different position to the public sector in that it does not share the obligation imposed upon the state by section 27(2) of the Constitution. It is, however, important to bear in mind that the right of access to health care services is specified in section 27(1) and there is no express indication in this subsection that the right of access to health care services is one that is enforceable only against the state. The question of the horizontal application of the Bill of Rights has proven to be a vexed one and is canvassed in more detail elsewhere. However it is important to note that in terms of sections 8(2) and 8(3) of the Constitution -

“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.

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).”

In *Jooste v Botha*⁸³ van Dijkhorst J stated that in determining whether a horizontal right is intended, one has to have regard to the nature of the proposed right, its enforceability, the practicalities of the human relationships involved and whether public policy or public *mores* require such moral obligation to be converted into a legal obligation. He said that it is important to bear in mind that the proposed horizontal right will not operate in a void. It will invariably infringe upon and curtail the rights of others. According to van Dijkhorst J, the horizontal application of the Bill of Rights is not mechanical or unqualified, but is to be done with circumspection. It is submitted that if one considers the right of access to health care services applied horizontally and juxtaposed against the right to refuse to provide those services, one must ask on what basis the latter should outweigh the former in the balancing exercise which would confront a court should this issue arise in litigation⁸⁴. The latter could be described as the right of free trade but not necessarily the right embodied in terms of section 22 on its own as this right is in the words of the Constitution: “the right to *choose* their trade, occupation or profession. The practice of a trade, occupation or profession may be regulated by law”[writer’s italics]. Thus the right is not to *practice* a trade, occupation or profession freely, because this can be regulated by law, but to freely *choose* such trade occupation or profession. The right to freedom of association is granted but not elaborated upon in section 18 in the Bill of Rights. The right to refuse to treat a patient could possibly be based on this right.

It is quite possible that in certain circumstances there is no contractual relationship between a patient and a provider of health care services because the provider has

⁸³ *Jooste* 2000 (2) SA 199 (T)

⁸⁴ Sachs J in *Prince v President, Cape Law Society, And Others* 2002 (2) SA 794 (CC) stated that:” In *Christian Education South Africa v Minister of Education* 2000 (4) SA 757 (CC)] and *Prince [Prince v President, Cape Law Society, and Others* 2000 (3) SA 845 (SCA)] this Court emphasised the importance of contextualising the balancing exercise required by s 36 of the Constitution. Such contextualisation reminds us that although notional and conceptual in character, the weighing of the respective interests at stake does not take place on weightless scales of pure logic pivoted on a friction-free fulcrum of abstract rationality. The balancing has always to be done in the context of a lived and experienced historical, sociological and imaginative reality. Even if for purposes of making its judgment the Court is obliged to classify issues in conceptual terms and abstract itself from such reality, it functions with materials drawn from that reality and has to take account of the impact of its judgments on persons living within that reality. Moreover, the Court itself is part of that reality and must engage in a complex process of simultaneously detaching itself from and engaging with it. I believe that in the present matter, history, imagination and mind-set play a particularly significant role, especially with regard to the weight to be given to the various factors in the scales.”
The court in *Van Zyl and Another v Jonathan Ball Publishers (Pty) Ltd and Others* 1999 (4) SA 571 (W) quoted Burchell J *Personality Rights*: “The balancing of rights and interests is the essence of the legal process and an adjudicator cannot avoid making difficult decisions. The appropriate balance between individual reputation, dignity and privacy and freedom of expression, for instance cannot be sidestepped.”

contracted⁸⁵ with a medical scheme or managed care organisation to treat the patient. Health maintenance organisations are not as common in South Africa as they are in the United States and the model in terms of which a private provider of health care services employs various kinds of health professionals to fulfil its contractual obligations to render services to the employees of a particular employer or some other collective does not feature significantly in the South African context. There are many different models of managed health care⁸⁶ but those that seem to be the most common in South Africa are essentially an extension of medical schemes administration, often contracted out to specialised consultants⁸⁷ who offer services relating to pharmacy benefit management, management of hospital services utilisation etc. Large providers such as private hospitals appoint their own case managers largely to deal with those medical schemes that are applying managed care principles to benefit utilisation by beneficiaries. Depending on the nature of the contract between the hospital and the scheme there is sometimes a contractual provision which precludes the service provider from recourse to the patient for payment for treatment rendered in terms of the contract. Chapter five of the regulations to the Medical Schemes Act⁸⁸ deals expressly with the provision of managed health care. Managed health care tends to use generally accepted and highly specific treatment protocols⁸⁹ not only so that

⁸⁵ One kind of agreement that can be entered into is a capitation agreement. This term is defined in the regulations to the Medical Schemes Act No 131 of 1998 as follows - “‘capitation agreement’ means an arrangement entered into between a medical scheme and a person whereby the medical scheme pays to such person a pre-negotiated fixed fee in return for the delivery or arrangement for the delivery of specified benefits to some or all of the members of the medical scheme”

⁸⁶ The regulations to the Medical Schemes Act No 131 of 1998 define managed health care as follows - “‘managed health care’ means clinical and financial risk assessment and management of health care, with a view to facilitating appropriateness and cost-effectiveness of relevant health services within the constraints of what is affordable, through the use of rules-based and clinical management-based programmes;

⁸⁷ The regulations to the Medical Schemes Act No 131 of 1998 define a managed care organisation as follows – “‘managed health care organisation’ means a person who has contracted with a medical scheme in terms of regulation 15A to provide a managed health care service;”

⁸⁸ Fn 37 *supra*

⁸⁹ The regulations to the Medical Schemes Act No 131 of 1998 define a protocol as follows – “‘protocol’ means a set of guidelines in relation to the optimal sequence of diagnostic testing and treatments for specific conditions and includes, but is not limited to, clinical practice guidelines, standard treatment guidelines, disease management guidelines, treatment algorithms and clinical pathways;” Regulation 15D stipulates standards for managed health care as follows -

“If any managed health care is undertaken by the medical scheme itself or by a managed health care organisation, the medical scheme must ensure that:

- (a) a written protocol is in place (which forms part of any contract with a managed health care organisation) that describes all utilisation review activities, including a description of the following:
- (i) procedures to evaluate the clinical necessity, appropriateness, efficiency and affordability of relevant health services, and to intervene where necessary, as well as the methods to inform beneficiaries and health care providers acting on their behalf, as well as the medical scheme trustees, of the outcome of these procedures;
 - (ii) data sources and clinical review criteria used in decision-making;
 - (iii) the process for conducting appeals of any decision which may adversely affect the entitlements of a beneficiary in terms of the rules of the medical scheme concerned;
 - (iv) mechanisms to ensure consistent application of clinical review criteria and compatible decisions;
 - (v) data collection processes and analytical methods used in assessing utilisation and price of health care services;
 - (vi) provisions for ensuring confidentiality of clinical and proprietary information;

funders can be sure that their beneficiaries are receiving treatment which is recognised within the health profession as being appropriate for a particular condition but more specifically so that they can predict the expenses associated with the treatment of that condition and manage the financial risks accordingly. Medical schemes who use a managed care regime will usually not fund treatment which deviates from the accepted and preset treatment protocols except in emergency situations.

4.3 Informed Consent in the Context of Contract

The role of informed consent in the formation and conclusion of a contract is of particular importance in the context of contracts for health care services. Informed consent can be a precursor to the contract for health care services in the same way as can a misrepresentation inducing a contract but it can also form a part of the terms of the contract itself⁹⁰. In the contractual context in particular, the role of the concept of therapeutic privilege, it is submitted, can be problematic. In order for a contract to arise there must be an intention to contract⁹¹. The intention to contract must in its turn arise from the exercise of the free will of the parties in the circumstances in which the

-
- (vii) the organisational structure (e.g. ethics committee, managed health care review committees, quality assurance or other committee) that periodically assesses managed health care activities and reports to the medical scheme; and
 - (viii) the staff position functionally responsible for day-to-day management of the relevant managed health care programmes;
 - (b) the managed health care programmes use documented clinical review criteria that are based upon evidence-based medicine, taking into account considerations of cost- effectiveness and affordability, and are evaluated periodically to ensure relevance for funding decisions;
 - (c) the managed health care programmes use transparent and verifiable criteria for any other decision-making factor affecting funding decisions and are evaluated periodically to ensure relevance for funding decisions;
 - (d) qualified health care professionals administer the managed health care programmes and oversee funding decisions, and that the appropriateness of such decisions are evaluated periodically by clinical peers;
 - (e) health care providers, any beneficiary of the relevant medical scheme or any member of the public are provided on demand with a document setting out-
 - (i) a clear and comprehensive description of the managed health care programmes and procedures; and
 - (ii) the procedures and timing limitations for appeal against utilisation review decisions adversely affecting the rights or entitlements of a beneficiary; and
 - (iii) any limitations on rights or entitlements of beneficiaries, including but not limited to restrictions on coverage of disease states; protocol requirements and formulary inclusions or exclusions.

⁹⁰ Van der Merwe *et al* (fn 23 *supra*) state at p 74 that: "A representation which occurs during precontractual negotiations can be made a part of the consensus between the parties and as such becomes a term of the ensuing contract. For example, a representation may be warranted to be true. Should the representation then turn out to be false the contract will have been breached and the normal consequences of breach of contract by way of breach of warranty will follow. Whether a representation amounts to a contractual term of whether it merely causes an error in motive without becoming a part of the contract (although it may influence one party's decision to enter into the contract) must be decided according to the intention of the parties."

⁹¹ It is therefore all the more interesting that Claassen NJB and Verschoor *Medical Negligence in South Africa* at p 69 identify four exceptions to the physician's duty to inform, only one of which can be seen in a contractual context (in cases where the patient indicates that he does not wish to be informed of the nature of the proposed treatment, the risks involved or the probably consequences). The other three are situations in which the patient either specifically lacks contractual capacity – i.e. where the patient is brought into hospital in a critical, unconscious condition, or where the patient's state of mind is such that his capacity to contract (in the sense of being able to take rational decisions for his own benefit) could potentially be impaired or diminished by the disclosure i.e. where the disclosure of the full extent of his illness will influence him to such a degree that his recovery will be prejudiced or presents a threat to the patient's well-being or where the patient specifically does not consent to the treatment - i.e. in the event of an emergency where a patient's interests are sacrificed in favour of, e.g. the protection of society such as where the patient is suffering from a contagious disease or is inoculated to prevent its outbreak.



contract is to be concluded. They must therefore be aware of those circumstances in order to make a decision to be bound by a contract. Misrepresentations inducing a contract can vitiate the consent requirement and invalidate the contract. This is a fundamental and inherent conflict that arises within the law of contract in the context of health services delivery. It also serves to illustrate one aspect of the uncomfortable fit of the law of contract within this context. It is no small irony that the fact that non-disclosure of material facts on the basis of therapeutic privilege can be pleaded as a defence in the context of the law of delict while that same non-disclosure in the context of the law of the subsequent contract for health care services could vitiate the agreement between the parties⁹². Welz⁹³ explores the boundaries of medical therapeutic privilege by noting that decisions dealing with the therapeutic privilege defence are notably absent in South African law. He notes that in *SA Medical and Dental Council v McLoughlin*⁹⁴ Watermeyer CJ commented 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 and for a medical man to disclose to anyone, other than the patient, the form of treatment which he is carrying out, may amount to a gross breach of confidence between doctor and patient." Welz observes that this statement is in no way conclusive, however. It alludes to the issue of confidentiality in the context of the doctor-patient relationship and hardly even contains the rudiments of the therapeutic privilege defence. He notes that what Watermeyer J had to say in *Richter & Another v Estate Hamman*⁹⁵ when referring to the problems surrounding the so-called therapeutic privilege of the medical profession is more to the point. He described the doctor's dilemma in a way that clearly contributed to the wider debate concerning the existence and the desirability or otherwise of this defence when he

⁹² Christie fn 2 *supra* notes at p 313 that: "In our modern law in which all contracts are *bona fidei*, it is not necessary to prove that a misrepresentation was fraudulent in order to invalidate the contract and the innocent party is equally entitled to rescind whether the representation was fraudulent or innocent". The reason is that, once it has been discovered that the representation was incorrect it is against good faith for the party who made it to continue to hold the innocent party to a contract so obtained. *Parke v Hamman* 1907 TH 47 p52; *Lamb v Walters* 1926 AD 358 at p 364; *Sampson v Union and Rhodesia Wholesale Ltd* 1929 AD 469 at p 480; *Harper v Webster* 1956 (2) SA 495 (FC) 501; *Pretorius v Natal South Sea Investment Trust Ltd* 1965 (3) SA 410 (W) 415H. It is submitted that in the case of the patient in the health services context, the power to rescind the contract may be cold comfort indeed.

⁹³ Welz D 'The Boundaries of Medical-Therapeutic Privilege' (1999) 116 *South African Law Journal (SALJ)* p 299. See also Van Oosten FFW 'The Doctrine of Informed Consent in Medical Law' (unpublished doctoral thesis University of South Africa 1989); Van Oosten FFW 'Informed consent: patient rights and the doctor's duty of disclosure in South Africa.' Paper read at a conference at Sun City in August 1987 (1989 *Medical Law*, 7(5) p443-56); Van Oosten FFW 'The so-called "therapeutic privilege" or "contra-indication": Its nature and role in non-disclosure cases' 1991 *Medicine and Law* 10 (1) p 31; Van Oosten FFW 'Castell v De Greef and the doctrine of informed consent: Medical paternalism ousted in favour of patient autonomy' 1995 *De Jure* 164; Welz D 'The parameters of medical-therapeutic privilege' (unpublished masters dissertation University of South Africa 1998; Coetzee LC 'Medical Therapeutic Privilege' (unpublished masters dissertation University of South Africa 2001)

⁹⁴ *McLoughlin* 1948 (2) SA 355 (A) at p 366

⁹⁵ *Richter* 1976 (3) SA 226 (C) at 232 G-H

explained: “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 best interests to have it. In *Castell v De Greeff*⁹⁶ Ackermann J expressly acknowledged the therapeutic privilege defence in South Africa law but left open the question what the ‘ambit of the so-called “privilege” may today still be’. Welz notes that while not rejecting the defence out of hand, Ackermann J appears to hold the view that it does not fully accord with the present day developments of South African law which clearly promote patient autonomy and self-determination. He adds that South African legal opinion, scant as it may be, appears to be unanimous in its acceptance in principle of the notion that in special circumstances the duty to disclose may be suspended⁹⁷. Welz states that this is an exception to the general rule that ordinarily a patient in a non-emergency case must be informed of the nature of the treatment and the substantial risks it holds for him or her.⁹⁸ He notes that such a withholding of information must be in the best interests of the patient him- or herself but may also be justified where full disclosure may create a substantial danger to a third party⁹⁹. Welz observes that this common sense view is widely supported in medico-legal literature and may predictably be upheld in suitable cases brought before South African courts. He then states that in order to explore the limits of medical-therapeutic privilege, the wider debate concerning consent to medical treatment and whether emphasis should be placed on the autonomy and right of self-determination of the patient in the light of all the facts or on the right of the medical profession to

⁹⁶ *Castell* 1994 (4) SA 408 (C) at 426H

⁹⁷ Welz , fn 93 *supra*, refers to Van den Heever P ‘The Patient’s Right to Know: Informed Consent in South African Medical Law’ 1995 *De Rebus* 53

⁹⁸ Welz , fn 93 *supra*, refers to Strauss SA *Doctor Patient and The Law* p10

⁹⁹ Welz, fn 93 *supra*, refers to Giesen D *International Medical Malpractice Law* at p 382. See also Claassen and Verschoor fn 91 *supra* at p 69-71 who refer to the English case of *Sidaway v Board of Governors of the Bethlehem Royal Hospital and the Maudsley Hospital* [1985] 1 All ER 643 653 F in which the scope of therapeutic privilege is described as: “ This exception enables a doctor to withhold from his patient information as to risk if it can be shown that a reasonable assessment of the patient would have indicated to the doctor that disclosure would have posed a serious threat of psychological detriment to the patient.” They also refer to the American case of *Canterbury v Spence* 464 F 2d 772 CA SC 1972 at 789 where the court stated: “The critical enquiry is whether the physician responded to a sound medical judgment that a communication of the risk information would present a threat to the patient’s well-being. The physician’s privilege to withhold information for therapeutic reasons must be carefully circumscribed, however, for otherwise it might devour the disclosure rule itself. The privilege does not accept the paternalistic notion that the physician may remain silent simply because divulgence might prompt the patient to forego therapy the physicians feels the patient really needs. That attitude presumes instability or perversity for even the normal patient and runs counter to the foundation principle that the patient should and ordinarily can make the choice for himself.” Claassen and Verschoor point out that in *Hatcher v Black* (*The Times*, July 2, 1954 as cited by Jackson RM and Powell JL 1982 *Professional Negligence* 1 ed at p 238) it was decided that not only may a practitioner withhold information from a patient, he is even entitled to tell a lie in connection with the proposed treatment if he is of the opinion that the patient’s chances of recovery will be improved thereby. It is hardly necessary to point out that the latter situation is anathema to the creation of a contract between the parties since it precludes consensus.

determine the meaning of reasonable disclosure¹⁰⁰. It is submitted that in the context of the traditional, common law of contract in particular, the concept of therapeutic privilege is a paternalistic and patronising view that gives the power to decide what is in the best interests of the one contracting party to the other contracting party and could constitute anathema rather than common-sense¹⁰¹ especially in the private sector environment in which health professionals and health institutions are out to make a profit from the delivery of health care services. Christie explores whether a general test can be propounded for deciding whether in any particular case silence amounts to a misrepresentation and notes that a big step in this direction was taken by Vieyra J in *Pretorius v Natal South Sea Investment Trust Ltd*¹⁰² Christie observes that the test of involuntary reliance here applied is in accordance with the principle underlying the requirement of disclosure of material facts in contracts of insurance. The insured must disclose all the material facts in contracts of insurance. The insured must disclose all such facts because the insurer involuntarily relies on him for information on such facts: it might theoretically be possible to ascertain these facts by other means but it

¹⁰⁰ Welz fn 93 *supra* goes on to investigate in his paper the nature and scope of therapeutic privilege with reference to American, Canadian, Anglo-Australian and German law. He concludes that the duty to disclose is not absolute but relative and that various instances can be identified in which the duty of disclosure is restricted or does not exist at all. He notes that these exceptions to the general disclosure rule have been conveniently categorized in the form of instances where the defence of therapeutic privilege is applicable in certain jurisdictions. These are the following:

- (1) Where disclosure would be detrimental to the patient's health (physical or mental) or endanger his or her life.
- (2) Where it might interfere with the patient's rational decisionmaking.
- (3) Where it might detrimentally affect the patient's therapy.
- (4) Where it would be inhuman.
- (5) Where the risks attached to it are as grave as those attached to the treatment or even outweigh them.
- (6) Where it will present a threat to a third party.

¹⁰¹ Christie (fn 2 *supra*) at p 320 notes that silence may amount to a misrepresentation in some cases. There is no general rule that all material fact must be disclosed and that non-disclosure therefore amounts to misrepresentation by silence but in certain circumstances this is undoubtedly the rule. (*McCann v Goodall Group Operations (Pty) Ltd* 1995 (2) SA 718 (C) 723E-F) He notes that in *Iscor Pension Fund v Marine and General Trade Insurance Co Ltd* 1961 (1) SA 178 (T), Roberts AJ at p185 softened the previous hard line between contracts of insurance and other contracts in these words: "In some contracts parties are required to place their cards on the table to a greater extent than in others, but the determination of the extent of the disclosure does not depend on the label we choose to stick on a contract. The principles applicable to contracts of insurance do not differ in essence from those applicable to other kinds of contracts, but where one party has means of knowledge not accessible to the other party, and where from the nature of the contract the latter (as in the case of insurance) binds himself on the basis that all material facts have been communicated to him, the non-disclosure of any such fact is fatal...The contract is void because the risk run is in fact different from the risk understood and intended to be run at the time of the agreement (*Carter v Boehm*, 97 ER 1162). These principles apply to suretyship though there is no universal obligation to make disclosure but 'very little said which ought not to have been said, and very little not said which ought to have been said would be sufficient to prevent the contract being valid' (*Davies v London Provincial Marine Insurance Co* (1878) 8 Ch D 469 at p 475)" Christie notes at p321 that other circumstances in which there can be no doubt that silence may amount to a misrepresentation are: where part of the truth has been told but the omission of the remainder gives a misleading impression (*Marais v Edelman* 1934 CPD 212); where a true representation has been made but before the making of the contract the facts have changed (*Viljoen v Hillier* 1904 TS 312 p 315-316; *Cloete v Smithfield Hotel (Pty) Ltd* 1955 (2) SA 622 (O) p 626-627); where a party, not necessarily with a dishonest motive, has done something which has had the effect of concealing facts which would otherwise have been apparent to the other party *Dibley v Furter* 1951 (4) SA 73(C); *Knight v Hemming* 1959 (1) SA 288 (FC); 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))

¹⁰² *Pretorius* 1965 (3) SA 410 (W) in which the court said there was "an involuntary reliance of the one party on the frank disclosure of certain facts necessarily lying within the exclusive knowledge of the other such that in fair dealing the former's right to have such information communicated to him would be mutually recognised by honest men in the circumstances." Vieyra J based his judgment on an article by MA Millner (1957) 'Fraudulent Non-Disclosure' 74 SALJ 177.

would not be practical in the business sense. Christie states that it is difficult to imagine any other basis for the rule that partners and agents must make full disclosure than that their co-partners and principals are, by the vary nature of their relationship, in a position of involuntary reliance on them - it would not be practical in the business sense for them to obtain information on material facts known to their partners or agents by making inquiries elsewhere. It is submitted that the same is true, if not more so, for the patient with regard to the information concerning his health and medical treatment in the possession of the health care provider. The patient is involuntarily reliant on the health care provider to disclose information which, practically speaking, it would be impractical to obtain elsewhere. Christie notes that -

“...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.”¹⁰³

It is submitted that Christie’s reasoning is particularly apposite and elucidating in the context of contracts for health care services since the latter perfectly fit the paradigm he proposes with regard to duties of disclosure and so-called fiduciary relationships. It is submitted that much of the tension between the South African government and the private health sector in South Africa at present, ostensibly in relation to law reforms contained in the National Health Act¹⁰⁴ concerning certificate of need and in the Medicines and Related Substances Act¹⁰⁵ concerning the licensing of doctors to dispense medicines, essentially stems from the fact that the state perceives health care providers to have fiduciary responsibilities of an order close to which Birks identifies

¹⁰³ Christie fn 2 *supra* at p 322. See also Kerr (fn 21 *supra*) who states at p 279 that a non-disclosure is similar in many respects to a misrepresentation. At p291 he points out that non-disclosure leaves the other party with an incomplete picture of the situation which leads to a different decision from that which would have been taken had the situation been fully understood. Kerr points out at p 295 that if each party to negotiations leading up to a contract had always to mention all he knew that might conceivably influence the other party most transactions would take an unreasonably long time and/or involve an unreasonable amount of paper work. He states: “Further, some facts are considered in law to be irrelevant to particular transactions. In addition to a certain extent each party is expected to inform himself of available facts.” Kerr notes at p 75 that classes of misrepresentation are often distinguished by virtue of the presence or absence of fault or of a particular type of fault. Hence, he says, one encounters distinctions between misrepresentations which are accompanied by fault and those which are not so accompanied. He states that none of these distinctions is truly fundamental. They simply serve to indicate the presence or absence of (a particular type of) fault as but one of the elements of misrepresentation. He states that the distinctions do serve a practical purpose inasmuch as they affect the nature and scope of the applicable remedies and notes that an analysis and systematisation of the requirements of misrepresentation indicate that in the present context misrepresentation is regarded as nothing more than a particular delict. Kerr states that neither logic nor policy appears to necessitate such an approach. It is quite possible – and perhaps even preferable, to focus on the quality of the conduct involved as being improper(whether in the sense of being wrongful or even having a wider meaning) without resorting to a more technical concept such as delict.

¹⁰⁴ National Health Act fn 10 *supra*

¹⁰⁵ Medicines Act fn 9 *supra*

as the third degree of obligatory altruism¹⁰⁶, whilst the health professionals and providers themselves have come to perceive the relationship to be at most at the

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Birks P 'The content of fiduciary obligation' 2000 *Israel Law Review* 34 p 3 explores this subject in some detail and argues that the word 'fiduciary' fails to identify either the content or the causative event of the obligation of which we generally mean to speak. He notes that since Justice Paul Finn published his prize-winning book in 1977 (Finn PD *Fiduciary Obligations*) fiduciary obligations have achieved a new prominence in the common law world. "They have become, as the saying goes, all the rage. Breach of fiduciary duty bids to become a new civil wrong which can be committed by a wide range of people who find themselves concerned with the welfare of others. Professional advisors, governmental agencies, even parents, have had to take account of this new kind of liability." Although Birks is not in favour of overuse of the fiduciary concept which seems to have been created by its rise to fashion, he continues to state that "Abuse of confidence is one genuine addition to the list. Abuse of confidence is now a well established civil wrong, despite the reluctance of 'tort' to welcome wrongs with no common law pedigree. Breach of fiduciary duty will turn out to be another, but much more closely confined than counsel have tried to make it. The name must change. The word 'fiduciary' signally fails to identify either the content or the causative event of which we generally mean to speak." Birks notes that: "All primary obligations recognised by law require some degree of altruism. In general it requires in the interest of others only that we inhibit our own conduct so that it does not cause harm to them. In special circumstances it requires us to take positive action to improve another's position. In even more special circumstances it requires us to take positive action to improve another's position disinterestedly – that is, uninfluenced by any competing interest of our own. These are the three degrees of legally obligatory altruism." With regard to this last he states that: "The third degree requires not only positive action in the interest of another but also disinterestedness, the elimination of the pursuit of any conflicting interest of the actor himself. The difference between the two degrees is easy to illustrate from contract cases. A contractor, say a builder, who is obliged to use skill and care to implement the client's wishes, is ex hypothesi constrained to act positively in the interest of the other, the client. He is not thereby obliged to forego discounts and commissions which he knows that he can get from particular suppliers. Similarly a shopkeeper who accepts the burden of advising a buyer as to the suitability of goods for a particular purpose is not bound to exclude from consideration a brand of his own making or in which he has a material interest. The limit of the obligation in these cases is to advance the other's interest according to an objective standard. If the contractor's concurrent pursuit of its own interest brings the performance below that standard it will be in breach, as where materials on which he was able to obtain a discount prove unsatisfactory. But the mere fact that the contractor takes a secret commission or other collateral economic advantage is not in itself a wrong. Only the third degree of altruism requires self-denial of that kind. This line between the second and third degree of obligatory altruism was drawn in *Hospital Products Ltd v US Surgical Corporation* (1984) 156 CLR 41 (HCA). An American company which manufactured surgical equipment had sent a senior executive, Blackman, to Australia to develop its sales there. In Australia, Blackman, finding that his employers had no patent there, set about copying their products and marketing them through companies which he himself created, in this way he made huge profits in competition with his employers. There was no doubt that he had been under a contractual obligation to use his best efforts in their behalf. He was, therefore, in breach of contract and he had to pay massive compensatory damages for that breach. However, it would have been even better from the point of view of his employers if they had been able to take the profits that he and his companies had made. They failed to establish any secondary obligation to pay over those profits. The majority of the High Court thought that the only way that the American company could establish an obligation to pay over the profits was for them to show that Blackman was their fiduciary (Deane J took the view that this was an unnecessary detour and preferred to ask directly whether this was such a breach of contract as made him liable for his profits. This is the preferable approach); they thought he was not. Deane J's view is arguably preferable. He thought that in such a case in which the lining of the defendant's own pocket was achieved through breach of contract, it was open to the courts to award by way of damages the profits which he had made, without any need to find that the defendant was in breach of a fiduciary obligation... For the purpose of the present exercise of differentiation, we only need to see that, rightly or wrongly, the High Court of Australia thought Mr Blackman was under an obligation to promote the interests of his employer but not under any obligation to promote those interests disinterestedly. That is, he was not bound to abstain from the pursuit of any interest of his own that might possibly have led him to sacrifice the interests of those relying on him. His was, in their view, an obligation of altruism in the second degree. His liability, whatever its measure should have been, could only be bad for management, not pursuing interests of his own."

<http://shelburne.butterworths.co.uk/truststaxestates/articles/>

The lack of recognition of the fiduciary nature of the provider patient relationship is not confined to South Africa. See Choudhry S, Choudhry NK and Brown AD 'Unregulated private markets for health care in Canada? Rules of Professional Misconduct, Physician Kickbacks and Physician Self-referral' 2004 *CMAJ* 170(7) p 1115 who observe that IHF's [privately owned independent health facilities] depend on physician referrals for patients. This raises 2 important issues. First, IHF's can compensate physicians for patient referrals (a kickback), a practice that can potentially distort clinical judgment. Second, physicians can make referrals to IHF's that they themselves own, raising similar concerns. Both problems have occurred in the United States and have prompted regulation... Financial conflicts of interest involving physicians are regulated by common law which imposes a fiduciary duty on physicians towards patients. [*McInerny v MacDonald* (1992) 93 D.L.R. (4th) 415] Canadian courts have stated that physicians fulfill this duty by disclosing conflicting interests to patients. [*Henderson v Johnston* (1956) 5 D.L.R. (2d) 524 (Ont HC)] Unfortunately in most clinical settings disclosure provides inadequate protection for patients." They note that the US data suggests that physician ownership of IHF's increases the number of referrals and leads to higher costs. Physicians who owned and operated diagnostic imaging equipment in their offices were up to 7 times more likely to obtain radiologic examinations than were physicians who always referred patients to radiologists. In addition, the charges per episode of care were significantly higher for self-referring physicians. Moreover the authors note that the existing data on quality suggest that the purported benefits of self-referral for quality may not exist. For example, licensed physiotherapists spent significantly less time per visit treating patients in physician-owned facilities than in other facilities. Choudhry *et al* point out that some physicians are deftly dodging the body of law that imposes a fiduciary duty on physicians. <http://www.cmaj.ca/cgi/content/full/170/7/1115> It is worth noting that in South Africa, the vast majority of private hospitals and clinics are IHF's. Litman M 'Self-referral and Kickbacks: Fiduciary Law and the Regulation of "trafficking

second degree of obligatory altruism. Unfortunately, the Supreme Court of Appeal has recently reinforced this view in *Afrox Healthcare v Strydom*¹⁰⁷, being unable to see private hospitals as any different from suppliers of other goods and services. The former requires a certain level of disinterestedness on the part of health professionals and other providers of health care services while the latter only recognises primary duties to act positively for the benefit of another both in contract and, outside of a contract. Birks points out that under the latter head every tort is the breach of a primary duty imposed in the absence of contract. Sometimes the primary duty is to take positive action in the interests of another¹⁰⁸. This could be seen as a point of fundamental difference between the delivery of health care services in the public sector and that in the private sector. The former is likely to have a higher degree of personal disinterestedness in the delivery of health care services than the latter due largely to the fact that the latter is profit driven unlike the former. It is submitted, however the public health sector is not entirely disinterested in the sense contemplated by Birks but rather that its interests are largely different to those of the private sector. The public health sector although not interested in making profits for profit's sake does have a very real interest in increasing the scope and size of its income given the enormous financial pressures it faces to meet the ever increasing health care needs of the population in general. However it is interesting that Birks, comes close to using the language of the South African constitution in pointing out that the obligation of disinterestedness cannot be severed from the obligation to *promote and preserve*. He

in patients” 2004 *CMAJ* 170 (7) p 1119 notes: “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 behaviour 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.

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Afrox fn 6 *supra* discussed in Chapter 6

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Birks fn 106 *supra*. The first degree of obligatory altruism he identifies is framed in the negative and is illustrated by Birk with reference to the case of *Donoghue v Stevenson* ([1932] AC 562 (HL) 580) in which the plaintiff was made ill by the remains of a snail in a ginger beer bottle and in which Lord Atkin famously stated: “The liability for negligence, whether you style it such or treat it as in other systems as a species of “culpa” is no doubt based upon a general public statement of moral wrongdoing for which the offender must pay. But acts or omissions which any moral code would censure cannot in a practical world be treated so as to give a right to every person injured by them to demand relief. In this way that rules of law arise which limit the range of complainants and the extent of their remedy. The rule that you are to love your neighbour becomes in law, you must not injure your neighbour; and the lawyer’s question, who is my neighbour? receives a restricted reply. 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”.

notes that an independent obligation to abstain from pursuing interests of one's own is unintelligible, certainly unworkable and states that the very formulation of the chief restatement of this obligation shows that it is an obligation of disinterestedness in the course of doing something: the trustee shall not pursue any interest of his own which might possibly conflict with his duty to the beneficiary, *scilicet* his duty to promote and preserve the interest of the beneficiary. So, says Birks, these two are bound together. The core obligation of the trustee is a compound obligation and it is indivisible at least in the sense that while the positive obligation of care can exist on its own, the obligation of disinterestedness cannot. The trustee, says Birks, must promote and preserve the interests of the beneficiary with the care and skill of a prudent person of business and to abstain from the pursuit of all interests which might conflict with that duty. In the constitutional context in South Africa, the beneficiary for the public health sector is the person who holds the right of access to health care services including reproductive health care in terms of section 27(1) of the Constitution and the state's obligation is to protect, respect, promote and fulfil that right. It is not too difficult to draw an analogy between the position of a trustee and that of the state. That there is an added dimension to contractual relationships between health service providers and patients is widely recognised¹⁰⁹. In fact a fiduciary relationship can even arise between providers of services to health practitioners in some instances due to the nature of the contractual relationship in terms of which support services are provided to the practitioner¹¹⁰.

¹⁰⁹ For instance in Report C: 'Fiduciary Duty of a MSO On Behalf of a Physicians Contractee' it is noted that in Black's Law Dictionary a contract is defined as an agreement between two or more persons which creates an obligation to do or not to do a particular thing. Black's defines a fiduciary as a person having duty, created by his undertaking, to act primarily for another's benefit in matters connected with such undertaking. A fiduciary invokes a higher level of trust that is born out of dependency. The Report notes that a fiduciary duty as defined by Black's is "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." The Report points out that patients generally depend upon and trust the knowledge, professionalism and skill of physicians for their health needs, thus creating a fiduciary responsibility on the part of physicians. Consequently patients are entitled to certain rights as the result of that relationship. AMA Policy 140.975 "Fundamental Elements of the Patient-Physician Relationship" states that these rights include the following: "From ancient times physicians have recognised that the health and well-being of patients depends upon a collaborative effort between physician and patient. Patients share with physicians the responsibility for their own health care. The patient-physician relationship is of the greatest benefit to patients when they bring medical problems to the attention of their physicians in a timely fashion and work with their physicians in a mutually respectful alliance. Physicians can best contribute to this alliance by serving as their patients' advocate and fostering these rights: (1) The patient has the right to receive information from physicians and to discuss the benefits, risks and costs of appropriate treatment alternatives. Patients should receive guidance from their physicians as to the optimal course of action. Patients are also entitled to obtain copies of summaries of their medical records, to have their questions answered, and to be advised of potential conflicts of interest that their physicians might have, and to receive independent professional opinions...." Thus, says the Report, it can be concluded that a fiduciary duty is more than a contract duty, and also that there are certain rights that of patients that physicians should respect. (http://www.ama-assn.org/ama1/pub/upload/mm/21/reportc_i97.doc)

¹¹⁰ In Report C (fn 109 *supra*) it is noted that at the 1997 Annual Meeting, the American Medical Association Organized Medical Staff Section (AMA-OMSS) adopted Substitute Resolution A12, "Fiduciary Duty of a MSO on Behalf of a Physician Contractee". This resolution asked that the AMA-OMSS study the legal duties and responsibilities that flow from management services contracts with individual physicians and physician groups. Testimony heard during the OMSS reference committee hearing reflected not only confusion in understanding the legal rights and responsibilities of

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.

4.4 Freedom of Contract

Freedom to contract and freedom of contract have been identified as principles that are fundamental to the law of contract in South Africa. This freedom is based on public policy¹¹¹. 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. Even before the Constitution came into being, the freedom of contract and the logically allied principle of *pacta servanda sunt* were defined and limited by considerations of public policy¹¹².

a Management Services Organisation (MSO) but also its relationship and fiduciary responsibility to physicians and other contracting entities. The Assembly agreed that it would be helpful for the OMSS Governing Council to investigate the issue to determine if it is simply a contractual matter that can be rectified through review of the contract by appropriate legal counsel. The focus of Report C was the distinction between a contract relationship that an MSO may have with a physician and the MSO's possible fiduciary relationship to the physician. The Report notes with regard to MSOs that while there is no commonly accepted definition of such an organisation the following description could be used for the purposes of a study on MSOs: "An entity that is owned by physicians, hospitals, private investors, or a combination thereof, which provides contract management and/pr practice management services to physicians and medical groups."

The study indicated that in some cases MSOs purchase the hard assets of medical practices (e.g. medical equipment, office furniture and supplies) and the physicians and other office staff become employees of the MSO (or of a foundation in states like California that prohibit the corporate practice of medicine). In other cases MSOs offer services to networks of independent physicians. In most cases MSOs use a combination of these approaches. It is observed in the Report that in an article by Mark F. Weiss, private attorney specializing in the representation of physicians and physician groups, published in the September 18, 1995 issue of LACMA Physician, he suggests that some MSOs may have created a fiduciary duty to the physician – the highest duty imposed by law – owed by the MSO to the physician. In the article he states: "An agent must act with the utmost good faith in its dealings with the principal. The relationship obligates the agent to perform its services in accordance with the highest degree of loyalty, integrity and honesty. The agent's failure to perform to such standards will result in tort liability (including punitive damages) for breach of fiduciary duty and fraud as well as liability for breach of contract. Therefore even though the MSO has profit motives different and apart from those of the physician, it is still possible that it is the physician's agent. The existence of an agency relationship is determined by the terms of the agreement between the parties, interpreted in light of the circumstances in which the agreement was made.

111 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 themselves 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 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.'

(See also *Wells v South African Aluminite Company* 1927 AD 69 at p 73) In *SA Sentrale Ko-op Graanmaatskappy Bpk v Shifren en Andere* 1964 (4) SA 760 (A) at 767A, Steyn CJ emphasised '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 suretyship that bring us to the conclusion that it is only when a suretyship 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."

112 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 of contract where freedom of contract and the principle of *pacta servanda 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

Strauss¹¹³ in discussing the doctor-patient relationship in the private sector context points out that a doctor is, with a few exceptions, at liberty to select or refuse patients at will. Continuing he observes that “There being no legal duty in general upon a doctor to accept a patient, it is also true that the doctor has no general right to treat any person”¹¹⁴. At first glance, this statement does not seem to be true of a situation in which the state is constitutionally obliged to provide access to health care services as discussed in chapter two. If one assumes for the moment that there is an obligation on the state to provide health care services, this does not necessarily mean that the state has a general right to treat a person. It is a well-established principle that people cannot as a general rule¹¹⁵ be treated against their will even if there is an obligation to treat. The patient’s rights to bodily and psychological integrity in terms of section 12 of the Constitution cannot be taken lightly. As far as the state’s obligation to treat a patient, if any, is concerned, this must also be qualified by the fact that the Constitution itself recognises that the realisation of the right to health care services is limited by available resources and that it requires a series of progressive steps towards achievement of the right.¹¹⁶ In view of this there can only be at best a qualified obligation on a public provider to treat a patient. It is submitted, however that even so, the matter is not as simple as this for a number of reasons. Firstly, as has been

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, eg 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 judgment of the Court, Rabie CJ points out: ‘Omdat opvatting 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 ook 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.’

‘Die opvatting dat ’n persoon wat ’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 893H.) ‘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 895D - E.) The Court may reduce a stipulated penalty to such an extent as it may consider equitable in the circumstances’ (Act 15 of 1962, s 3 - reinstating the common law). Not only contracts against public interest or public policy are subject to control by the Court, but also those offending the boni mores. In this field reference must be made to the sense of justice (regsgevoel) of the community, as is the case in *delict*, where it is now recognised that there is no numerus clausus of actionable wrongs.

113 Strauss fn 98 *supra* at p3

114 Strauss fn 98 *supra*

115 Where there is a serious risk to public health or safety from highly contagious diseases or mental illness the position is somewhat different but these situations are exceptions to the general rule and are strictly controlled by legislation for example the Health Act No 63 of 1977 and Regulations thereto and the Mental Health Act No 18 of 1973 soon to be replaced by the Mental Health Care Act No 17 of 2002.

116 In reality, if one regards the right of access to health services in its purest form as being unrestricted access to health services of all types and levels necessary and appropriate for the treatment of any health condition then the right of access to health care is unlikely ever to be realised but will always consist of an endless progression towards it.



stated in chapter two of this thesis, section 27(1)(a) of the Constitution states simply that everyone has the right of access to health care services including reproductive health care. It does not suggest that the state alone bears the concomitant obligation of this right. Section 27(2) imposes an obligation upon the state to take reasonable legislative and other measures within its available resources to achieve the progressive realisation of the right. The wording of section 27(2) does not require the state to provide health care services. It imposes a much less direct obligation – to take reasonable legislative and other measures within its available resources to achieve the progressive realisation of the right. The obligation that is imposed upon the state by section 27(2) allows a fair degree of flexibility to the state in achieving the progressive realisation of the right. Furthermore, the right awarded in section 27(1)(a) is a right of *access* as has been pointed out in chapter two. It is submitted that the wording of section 27 of the Constitution allows sufficient latitude for the state not to provide health care services at all but rather to contract with private sector providers for the provision of those services. Such a step would still be fulfilling its constitutional obligation to take reasonable legislative and other measures to achieve the progressive realisation of the right within available resources. Strictly speaking there is thus no explicit constitutional obligation upon the state to provide health care services itself. Whether or not such an obligation exists would depend upon the circumstances governing the availability of health care services in South Africa. In a situation such as the present, the private sector does not have the capacity to provide health care services to the general population. As long as such a situation exists, it could probably successfully be argued that the state does have a constitutional obligation to provide health care services itself. However, if the state contracted out the management of public health care facilities to the private sector - in other words placed at its disposal the remaining health care facilities in the country - and entered into contractual arrangements with the private sector whereby the latter provided health care services to all residents of South Africa in fulfilment of the state's constitutional obligations, and the state became essentially a funder of health care services rather than a provider, it could not be argued that the state was legally obliged to treat anyone. In a situation in which the state had contracted out the delivery of health services to the private sector, the constitutional right of access to health care services would be enforceable against both the state and the private sector since while the state could never escape its constitutional obligation to achieve the



realisation of the right of access to health care services, the private sector would be contractually or even statutorily¹¹⁷ obliged to provide those services. The other qualifier is that even if the state is obliged to provide health care services itself, it does not necessarily follow that it must provide them to everyone. People who have access to health care services because they are able to pay for them would not necessarily be entitled to health care services from the state in the absence of express arrangements to the contrary.

The privatisation scenario painted above, although it is not, to the knowledge of the writer, currently contemplated by the South African government, is a useful illustration of the notion that a private sector provider's right to refuse to treat a patient may not be much different to that of a public sector provider and of the further logical step that the freedom to choose with whom to contract is not necessarily proof, or a *sine qua non*, of the contractual nature of the provider-patient relationship. Even in the private sector, it is doubtful whether a private provider would have the right to refuse, without good reason, to treat anyone who came to him or her for health care services. Strauss observes that a doctor who arbitrarily and unreasonably refuses to attend a seriously ill or injured person may be held liable if the patient cannot manage to get another doctor and suffers harm¹¹⁸. He refers to Voet who states that a doctor who refuses to attend a patient cannot be held liable under the Aquilian law (i.e. for damages), although, Voet adds that "it would suit the duty of a good man to come to help the imperilled fortunes of his neighbour, if he can do it without hurt to himself."¹¹⁹ He notes that Voet hastens to add that a doctor who performs a good operation but then abandons the curative treatment will not escape liability. Strauss then discusses the question of liability for omissions with reference to the duty to rescue with reference to the case of *Minister van Polisie v Ewels*. Whilst this is straying into the area of the law of delict, which will be the subject of further discussion in another section of this chapter, it must be noted here, as it was noted in section 2 of this chapter dealing with administrative law, that questions of public policy, especially as identified in the values espoused by the Constitution, are

¹¹⁷ For instance in terms of a statute creating a social health insurance system in which private providers must provide certain health services if the state enters into a contract with them

¹¹⁸ Strauss (fn 98 *supra*) is writing primarily in the context of the private sector but does not specify whether he regards this statement as applicable to both public and private sectors or only one of them.

¹¹⁹ Strauss fn 98 *supra* p 23 quoting at footnote 2, *Commentarius ad Pandectas* 9.2.3 (Gane's translation).

common to the law of both delict and contract. Policy considerations in the law of delict which impose an obligation upon a health services provider to provide such services to a particular patient may be the same policy considerations that effectively compel a provider to contract with that patient for the provision of health care services.

If the power of the state to refuse to treat a patient is different from that of a public sector provider it is likely to be not so much as a result of the Constitutional obligations of the state to achieve the progressive realization of the right of access to health care services in section 27(2) but rather due to the fact that the state as a provider of health care services is regulated in terms of a number of statutes, for example the Health Act¹²⁰, and is bound by administrative law considerations. It could be that the state contracts with certain categories of patients for the rendering of health services and not others. In this scenario, the patients with whom the state contracts would be the so-called 'externally funded' patients, for example patients who are members of medical schemes or who are covered by the Road Accident Fund and who have a choice of whether or not to obtain health services in the public sector, whilst those who are not externally funded and who literally have no choice but to obtain health services in the public sector have a relationship with the state based on administrative law. The reasons for this distinction would be based on the different intentions of the two types of patients and the state with respect to each of them – provided that such intentions are in fact different. This might be indicated in different admission procedures for the two types of patient, procedures for instance in terms of which the externally funded patients are required to sign forms on admission that indicate a contractual intent such as an undertaking to pay for the services rendered in the event of the failure of their medical schemes to pay, the application of different rates and terms of payment to the externally funded patients, their utilisation of specific facilities within a health establishment reserved only for externally funded patients, consent to be bound by the undertaking in their personal capacity etc. In the case of patients who are not externally funded, the inherent nature of health care services is such that the intention of such patients in a contractual context would play a relatively minor role compared to the intention of the state. Whilst this may seem

¹²⁰ Health Act fn 18 *supra*

unpalatable it is the hard truth of the matter. Such patients have no bargaining power. They have no choice but to accept the services offered by the state or remain ill or injured, and possibly even die. They have no option but to use state facilities, no power to demand particular drugs or services in preference to others that achieve the same result, no real power to refuse to enter into a contractual relationship if the state decides that this is its preferred legal basis for the public provider relationship. The situation strikes at the heart of the general, free market contractual assumption that the parties are on a relatively equal footing. Where public policy recognises that they are not on an equal footing there is usually significant legislative or judicial 'interference' in the relationship such as happens, for instance in the case of employment contracts or restraint of trade agreements.¹²¹ In the health care sector contracts generally and in the public health care sector in particular contracts are very often not expressed in writing and are not even in express terms. If they exist, they are very often implied. They are inferred from the circumstances. As such they are often conceptual frameworks retrospectively superimposed upon a particular set of factual circumstances so as to come to a particular conclusion on the basis of a pre-selected process of logic. As such they are elegant, often ethereally grey, legal fictions after the fact as opposed to the present intentions of the parties baldly stated in black and

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Diemont J observed at p762-763 in *Wohlman v Buron* 1970 (2) SA 760 (C): "It is trite law that a distinction must be drawn between contracts entered into between masters and servants and contracts for the sale of a goodwill where the parties contract on an equal footing. This has been stated many times. I need refer only to the oft-cited judgment of Greenberg, J.A., in *Van de Pol v Silbermann and Another*, 1952 (2) SA 561 (AD) at p. 571. In that case the learned Judge said that in agreements in restraint of trade where the parties are contracting on an equal footing the fact that they have agreed on terms is not conclusive evidence that such terms are reasonable, nevertheless such agreement is weighty evidence pointing to the conclusion that the restraint imposed was no more than was necessary to protect the interests of the parties concerned." The link between freedom of trade, sanctity of contract and the power balance between the parties is evident from *Drewtons (Pty) Ltd v Carlis* 1981 (4) SA 305 (C) in which Watermeyer JP stated: "In *Crimpers Salon (Pty) Ltd v Thomas* 1981 CPD unreported I had occasion to say: 'I am also of the firm conviction that while there is, of course, the need for the Court to preserve the right of freedom of trade, it is equally necessary, if not more so, to maintain the sanctity of contract and the Court should be slow to decline to enforce the terms of an agreement, including those of a restraint clause, voluntarily entered into by adults of contractual capacity who contract on an equal footing.'" Claassen J observed in *Filmer And Another v Van Straaten* 1965 (2) SA 575 (W): "In the case of *Hepworth Ltd v Snelling*, 1962 (2) P.H. A.48, I mentioned the well-known legal principles applicable in a case like the present. For the sake of convenience I repeat here substantially what was said on that occasion: 'The law appertaining to a matter of this nature has been stated in many cases in this country and in England. The law could be considered from three aspects:

- A. The general rule applicable in all trade-restricting contracts.
- B. The general rule applicable where parties contract on equal terms - such as where two general dealers or two auctioneers enter into a trade restricting contract.
- C. The rules applicable where parties do not contract on equal terms, as, for example, in the cases of master and servant or teacher and pupil...

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 themselves. 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 W.L.D. 75 at p. 83.

In *Shacklock Phillips-Page (Pvt) Ltd v Johnson* 1977 (3) SA 85 (R), Goldin J commented at p89: The Court will regard with more favour and abstain from interfering in contracts between parties contracting on equal terms than in disputes between persons of unequal bargaining power, because equal contracting parties may often be regarded as the best judges as to what protection is reasonable in their own interests (*Spa Food Products Ltd.*, *supra* at p. 718; *Ackermann-Göggingen Aktiengesellschaft v Marshing*, 1973 (4) SA 62 (C) at pp. 72 - 73; *Eso's Case*, *supra* at p. 712).

white¹²². In a situation where one party has no real choice but to enter into a contract, no choice in reality as to the terms and conditions thereof and no bargaining power with which to negotiate contractual terms and conditions with the other party, the inference of a contractual relationship between them would, it is submitted, be highly artificial to say the least.

At a constitutional level there is no prohibition on either the public or private sector either contracting or charging for health care services. The requirement is not 'free' health services but "access" to health services. As has been pointed out in a previous chapter, 'access' means different things to different people depending on their personal means and resources. In the case of the indigent, 'access' may well imply that health services must be rendered free of charge but in the case of patients who can afford to pay even if it is only a small amount, towards the costs of the health care services they receive, 'access' does not mean free of charge. The state has the power to legislate tariffs and fees for services it renders in order to cover the costs or partial costs thereof. In such circumstances, it has no need of a contractual relationship upon which to base its right to payment. This state of affairs may mitigate against the inference of a contractual relationship between provider and patient.

4.5 Emergency Medical Treatment

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In *J De Moor (Edms) Bpk v Beheerliggaam Van Outeniqua* 75/80 1985 (3) SA 997 (T) the court observed: "In *Roberts Construction Co Ltd v Dominion Earthworks (Pty) Ltd and Another* 1968 (3) SA 255 (A) het die Appellhof beslis dat: "An implied contract cannot be pleaded baldly and left, as it were, in the air without any indication from what it is to be inferred. It is necessary to plead the circumstances giving rise to the implied contract." Op 261F in fine- 262A - C sê Jansen WN AR: "The general principle would require a statement of the facts or circumstances constituting any implied contract relied upon, or, put in another way, the facts or circumstances from which such contract is inferred". In *Spes Bona Bank v Portals Water Treatment* 1981 (1) SA 618 (W) Nestadt J pointed out: Wessels *Law of Contract in South Africa* 2nd ed vol 1 para 261, quoting an old English case, says that the only difference between an express and an implied contract is as to the mode of proof. An express contract is proved by direct evidence, an implied contract by circumstantial evidence. The nature of such evidence was referred to by Van Zyl J in *Frame v Palmer* 1950 (3) SA 340 (C) at 345 in the following terms: "... An implied or tacit contract differs from an express contract only in the manner in which the offer or acceptance is made, namely it is not expressed in words, gesture or writing but is implied from all the circumstances and the actions of the parties: Voet 2.14.15. From these circumstances and actions the Court, in order to establish such a contract, must come to the conclusion that there was an implied offer and implied acceptance and that the parties intended to contract with each other; in other words that from the circumstances and by their actions the parties in fact intended that a binding contract should come into being. With the exception that the contract is entered into tacitly or by implication all the other essentials which must be present when an ordinary express contract is entered into must also be present in an implied contract. (See too *Fiat SA v Kolbe Motors* 1975 (2) SA 129 (O); Wessels vol 2 para H 4426.) The person whom it is proposed to fix with a tacit contract must be fully aware of the circumstances referred to and his conduct must be unequivocal. (*Blaikie-Johnstone v Holliman* 1971 (4) SA 108 (D) at 119; *Big Dutchman (SA) (Pty) Ltd v Barclays National Bank Ltd* 1979 (3) SA 267 (W) at 281; Wessels paras 259, 266) In the latter regard, Wessels, quoting *Maasdorp Institutes of SA Law* vol 3 4th ed at 64, states (in para 256): "In order to constitute a valid tacit contract, the conduct of the parties must not only be such as to be consistent with consent, but such as will allow of no other interpretation according to the rule of common sense." This paragraph was referred to with approval in *Bristow v Lycett* 1971 (4) SA 223 (RA). The legal effect, therefore, of a person's conduct depends largely upon what a court of law thinks a reasonable man would consider his intention to have been. If the court has any doubt, the presumption will be against the person who asserts that there has been a tacit contract."



At the outset a distinction must be made between health care services generally and emergency medical treatment, given that the Constitution itself draws such a distinction. However, even the right not to be refused emergency medical treatment is not without its limitations. These limitations are essentially the available resources of the state¹²³. The KwaZulu-Natal Health Act¹²⁴ refers to ‘emergency medical services’ rather than ‘emergency medical treatment’. It states at section 29(1) that a health care user is entitled, “as a matter of right, to emergency medical services for any life threatening condition at any public health care establishment or private health care establishment”. Subsection (3) of section 29 stipulates that a person employed in a public health care establishment or private health care establishment who turns away a person requiring emergency medical services in terms of subsection (1) commits an offence. This is an extreme view of the right of not to be refused emergency medical treatment since it criminalizes (at least in the province of KwaZulu-Natal) the act of turning away a person requiring emergency medical services. The other provinces do not share this view. The Mpumalanga Hospitals Bill of 1997¹²⁵ states in section 18 concerning admission and discharge of patients: “The head of clinical services of a provincial hospital shall, subject to any regulations, determine the order in which persons shall be admitted to such hospital having regard to the urgency of their need for treatment: provided that admission to a provincial hospital may not be denied in the case of an emergency. The Bill does not make this an offence. The Mpumalanga Health Facilities and Services Bill of 2000, which seems to have superseded the Mpumalanga Hospitals Bill of 1997, also makes no mention of a refusal of emergency treatment as being a criminal offence. Section 4 is the same as section 18 of the 1997 Bill. The Eastern Cape Provincial Health Act¹²⁶ merely stipulates at section 12(b) with

¹²³ Thus Combrinck J in *Soobramoney v Minister Of Health, Kwazulu-Natal* (fn 76 *supra*) observed as follows at 439-440: “As pointed out by counsel for the respondent a 27(3) does not create a right to emergency medical treatment. It prohibits anyone from refusing emergency medical treatment. I consider that the section must be interpreted in such a way that it is implicit in the words ‘emergency medical treatment’ that such treatment is possible and available. It could surely not have been the intention of the Legislature that irrespective of the costs and whether or not funds were available and irrespective of whether the treatment was available the persons requiring emergency medical treatment had to receive such treatment. So, for instance, if a hospital had an intensive care unit which was full and an emergency patient arrived would it be obliged to move one of its patients out so as to accommodate the emergency patient? Alternatively, is the State obliged to build additional intensive care units, procure additional dialysis machines, ventilators, heart-lung machines and other life-saving equipment to enable it to cater for all the patients requiring emergency medical treatment? It could surely not have been the intention of the Legislature that the right to access to health care was subject to the constraints of the State’s resources and that a patient could be refused treatment but when his or her condition reached a critical stage and emergency treatment was required, the State then had to provide it irrespective of the cost.”

¹²⁴ KwaZulu-Natal Health Act No 4 of 2000

¹²⁵ Provincial Gazette No 282 of 25 October 1997, Notice No 356 of 1997. As far as the writer has been able to ascertain, this Bill has not yet been passed into law in Mpumalanga

¹²⁶ Eastern Cape Provincial Health Act No 10 of 1999

regard to emergency medical treatment for any life threatening condition that users are entitled to it “through ambulance services and at any public or private health care establishment.” The National Health Act¹²⁷ does not criminalize a refusal to render emergency medical treatment. This discrepancy between the law of KwaZulu-Natal and the other provinces illustrates the need for framework legislation such as the National Health Act. The KwaZulu-Natal Health Act¹²⁸, in criminalizing the constitutional prohibition of a refusal to render emergency medical services does not specify any exceptions to the rule. No matter how busy or incapable a health facility may be of attending to a particular patient, no matter how many other emergency patients it may also have to attend to, no matter how few health professionals may be physically available to give the patient immediate attention, it is a criminal offence, in KwaZulu-Natal, to turn away someone requiring emergency medical services. It could even be argued that the criminalizing of such a provision is counterproductive since instead of quickly referring a person requiring emergency medical treatment to another facility where he or she can be attended to immediately, such person may have to wait for a while at the facility he or she first went to for assistance because the personnel there might be afraid of committing a criminal offence in sending him or her to another health care institution. In genuine circumstances of emergency such delays can be fatal. Whilst it could be argued that emergency medical services could be seen as including the act of sending a person to another health care facility that is better equipped to render the emergency services required, this is not at all clear from the definition in the KwaZulu-Natal Health Act¹²⁹.

If a person is entitled to emergency medical services ‘as of right’ this does not necessarily mean that a contractual relationship cannot arise between the patient and the provider. However, the reasons for inferring such a relationship may be thin on the ground. The fact that a person is entitled to emergency medical services also does not preclude the provider from subsequently seeking payment from the patient or other responsible person for the emergency medical treatment that was rendered.

The terms ‘emergency medical services’ and ‘emergency medical treatment’ are not necessarily synonyms. Firstly the term ‘emergency medical services’ in the health

¹²⁷ National Health Act fn 10 *supra*

¹²⁸ KwaZulu-Natal Health Act fn 124 *supra*

¹²⁹ KwaZulu-Natal Health Act fn 124 *supra*

care environment tends to focus attention on health care service infrastructure such as trauma units and the manner in which such units are equipped, ambulance services and who may operate them, other specialised forms of transportation of critically ill or injured persons, and disaster management and containment systems. The term ‘emergency medical treatment’, on the other hand is rather more indicative of the direct and immediate application of recognised medical techniques to the person of one requiring such treatment. It is more personalised and less diffuse than the term “emergency medical services” and conveys a sense of application of medical skill and knowledge to an individual who is seriously ill or injured. It is the term used by the Constitution in section 27(3).

Attempts to define the term ‘emergency medical treatment’ are problematic from the point of view of constitutional law since there is no definition of the term in the Constitution itself. An attempt to define it in other legislation for the purpose of giving effect to the right embodied in section 27(3) of the Constitution could be regarded as an attempt to indirectly amend the Constitution. At the same time, the Constitution is what might be called framework legislation *par excellence* in the sense that the detailed mechanics relating to the Bill of Rights are not contained therein. The question of what constitutes an emergency has apparently plagued other jurisdictions to the extent that they have seen fit to define it fairly specifically.¹³⁰ Although the constitutional court has very usefully given an idea of the nature of emergency medical treatment in *Soobramoney*¹³¹, it too did not give a precise definition but rather expressed a general sense of what emergency medical treatment does not include – notably chronic conditions in respect of which ongoing, long-term medical treatment is required and designed to indefinitely postpone death rather than to immediately save a life. This creates something of a certainty problem for people generally and the law relating to the delivery of health care services in particular. Whilst the court in *Soobramoney*¹³² seems to have ruled out the possibility of a subjective interpretation

¹³⁰ See discussions of emergency medical treatment in Chapter Two – especially with regard to the American Emergency Medical Treatment and Labor Act.

¹³¹ *Soobramoney v Minister of Health, KwaZulu-Natal* (fn 37 *supra*)

¹³² *Soobramoney* fn 79 *supra*. Combrinck J observed in *Soobramoney* at p 440: “In any event, the applicant, in my view on the facts, cannot rely on the provisions of s 27(3). He has been suffering from the diseases mentioned for some years. He has not contracted a sudden illness or sustained unexpected trauma. It is true that if he does not receive the treatment he will die. Unfortunately, that is the position with all persons who suffer from long term disease. So, for instance, a person who has cancer may suffer from the disease for a number of years, but will eventually reach the stage where within days he will die. *It is then an emergency situation for him but it is not the emergency that, in my view, the Legislature had in mind in s 27(3).*” (writer’s italics).



of the term 'emergency' so that the patient's perceptions of his or her health status are not the material factor in ascertaining whether or not a particular situation does constitute an emergency, one is still left with the possibility of a large number of grey areas which will presumably ultimately have to be decided by the courts. For instance is it only situations in which a person's life is materially threatened that are envisaged by section 27(3) of the Constitution or does it include situations in which a person's health, as opposed to life, is threatened? Take for instance a situation where a worker loses a finger in an industrial accident and is rushed to the nearest health facility where he urgently requires surgery to have the finger re-attached to his hand if he is to regain full use of it or the situation of a person who sustains a chemical injury to her eyes which, if treated immediately will save her sight although her life is not in any danger. What about a woman who is in labour and about to give birth? Does her situation constitute a medical emergency or does it only become an emergency when it becomes necessary for her to have a Caesarian section because the child is positioned incorrectly and becomes stuck in the birth canal? As stated previously the question of what constitutes emergency medical treatment as opposed to ordinary health care services has considerable financial implications given the Constitutional prohibition on refusal of medical treatment. It is logical, given this state of legal affairs, that the nature of emergency medical treatment will have to be determined with regard to each particular case and possibly, in terms of the principle of subsidiarity, the decision as to whether or not treatment does constitute emergency medical treatment is ultimately a medical decision rather than a legal one¹³³. This does not, however, solve the potential problem of variations in practice due to the subjectivity of the health professionals involved. It is conceivable that one health professional may quite reasonably classify certain medical treatment as ordinary health care services whilst another could justifiably argue that the same treatment

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In *Soobramoney* fn 79 *supra* Combrinck J observed: "Where there is a conflict such as this, the Court would normally weigh up the interests of the respective parties and based on equity decide which party's right should take precedence over the other. Insofar as the present case is concerned however, I am of the view that it is not the function of the Court to decide who shall and who shall not receive the required medical treatment. It is for the medical practitioners to make these decisions. They are qualified, whereas I am not, to decide on clinical grounds which patient will benefit the most from the treatment. The Court will only interfere if the doctors involved have exercised their judgment unreasonably, arbitrarily or have discriminated against a patient. In this regard I am in complete accord with the remarks of Balcombe LJ in the case of *Re J (a minor)* (wardship: medical treatment) a judgment of the Court of Appeal reported in [1992] 4 All ER 614 at 625g: 'I would also stress the absolute undesirability of the court making an order which may have the effect of compelling a doctor or health authority to make available scarce resources (both human and material) to a particular child, without knowing whether or not there are other patients to whom those resources might more advantageously be devoted. Lord Donaldson MR has set out in his reasons the condition of J and his very limited future prospects. The effect of the order of Waite J, had it not been immediately stayed by this court might have been to require the health authority to put J on a ventilator in an intensive care unit, and thereby possibly to deny the benefit of those limited resources to a child who is much more likely than J to benefit from them.'"

constitutes emergency medical treatment. The reason for this is that there is usually an element of subjectivity in any expert opinion whether of a legal or medical or other technical nature. As stated previously, attempts to define the term ‘emergency medical treatment’ in legislation, are constitutionally problematic because the Constitution itself does not define the term. There is also a practical difficulty which runs alongside the legal one. Attempts at definition of this kind of term are complicated by the fact that a definition is a generic description of a concept based upon an appreciation of most, if not all of the foreseen or anticipated variations that can occur within such a concept whilst emergency situations are often difficult to foresee or anticipate (adjectives such as ‘sudden’ and ‘unexpected’ are often used in relation to the word ‘emergency’¹³⁴) and the number of possible permutations is considerable and unpredictable. What constitutes an emergency with regard to one set of facts may not constitute an emergency in respect of another. A case in point is that of a person stung by a bee. The bee sting itself may or may not be an emergency depending on whether or not the person stung is allergic to bee stings. An allergy to bee stings can be life threatening for a person who is allergic since he or she may suffer from anaphylactic shock brought on by the venom but such a sting would be a completely minor event for someone who is not allergic.

The question is where does emergency medical treatment begin and end. From the point of view of the provider patient relationship, this distinction may depend upon whether the relationship has a basis in contract or not. It may be that emergency medical treatment is not based upon the law of contract but other health services are. It could be argued that the rendering of emergency medical treatment is a public function - because in terms of the Constitution, no-one may be refused emergency medical treatment - whereas the rendering of other health services may or may not be a public function depending upon whether it is a public or private provider that is rendering the services. This point will be explored in more detail in the section on the private sector. In practical terms one must ask for example, whether the emergency

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In *Soobramoney* (fn 37 *supra*) the court noted with regard to the experience of the patient in *Paschim Banga Khet Mazdoor Samity and Others v State of West Bengal and Another* that “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 stabilise his condition.” See for example also *Samson v Winn* 1977 (1) SA 761 (C) in which the court held: “This is, to my mind, almost a classical case of a sudden or unexpected emergency, and the conduct of the defendant must be judged according to the standards of a reasonable man placed in similar circumstances” and *Epol (Pty) Ltd v Bezuidenhout* 1980 (3) SA 624 (T) where the court observed that: “He drove a vehicle in such a manner so as to place the said Moloi in a position of imminent danger and thereby caused the said Moloi to be faced with a sudden and unexpected emergency.”

transportation of a patient to the nearest facility constitute emergency medical treatment (a) if it is not in an ambulance and (b) if it is? When a patient has been attended to within a hospital's trauma unit and is then transferred to the intensive care unit, does the treatment in intensive care remain emergency medical treatment or does it become a critical health care service? As stated previously, questions such as these are important because of the constitutional distinction between emergency medical treatment and health services of a more general nature. The obligations of the provider to the patient may be different depending upon whether or not it is emergency medical treatment. Whilst a provider may in certain circumstances have no option but to refuse a patient emergency medical treatment, the provider may be obliged to refer the patient to another provider who can. The same is not necessarily true in the case of ordinary health services.

In *Soobramoney* the question was whether the required treatment constituted emergency medical treatment at all. The courts have not yet addressed the question of when medical treatment ceases to be emergency medical treatment for purposes of the Constitution. In practical terms it is likely that this question will have to be resolved on a case-by-case basis. However, for operational and financial reasons, there is a need for health legislation to define the nature of emergency medical care or emergency medical services.

The draft regulations¹³⁵ to the KwaZulu-Natal Health Act define "emergency medical care" as "the on-site evaluation, treatment and care of an ill or injured public health care user by an emergency care practitioner in an emergency medical incident and the continuation of evaluation, treatment and care of the public health care user during the transportation of the public health care user to or between public health care establishments". What is meant by "on-site" is not clear. Does it include the treatment of the user in a trauma unit by a medical practitioner who specialises in emergency medical treatment or does it mean only treatment by a paramedic at the site where a person first succumbs to the illness or sustains the injury or does it include both?

¹³⁵ Notice No 23 of 2002 in Gazette No 6120 of 15 August 2002 (published for public comment)

The Free State regulations¹³⁶ define “emergency medical care” as “the evaluation, treatment and care of an ill or injured person in an emergency care situation and the continuation of treatment and care during the transportation of such person to or between medical facilities. The care begins at the site where the emergency occurred, until the patient is discharged/transferred out of an emergency care facility.” These regulations are for the purpose of controlling and regulating the delivery of emergency medical services in the Free State rather than fleshing out the rights of users to emergency medical treatment. However they at least specify when the emergency situation ends – i.e. when a person is transferred out of the emergency care facility.

The Gauteng Ambulance Services Bill¹³⁷ defines “emergency medical care” as “the rescue, evaluation, treatment and care of an ill or injured person in an emergency care situation and the continuation of treatment and care during the transportation of such patients to or between medical facilities in order to prevent loss of life aggravation of illness or injury.” This definition envisages only rescue and evacuation type situations as opposed to treatment once the patient has reached an emergency care facility but then the Bill is primarily concerned with ambulance services as opposed to health services of a broader nature.

A finding of a contractual relationship between a patient and a provider in an emergency situation is likely to be fairly synthetic given the nature of the circumstances in which emergency medical treatment is usually required. The patient is sometimes not even conscious and even if he is, he is usually in no fit state to formulate an intention to contract. The constitutional right to life and the constitutional prohibition on the refusal of emergency medical treatment are consistent. The basis of the relationship is more likely to be in constitutional law than in the law of contract as far as emergency medical treatment is concerned. The fact

¹³⁶ Provincial Notice No. 65 of 2003 ‘Regulations Governing Emergency Medical Services In The Free State Province’, Provincial Gazette No 22 of 28 March 2003. The regulations define: “Emergency Medical Care Incident” as “an event threatening or causing acute injury and/or illness, which requires immediate preventative and/or remedial medical intervention” and “Emergency Medical Service” as “a private or state organization operating on a twenty-four hour basis, which is solely dedicated, staffed and equipped to offer:

- (i) pre-hospital medical treatment and the transport of the ill and/or injured;
- (ii) inter-hospital emergency medical treatment and transport of referred patients;
- (iii) where appropriate, the medical rescue of patients from a medical rescue situation detrimental to the health of an individual or community”

¹³⁷ Gauteng Ambulance Services Bill Notice No 2229 in Provincial Gazette No 124 of 08 May 2002

that payment may be required of a person who has received emergency medical treatment does not necessarily render the relationship contractual. South African law recognises a number of possibilities for the recovery of expenses or fees such as actions on the basis of unjust enrichment or *negotiorum gestio*¹³⁸ where a person has acted for the benefit of another at his own expense. The relationship of in the case of *negotiorum gestio* has been described as quasi-contractual¹³⁹.

It is submitted that the constitutional stipulation that no one may be refused emergency medical treatment is not confined to the public health sector. It applies to the private health sector as well. A private provider may charge for services with respect to emergency medical treatment but this does not detract from the fact that such treatment may not be refused. In such circumstances, the constitutional basis of any contract that may arise between the provider and the patient for such services is

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In *Maritime Motors (Pty) Ltd v Von Steiger And Another* 2001 (2) SA 584 (SE) the concept of *negotiorum gestio* was explained by Janser J as follows: "It appears from the same work that the term *negotiorum gestor* was originally used to describe the person who acts on behalf of another and solely for the latter's benefit in circumstances of urgency, knowing that he had no such authority to act. There was and could be no question of any relationship arising between the parties by consent. It was further emphasised by the learned authors that the *negotiorum gestor* plays a constantly shrinking role in the world of ever-improving communications because it is quite clear that an unauthorised person should not interfere in another's affairs if it is possible to get in touch with that other. In *Standard Bank Financial Services v Taylam* 1979 (2) SA 383 (C) at 387 in fin - 388C Van Zijl JP set out the law in regard to *negotiorum gestorum* as follows: 'Our law in regard to *negotiorum gestorum* is based firmly, with but minor divergencies, upon the Roman law. In Roman law the payment of the debt of another without a mandate to do so gives rise to the *actio negotiorum gestorum contraria* and the *gestor* could recover the amount of such payment together with the interest thereon unless the debtor had some interest in the payment not being made. (See *Digest* 3.5.43 and 22.1.37.) This quasi-contractual relationship was brought about where the *gestor*, acting without a mandate, rendered a service to the *dominus* - in this instance the debtor - and in doing so acted reasonably and in the interest of the *dominus* with the intention not only of administering the affairs of the *dominus* but also of being compensated for such administration. This action fell away if the *gestor* did not intend to serve the *dominus*, i.e. the *gestor* mistakenly thought he was administering his own affairs or made payment of a debt *sui lucri causa*. There is a basic difference between the *gestores* in these two instances. In the first the *gestor* acted *bona fide*, but in the mistaken belief that he was serving the *dominus*. In the latter instance he acted *mala fide* in his own interest. These two classes of *gestor* can be described respectively as the *bona fide gestor* and the *mala fide gestor*. Neither of them could sue as *negotiorum gestor* as neither had the intention to serve the *dominus*. If, however, the *dominus* had been enriched at their expense they were each given the right to recover from the *dominus* on the grounds of unjust enrichment.' The distinction between *negotiorum gestio* and unjust enrichment was explored by the court in *Couws v Jester Pools (Pty) Ltd* 1968 (3) SA 563 (T) where it noted that "Rubin, *Unauthorised Administration in South Africa*, pp. 72 - 73, also emphasises the distinction between the true action based on *negotiorum gestio* and an action based on enrichment: 'There can be little doubt that in most cases a *negotiorum gestio* results in actual enrichment of the *dominus*. The destruction of the beneficial service rendered by the *gestor* before the *dominus* could enjoy it may safely be regarded as a rare occurrence. It is clear, also, that in some cases the same result would be achieved whether the person rendering the service claimed as a *gestor* or relied on the principle of unjust enrichment; furthermore, that in such cases, the latter course must be recommended because the intention of the plaintiff would be irrelevant, and to that extent the proceedings would be simplified. It must be borne in mind, however, that in the one case the claim is for all the useful and necessary expenses incurred; in the other, it is based upon an entirely different criterion, namely, the extent to which the *dominus* has been enriched. In the first case the question is whether they are expenses which the *dominus* would, himself, have incurred, whether the amount thereof represents his actual enrichment or not; in the second case all considerations other than the actual enrichment of the *dominus* fall away. It follows, therefore, that there are circumstances in which a plaintiff who, able to base his claim on *negotiorum gestio*, nevertheless chose to rely on the principle of unjust enrichment, would, thereby, deprive himself of the right to recover part of the amount which he had expended in the course of the *gestio*. In fact, such a plaintiff would be ill advised to base his claim on the principle of unjust enrichment, unless he had first satisfied himself that he would be entitled to recover no less on that basis than on the basis of *negotiorum gestio*.' See also *Absa Bank Ltd T/A Bankfin v Stander T/A Caw Paneelkloppers* 1998 (1) SA 939 (C) at p944 where van Zyl J observed: "Hence the basic prerequisite for an action arising from *negotiorum gestio*, namely the intention to manage the affairs of another (*animus negotia aliena gerendi*), was absent. I have dealt fully with this prerequisite in my study on *Negotiorum Gestio in South African Law* (1985) at 31-40, where the relevant authorities are set forth."

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Standard Bank Financial Services Ltd v Taylam (Pty) Ltd 1979 (2) SA 383 (C)

very much apparent. It is submitted that the private provider does not have a choice as to whether or not to render emergency medical treatment. There may be objectively ascertainable circumstances in which such provider is unable to render the required services, for instance because of lack of capacity due to the demands of other patients in a similar situation, or because the technology required to perform certain procedures is unavailable etc but these are objective circumstances that exist irrespective of the inclination, or lack thereof, of the provider to render the emergency medical treatment. If the relationship between a provider of emergency medical services and a person requiring them is contractual, then, it is submitted, it is a contract mandated by the Constitution. The usual rules of freedom to contract do not apply in the sense of that the provider has the power to choose with whom to contract.

4.6 Damages

The damages payable for breach of contract, unlike those in respect of a delict, are usually calculated to place the plaintiff in the position in which he or she would have been but for the breach. A plaintiff who wishes to claim damages must prove –

- (a) Breach of contract committed by the other contractant;
- (b) Damage;
- (c) A factual causal connection between the breach and the damage;
- (d) That for the purposes of the law the damage is close enough to the breach in that it was reasonably foreseeable or agreed to by the contractants.¹⁴⁰

There are clearly many areas of commonality between the factors listed above and those required to succeed in a claim in delict.

Christie¹⁴¹ notes that any the investigation of damages for breach of contract must logically start with an inquiry into whether the damages were caused by breach. It so happens, he says, that this inquiry has engaged the courts more frequently in the law of delict than in the law of contract but in both types of case the inquiry is basically the same and Corbett CJ's restatement of the relevant principles in *International*

¹⁴⁰ Van der Merwe, Van Huyssteen, Reinecke, Lubbe Lotz fn 23 *supra* p296

¹⁴¹ Christie fn 2 *supra* at p629

*Shipping Co (Pty) Ltd v Bentley*¹⁴² is as authoritative in contract as in delict. Christie points out that these principles call for a two-stage inquiry first into factual causation and then into legal causation. To establish factual causation it must be shown that the breach was the *causa sine qua non* of the loss. This is the same test that is most often applied to establish factual causation in delict and is discussed in more detail in the chapter on the law of delict¹⁴³.

A contractant who claims damages must prove that he actually suffered damage or loss as a result of the breach of contract. South African courts are not prepared to award nominal damages where actual damage cannot be proven.¹⁴⁴ In the health care context, the harm suffered in respect breach of contract is in effect very similar to that in terms of the law of delict given the nature of the services that are rendered. There is often pain and suffering, loss of amenities of life, loss of expectation of life and disfigurement as well as patrimonial loss. The law of contract, however, only

¹⁴² *Bentley* 1990 (1) SA 680 (A) 700E-701A

¹⁴³ See also Kerr, fn 21 *supra* 648, who states that normally a number of factors, each of which is a *conditio sine qua non*, contribute to bringing about the loss. He quotes the dicta of Corbett CJ in *Bentley* (fn 131 *supra*) to which Christie also refers. At 700E of the judgment Corbett CJ stated: As has previously been pointed out by this Court, in the law of delict causation involves two distinct enquiries. The first is a factual one and relates to the question as to whether the defendant's wrongful act was a cause of the plaintiff's loss. This has been referred to as 'factual causation'. The enquiry as to factual causation is generally conducted by applying the so-called 'but-for' test, which is designed to determine whether a postulated cause can be identified as a *causa sine qua non* of the loss in question. In order to apply this test one must make a hypothetical enquiry as to what probably would have happened but for the wrongful conduct of the defendant. This enquiry may involve the mental elimination of the wrongful conduct and the substitution of a hypothetical course of lawful conduct and the posing of the question as to whether upon such an hypothesis plaintiff's loss would have ensued or not. If it would in any event have ensued, then the wrongful conduct was not a cause of the plaintiff's loss; *aliter*, if it would not so have ensued. If the wrongful act is shown in this way not to be a *causa sine qua non* of the loss suffered, then no legal liability can arise. On the other hand, demonstration that the wrongful act was a *causa sine qua non* of the loss does not necessarily result in legal liability. The second enquiry then arises, viz whether the wrongful act is linked sufficiently closely or directly to the loss for legal liability to ensue or whether, as it is said, the loss is too remote. This is basically a juridical problem in the solution of which considerations of policy may play a part. This is sometimes called 'legal causation'. (See generally *Minister of Police v Skosana* 1977 (1) SA 31 (A) at 34E - 35A, 43E - 44B; *Standard Bank of South Africa Ltd v Coetsee* 1981 (1) SA 1131 (A) at 1138H - 1139C; *S v Daniels en 'n Ander* 1983 (3) SA 275 (A) at 331B - 332A; *J Siman & Co (Pty) Ltd v Barclays National Bank Ltd* 1984 (2) SA 888 (A) at 914F - 915H; *S v Mokgethi en Anders*, [1990 (1) SA 32 (A)] a recent and hitherto unreported judgment of this Court, at pp 18 - 24.) Fleming JG *The Law of Torts* 7th ed at 173 sums up this second enquiry as follows: 'The second problem involves the question whether, or to what extent, the defendant should have to answer for the consequences which his conduct has actually helped to produce. As a matter of practical politics, some limitation must be placed upon legal responsibility, because the consequences of an act theoretically stretch into infinity. There must be a reasonable connection between the harm threatened and the harm done. This inquiry, unlike the first, presents a much larger area of choice in which legal policy and accepted value judgments must be the final arbiter of what balance to strike between the claim to full reparation for the loss suffered by an innocent victim of another's culpable conduct and the excessive burden that would be imposed on human activity if a wrongdoer were held to answer for all the consequences of his default.' In *Mokgethi's* case *supra*, Van Heerden JA referred to the various criteria stated in judicial decisions and legal literature for the determination of legal causation, such as the absence of a *novus actus interveniens*, proximate cause, direct cause, foreseeability and sufficient causation ('adekwate veroorsaking'). He concluded, however, as follows: 'Wat die onderskeie kriteria betref, kom dit my ook nie voor dat hulle veel meer eksak is as 'n maatstaf (die soepele maatstaf) waarvolgens aan die hand van beleidsoorwegings beoordeel word of 'n genoegsame noue verband tussen handeling en gevolg bestaan nie. Daarmee gee ek nie te kenne nie dat een of selfs meer van die kriteria nie by die toepassing van die soepele maatstaf op 'n bepaalde soort feitekompleks subsidiêr nuttig aangewend kan word nie; maar slegs dat geen van die kriteria by alle soorte feitekomplekse, en vir die doeleindes van die koppeling van enige vorm van regs aanspreeklikheid, as 'n meer konkrete afgrensingsmaatstaf gebruik kan word nie.'

It must further be borne in mind that the delictual wrong of negligent misstatement is relatively novel in our law and that in the case which in effect brought it into the world, *Administrateur, Natal v Trust Bank van Afrika Bpk* 1979 (3) SA 824 (A), Rumpff CJ emphasised, with reference to the fear of the so-called 'limitless liability', that this new cause of action could be kept within reasonable bounds by giving proper attention to, *inter alia*, the problem of causation (see at 833B).

¹⁴⁴ 7 LAWSA 'Damages para 12 and Van der Merwe *et al* fn 21 *supra*



recognises patrimonial damages. In *Edouard v Administrator, Natal*¹⁴⁵ the court observed that it may be that the needs of modern society require that damages should be recoverable on contract for non-pecuniary loss for injured feelings, pain and suffering etc but that if there is a need to extend the rules of our law relating to the recoverability of non-pecuniary loss flowing from breach of contract, such need best be accommodated in the law of delict where the concepts of wrongfulness and fault (in the form of *culpa* and *dolus*) and the defences germane to delict can be used to define the limits of the relief. This reluctance of the courts to depart from the compartmentalisation of law at the expense of justice is unfortunate. The courts use the same considerations to limit liability for damages in contract as they do in the law of delict. To say then, that such forms of damages are best confined to delictual claims is illogical and irrational. Public policy considerations play as strong a role in the law of contract as they do in the law of delict when questions of the limitation of damages arise. The consequences 'wrong' that is done to the plaintiff upon breach of contract in the health care context is no different in effect to that same wrong when couched in delictual terms. The pain and suffering is the same, the loss of expectation of life etc are all the same irrespective of the nature of the cause – i.e. breach of contract or breach of a duty in delict. The failure of the courts to appreciate the difference between contracts for the supply of health care services and those for the supply of other services leads to decisions in this specific context that are difficult to justify on rational grounds and without the use of legal sophistries such as the need to define the limits of relief. Legal causation is used to avoid awards of damages based on causes that are too remote. Christie points out that damages for breach of certain types of contract, such as sales, leases and contracts of employment are frequently assessed according to principles that have been evolved to meet the special requirements of those contracts¹⁴⁶. It is a great pity that they show no inclination to do the same in respect of contracts for health services when there are so many policy reasons for doing so notably that health services are increasingly being regarded as a public rather than a private good, that they are the subject of constitutional rights and that the provider patient relationship is and should remain, fiduciary in nature despite the fact that health professionals in this country seem to have lost sight of this fact

¹⁴⁵ *Edouard* 1989 (2) SA 368 (D)

¹⁴⁶ *Christie* fn 2 *supra* at p 630

some time ago¹⁴⁷. It is submitted that these factors present powerful arguments for regarding contracts for health services differently to those for other goods and services.

The courts' refusal in South Africa to award non-pecuniary damages for breach of contract on the ground that such claims should be restricted to the law of delict starts to encounter logical difficulties when one enters the realm of damages for mental distress or psychological harm, as opposed to physical harm, for breach of contract unless one asserts, as did the court in *Clinton-Parker v Administrator, Transvaal Dawkins v Administrator, Transvaal*¹⁴⁸ that the mind and the body do not exist in two separate dimensions but that both exist in the physical dimension and that the nervous system is just as much a part of the body as any other physical structure. Even this argument does not help to justify the failure to recognise the possibility of damages for non-pecuniary loss in the law of contract – especially in the context of contracts for health care services. Pain and suffering, like psychological harm, are experienced through the nervous system – a physical structure. The loss of amenities of life is experienced through the physical organism. There is no other way to experience the realities of the physical world including loss, pain and suffering, except via the physical structures of the body. Mental or psychological stress is accompanied by well-recognised and documented physical reactions and strains on the body.

¹⁴⁷ The fierce resistance by dispensing doctors in South Africa to the legislative introduction of a system of licensing of dispensing doctors and other health professionals who wish to dispense medicine in a series of litigation against the government is a case in point. Judge President Ngoepe, in the Transvaal Provincial Division, recently accused the doctors of using their patients as a human shield against the state to assist their attempts to circumvent the legislation. At the time of writing, the litigation is still ongoing. The licensing system is designed to ensure that health professionals are properly qualified to dispense medicine in a manner that is not prejudicial to patients. The dispensing doctors have a conflict of interest in the dispensing of medicine that has been internationally recognised *inter alia* by the World Health Organisation since in no other 'market' environment is it possible for a vendor to instruct a customer to purchase an item with such persuasive force and from such a position of power relative to the customer. The chances of a patient refusing to purchase medicine prescribed for him or her by a doctor are very low.

¹⁴⁸ *Clinton-Parker* 1996 (2) SA 37 (W). In that case at p54 the court stated that: "The Appellate Division in Bester's case [*Bester v Commercial Union Verzekeringmaatskappy van SA Bpk* 1973 (1) SA 769 (A)] made it clear that general principles of delict apply to cases where nervous shock or psychiatric damage are the consequence of a negligent act. The crucial question to be asked, according to Bester's case, is whether the consequence was in all the circumstances of a specific case reasonably foreseeable. Jonathan Burchell in *Principles of Delict* at 59 points out that the Courts 'here and in other countries have been cautious about extending liability for negligently caused nervous shock'. The learned author deals with developments in South African law in this regard. He reminds us that in the early cases in South Africa liability for negligently inflicted nervous shock was restricted by two factors, viz the nervous shock had to result in physical injury and the plaintiff must have feared for his or her own safety. Burchell states: 'The first of these restrictions was based on the outdated distinction between mind and matter and based on the view that injury to the physical body was the subject of Aquilian liability and that damage to the individual's nervous system on its own was not sufficient for such liability. The second factor was a way of limiting the scope of potential liability to someone who in fact ran the risk of being physically injured. 'With reference to Bester's case, Burchell correctly concludes that the above approach has now been regarded as too restrictive. He points out that Bester's case held that the brain and the nervous system is just as much part of the physical body as an arm or a leg. The learned author states at 60: 'The Appellate Division in this case looked at certain limiting factors. The nervous shock in order to give rise to a claim for damages under the Aquilian action must be substantial and not of short duration and such shock must be reasonably foreseeable before the defendant can be held liable for causing such injury.'"



Therefore to state that damages for loss of a 'physical' kind are recognised while damages that are not of a 'physical' kind are not is to make a specious distinction. Why should a plaintiff suing for breach of contract have to prove that one kind of loss, (non-pecuniary) was caused through the fault of the defendant whilst there is no similar restriction with regard to pecuniary loss? In the context of a breach of contract for health care services why should different legal standards apply to different types of damages flowing from the same series of events? The argument that non-pecuniary damages are best decided in terms of the law of delict because this is more likely to limit claims in damages for non-pecuniary loss is not valid if the observations of Christie referred to earlier with regard to *International Shipping Co (Pty) Ltd v Bentley* are correct. It is submitted that the problem with contract law in certain contexts is that it is essentially commerce based and commercially driven. In light of such a backdrop it is easy to see why damages for non-pecuniary loss do not form part of this area of the law. The law of contract when seen in this light is about business transactions between two or more parties in a situation that involves trade or a bargain of some sort. It is about the creation of wealth for the parties or the improvement in some way of their worldly estates and is therefore concerned with issues of patrimony. The world has changed subtly and in many ways, however, since this view of the law of contract was first conceived¹⁴⁹. We have public utilities such as

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In European contractual law, Article 9:501: Right to Damages provides that-

(1) The aggrieved party is entitled to damages for loss caused by the other party's non-performance which is not excused under Article 8:108.

(2) The loss for which damages are recoverable includes:

(a) non-pecuniary loss; and

(b) future loss which is reasonably likely to occur.

In terms of Article 9:502: General Measure of Damages -

The general measure of damages is such sum as will put the aggrieved party as nearly as possible into the position in which it would have been if the contract had been duly performed. Such damages cover the loss which the aggrieved party has suffered and the gain of which it has been deprived.

Whilst Article 9:503: Foreseeability provides that -

The non-performing party is liable only for loss which it foresaw or could reasonably have foreseen at the time of conclusion of the contract as a likely result of its non-performance, unless the non-performance was intentional or grossly negligent. <http://www.cisg.law.pace.edu/cisg/text/textef.html#a9501>. The increasing standardisation of commercial law due to globalisation is a trend which South African courts will not be able to ignore for much longer. In South Africa, in the health care context, health tourism is a growing industry and it is only a matter of time before a foreign national sues a South African health care institution for breach of a contract for health care services. Legal principles that are more prejudicial to the locals than their foreign counterparts are likely to be subjected to considerable criticism and review as globalisation continues. By way of example of the potential for an area of law to take on different contexts and purposes, in accordance with the changing needs of society one need look no further than the law of delict. It has been observed by Gallo P 'Punitive Damages in Italy?', that in ancient Roman Law the main function of tort law was punishment and deterrence. In the field of tortious liability Roman law was characterised by a plurality of remedies, such as *actio furti*, *rapina*, *injuria*, *damnum injuria datum* whose main function was punishment and deterrence rather than compensation. The wrongdoer was compelled to pay up to four times as much compensatory damages. The penalties were paid directly to the victim of the tort. Roman law also knew public penal action especially in the field of tortuous conduct against the state, the public order, the king's peace etc. Subsequently law started to develop and expanded its field of application to that of protection of the person, theft, robbery, injury to the person etc. In this way the main function of the penal law became punishment and deterrence while the main function of tort law became compensation. Gallo observes that in modern times civil lawyers usually say that the only function of tort law is compensation. Punishment and deterrence can only be achieved by means of penal law. Also in common law countries, he states, one can notice a similar evolution and a growing tendency to differentiate the main functions of tort law and

electricity supplies, public transport systems, telecommunication systems and postal systems that until recently were state run and owned and without which it was difficult if not impossible to conduct business, and water and sewerage systems

penal law. Having said this however it is important to note that in Anglo-American law, the function of punishment and deterrence has never been completely eliminated from the field of tort law. Gallo notes that in England, starting from the 13th century, statutes introduced private penalties and subsequently punitive damages were also contemplated by case law. More recently the House of Lords limited the applicability of exemplary damages to three situations:

- (1) Where the public administration deprives a citizen of his fundamental rights;
- (2) Whenever someone aims at obtaining enrichment as a consequence of his wrongful conduct;
- (3) When punitive damages are especially provided by statute.

He points out that punitive damages have greatly expanded their field of application in the United States and in the field of product liability. Gallo states that in Italy and more generally in Europe, there are no applications of private sanctions comparable to the American ones especially in the field of product liability but that starting from the eighties, Italian case law is showing a growing tendency to rediscover exemplary damages as a consequence of the expansion of tort law in the field of the protection of the person, his reputation, honour and privacy.

<http://www.ius.unifr.it/cardoza/Review/Torts/Gallo-1997/gallo.htm>

It is submitted that the significant point to note here is that rigid compartmentalisation of principles of common law into particular areas is not only artificial but can also lead to a situation in which a branch of the common law no longer meets the needs of the society it is supposed to serve and fails to fulfil its perceptions of justice. Such areas of law are likely to find themselves in danger of extinction (often by way of legislative intervention) when such a situation prevails. It is hardly insignificant that the South African Law Commission was called upon some time ago to consider the question of unconscionable contracts and that it lamented the unseemly demise of the *exceptio doli* from the common law in no uncertain terms.

In the Netherlands, the main source of the law of damages which governs personal injury cases is to be found in legislation, mainly the Dutch Civil Code. Articles 6:95-6:110 lay down specific provisions on damages. They provide rules in relation to the heads of loss and the method of assessment of the amount of damages to be awarded. Significantly the articles apply, in principle, whether the cause of action is in tort or for breach of contract. In accordance with articles 6:95 and 6:96, all pecuniary losses caused by a tort or breach of contract must be compensated, irrespective of whether such losses for instance arise from harm to the person, to goods or to other interests. The right to compensation for non-pecuniary damage is limited to certain categories. Article 6:95 states: "The damage which must be repaired pursuant to a legal obligation to make reparation consists of patrimonial damage and other harm, the latter to the extent that the law grants a right to reparation thereof". Dutch law provides a limited right to non-pecuniary damages in personal injury cases. Article 6:106 states: "(1) The victim has the right to an equitably determined reparation of harm other than patrimonial damage: (a) if the person liable had the intention to inflict such harm; (b) if the victim has suffered physical injury, injury to honour or reputation or if his person has been otherwise afflicted; (c) if the harm consists of injury to the memory of a deceased person inflicted upon the non-separated spouse, upon the registered partner or upon a blood relative up to the second degree, provided that the injury took place in a fashion which would have given the deceased, had he still been alive, the right to reparation of injury to honour or reputation. (2) The right to reparation in the preceding paragraph cannot be transferred or seized, unless agreed upon by contract or unless an action for such reparation has been instituted. For transfer by general title it is sufficient that the title-holder has notified the other party that he claims reparation." The phrase in paragraph 1(b) which refers to a person who has been otherwise afflicted ('of op andere wijze in zijn persoon is aangetast') is open to judicial interpretation, allowing for further development in this area. The amount of non-pecuniary damages is determined according to equity ('naar billijkheid'). Source: Lindenberg S D and Verburg R 'Personal Injury Compensation in the Netherlands'

<http://www.peopil.com/downloads/netherlands-web.doc>

In the United Kingdom Lord Bingham stated in *Watts v Morrow* [1991] 4 All ER 937 CA that: "A contract breaker is not in general liable for distress, frustration, anxiety, displeasure, vexation, tension or aggravation which his breach of contract may cause to the innocent party. This rule is not, I think, founded on the assumption that such reactions are not foreseeable, which they surely are or may be, but on considerations of policy. But the rule is not absolute..." Lord Bingham went on to note the exceptions to the 'mental distress' rule: "Where the very object of the contract is to provide pleasure, relaxation, peace of mind or freedom from molestation, damages will be awarded if the fruit of the contract is not provided or if the contrary result is procured instead." Palfreyman D notes that this exceptional category of cases is not the product of Victorian contract theory but the result of evolutionary developments in case law from the 1970s, and that in practice in real life in the lower courts non-pecuniary damages are regularly awarded on the basis that the defendant's breach of contract deprived the plaintiff of the very object of the contract, viz, pleasure, relaxation and peace of mind. <http://oxcheps.new.ox.ac.uk>

In *Farley v Skinner* [2001] 3 WLR 899 the House of Lords allowed an amount of £10 000 for non pecuniary damages for the diminished enjoyment of a property due to aircraft noise. The house that Mr Farley had bought was not far from a navigation beacon and the impact of aircraft noise on the property was marked. Mr Farley had specifically asked about aircraft noise and told the agent that he did not want a property on a flight path. He was a successful businessman who wanted to retire to the country. When he moved in to the property he discovered the noise problem but decided not to sell. He sued Mr Skinner for damages for non-pecuniary loss in the form of diminished enjoyment of the property. See also Lawlor Rochester of Glaholt and Associates 'Case Comment: Non-Pecuniary Damages for Breach of a Construction Contract [(1986) 13 C.L.R. 63]' and the Canadian cases of *Pilon v Peugeot Canada Ltd* (1980), 29 O.R. (2d) 711, 114 D.L.R. (3d) 378, 12 B.L.R. 227; *A.G. Ont. v Tiberius Productions Inc* (1984) 46 O.R. (2d) 152, 44 C.P.C. 14, 8 D.L.R.(4th) 479, 25 A.C.W.S. (2d) 163 (Ont. H. C.); *Vorvis v Ins. Corp of B.C.* (1984), 53 B.C.L.R. 63, 4 C.C.E.L. 237, 9 D.L.R.(4th) 43, 28 A.C.W.S. (2d) 111 (B.C. C. A.); *Fanstone v Fensom* (1979), 1 A.C.W.S. 59 (B.C.S.C.); *Edwards v Boulderwood Dev Co.* (1983), 1 C.L.R.73 (N.S.T.D.), reversed (1984), 64 N.S.R. (2d) 395, 9 C.L.R. 253, 30 C.C.L.T. 223, 34 R.P.R. 171, 143 A.P.R. 395, 21 A.C.W.S. (2d) 181 (N.S. C.A.) there discussed.

<http://www.glaholt.com/Articles/Non-Pecuniary.htm>



without which urban and suburban life would be intolerable.¹⁵⁰ At the risk of sounding repetitive, it must be acknowledged that access to health care services is now a constitutional right and therefore much more than just the subject matter of a commercial contract in the ordinary context of trade. The Constitution does not distinguish between the rights to bodily and psychological integrity. They are, if anything, interrelated and largely inseparable. A contract for health care services is by and large not concerned with the patrimony of the patient and any claim that a patient is patrimonially 'enriched' by health care services is likely to end up in tautologous and meaningless arguments to the effect that the extent to which he or she is enriched is measurable in terms the cost of those services. To put it another way, good health is not something to which a price tag can be readily attached. It is submitted that if public goods such as health services are to be dealt with in terms of the law of contract then the backdrop against which the law of contract has traditionally been considered and construed must take on a richer and more meaningful texture if it is to remain a credible and rational tool for the resolution of disputes in this area. Contracts can be useful vehicles for securing a wide variety of goods and services that have many different social values both for the individual consumer and for society as a collective. It is clear from the socio-economic rights reflected in the Bill of Rights that the interests of society in the access of individuals to some kinds of goods and services is much greater than in the case of others. It is to be hoped in future, at least with respect to contracts for health care services, that South African courts will use such considerations to justify a move away from the dicta in cases such as *Edouard v Administrator, Natal*¹⁵¹ in which the court observed with regard to *Jockie v Meyer*¹⁵² that this case was clear authority that, even where the loss flows from a breach of contract, damages are only recoverable for non-pecuniary loss suffered as a result of contumelia, if the pleadings allege and the evidence proves the essentials of the *actio*

¹⁵⁰ The Romans, it is true also had municipal water systems but it is doubtful that these were a central focus of their law of contract and in any event the legal system in South Africa is not Roman in origin but Roman-Dutch with a strong British flavour in some areas.

¹⁵¹ *Edouard* fn 145 *supra*

¹⁵² *Jockie* 1945 AD 354. See the discussion of this case in Christie (fn 2 *supra*) at p 633-634 where he notes that: "The non-patrimonial damages claimed in *Edouard* could have been refused without going so far as this, and the result is not a happy one as legislation is unlikely and would be difficult to draft. Our law will therefore remain incapable of awarding realistic damages against a party who is in breach of a contractual undertaking to provide convenience, comfort, entertainment or enjoyment unless the Supreme Court of Appeal can be persuaded to step out of the corner into which the Appellate Division painted itself." It is submitted that contracts for health care services are a case in point. Their objective is generally the alleviation of pain and suffering and loss of amenities. Where the actions or omissions of the provider effectively cause more of same it is difficult to see why damages for breach of contract should not be awarded. A rigid logic whose main aim seems to be to promote some notion of legal conceptual elegance and compartmentalisation of legal principles is cold comfort for the suffering patient.

injuriarum, i.e. the claim has to be laid in delict and more particularly under the *actio injuriarum* and that in South Africa law damages for injured feelings are not as a general rule recoverable in a claim on contract.

4.7 Statutory Considerations

The Consumer Affairs (Unfair Business Practices) Act¹⁵³ states that -

“‘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
- (e) unfairly affecting any consumer.”¹⁵⁴

It seems that the facts of the Afrox case fall squarely within the unfair business practice jurisdiction of the Consumer Affairs Act.

The Act provides for the establishment of a Consumer Affairs Committee whose functions are to-

- (a) from time to time make known information on current policy in relation to business practices in general and unfair business practices in particular, to serve as general guidelines for persons affected thereby;
- (b) receive and dispose of representations in relation to any matter with which it may deal in terms of the Act;
- (c) receive and dispose of particulars of the result of any investigation made by a competent authority in relation to any matter with which the committee may deal in terms of the Act;
- (d) may make such preliminary investigation as it may consider necessary into, or confer with any interested party in connection with, any unfair business practice which allegedly exists or may come into existence;

¹⁵³ Consumer Affairs Act No 71 of 1988

¹⁵⁴ In the Consumer Affairs 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 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;” The Act defines a consumer as follows-

“‘consumer’ means -

- (a) any natural person to whom any commodity is offered, supplied or made available;
- (b) any natural person from whom any investment is solicited or who supplies or makes available any investment;
- (c) any other person who the Minister with the concurrence of the committee declares to be a consumer by notice in the Gazette;
- (d) any person who is a consumer for the purposes of this Act in terms of any other law;”

- (e) perform any other function assigned to it by the Act.
- (f) if it chooses assign any preliminary investigation or investigation in terms of the Act to a competent authority.

Consumers are defined in the Free State legislation as natural persons to whom any commodity is offered, supplied or made available where that person does not intend to apply the commodity for the purposes of resale, lease, the provision of services or the manufacture of goods for gain, any natural person from whom is solicited or who supplies or makes available any investment and any other person whom the responsible Member of the Executive Council declares to be a consumer.

Consumer Affairs Courts exist in the various provinces¹⁵⁵. Their powers are extensive. Generally speaking, they have the power to hear, consider and make a decision on any matter before the court, award costs on a prescribed scale against any person found to have conducted the unfair business practice concerned and who is found to have acted fraudulently or grossly unreasonably. The Free State legislation makes provision for the appointment of a consumer protector to receive and investigate complaints of alleged harmful business practices. They can issue urgent temporary orders including attachment orders, prohibitory interdicts and authorising an investigating officer to take any action that may be necessary to prevent the unfair business practice in question. They can also make orders such as may be necessary to ensure the discontinuance or prevention of an unfair business practice and may direct the dissolution of any body or the severance of any connection or form of association between two or more persons or bodies. They can make orders relating to advertising, business schemes, practices or methods of trading, marketing and distribution and business interests. They can appoint curators *inter alia* to realize the assets of the person involved in an unfair business practice and distribute them among the consumers concerned.

¹⁵⁵

In terms of various provincial statutes. See the Consumer Affairs Act No. 14 of 1998 of the Free State; the Consumer Affairs (Unfair Business Practices) Act No. 8 of 1996 of Limpopo Province; Consumer Affairs (Harmful Business Practices) Amendment Act, 2003 (Act No. 2 of 2003) of Limpopo Province; Western Cape Consumer Affairs (Unfair Business Practices) Act, No 10 of 2002; Consumer Affairs Unfair Business Practice Act 5 of 1998 of the Eastern Cape; Consumer Affairs (Harmful Business Practices), Act 1996 (Act No. 4 of 1996) of the North West Province; the Gauteng Consumer Affairs (Unfair Business Practices) Act 7 of 1996; The Mpumalanga Consumer Affairs Act, 1998 (Act No. 6 of 1998); Northern Cape Consumer Affairs (Unfair Business Practices) Act, 1996 (Act No 7 of 1996)

It is of interest to note that in European Contract Law¹⁵⁶, Article 4:110 entitled 'Unfair Terms not Individually Negotiated' provides that -

- (1) A party may avoid a term which has not been individually negotiated if, contrary to the requirements of good faith and fair dealing, it causes a significant imbalance in the parties' rights and obligations arising under the contract to the detriment of that party, taking into account the nature of the performance to be rendered under the contract, all the other terms of the contract and the circumstances at the time the contract was concluded.
- (2) This Article does not apply to:
 - (a) a term which defines the main subject matter of the contract, provided the term is in plain and intelligible language; or to
 - (b) the adequacy in value of one party's obligations compared to the value of the obligations of the other party.

Perhaps one solution for patients wishing to claim in terms of the law of contract in respect of unsatisfactory contracts for health care services is to approach, not the ordinary courts which seem incapable of moving away from antiquated ideas about the 'market' for such services, but the Consumer Affairs Courts instead. They may be more likely to have an understanding of the need to protect consumers and of the nature and extent of the imbalances in bargaining power between consumers and suppliers that in reality pervade the health services sector.

4.8 Tacit Contracts

The courts appear to differ on the test to be used in order to determine the existence of an implied or tacit contract¹⁵⁷. The one test has been dubbed the "no other reasonable

¹⁵⁶ Principles Of European Contract Law Text of articles in English: Parts I and II (complete and revised version 1998)
<http://www.cisg.law.pace.edu/cisg/text/textef.html#9s5>

¹⁵⁷ The Appellate Division in *Joel Melamed and Hurwitz v Cleveland Estates (Pty) Ltd; Joel Melamed and Hurwitz v Vorner Investments (Pty) Ltd* 1984 (3) SA 155 (A) observed: "As to tacit contracts in general, in *Standard Bank of South Africa Ltd and Another v Ocean Commodities Inc and Others* 1983 (1) SA 276 (A) it was stated (at p 292B - C): "In order to establish a tacit contract it is necessary to show, by a preponderance of probabilities, unequivocal conduct which is capable of no other reasonable interpretation than that the parties intended to, and did in fact, contract on the terms alleged. It must be proved that there was in fact *consensus ad idem*. (See generally *Festus v Worcester Municipality* 1945 CPD 186 at p 192 - 3; *City of Cape Town v Abelsom's Estate* 1947 (3) SA 315 (C) at p 327 - 8; *Parsons v Langemann and Others* 1948 (4) SA 258 (C) at p 263; *Bremer Meulens (Edms) Bpk v Floros and Another*, a decision of this Court



interpretation test” and the other the “preponderance of probabilities test”.¹⁵⁸ Christie points out that on the face of it these two tests are irreconcilable and the courts are in some difficulty choosing which to employ. He suggests that it is not necessary to abandon each test entirely as it is possible to synthesise them into a test which incorporates the best of both and states that the best approach to a synthesis seems to be to recognise that in deciding whether a tacit contract or tacit term has been proved the court is undertaking an inquiry that involves three stages instead of the usual two. Christie states that the first stage is to decide on the preponderance of probabilities, what facts have been established. The second stage is to decide, also on a preponderance of probabilities, what conclusion consistent with those facts is most likely to be correct. However, when deciding whether a tacit contract has been proved a third stage must be interposed. This, says Christie, is to decide how the proved facts, i.e. the conduct of each party and the surrounding circumstances, must have been interpreted by the other¹⁵⁹. He continues to state that his analysis is no more than an explanation of the words ‘unequivocal conduct’ that are included in most if not all formulations of the no other reasonable interpretation test. The one party’s conduct must be unequivocal in the sense that the other party could have no reasonable doubt of his intention to contract but in deciding whether agreement is the proper inference to draw from such conduct the court, suggests Christie may be satisfied on the preponderance of probabilities. He restates his proposed synthesis of the two tests as follows:

reported only in Prentice Hall, 1966 (1) A36; *Blaikie-Johnstone v Holliman* 1971 (4) SA 108 (D) at p 119B - E; *Big Dutchman (South Africa) (Pty) Ltd v Barclays National Bank Ltd* 1979 (3) SA 267 (W) at p 281E - F; *Muhlmann v Muhlmann* 1981 (4) SA 632 (W) at p 635B - D.)”

This is the traditional statement of the principle, as is borne out by the cases cited; and it was accepted as being correct by appellants’ counsel. The correctness of this general formulation has nevertheless been questioned on the ground that it would appear to indicate a higher standard of proof than that of preponderance of probability as regards the drawing of inferences from proven facts (see Christie *The Law of Contract in South Africa* at p 58 - 61; cf also *Flat SA v Kolbe Motors* 1975 (2) SA 129 (O) at p 140; *Plum v Mazista Ltd* 1981 (3) SA 152 (A) at p 163 - 4; *Spes Bona Bank Ltd v Portals Water Treatment South Africa (Pty) Ltd* 1983 (1) SA 978 (A) at p 981A - D). In this connection it is stated that a court may hold that a tacit contract has been established where, by a process of inference, it concludes that the most plausible probable conclusion from all the relevant proved facts and circumstances is that a contract came into existence (see Plum’s case *supra* at p 163 - 4). It may be that in the light of this the principle as quoted above from *Standard Bank of SA Ltd v Ocean Commodities Inc (supra)* requires reformulation. In this regard, however, there is this point to be borne in mind. While it is perfectly true that in finding facts or making inferences of fact in a civil case the court may, by balancing probabilities, select a conclusion which seems to be the more natural or plausible one from several conceivable ones, even though that conclusion is not the only reasonable one, nevertheless it may be argued that the inference as to the conclusion of a tacit contract is partly, at any rate, a matter of law, involving questions of legal policy. It appears to be generally accepted that a term may not be tacitly imported into a contract unless the implication is a necessary one in the business sense to give efficacy to the contract (see *Van den Berg v Tenner* 1975 (2) SA 268 (A) at p 276H - 277B and the cases there cited). By analogy it could be said that a tacit contract should not be inferred unless there was proved unequivocal conduct capable of no other reasonable interpretation than that the parties intended to, and did in fact, contract on the terms alleged.

¹⁵⁸

Christie fn 2 p 93.

¹⁵⁹

Christie fn 2 *supra* p 94-95

“In order to establish a tacit contract it is necessary to prove, by the preponderance of probabilities, conduct and circumstances which are so unequivocal that the parties must have been satisfied beyond reasonable doubt that they were in agreement. If the court is satisfied on the preponderance of probabilities that the parties reached agreement in that manner it may find the tacit contract established.”¹⁶⁰

Christie’s proposed synthesis of the two tests has not met with universal approval.¹⁶¹

In *Edouard*¹⁶² the plaintiffs did not need to prove a tacit contract because the court *a quo* took the written consent form as being part of the contract. Furthermore the parties had in any event agreed in advance on the facts, including the existence of the contract between them, and the matters upon which the court should decide. The existence of a tacit contract between them was thus not one of them.

In the context of health care services many contracts are not in express terms either written or verbal. The patient presents at a health facility and is treated. In the case of a public-provider the patient undergoes a means test in order to establish into which financial category he or she falls and to determine what if any fee is payable as determined by the provincial government by way of fee regulations. The documentation may at most consist of a consent form but in some cases this is not even available as consent can be obtained verbally from the patient. If a contractual relationship is to be found to exist between the public provider and the patient it will often have to be inferred from the circumstances. It is therefore of importance to ascertain under what circumstances the courts are likely to infer a contract between the parties. In *Joel Melamed and Hurwitz v Cleveland Estates (Pty) Ltd; Joel Melamed and Hurwitz v Vornier Investments (Pty) Ltd*¹⁶³ Corbett JA noted that in the cases concerning tacit contracts which had previously come before the courts, there had always been at least two persons involved. He said that in order to decide whether

¹⁶⁰ Christie fn 2 *supra* p 96. The test proposed by Christie was apparently cited with approval in *Landmark Real Estate (Pty) Ltd v Brand* 1992 (3) SA 983 (W)

¹⁶¹ See *Muller v Pam Snyman Eiendomskonsultante (Pty) Ltd* 2001 (1) SA 313 (C) in which the court discussed the two tests and stated a preference for the ‘no other reasonable interpretation test’. Comrie J said: “It seems to me, with respect, that proof of the primary facts on a balance of probabilities is required by either test, and that the main difference between them lies in the strength of the inferences to be drawn from the facts so proven. As Corbett JA observed, that would at least in part be influenced by considerations of legal policy. My own preference, writing as a single Judge of first instance, is for the so-called traditional test, the only reasonable interpretation test, provided that the test is applied in a common sense and businesslike way. I respectfully disagree with the ‘synthesis’ solution proposed by Christie (loc cit). I fear that to borrow notions from the criminal law will tend to obfuscate rather than clarify the position. The idea of a compelling inference appeals to me: a compelling inference derived from proof on a balance of probabilities of unequivocal conduct usually in a business setting. Perhaps it is the word ‘plausible’ which disturbs me.”

¹⁶² *Edouard* fn 1 *supra*

¹⁶³ *Joel Melamed* see fn 157 *supra*

a tacit contract arose the courts have had regard to the conduct of both parties and the circumstances of the case generally and that the general approach was an objective one. He observed that the subjective views of one or other of the persons involved as to the effect of his actions would not normally be relevant. Corbett JA said that where there is only one person involved a tacit contract may be inferred from conduct and the general circumstances, but in such a case the court should carefully scrutinize the evidence in order to distinguish between statements of fact capable of objective assessment and subjective views as to the matter in issue.

4.9 Implied Terms

The doctrine of legitimate expectation is one that is traditionally regarded as applicable to public entities rather than private persons. Pretorius¹⁶⁴ notes that the twin pillars that buttress natural justice are statute and contract and that the statutory pillar of natural justice has been renovated and fortified as a result of the introduction of the legitimate expectation. He then asks whether this doctrine also reinforces the contractual pillar of natural justice in other words whether the doctrine of legitimate expectation finds application outside of the field of administrative law. This question will be explored in more detail in the section on the private sector later in this chapter with regard to private provider-patient relationships but it is also relevant to an exploration of the public provider –patient relationship and will be discussed here from this latter perspective.

It may seem strange at first to start a discussion of implied terms in contracts with an consideration of the administrative law doctrine of legitimate expectation but, as will be seen from what follows, and in support of the central theme of this thesis, the various branches of law are simply facets of a larger, internally consistent, whole. The relationship between administrative law and the law of contract in the context of health services delivery is an important one both from an underlying public policy perspective and because at least one of the parties to the contractual relationship presently under consideration cannot escape the dictates of administrative justice as enshrined in the Constitution. The question to be answered with regard to public provider-patient contracts must always be whether such contracts must be seen purely

¹⁶⁴ Pretorius D M "Letting the Unruly Horse Gallop In the Field of private Law: The Doctrine of Legitimate Expectation in 'Purely Contractual' Relations" 2001 *SALJ* 118 p 473

in the light of the law of contract or whether they must always be regarded against a backdrop of relevant administrative law principles? In other words can the approach to the public provider-patient relationship ever be based on just one legal 'layer' or will it always be multi-layered? This question is of considerable significance for courts of law in considering questions of claims for damages but it is equally relevant for legal practitioners drawing up the particulars of claim. Traditionally the plaintiff chooses the battleground¹⁶⁵, casting it as widely as possible so as to include all of the potential and legally viable bases for relief. Thus in the context of claims relating to health care services there is often the question of whether one proceeds on the basis of the law of contract or delict or whether one can use both. Very often the lines between them are not as distinct as they at first glance appear¹⁶⁶. In fact one of the more controversial decisions¹⁶⁷ of the Appellate Division in the field of the law of delict was apparently based upon a desire to preserve the increasing blurring of distinctions between the law of contract and the law of delict¹⁶⁸. Where the provider operates

¹⁶⁵ See for instance *Martin v Martin* 1997 (1) SA 491 (N) in which the court held: "And, in any event, if the respondent had a choice of remedies she was perfectly entitled to choose the one which she considered the more efficacious, regardless of any supposed advantages which the other may have had for the appellant."

¹⁶⁶ See *Friedman v Glicksman* 1996 (1) SA 1134 (W) and *Mukheiber v Raath And Another* 1999 (3) SA 1065 (SCA) in which the court observed: "In *Edouard Van Heerden JA* (at 590F), in dealing with the nature of the wrong complained of, indicated that the wrong consists of the prior breach of contract or delict which led to the birth of the child and the consequent financial loss. I consider this approach of the law to be correct. There can be but one test for wrongfulness, based as it is ultimately on considerations of public policy, and whether the claim is brought in contract or delict. It is well recognised today that a contract between a patient and a doctor imposes on the latter a duty to exercise due care and skill; but even in the absence of a contract between them there is a duty of care on the doctor (see the remarks in *Lillicrap, Wassenaar and Partners v Pilkington Brothers* (supra at 499A-1)). The duty of care in either case seems inevitably to be measurable by the same yardstick and I am of the view that the same policy considerations that underlie the *Edouard* judgment are applicable in the appeal now under consideration. These considerations do not stand in the way of allowing the Raath's action." See also for examples of alternative causes of action *Pinshaw v Nexus Securities (Pty) Ltd And Another* 2002 (2) SA 510 (C); *Rens v Coltman* 1996 (1) SA 452 (A); *Esterhuizen v Administrator, Transvaal* 1957 (3) SA 710 (T); *Van Der Walt Business Brokers (Pty) Ltd v Budget Kilometers CC And Another* 1999 (3) SA 1149 (W) A.

¹⁶⁷ *Boberg PQR The Law of Delict Vol I: Aquilian Liability* in his discussion of *Lillicrap* lists the many criticisms of the judgment in a footnote.

¹⁶⁸ In *Lillicrap, Wassenaar And Partners v Pilkington Brothers (Sa) (Pty) Ltd* 1985 (1) SA 475 (A) the court noted: "There is clear authority that in certain situations negligence in performing a contractual obligation may give rise to liability in both contract and delict. The case of the negligent surgeon is the clearest example. *Van Wyk v Lewis* 1924 AD 443 - 444. But this was a case of physical injury and of a duty which, while co-existent with the contractual duty, was not dependent on the existence of the contract. There is no general rule in our law (as there may be in England - see *Esso Petroleum Co Ltd v Mardon* [1976] 1 QB at 820) that a professional man's breach of his contractual duty, causing economic loss, is per se a delict. On the contrary, the weight of South African authority is against that approach. In the first place, there is the strong dictum in *Hamman v Moolman* 1968 (4) SA at 348E - G which indicates that it is unnecessary and undesirable to extend delictual liability for negligent statements where well-established contractual remedies exist. Cf the *Administrateur, Natal* case supra at 834F. The Cape Provincial Division has not followed this dictum: *Kern Trust (Edms) Bpk v Hurter* 1981 (3) SA at 607. But it has, correctly, been adopted in the Transvaal. *Latham v Sher* 1974 (4) SA at 695H - 696A; *Du Plessis v Semmelink* 1976 (2) SA at 503A - F. More particularly, where a professional man is negligent in carrying out his contractual duty (absent physical damage), there is much authority that only an action in contract lies. This was for many years accepted law in England. *Steljes v Ingram* [1903] 19 TLR 534 (architect); *Groom v Crocker* [1939] 1 KB 194 (solicitor). This view of the law survived the decision in *Hedley Byrne & Co Ltd v Heller & Partners Ltd* 1964 AC 465. See *Bagot v Stevens Scanlan & Co* [1966] 1 QB 197 (architect); *Clark v Kirby-Smith* 1964 Ch 506 (solicitor); *Cook v Swinfen* [1967] 1 WLR 457 (solicitor). However, tortious liability for negligent statements in England has now been extended holus-bolus into the field of contract. *Esso Petroleum Co Ltd v Mardon* [1976] 1 QB 801; *Midland Bank Trust Co v Hett, Stubbs & Kemp* 1979 Ch 384. Natal has followed suit - *Rampal (Pty) Ltd and Another v Brett, Wills & Partners* 1981 (4) SA at 365E - 366E. In the Transvaal, however, there is Full Bench authority that the action lies only in contract. *Bruce NO v Berman* 1963 (3) SA at 23F - H. See also *Honey & Blanckenberg v Law* 1966 (2) SA at 46; *Mouton v Die Mynwerkersunie* 1977 (1) SA at 142H. (In *Tonkwane Sawmill Co*

within the public sector, does this range of options become extended to include administrative and constitutional law? It is the nature of the parties that complicates matters when dealing with a private law relationship between two parties where at least one of them is an organ of state¹⁶⁹. Put another way, the question with regard to

Ltd v Filmalter 1975 (2) SA at 453 and in *Broderick Properties (Pty) Ltd v Rood* 1964 (2) SA at 310 this point was not raised.) For the reasons which follow, there is no reason of need, convenience or policy to extend the liability of a professional into the delictual field, and policy and convenience in fact point the other way. See also Van der Walt (op cit at 8 para 5); McKerron (1973) 90 SALJ at p 1. The recognition of a duty of care (during the period of their contractual relationship) in the terms alleged by the respondent would impose upon the appellant no substantive obligation which it did not owe to the respondent under the contract between them. The two sets of obligations, as has been seen, would be co-extensive. This would constitute an invasion by the law of delict of an area which is already fully and satisfactorily occupied by other legal rules. There is no ground of legal policy which calls for or justifies such an invasion. *Herschel v Mrupe* (supra at p 478C). *Hamman v Moolman* 1968 (4) SA at 348E. If liability in delict were allowed in principle in such a situation, the distinction between contract and delict would be unnecessarily undermined where the delictual duty of care arises exclusively by virtue of the contractual relationship between the parties (as was the position here) and is precisely co-extensive with the contractual duty. Further, for the reasons given below, the type of damages sought by the respondent are appropriate only to a contractual claim and are alien to our principles of delictual liability. It is wrong in principle to allow a contracting party, whose rights and obligations have been determined by his agreement and that of the other contracting party, to circumvent the consensual definition of the parties' rights and obligations by proceeding in delict. This is particularly so in the present case where the appellant's contractual duties have been set out in detail in the agreement. In such a situation it is implicit that the parties intended the contractual definition of their rights and obligations to be exclusive of any other liabilities. See W J Hosten 'Concursus Actionum of Keuse van Aksies' 1960 THRHR at 267 - 269. *Bagot v Stevens, Scanlan & Co* [1966] 1 QB 197. Justice and practical convenience do not call for the additional remedy. In some cases it is resorted to because of more favourable prescription provisions. But this is not in law or policy a good ground for granting a remedy in delict where a contractual remedy was previously available. The ruling that the various contractual considerations and in particular the question of a frustration of the contract by allowing a claim in delict are matters for pleading, not exception, is incorrect: they are matters of policy and therefore relevant to the existence of the duty of care. Other authorities which caution against an undue extension of delictual liability grounded on negligence into an area covered by contract are *Alliance Building Society v Deretich* 1941 TPD at 206; *Atkinson Oates Motors Ltd v Trust Bank of Africa Ltd* 1977 (3) SA at 198. See also the Canadian cases of *J Nunes Diamonds Ltd v Dominion Electric Protection Co* (1972) 26 DLR (3d) (Canadian Sup Ct) at 727 - 8. (Cf 723); *Sealand of the Pacific v Robert McHaffie Ltd* 1974) 51 DLR (3d) 792 (British Columbia CA). The Judge *a quo* incorrectly held that the minority judgment of SPENCE J in the *J Nunes Diamonds* case accords with the overwhelming weight of authority in our law: it is rather the majority judgment of Pigeon J which accords with the weight of South African authority and in particular the approach to the question of extending delictual liability in the cases cited above. For the same reason the minority judgment of Wilson JA in *Dominion Chain Co Ltd v Eastern Construction Co Ltd* (1976) 68 DLR (3d) at 394 and 395 is preferable to that of the majority."

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Viljoen JA observed in *East London Western Districts Farmers' Association And Others v Minister Of Education And Development Aid And Others* 1989 (2) SA 63 (A): "The state may, of course, in appropriate circumstances, also be a party to a private law dispute pertaining to contract or delict, or one governed by s 1 of Act 20 of 1957, but in my view the present is not such a case. It is purely a matter of administrative law. In this respect Wiechers *Administrative Law* (2nd ed) deals at 306 H (see at 345 - 6 of the Afrikaans second edition of *Administratiefreg*) with the relationship between State and private liability as follows: 'Many of the problems arising in the determination of the ambit of state liability for administrative acts may be ascribed to the fact that private law is regarded as the basis for such liability. If, on the other hand, it is accepted that the relationship of State liability is an administrative law relationship which is governed by the rules of administrative law, the application of private law within this relationship acquires due significance. According to this approach the relationship of State liability is an unequal relationship insofar as the state is able to regulate its own liability, primarily in accordance with private law, but sometimes in a manner peculiar to administrative law. Because the relationship within which the aggrieved individual and the administrative organ find themselves is in many aspects analogous to the private law relationship of obligation, it is understandable that the rules of private law are particularly suited to the governing of this relationship. However, the application of private law should not obscure the fact that the relationship of state liability is one of inequality.' He proceeds to enumerate the differences between the relationship of state and private liability, among which the following two are, in my view, apposite: '1. In the private law relationship of obligation private law interests and powers are weighed up against one another while in the state liability relationship powers of Government and the general interest on the one hand, and the general interest and private interests and rights on the other, are weighed up against one another. The determination of the nature and scope of Government, or more specifically, administrative powers, is primarily a question of administrative law...3. In the state's relationship of liability the state may unilaterally determine the content and ambit of its own liability, but in the private law relationship one party cannot determine its own powers and duties without the other's consent, whether express or tacit.' Our law seems to be well settled insofar as statutory authority conferred on lower-tiered public bodies is concerned. This is so both as regards the onus to be discharged as well as the substantive law. The principles applicable are set out, *inter alia*, in the case of *Johannesburg Municipality v African Realty Trust Ltd* 1927 AD 163, the headnote of which reads: 'Where the exercise of statutory powers is alleged to have resulted in an injury to another the enquiry in each instance is whether an interference with private rights is justified. If it is not there is an end to the matter. If it is then the exercise of the statutory power is limited by another consideration, namely that it must be carried out without negligence - *Geddes v Ban Reservoir* 3 AC 430; *Tobiansky's case* (1907 TS 134); *New Heriot Mining Co v Union Government* 1916 AD 421 applied. If the nature of the work authorised is such that it may or may not interfere with private rights according to circumstances then the person entrusted with statutory authority is entitled to show that under the circumstances of the case it is impossible to carry out the work without such interference in which case an

public provider-patient relationships in the contractual setting is whether the state can ever escape its nature and, like the prince in the fairy-tale, assume the role of a pauper so as to be able to contract on an equal footing with the patient. If the answer to this question is in the negative¹⁷⁰, then the further question arises as to the applicability of the doctrine of legitimate expectation to the contractual relationship between the public provider and the patient. As indeed the question also arises as to whether there would be certain terms implied by law within this contractual relationship that are grounded in administrative law. The question of the applicability of the doctrine of legitimate expectation in a contractual context is not on quite the same footing as other terms implied in the contract on the basis of administrative law because a legitimate expectation, in the context of administrative law stands outside of the concept of a right conferred by law. In administrative law, a legitimate expectation is an interest as opposed to a right¹⁷¹. The objection to the importation of a legitimate expectation into a contract as an implied or tacit term is that it would confer upon it

inference that an infringement of private rights was sanctioned would be justified. For otherwise the grant of statutory authority would be nugatory. As to what amounts to negligence in such circumstances, if by a reasonable exercise of the powers given by statute or common law the damage could be prevented, it is negligence not to make such reasonable exercise of such powers.' At 172 Innes CJ distinguishes between directory and permissive powers conferred upon a local authority as follows: 'Where express provision is made on the point there is no difficulty: and even where the contemplation of the Legislature is not expressed it may be very clearly implied. If, for instance, the statutory powers are directory, then their exercise in the manner authorised cannot create liability at the suit of an injured party. For the doing of what the Legislature has ordered in the way which it has indicated cannot found an action at the instance of a person prejudiced thereby. The implication is clear that the lawgiver intended to legalise an infringement of his rights. (*Metropolitan Asylum Dist v Hill* 6 AC at 203.) Cases where the statutory powers are permissive and not directory present greater difficulty. But the test is the same - can an intention to interfere with the common law rights of others be implied? Certain general considerations may be useful, but are not necessarily decisive.'"

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This question of the distinction between private law and public law relationships, which is in essence what is under discussion here, ties in to an even more complex and yet relevant constitutional debate concerning the vertical as opposed to horizontal application of the rights in the Bill of Rights in the Constitution. There are four basic permutations that are relevant within this chapter dealing with the relationships between provider and patient. They are as follows: public entity vs private entity under public law; public entity vs private entity under private law; private entity vs private entity under public law and private entity vs private entity under private law. The validity of the distinctions between public and private law lie at the heart of the debate. In *Du Plessis And Others v De Klark And Another* 1996 (3) SA 850 (CC) Krieger J observed as follows in this regard: "My reading of chapter 3 gives to the Constitution a simple integrity. It says what it means and means what it says. There is no room for the subtleties and nice distinction so dear to the hearts of medieval theologians and modern constitutional lawyers. The Constitution promises an 'open and democratic society based on freedom and equality', a radical break with the 'untold suffering and injustice' of the past. It then lists and judicially safeguards the fundamental rights and freedoms necessary to render those benefits attainable by all. No one familiar with the stark reality of South Africa and the power relationships in its society can believe that protection of the individual only against the State can possibly bring those benefits. The fine line drawn by the Canadian Supreme Court in the *Dolphin Delivery* case and by the US Supreme Court in *Shelley v Kraemer* between private relationships involving organs of State and those which do not have no place in our constitutional jurisprudence. Nor are we consigned to the hypocrisy so trenchantly excoriated by the authors of the two Canadian articles quoted in *Baloro and Others v University of Bophuthatswana and Others*. What is more, my reading of the Constitution avoids jurisprudential and practical conundrums inherent in the vertical-but-indirectly-horizontally-irradiating interpretation. One does not need to ascertain whether a question is one of public or private law (wherever the boundary may lie in our legal system); one is not confronted with knotty problems where a private relationship is, wholly or partially, governed by statute; nor where an organ of State is a party to a manifestly private law dispute, for example flowing from contract or delict. There are no anomalies where one sues a policeman and his Minister in delict or when an organ of State and a private person are co-plaintiffs or co-defendants. Nor is it of any consequence that a rule of the common law derives from an ancient statute of a former government or from the writings of a legal sage of old. The law is the law; where the chapter fits, it is applied; where it does not, its spirit, purport and objects are duly regarded." (footnotes omitted).

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The PAJA distinguishes between a right and a legitimate expectation by using them in the alternative in section 3(1) "Administrative action which materially and adversely affects the rights or legitimate expectations of any person must be procedurally fair." Devenish GE, Govender K and Hulme D *Administrative Law and Justice in South Africa* note at p311 "Obviously where existing rights are affected there is no need to rely on the doctrine" [of legitimate expectation]. However a degree of overlapping may occur."



the status of a right as opposed to an interest. The question is whether in the context of the law of contract, this objection is a valid one. The answer hinges upon the peculiar nature of a legitimate expectation. In terms of the law of contract a tacit term can be implied from the facts, from trade usage or by law. Legitimate expectation according to Devenish *et al* may arise either from an express promise given on behalf of a public authority or from the existence of a regular practice which the claimant can reasonably expect to continue¹⁷². It is submitted that there are significant similarities between tacit terms in the law of contract and legitimate expectations in administrative law. Like a tacit term in contract law, a legitimate expectation, in its preliminary form, generally sits outside of the formally recognised boundaries of the relationship between the parties. In the case of contract it sits outside of the written document in which the parties have described their agreement. In the case of administrative law it sits outside of the statutorily defined relationship of a public entity to ordinary citizens. Like a tacit term, a legitimate expectation may arise from the facts or from 'trade usage' in the sense of a longstanding practice of a public authority, or by law. In the case of the last mentioned, the existence of a right, could give rise to a legitimate expectation that a power to take a decision affecting the ability to freely exercise that right would require that those affected are given an opportunity to be heard¹⁷³. Devenish *et al*¹⁷⁴ note that the application of the doctrine of legitimate expectation usually but not necessarily requires a promise or the existence of a regular practice and that in at least one case the court refused to extend the doctrine by finding a legitimate expectation in their absence.¹⁷⁵ Although they cite two cases in which the courts have been prepared to recognise a legitimate expectation in the absence of a promise or practice they state that it is problematic whether mere considerations of fairness in the absence of a promise or the existence of a regular practice should give rise to application of the doctrine of legitimate expectation. The moral of the story is that there must be an objective, rational basis and legal for a

172 Devenish *et al* fn 171 *supra* at p308-309

173 Thus in *Public Servants Association of SA v Minister of Justice* 1997(3) SA 925 (T) the court found that the applicants not only had a right to be considered for the posts concerned but they had a legitimate expectation to be appointed to such posts. They therefore had a right to be heard in relation to the formulation of the affirmative action policy. In this case the applicants were all white male state attorneys who contended that they had not even been interviewed for positions for which they were well qualified, on the grounds of their race and gender. The Department of Justice had introduced an affirmative action policy to the effect that no white males would be considered eligible for certain posts.

174 Devenish *et al* fn 171 *supra* at p315

175 *Ngema v Minister of Justice, KwaZulu* 1992(4) SA 349 (N)

legitimate expectation¹⁷⁶. One cannot have a legitimate expectation contrary to a law, or, it is submitted, public policy¹⁷⁷, which stipulates differently¹⁷⁸. The same is true of tacit or implied terms in a contract. In order to decide whether a tacit term is to be imported into a contract one must first examine the express terms of the contract.¹⁷⁹ The express terms, as Christie points out, may deliberately exclude the possibility of importing tacit terms of a particular type. The same is true for a legitimate expectation. It may be excluded by the terms of a statute or subordinate legislation. No tacit term may be imported in contradiction of an express term.¹⁸⁰ A legitimate expectation may not be entertained in the face of contrary statutory provisions. The express terms may also exclude the possibility of importing tacit terms even when the express terms do not expressly cover the question but give rise to the inference that the parties do not wish to include the term in question. It is submitted that the same is true with regard to statutory interpretation and the doctrine of legitimate expectation.

¹⁷⁶ The court said in *Administrator, Transvaal, and Others v Traub and Others* 1989 (4) SA 731 (A): "It is clear from these cases that in this context legitimate expectations' are capable of including expectations which go beyond enforceable legal rights, provided they have some reasonable basis."

¹⁷⁷ The doctrine of legitimate expectation is recognised on the grounds of public policy. It would not therefore make sense to permit a legitimate expectation to fly in the face of the basis for its acceptance into law. The court in *Traub* (fn 164 *supra*) noted that: "A useful and comprehensive overview and analysis of the relevant decisions is to be found in an article by Prof Robert E Riggs, published in (1988) 36 *American Journal of Comparative Law* at 395ff. In an epitomical first paragraph to his article Prof Riggs states: "Since the landmark decision of *Ridge v Baldwin*, handed down by the House of Lords in 1963, English Courts have been in the process of imposing upon administrative decision-makers a general duty to act fairly. One result of this process is a body of case law holding that private interests of a status less than legal rights may be accorded procedural protections against administrative abuse and unfairness. As these cases teach, a person whose claim falls short of legal right may nevertheless be entitled to some kind of hearing if the interest at stake rises to the level of a "legitimate expectation". The emerging doctrine of legitimate expectation is but one aspect of the "duty to act fairly", but its origin and development reflect many of the concerns and difficulties accompanying the broader judicial effort to promote administrative fairness. As such, it provides a useful window through which to view judicial attempts to mediate between individual interests and collective demands in the modern administrative state." Devenish *et al* (fn 159 *supra*) state at p 318 that "Legitimate expectation is intrinsically merely a manifestation of the seminal principle of fairness which is so fundamental to the manner in which the courts must interpret and apply the norms and principles of contemporary administrative law". This appears to be a fair summing up of the situation."

¹⁷⁸ In *University Of The Western Cape and Others v Member of Executive Committee for Health and Social Services and Others* 1998 (3) SA 124 (C) the court held: "Without dwelling much on the doctrine of legitimate expectation, it should be pointed out that no one can have a legitimate expectation of doing something contrary to the law, or of preventing a functionary from discharging his statutory duty. See *Attorney-General of Hong Kong v Ng Yuen Shiu*, above at 351. See also *R v Ministry of Agriculture, Fisheries and Food, ex parte Hamble (Offshore) Fisheries Ltd* [1995] 2 All ER 714 (QB) at 723-4; *Union of Teachers' Associations of South Africa and Another v Minister of Education and Culture, House of Representatives, and Another*; *Isaacs and Others v Minister of Education and Culture, House of Representatives, and Another* 1993 (2) SA 828 (C) at 841H-I. In my view it is in the interests of good administration that a public body should act fairly and should implement whatever promise it may have made so long as the implementation thereof does not interfere with its statutory duty. In *casu* the first respondent is under a statutory duty in terms of s 11 of the Act to make appointments to the public service. Therefore any promise or undertaking which conflicts with its statutory duty to make appointments cannot be enforced by the courts. The contrary is clearly untenable. It would lead to an absurd situation whereby public bodies could simply ignore their statutory duties by making promises which conflict with them. Surely it would be unfair to enforce promises which fly in the face of statutory duties. Thus whatever the source of a 'legitimate expectation' might have been in *casu*, I am satisfied that it was not legitimate because the applicants knew that the first respondent was under a statutory duty to make appointments to posts which had to be advertised.

¹⁷⁹ See Christie fn 2 *supra* p 191. He refers to the words of Rumpff JA in *Pan American World Airways Inc v SA Fire and Accident Insurance Co Ltd* 1965 3 SA 150 (A) 175C: "When dealing with the problem of an implied term the first enquiry is, of course, whether, regard being had to the express terms of the agreement, there is any room for importing the alleged implied term."

¹⁸⁰ Authorities cited by Christie (fn 2 *supra*) in this regard at p 191 are *FJ Hawkes & Co Ltd v Nagel* 1957 (3) SA 126(W) 132 C; *Springvale Ltd v Edwards* 1969 1 SA 464 (RA) 472C; *Neuhoff v York Timbers Ltd* 1981(4) SA 666 (T) 679; *Robin v Guarantes Life Assurance Co Ltd* 1984(4) SA 558 (A) 567A-F

An implied term that is not derived from trade usage or law is derived not only from the common intention of the parties but also their imputed intention¹⁸¹. In the law of contract, terms can be implied by trade usage just as a legitimate expectation can arise from a regular practice on the part of an administrator.¹⁸² With regard to terms imposed by law Corbett AJA pointed out in *Alfred McAlpine*¹⁸³ that such terms are imposed by law from without¹⁸⁴. He observes that in a sense ‘implied term’ is, in this context a misnomer in that in content it simply represents a legal duty (giving rise to a correlative right) imposed by law, unless excluded by the parties, in the case of certain contracts. Christie notes that this observation of Corbett AJA raises ‘the vexed question’ of nomenclature. He says that the point is that a contract is an agreement and one would therefore expect all its terms to be agreed between the parties. Like a tacit term, somewhat paradoxically, a legitimate expectation in fact takes on the flavour of a right once it has been recognised by a court of law in the sense that legal consequences flow from it. The distinction between a tacit term and a legitimate expectation on the basis that the one effectively confers rights and obligations once it is recognised and the other does not is thus largely notional rather than practical.

181 In *Alfred McAlpine & Son (Pty) Ltd v Transvaal Provincial Administration* 1974 (3) SA 506 (A), Corbett AJA observed: “In the second place, “implied term” is used to denote an unexpressed provision of the contract which derives from the common intention of the parties, as inferred by the Court from the express terms of the contract and the surrounding circumstances. In supplying such an implied term the Court, in truth, declares the whole contract entered into by the parties. In this connection the concept, common intention of the parties, comprehends, it would seem, not only the actual intention but also an imputed intention. In other words, the Court implies not only terms which the parties must actually have had in mind but did not trouble to express but also terms which the parties, whether or not they actually had them in mind, would have expressed if the question, or the situation requiring the term, had been drawn to their attention (see *Dahl v Nelson, Donkin and Co.* (1881) 6 App. Cas. 38 at p. 59; *Techni-Pak Sales (Pty.) Ltd. v Hall*, 1968 (3) SA 231 (W) at pp. 236 - 7; Chitty, *Contracts*, 23rd ed., p. 313; B Weeramantry, *The Law of Contracts*, p. 573; but cf. *Trollope & Colls v N.W. Hospital Board*, (1973) 2 All E.R. 260 at pp. 267 - 8).”

182 See the discussion in Christie (fn 2 *supra*) from p184-190. See also Kerr AJ fn 21 *supra* at p 355 who states “Where a usage is actually known to the contracting parties, and the court can feel confident that they intended to adopt it, it is probable that the requirement of reasonableness means little more than that the usage must not be so opposed to public policy that if the parties had expressly stated it as part of their contract, the law would not have enforced it.”

183 *Alfred McAlpine* fn 181 *supra*

184 In legal parlance the expression “implied term” is an ambiguous one in that it is often used, without discrimination, to denote two, possibly three, distinct concepts. In the first place, it is used to describe an unexpressed provision of the contract which the law imports therein, generally as a matter of course, without reference to the actual intention of the parties. The intention of the parties is not totally ignored. Such a term is not normally implied if it is in conflict with the express provisions of the contract. On the other hand, it does not originate in the contractual consensus: it is imposed by the law from without. Indeed, terms are often implied by law in cases where it is by no means clear that the parties would have agreed to incorporate them in their contract. Ready examples of such terms implied by law are to be found in the law of sale, e.g. the seller’s implied guarantee or warranty against defects; in the law of lease the similar implied undertakings by the lessor as to quiet enjoyment and absence of defects; and in the law of negotiable instruments the engagements of drawer, acceptor and endorser, as imported by secs 52 and 53 of the Bills of Exchange Act, 34 of 1964. Such implied terms may derive from the common law, trade usage or custom, or from statute. In a sense “implied term” is, in this context, a misnomer in that in content it simply represents a legal duty (giving rise to a correlative right) imposed by law, unless excluded by the parties, in the case of certain classes of contracts. It is a naturalium of the contract in question.

The debates around non-variation clauses in the law of contract highlight the question of legitimate expectation in the field of administrative law¹⁸⁵. In *Brisley v Drotzky*¹⁸⁶ Olivier JA conceded that Hutchison was correct where he said the following concerning *SA Sentrale Ko-op A Graanmaatskappy Bpk v Shifren en Andere*¹⁸⁷:

“The principle in Shifren’s case has consistently been reaffirmed, albeit with the rider in a recent case that non-variation clauses are to be restrictively interpreted since they curtail freedom of contract. It is therefore still good law, despite the fact that the courts have frequently felt uncomfortable about applying the principle, and have resorted to all sorts of ingenious stratagems to avoid doing so. The reason is quite simply that, no matter how logical its theoretical justification, in practice the principle would be productive of injustice if applied without a good deal of discretion and qualification. For, on the face of it, Shifren appears to allow a party to go back on his or her word, even when another has in good faith relied thereon. Take the all too common situation represented by Shifren itself: a contract of lease containing a non-variation clause requires the written consent of the landlord for any cession by the tenant of its rights under the contract; the landlord orally consents to such a cession but later, after the cession has taken place, purports to cancel for breach, averring that the oral agreement is of no force or effect in view of the non-variation clause. To permit the landlord to cancel the contract in such circumstances seems not merely unjust but a violation of the principle that parties to a contract are expected to behave in accordance with the dictates of good faith.”¹⁸⁸

In the context of legitimate expectation there is a similar feeling that an administrator should not be allowed to go back on his or her word when another has in good faith relied thereon at least without observing some form of procedural fairness¹⁸⁹. The debate concerning substantive as opposed to procedural fairness in the context of the doctrine of legitimate expectation as canvassed in *Meyer v Iscor Pension Fund*¹⁹⁰ is unnecessary for the purposes of this discussion since the intention here is simply to demonstrate the commonalities between the law of contract and administrative law without going too far into the complexities of either of them.

It is submitted that the question of whether the state can exclude the principles of administrative justice by way of contractual terms from its relationship with a patient

¹⁸⁵ In *Randcoal Services Ltd And Others v Randgold And Exploration Co Ltd* 1998 (4) SA 825 (SCA) van Heerden DCJ stated: “However, in my view, a non-variation clause curtails common law freedom to contract and must hence be restrictively interpreted.

¹⁸⁶ *Brisley* 2002 (4) SA 1 (SCA)

¹⁸⁷ *Shifren* 1964 (4) SA 760 (A)

¹⁸⁸ Hutchison D ‘Non variation clauses in contract: any escape from the Shifren straitjacket?’ (2001) 118 *SALJ* 720 at 721

¹⁸⁹ Brand JA observed in *Meyer v Iscor Pension Fund* 2003 (2) SA 715 (SCA): “At the end of his argument in this Court, Meyer relied on the doctrine of legitimate expectation, not only to reinforce his objection based on unfair discrimination but as the mainstay of his whole case. He was, however, immediately confronted with the fundamental difficulty that, in administrative law, the doctrine of legitimate expectation has traditionally been utilised as a vehicle to introduce the requirements of procedural fairness and not as a basis to compel a substantive result. According to the traditional approach, it matters not whether the expectation of a procedural benefit is induced by a promise of procedural benefit itself or by a promise that some substantive benefit will be acquired or retained. The expectation remains a procedural one.”

¹⁹⁰ *Meyer* 2003 (2) SA 715 (SCA)



must be answered on a similar basis to the approach of the courts to non-variation clauses in the law of contract¹⁹¹. Non-variation clauses are inimical to the concept of contract since they effectively restrict the rights or powers of the parties to contract. They undermine their own foundations in law. As such they represent something of a legal paradox. In the same way, purported waivers of constitutional rights undermine the founding principles of the legal system. As such they should not, as a general rule, be permitted. This view is supported by the judgment in *ABBM Printing & Publishing (Pty) Ltd v Transnet Ltd*¹⁹², the applicant had for a number of years published and printed an in-flight magazine for the respondent which was wholly controlled and owned by the state. The respondent called for new tenders for the printing and production of the magazine and awarded the tender to someone else. The applicant asked for reasons for its decision from the respondent which referred the applicant to clause 10.1 of the conditions of tender, which provided that the respondent would not 'bind itself to accept the lowest or any tender, nor . . . assign any reason for the rejection of a tender'. The applicant responded that it was nevertheless entitled to establish that the tender process did not infringe its right to just administrative action guaranteed by s 33 of the Constitution of the Republic of South Africa Act 108 of 1996. The court found on the facts that there was no evidence of that the applicant had waived its constitutional right to administrative justice and said that it did not therefore have to look at the 'considerable weight of authority that doubts that a person can be held to a statutory or constitutional waiver of his constitutional rights'. The court did say that if it had not been able to find on the facts as it had done, however, then it would that there was no estoppel and no waiver of the applicant's

¹⁹¹ See *Miller and Another NNO v Dannecker* 2001 (1) SA 928 (C) where the court observed: "Finally, good faith or *bona fides* has deep roots in South Africa's mixed legal system. In *Eerste Nasionale Bank van Suidelike Afrika Bpk v Saayman NO*, fn 25 *supra* at 321 - 2 ([1997] 3 All SA 391 at 406) Olivier JA held that there is a close link between the concepts of good faith, public policy and the public interest in contracting. This is because the function of good faith has always been to give expression in the law of contract to the community's sense of what is fair, just and reasonable. The principle of good faith is then a wider notion of public policy; the courts invoke and apply the principle because the public interest so demands. Good faith accordingly has a dynamic role to play in ensuring that the law remains sensitive to and in tune with the views of the community. (See generally Dale Hutchison *Good Faith in the South African Law of Contract* SA Law Commission, Draft 199, of which Judge Olivier JA is chairperson). In *casu*, we would have to assume that good faith lay at the root of the oral agreement constituting the pactum. The plaintiffs would thus hardly be heard to seek to rely on strict compliance with the provisions of clauses 15.1 and 15.2 of the franchise agreement if, indeed, there had been a pactum as alleged by the defendant. The dictates of public policy and the views of the community would never be served by a slavish adherence to a non-variation clause in the face of an agreement in the form of the pactum. It is my view, that if nothing else, the defendant in *casu* would successfully hold the plaintiffs to the pactum on the grounds that the agreement must be taken to have been entered into in good faith. The good faith basis of contract, after all, imposes an obligation on contractors not to exercise powers in ways which run counter to the concept of *bona fides*. Jansen JA put it in *Tuckers Land and Development Corporation (Pty) Ltd v Hovis* 1980 (1) SA 645 (A) as follows (at 625D - G): 'It could be said that it is now, and has been for some time, felt . . . that in all fairness, there should be a duty upon a promisor, not to commit an anticipatory breach of contract, and such a duty has always been enforced by our Courts. . . . 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.'"

¹⁹² *ABBM Printing* 1998 (2) SA 109 (W)

constitutional right to reasons for the respondent's decision.¹⁹³ In *Transnet Ltd v Goodman Brothers (Pty) Ltd*¹⁹⁴ the court succinctly held that:

"In my view, the correct approach to the question of waiver of fundamental rights is to adhere strictly to the provisions of s 36(1) of the Constitution. It provides that: 'The rights in the Bill of Rights may be limited only in terms of law of general application to the extent. . . .' A waiver of a right is a limitation thereof. One must be careful not to allow all forms of waiver, estoppel, acquiescence, etc to undermine the fundamental rights guaranteed in the Bill of Rights. In my view, a strict interpretation of s 36(1) is indicated. Transnet has not made out a case that the waiver it relies upon is warranted by a law of general application."

It is submitted that the concerns of administrative law and principles of administrative justice are not so far removed from the concerns of the law of contract under the South African constitutional order¹⁹⁵ as the conceptual distinctions between them as

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See p118 of the *ABBM* judgment (fn 192 *supra*) where the court stated: "The respondent bears the onus of proving the applicant's waiver of its constitutional rights. Although para 10.1 of the respondent's invitation to tender records that it will not assign any reasons for rejecting a tender, there is on the affidavits before me, no evidence on which I can find that at the time it submitted its tender the applicant was aware of its constitutional rights and that it either expressly or impliedly waived its constitutional rights. On the facts before me I can find no basis on which it could be found that there is an estoppel. By reason of these findings it is unnecessary to deal with the considerable weight of authority which doubts that a person can be held to a statutory or constitutional waiver of his constitutional rights. In this regard I refer to *Community Development Board v Revision Court, Durban Central, and Another* 1971 (1) SA 557 (N) at 565B; *Tellis and Others v Bombay Municipal Corporation and Others*; *Kuppusami and Others v State of Maharashtra and Others* 1987 LRC (Const) 351 (SC), a decision of the Supreme Court of India at 366E-I; *S v Frames (Cape Town) (Pty) Ltd* 1995 (8) BCLR 981 (C) at 989E-J; *Maharaj v Chairman, Liquor Board* 1997 (1) SA 273 (N) at 276J-277B; *Hogg Constitutional Law of Canada* (Carswell, 1991) at 34-1. Had I been unable to decide the issue of waiver and estoppel on the facts I would, on the above authorities have found that there was no estoppel and that there had been no waiver by the applicant of its constitutional rights and that the respondent cannot rely on clause 10.1 of the conditions of tender to frustrate the applicant's constitutional right to reasons for the respondent's decision."

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Transnet 2001 (1) SA 853 (SCA)

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In *Brisley v Drotzky* fn 186 *supra* the court noted: "Ook Hutchison lewer 'n sterk pleidooi dat die *bona fides*, geskraag deur die Grondwet, groter erkenning in ons kontraktereg verdien. In 'n hoofstuk getiteld 'Good faith in the South African Law of Contract' in Roger Brownsword, Norma J Hird and Geraint Howells *Good Faith in Contract: Concept and Context* (1999) 213 op 230 - 1 skryf hy: 'What emerges quite clearly from recent academic writings, and from some of the leading cases, is that 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, content and field of application and provides them with a moral 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* is an expression." On this view of things, which seems to be correct, 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 doctrinal 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.' Terwyl bogemelde perspektiewe onderskryf moet word, is die moeilike vraag hoe die *bona fides* op kontraktuele geskille toegepas moet word. Die werking van die *bona fides* in ons kontraktereg is nog lank nie volledig verken en inhoud gegee nie. Dit sal oor jare en aan die hand van baie uitsprake moet geskied. Uiteindelik sal, hopelik, 'n nuwe raamwerk en denkpatroon in ons kontaktereg ontstaan. Teen 1988 het die meerderheid van hierdie Hof by monde van Joubert AR nie gehuiwer om 'n grafrede oor die *exceptio doli generalis* uit te spreek nie, soos blyk uit *Bank of Lisbon and South Africa Ltd v De Ornelas and Another* 1988 (3) SA 580 (A). Dié *exceptio* was 'n belangrike regs-middel wat aan die redelikheid en billikheid 'n sterk derogerende werking verleen het, dws dit is gebruik om die gestrengte reg in bepaalde gevalle te versag. Maar slegs 'n jaar later het hierdie Hof nie teruggedeeins om kontrakteervryheid en regsekerheid op te weeg nie teen 'the doing of simple justice between man and man' - (*Sasfin (Pty) Ltd v Beukes* 1989 (1) SA 1 (A) op 9A - C). Sedertdien, soos reeds genoem, het die redelikheid en billikheid in die vorm van die *bona fides* al hoe meer op die voorgrond getree. Dit is duidelik dat ons reg in 'n ontwikkelingsfase is waar kontraktuele geregtigheid meer as ooit tevore as 'n morele en juridiese norm van groot belang op die voorgrond tree. Hierdie tendens sal na alle waarskynlikheid, soos akademië soos Neels tereg aantoon, deur grondwetlike waardes versterk word. (Sien Jan Neels 'Regsekerheid en die Korrigerende Werking van Redelikheid en Billikheid' (deel 3) in (1999) 3 *TSAR* 477 op

public and private law at first glance suggest. In *Brisley v Drotzky* the Supreme Court of Appeal noted the importance of the constitutional values in the law of contract and the increased significance of concepts such as *bona fides* as one expression of the values and policies underlying the South African legal system. The concept of *bona fides* is common to both the law of contract and administrative law. In *Eerste Nasionale Bank Van Suidelike Afrika Bpk v Saayman No*¹⁹⁶ the court reviewed the long history of *bona fides* or good faith in the South African law of contract.¹⁹⁷ It is a

489; sien ook A van Aswegen 'The Future of South African Contract Law' in *Die Toekoms van die Suid-Afrikaanse Privaatreg*, (1994) 44 op 46 - 51; A van Aswegen 'The Implications of a Bill of Rights for the Law of Contract and Delict' 1995 *SAJHR* op 50 ev.) Daar kan veral gewys word op hoofstuk 2 van die Grondwet wat waardes soos vryheid, gelykheid en waardigheid beskerm; art 39(2) wat vereis dat die houe die gees, strekking en oogmerke van die handves moet bevorder wanneer die gemenerereg ontwikkel word, en op art 173 wat bepaal dat die hoër Howe die inherente bevoegdheid het om die gemenerereg te ontwikkel met inagneming van die belang van geregtigheid. Dit word ook al hoe meer duidelik dat kontemporêre gemeenskapsbehoefes, onder andere die beskerming van swakkere kontraktante, van die houe vereis om meer aktief op te tree. Ek vereenselwig my dus met Prof C F C van der Walt se pleidooi in 'Beheer oor Onbillike Kontraksbedinge - Quo Vadis vanaf 15 Mei 1999' 2000 *TSAR* 33 op 41): 'Bykans jaar na die uitspraak in *Neugebauer & Co Ltd v Hermann* en ten spyte van die "lyn van beslissings" wat daarop gevolg het, moet gekonkludeer word dat die houe waarskynlik nie self die punt sal bereik waar hulle relevante waardes regstreeks op kontraksbedinge sal toepas nie. Vir sover die houe aan hulleself en die presedentestelsel oorgelaat word om te onderskei tussen bedinge wat afdwing sal word of nie, en tussen bedinge wat nêg is of nie, sal hulle nie daarby uitkom nie. Intussen sal die houe waarskynlik steeds voortgaan om "grondliggende waarde" van goeie trou onregstreeks, agter die mom van allerlei ander regsfigure, remedies en diskresies toe te pas. Laasgenoemde werkswyse moet uit die oogpunt van judisiële optrede teen onbillike kontraktuele situasies uiteraard nie geringgeskat word nie. Tensy daar egter snel vordering met die regstreekse benadering kom, sal 'n aanvaarbare ewewig van regte en verpligtinge op die kontrakteregsterrein (dit wat as billik en regverdig bestempel word) nie deur die houe bereik kan word nie.'

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Saayman fn 27 *supra*

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The court in *Saayman* (fn 27 *supra*) stated: "In *Meskin NO v Anglo-American Corporation of SA Ltd and Another* 1968 (4) SA 793 (W) het Jansen R, toe nog 'n Regter van 'n Provinsiale Afdeling van die Hooggeregshof, sterk na vore getree as kampvegter vir die praktiese verwesenliking van die bona fide-beginsel in ons kontraktereg. Op 802A het hy verklaar: 'It is now accepted that all contracts are bonae fidei (some are even said to be uberrimae fidei). This involves good faith (bona fides) as a criterion in interpreting a contract (Wessels (op cit para 1976)) and in evaluating the conduct of the parties both in respect of its performance (Wessels para 1997) and its antecedent negotiation. Where a contract is concluded the law expressly invokes the dictates of good faith, and conduct inconsistent with those dictates may in appropriate circumstances be considered to be fraud; . . . ' En weer, na aanleiding van die plig om inligting te openbaar by die kontraksluiting, het hy gesê op 804D: 'It may, perhaps be questioned whether these criteria do not go further in applying ethical considerations in contrahendo than our authorities recognise. On the other hand 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. On the assumption (without deciding) that the ultimate test suggested by Millner correctly reflects the present state of our law, there is a striking resemblance between that test and eg "die algemene regsgevoel van die gemeenskap"' mentioned above in regard to delict generally.' Toe Jansen R na hierdie Bank verhef is, het hy dieselfde benadering konsekwent gehandhaaf, veral in *Tuckers Land and Development Corporation (Pty) Ltd v Hovis* 1980 (1) SA 645 (A) op 651B-652G en *Bank of Lisbon and South Africa Ltd v De Ornelas and Another* (*supra* op 611G-617H ev), in 'n minderheidsuitspraak. (Sien oor Jansen AR se bydrae, Carole Lewis in (1991) 108 *SALJ* op 249-64.) In ander uitsprake van hierdie Hof is die grondliggende waardes van die goeie trou, billikheid en openbare belang in die kontraktereg ook beklemtoon; veral wat betref die afdwing van kontrakte wanneer dit teen die regsgevoel skrei. So, bv het Hefer AR in *Benson v SA Mutual Life Assurance Society* 1986 (1) SA 776 (A) gekonstateer dat 'n hof die diskresie het om nie spesifieke nakoming van 'n kontrak te gelas nie. Hierdie diskresie, so is verklaar op 783C-E: '. . . 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, eg, 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. . . .' In verband met die afdwing van ooreenkomste wat die handelsvryheid beperk, het die Howe self 'n verreikende bevoegdheid om beperkinge op sodanige ooreenkomste te plaas, ontwikkel en wel op grond van openbare belang. In *Magna Alloys and Research (SA) (Pty) Ltd v Ellis* 1984 (4) SA 874 (A) het Rabie HR op 891H-I gesê: 'Omdat opvattinge 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 ook 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.' En op 893G: 'Die opvatting dat 'n persoon wat '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.' En op 895D-E: '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.' Die opvatting dat alle kontrakte in ons reg bonae fidei is, dws deur die goeie trou beginsel beheers word, is ook deur hierdie Hof erken onder andere in *Paddock Motors (Pty) Ltd v Igesund* 1976 (3) SA 16 (A) op 28;

similarly recurring theme in administrative law¹⁹⁸. Unfortunately the courts do not always express themselves in language that acknowledges the legal reality that the values and public policy principles underlying different branches of law are fundamentally the same or where different constitutional principles and values are applicable, that they are internally consistent with each other. This is due in part to a persistent distinction drawn by the courts between different branches of law, such as contract and delict, in a manner that implies that there is no fundamental relationship between them. Thus for instance in *Wagener v Pharmacare Ltd; Cuttings v Pharmacare Ltd*¹⁹⁹ the court observed:

“It is nevertheless necessary to say that the submission advanced on the appellants' behalf that the principle in the Kroonstad case should be extended to encompass strict product liability is untenable. That matter was concerned with a warranty imposed on a seller by the law of sale which can be excluded by contract. *Contract and delict, being quite separate branches of the law, have their own principles, remedies and defences*. One cannot, because of the absence of contractual privity between the injured party and the manufacturer, simply graft warranty liability onto a situation patently governed by the law of delict.”(writer’s italics).

Magna Alloys and Research (SA) (Pty) Ltd v Ellis (supra op 893C ev); *Mutual and Federal Insurance Co Ltd v Oudtshoorn Municipality* 1985 (1) SA 419 (A) op 433B–C; *LTA Construction Bpk v Administrateur, Transvaal* 1992 (1) SA 473 (A) op 480D–E; *Sasfin (Pty) Ltd v Beukes* 1989 (1) SA 1 (A) op 71 ev en weer 8C–D; *Botha (now Griessel) and Another v Finanscredit (Pty) Ltd* 1989 (3) SA 773 (A) op 782J ev. Die bona fides, wat weer gebaseer is op die redelikeheidsopvattinge van die gemeenskap, speel dus 'n wye en onmiskenbare rol in die kontraktereg. Zimmermann in sy bydrae ‘Good Faith and Equity’ in Zimmermann en Visser (reds) *Southern Cross - Civil Law and Common Law in South Africa* (1996) op 217–60 toon oortuigend aan dat gemelde beginselkompleks onderliggend is aan bekende regsinstellings soos estoppel, rektifikasie, onskuldige wanvoorstelling, die kennisleer, onbehoorlike beïnvloeding en dat dit 'n belangrike rol speel by die uitleg van kontrakte, die inlees van stilswyende en geïmpliseerde bedinge, die openbaringsplig by kontraksluiting, fiktiewe vervulling van 'n voorwaarde en die erkenning van repudiëring as 'n vorm van kontrakbreuk. Dit blyk ook dat daar 'n innige verband bestaan tussen die begrippe bona fides, openbare belang, openbare beleid en *justa causa*. Dit blyk uit die analise van Smalberger AR in *Sasfin (Pty) Ltd v Beukes* (supra op 71–8G); uit die woorde van Hoexter AR in *Botha (now Griessel) and Another v Finanscredit (Pty) Ltd* (supra op 783A–B) dat openbare belang gerig is op die noodsaaklikheid dat simple justice between man and man gedoen moet word, en uit wat gesê is in *Magna Alloys and Research (SA) (Pty) Ltd v Ellis* (supra). (Sien ook D Zimmermann *Southern Cross* op 259 voetnoot 326.) Dit kan na my mening tereg gesê word dat die bona fide-begrip in die kontraktereg 'n onderdeel van die algemeen-geldende openbare belangbeginsel is. Die bona fides word toegepas omdat die openbare belang dit vereis.”

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In *Simon's Town Municipality v Dews And Another* 1993 (1) SA 191 (A) the Appellate Division observed that “‘Good faith’ here relates to the subjective state of mind of the repository of the power and, broadly-speaking, requires that in exercising the power he should have acted bona fide, honestly and without ulterior motive. (Cf *Oude Meester Groep Bpk and Another v SA Breweries Ltd; SA Breweries Ltd and Another v Distillers Corporation (SA) Ltd and Another* 1973 (4) SA 145 (W) at 150G–151D; *Bloems Timber Kilns (Pty) Ltd v Volkskas Bpk* 1976 (4) SA 677 (A) at 689A–E.) In *Premier, Eastern Cape, And Others v Cekeshe And Others* 1999 (3) SA 56 (TK) the court noted: “Parliament can never be taken to have intended to give an official or an administrative body the power to act in bad faith or the power to abuse his or its powers. Such powers are conferred on an official or administrative body to promote the policy and/or objects of the Act. When the Court says it will intervene if a particular body acted in bad faith it is but another way of saying that such power was not being exercised within the scope of the statutory authority given by Parliament. (See *R v Commission for Racial Equality, ex parte Hillingdon London Borough Council* [1982] QB 276 ([1981] 3 WLR 520).) Dealing with the discretionary powers conferred on an administrative official or body, Wade (op cit) states as follows: ‘(W)here Parliament confers power upon some Minister or other authority to be used in discretion, it is obvious that the discretion ought to be that of the designated authority and not that of the Court. Whether the discretion is exercised prudently or imprudently, the authority’s word is to be law and the remedy is to be political only. On the other hand, Parliament cannot be supposed to have intended that the power should be open to serious abuse. It must have assumed that the designated authority would act properly and responsibly . . . with a view to doing what was best in the public interests and most consistent with the policy of the statute. It is from this presumption that the Courts take their warrant to impose legal bounds on even the most extensive discretion.’” In terms of section 6(2) of the PAJA, a court or tribunal has the power to judicially review an administrative action if the action was taken in bad faith.

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Wagener 2003 (4) SA 285 (SCA)

It is submitted with respect that it is not so much the decision of the court that is problematic as it is the manner of its justification. The existence of two separate branches of law should not be used in itself as justification for the refusal or granting of a particular remedy for a number of reasons. The most obvious reason is that the Constitution requires the courts to develop the common law in accordance with constitutional values and principles. These are common to all law in South Africa. One cannot therefore take the view that the one particular branch of law is totally separate to another and that on this basis alone a particular remedy should not be extended in the one, because it might constitute an intrusion into the other branch of law.²⁰⁰ A less obvious, but no less important and related, reason is that such an approach has the potential to lead the courts into the trap of using pre-constitutional legal reasoning to arrive at post-constitutional decisions without questioning or examining the basis for such pre-constitutional reasoning to establish whether or not it is consistent with constitutional principles and values²⁰¹. This in turn leads to a failure on the part of the courts to develop the common law as they are constitutionally mandated to do²⁰². Another reason not to be too insistent upon drawing clear distinctions between the different branches of law as an end in itself is exemplified by

²⁰⁰ The real question is whether the extension of the remedy is constitutionally required or justified.

²⁰¹ Thus in *Carmichele v Minister Of Safety And Security And Another (Centre For Applied Legal Studies Intervening)* 2001 (4) SA 938 (CC) the constitutional court observed: "The proceedings in the High Court and the SCA took place after 4 February 1997 when the Constitution became operative. It follows that both the High Court and the SCA were obliged to have regard to the provisions of s 39(2) of the Constitution when developing the common law. However, both Courts assumed that the pre-constitutional test for determining the wrongfulness of omissions in delictual actions of this kind should be applied. In our respectful opinion, they overlooked the demands of s 39(2). In the High Court and the SCA the applicant relied only on the common-law understanding of wrongfulness which has been developed by our Courts over many years. Save in one respect referred to in the applicant's heads of argument in the SCA, no reliance was placed on the provisions of the IC or the Constitution as having in any way affected the common-law duty to act owed by police officers or prosecutors to members of the public. With regard to the 'interests of the community' imposing a legal liability on the authorities, it was submitted by the applicant's counsel that it would 'encourage the police and prosecuting authorities to act positively to prevent violent attacks on women'. In support of that submission counsel referred to authorities in this Court and the SCA devoted to patterns of discrimination against women. It does not appear to have been suggested that there was any obligation on the High Court or the SCA to develop the common law of delict in terms of s 39(2) of the Constitution." (Footnotes omitted)

²⁰² Thus in *Carmichele* (fn 201 *supra*) the court noted: "It needs to be stressed that the obligation of Courts to develop the common law, in the context of the s 39(2) objectives, is not purely discretionary. On the contrary, it is implicit in s 39(2) read with s 173 that where the common law as it stands is deficient in promoting the s 39(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 s 39(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. It was implicit in the applicant's case that the common law had to be developed beyond existing precedent. In such a situation there are two stages to the inquiry a court is obliged to undertake. They cannot be hermetically separated from one another. The first stage is to consider whether the existing common law, having regard to the s 39(2) objectives, requires development in accordance with these objectives. This inquiry requires a reconsideration of the common law in the light of s 39(2). If this inquiry leads to a positive answer, the second stage concerns itself with how such development is to take place in order to meet the s 39(2) objectives. Possibly because of the way the case was argued before them, neither the High Court nor the SCA embarked on either stage of the above inquiry.

the words of the Supreme Court of Appeal in *Transnet Ltd v Goodman Brothers (Pty) Ltd*²⁰³:

“The identification of an administrative action, in contrast to an act regulated by private law, has become more difficult with the increasing use by the State of private law institutions, notably contract, to perform its duties. This takes place by privatisation, delegation, outsourcing, etc (see A Cockrell ‘Can you Paradigm? - Another Perspective on the Public Law/Private Law Divide’ 1993 *Acta Juridica* 227; Yvonne Burns ‘Government Contracts and the Public/Private Law Divide’ (1998) 13 SA Public Law at 234 et seq).”

It seems that a number of conclusions can be drawn from the foregoing discussions with regard to contractual relationships between public providers and patients:

1. It is unlikely that a contractual term will be interpreted as constituting a waiver of a constitutional right or as estopping a patient from enforcing his or her constitutional rights. The right of access to health care services is a constitutional right as is the right to administrative justice;
2. A public provider-patient contractual relationship is rarely likely to be one dimensional due to the fact that the public provider will be subject, in addition to purely contractual obligations, to the relevant provisions of administrative law. Since public providers derive their powers largely from legislation and since the implementation of legislation is regarded as administrative action, to the extent that the delivery of health care services constitutes the implementation of legislation, administrative law will be a factor in any contractual public provider-patient relationship²⁰⁴;

²⁰³ *Transnet* fn 194 *supra*

²⁰⁴ See in which Cameron JA observed: “Even if the conditions constituted a contract (a finding not in issue before us, and on which I express no opinion), its provisions did not exhaust the province's duties toward the tenderers. Principles of administrative justice continued to govern that relationship, and the province in exercising its contractual rights in the tender process was obliged to act lawfully, procedurally and fairly. In consequence, some of its contractual rights - such as the entitlement to give no reasons - would necessarily yield before its public duties under the Constitution and any applicable legislation. This is not to say that the conditions for which the province stipulated in putting out the tender were irrelevant to its subsequent powers. As will appear, such stipulations might bear on the exact ambit of the ever-flexible duty to act fairly that rested on the province. The principles of administrative justice nevertheless framed the parties' contractual relationship, and continued in particular to govern the province's exercise of the rights it derived from the contract. Counsel's invocation of the *Cape Metropolitan* case as authority to the contrary is mistaken. There it was held that a local authority's cancellation of an agreement was not ‘administrative action’ under the Constitution entitling the other contractant to procedural fairness before termination. Although the public authority derived its power to conclude the contract from statute, it was held that the same could not necessarily be said about its power to cancel. But the *Cape Metropolitan* case turned on its own facts, and this Court was careful to delineate them. In the first place, the tender cases were expressly distinguished. Second, the employment cases (where a public authority's express statutory power to dismiss public sector workers was held bound by public duties of fairness notwithstanding that a corresponding right existed at common law or that such a right might also have been contained in a contract) were also distinguished. Third and most importantly, the Court in *Cape Metropolitan* did not purport to provide a general answer to the question whether a public authority in exercising powers derived from a contract is in all circumstances subject to a public duty to act fairly. That question was left open. Instead, the Court's judgment makes it plain that the answer depends on all the circumstances. The critical passage in the reasoning of Streicher JA is this: ‘Those terms [ie entitling the public authority to cancel the contract] were not prescribed by statute and could not be dictated by the [public authority] by virtue of its



3. The considerations of public policy that underlie the law of contract must be interpreted as consistent with, if not the same as those that underlie administrative law since both are founded upon the principles and values established by the Constitution;
4. Due to the apparent restriction of the administrative law doctrine of legitimate expectation by the courts to procedural relief only, the doctrine of legitimate expectation does not at present provide an alternative remedy for substantive relief equivalent to that which can potentially be provided by an implied term in the context of the law of contract. It is thus likely that in practice there will still be separate causes of action cited for procedural relief as opposed to substantive relief on the basis of administrative law and the law of contract respectively;
5. The fact that the provider is a public body is likely to impact upon its contractual relationships in the sense that a number of terms may be implied by law that would not necessarily be implied had the provider been a private body. Such implied terms may, depending upon the context, include a duty to act reasonably, a duty to act fairly in terms of procedures envisaged under the contract, a duty to give written reasons for decisions and actions taken under the contract, a duty to give adequate notice of intended actions under the contract. The implied terms may be by virtue of section 3 of the PAJA which relates to procedurally fair administrative action affecting any person.²⁰⁵

This conclusion may meet with objections on the basis that the incorporation of implied terms of this nature in contracts with public providers is unnecessary because such providers cannot in any event escape the provisions of administrative law. The

position as a public authority. They were agreed to by the first respondent, a very substantial commercial undertaking. The [public authority], when it concluded the contract, was therefore not acting from a position of superiority or authority by virtue of its being a public authority and, in respect of the cancellation, did not, by virtue of its being a public authority, find itself in a stronger position than the position would have been had it been a private institution. When it purported to cancel the contract it was not performing a public duty or implementing legislation; it was purporting to exercise a contractual right founded on the consensus of the parties in respect of a commercial contract. In all these circumstances it cannot be said that the [public authority] was exercising a public power.'

The case is thus not authority for the general proposition that a public authority empowered by statute to contract may exercise its contractual rights without regard to public duties of fairness. On the contrary: the case establishes the proposition that a public authority's invocation of a power of cancellation in a contract concluded on equal terms with a major commercial undertaking, without any element of superiority or authority deriving from its public position, does not amount to an exercise of public power." (footnotes omitted)

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"Such implied terms may derive from the common law, trade usage or custom, or from statute." (*Alfred McAlpine & Son* fn 181 *supra*)

purists would argue that there may be separate and specific remedies for violations of statutory provisions that exclude other remedies and that the provisions of administrative law and the law of contract are separate branches of law with their own principles, remedies and defences. It is submitted that it is precisely for this reason that in certain circumstances it may be appropriate to allow terms implied by administrative law in a contract. When a person contracts with the government there is seldom a question as to in whose favour the power balance usually lies. In the context of health services, the patient is particularly vulnerable. He or she is in the majority of cases totally dependent upon the public provider for the services required and does not have the choice of obtaining them elsewhere. The consequences of a breach of contract for health services are often irreversible and sometimes fatal in which case purely procedural remedies may well amount to no remedy at all. The expectations of a patient contracting with the state may be quite different from those of a person contracting with a private provider and may even in some circumstances predispose the patient to being less careful in dealing with the public provider than the private provider – for example the same levels of self-interest would not be expected of a public provider as of a private provider, a certain respect and regard for public policy considerations and the interests of the community would feature higher on a patient's list of expectations of a public provider than of a private provider, the accountability of the public provider to the patient is not only in its capacity as provider of health care services but in its capacity as the state, the executive branch of government of the country, the custodian of the public interest, the respecter, protector, promoter, and fulfiller of the rights in the Bill of Rights.

Where the state dishonours such expectations in the context of health care services, the harm to the patient has the potential to be considerable. Moreover the harm flowing from a violation of such an implied term is likely to be quantifiable in much the same way that contractual damages arising from private provider-patient contracts are quantifiable. It is difficult to see a reason why, in the absence of any statutory provisions to the contrary and where appropriate in the circumstances, certain terms based in administrative law should not be implied in the public provider-patient contract where such a contract is found to exist.

4.10 Tacit or Implied Terms in Health Care Contracts

If one looks at the case law dealing with the delivery of health care services and those involving other forms expert skill and advice, it is submitted that there are a number of terms which may be inferred in a health care contract on the grounds of public policy, fairness and reasonableness. It is submitted that the following terms are relevant in the context of contracts for health the public health sector and the courts should be prepared to read them into contracts for health care services between public providers and patients in the appropriate circumstances. The terms are derived on the basis of the legal principles listed below, not necessarily in order of appearance and not necessarily only one principle at a time:

- 1 A term which is sought to be implied in a contract must be capable of clear and precise formulation;²⁰⁶
- 2 The terms below would in most instances satisfy the ‘officious bystander test’²⁰⁷
- 3 The court in *Standard Bank of SA Ltd v Durban Security Glazing (Pty) Ltd and Another*²⁰⁸ identified the following principles and guidelines for tacit terms. It is submitted that the tacit terms proposed below satisfy these requirements –
 - (a) A Court is slow to import a tacit term in a written agreement²⁰⁹. It is submitted that the public provider-patient contract is rarely if ever written;
 - (b) The Court has no power to supplement the bargain between the parties by adding a term which they would have been wise to agree upon, although they did not. The fact that the suggested term would have been a reasonable one for

²⁰⁶ *Rapp and Maister v Aronovsky* 1943 WLD 68 at 75; *Desai and Others v Greyridge Investments (Pty) Ltd* 1974 (1) SA 509 (A) at 522H - 523A; *Hamilton-Browning v Denis Barker Trust* 2001 (4) SA 1131 (N) at 1137

²⁰⁷ *Reigate v Union Manufacturing Co (Ramsbottom)* [1918] 1 KB 592 ([1918] 118 LT 483) referred to in *Hamilton-Browning v Denis Barker Trust* 2001 (4) SA 1131 (N); In *The MV Prosperous; Aegean Petroleum (UK) Ltd v Pan Bulk Shipping Ltd Cobam NV Intervening*; *Cobam NV v Pacific Northern Oil Corporation And Others* 1995 (3) SA 595 (D) the court observed that: “The ‘officious bystander test’ is expressed thus by MacKinnon LJ in *Shirlaw v Southern Foundries* (1926) Ltd [1939] 2 KB 206 at 227: ‘Prima facie that which in any contract is left to be implied need not be expressed as something so obvious that it goes without saying; so that if, while all the parties were making their bargain, an officious bystander were to suggest some express provision for it in their agreement, they would testily suppress him with a common zeal. At least it is true, I think, that, if a term were never implied by a Judge unless it could pass that test, he could not be held to be wrong.’” The court stated that “That test, to my mind, simply underlines and highlights the point that the term sought to be implied must be an obvious one.”

²⁰⁸ *Standard Bank of SA Ltd v Durban Security Glazing (Pty) Ltd and Another* 2000 (1) SA 146 (D)

²⁰⁹ *Sweets from Heaven (Pty) Ltd and Another v Ster Kinekor Films (Pty) Ltd and Another* 1999 (1) SA 796 (W)

them to adopt or that its incorporation would avoid an inequity or a hardship to one of the parties, is not enough. The suggested term must, in the first place, be one which was necessary as opposed to merely desirable, to give business efficacy to the contract; and, what is more, the Court must be satisfied that it is a term which the parties themselves intended to operate if the occasion for such operation arose, although they did not express it. . . . That does not mean, in my view, that the parties must consciously have visualised the situation in which the term would come into operation. . . . It does not matter, therefore, if the negotiating parties fail to think of the situation in which the term would be required, provided that their common intention was such that a reference to such a possible situation would have evoked from them a prompt and unanimous assertion of the terms which was to govern it ²¹⁰.

- (c) The question to be asked is based always upon an hypothesis: what would the parties have done if confronted with the situation that has arisen? The situation must, of course, be one necessarily and obviously arising out of the contract which the contract in express terms has not provided for²¹¹.
- (d) In order to determine whether a tacit term has been proved on a balance of probabilities regard must be had to the evidence, the conduct of the parties and the surrounding circumstances²¹².
- (e) The Court is to determine from all the circumstances what a reasonable and honest person who enters into such a transaction would have done, not what a crafty person might have done who had an *arrière pensée* to trick the other party into an omission of the term. The transaction must be regarded as a normal business transaction between two parties both acting as reasonable businessmen²¹³.

210 Per Colman J in *Techni-Pak Sales (Pty) Ltd v Hall* 1968 (3) SA 231 (W) at 236E - 237A (emphasis supplied).

211 Per Stratford JA in *Administrator (Transvaal) v Industrial & Commercial Timber & Supply Co Ltd* 1932 AD 25 at p 38 (emphasis supplied).

212 *Minister van Landbou-Tegniese Dienste v Scholtz* 1971 (3) SA 188 (A) at 196H-197A.

213 Per Wessels ACJ in *Administrator (Transvaal) v Industrial & Commercial Timber & Supply Co Ltd* 1932 AD 25 at p 33.

The tacit terms suggested below are derived as much from the law of delict and constitutional and administrative law as from the law of contract. Purists may object to such cross-pollination of the law of contract by these other areas of law. It is submitted, however, that given that the judgments of the courts are public knowledge and that public policy does not in principle distinguish between areas of law but is concerned in the main with constitutional values and principles, the public interest, fairness and reasonableness, there is no reason why principles from the law of delict, constitutional and administrative law should not inform the law of contract.

- 1 The public provider must take all reasonable steps to ensure that the health professional, eg the nurse, doctor or physiotherapist, in the employ of the public provider is qualified to perform the services the patient is receiving and such professional meets with the licensing requirements of any law with respect to his or her profession²¹⁴.
- 2 The patient will be treated with a reasonable degree of professional skill and care and to a standard required by the professional and ethical rules of the profession to which the relevant health practitioner belongs²¹⁵.
- 3 Decisions concerning the patient's treatment will be taken by the public provider in a manner that is lawful, reasonable and procedurally fair²¹⁶. In practice this

²¹⁴ See *Mtsetwa v Minister of Health* 1989 (3) SA 600 (D) in which the court said "The two Transvaal cases, as well as *Buls and Another v Tsatsarolakis* 1976 (2) SA 891 (T), neither mention nor support the distinction, which is pivotal to the decision in the Lower Umfolosi case, between professional work over which the hospital is said to have no control and for which it is accordingly not liable, and managerial or administrative duties performed by an employee, for which it is responsible. In the Transvaal cases the issue was simply whether the particular member of staff was negligent in the exercise of his duties, regardless of whether he was part of a professional team or not." See also *Buls and Another v Tsatsarolakis* 1976 (2) SA 891 (T); *Minister van Polisie en 'n Ander v Gamble en 'n Ander* 1979 (4) SA 759 (A); *Minister of Police v Rabie* 1986 (1) SA 117 (A).

²¹⁵ In *Van Wyk v Lewis* 1924 AD 438 at p 444 and p 448, it was held that "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". See also *Blyth v Van Den Heever* 1980 (1) SA 191 (A) and *Durr v Absa Bank Ltd And Another* 1997 (3) SA 448 (SCA) in which the court observed: "Not only did the Judge below adopt the 'typical broker' test, but he held that Mrs Durr tendered no evidence as to the duties and functions of bankers under circumstances such as exist in this case. That is not entirely correct. Mr Goldhawk had said: 'If a person holds himself out as an expert and there is support, such as a financial institution confirming that he's an expert, then any person dealing with him should be entitled to expert advice. There's the analogy of if you get into a taxi and the taxi driver is a bad driver, does that remove any negligence claim you may have against him?' Mr Goldhawk is a chartered accountant and a specialist investigating accountant. He was appointed as such by the liquidators of 'Supreme' and gained a deep insight into the group and its penumbra. In *Jansen Van Vuuren and Another NNO v Kruger* 1993 (4) SA 842 (A) the court said "The duty of a physician to respect the confidentiality of his patient is not merely ethical but is also a legal duty recognised by the common law." See also *Dube v Administrator, Transvaal* 1963 (4) SA 260 (W)

²¹⁶ *Janse Van Rensburg NO and Another v Minister Of Trade and Industry and Another NNO* 2001 (1) SA 29 (CC); *Winckler and Others v Minister of Correctional Services and Others* 2001 (2) SA 747 (C) Section 33(1) guarantees everyone the right to administrative action that is lawful, reasonable and procedurally fair. See also *South African Veterinary Council and Another v Veterinary Defence Association* 2003 (4) SA 546 (SCA)

means that the patient will be consulted before such decisions are taken and that he or she will be informed of the decision before it is taken.

- 4 The patient's consent will be obtained with regard to treatment that is administered to him or her prior to the administration of such treatment²¹⁷.
- 5 The provider undertakes to render the health services in accordance with the patient's consent and on the basis of the information supplied to the patient in order to obtain that consent²¹⁸.
- 6 The patient will be informed of the fact that treatment is of an experimental nature or is being conducted in the course of research and will be given the opportunity to refuse such treatment before it is administered²¹⁹.
- 7 The patient's health information will be kept confidential and will not be used in a way that will cause harm to the patient. It will not be disclosed to anyone without the patient's prior consent²²⁰.
- 8 The patient is entitled to rely on and act in accordance with the advice of the health professionals treating him or her in their capacity as experts²²¹.
- 9 Unless specifically stated otherwise in express and unambiguous terms the provider does not undertake to cure the patient²²².

²¹⁷ *Lybery v Jeffries*, 1925 AD 236; *Esterhuizen v Administrator, Transvaal* 1957 (3) SA 710 (T); *Richter And Another v Estate Hammann* 1976 (3) SA 226 (C); *Castell v De Greef* 1994 (4) SA 408 (C); *Broude v McIntosh And Others* 1998 (3) SA 60 (SCA)

²¹⁸ *Esterhuizen v Administrator, Transvaal* 1957 (3) SA 710 (T)

²¹⁹ Section 12(2)(c) of the Constitution

²²⁰ *Jansen Van Vuuren And Another NNO v Kruger* 1993 (4) SA 842 (A)

²²¹ *In Pinshaw v Nexus Securities (Pty) Ltd And Another* 2002 (2) SA 510 (C) the court said that "Clients are wont to place their trust not just in the company, but also in the individuals within the company with whom they deal. Clients tend to expect, and in my view are entitled to expect, the exercise of skill and care from the individual advisers and managers. A failure to exercise appropriate skill and care can have devastating consequences, as Durr's case *supra* illustrated. Furthermore, financial advisers and managers can vis-à-vis their immediate clients contract out of or limit liability, and as I see the position, they can for delictual purposes do the same for their employees. To fix Van Zyl with a duty to Mrs Pinshaw, in the circumstances pleaded, strikes me as being fair and in accord with the legal convictions of the community. It seems to me, therefore, that policy considerations favour upholding the duty rather than negating it."

²²² *In Buls and Another v Tsatsarolakis* 1976 (2) SA 891 (T) the court commented: "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." See Strauss *fn* 98 *supra* at p40-41 at which he respectfully submits that where a patient consults a doctor who undertakes to treat him, the doctor assumes no greater duty than to treat the



- 10 The provider will always act in the best interests of the patient and will only administer treatment that is medically necessary²²³.
- 11 The patient will not be abandoned by the provider. Alternative health services will be provided where the provider can no longer provide the health care services previously supplied to the patient. The provider ensure that where a course of treatment has commenced it will be completed²²⁴.
- 12 The provider is entitled to payment for health care services where this is provided for by law and the patient or other person responsible for the patient is liable to pay the costs of such services²²⁵.
- 13 In the absence of provisions in law to the contrary, the patient will not be detained against his or her will by the public provider²²⁶.
- 14 The provider will take reasonable measures to ensure the health and safety of the patient while he or she is receiving health services at its premises²²⁷.
- 15 The goods supplied to the patient in the course of medical treatment are fit for the purpose for which they were supplied and are free of latent defects²²⁸.

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 not generally do.

223 See *The State v Sikunyana and Others* 1961 (3) SA 549 (E) in which the court stated: “The medical practitioner who performs a dangerous operation with his patient’s consent incurs no criminal responsibility if just cause for the operation exists, for, the law does not regard his conduct as improper: but if ‘there is no just cause or excuse for an operation, it is unlawful even though the man consents to it’- vide *Bravery v Bravery*, 1954 (3) A.E.R. 59 at p. 67, per Denning, L.J. Any intentional act which involves the likelihood of bodily harm to another and which is not recognised by modern usage as a normal and accepted practice of society is forbidden by law and is in no way dependent upon the absence of consent on the part of the victim.”

224 *Applicant v Administrator, Transvaal, and Others* 1993 (4) SA 733 (W)

225 See the previous discussions of the legislation in the different provinces and their fee regulations.

226 Section 12(1) of the Constitution

227 *Beaven v Lansdown Hotel (Pty), Ltd* 1961 (4) SA 8 (N) *Regal v African Superslate (Pty.) Ltd* 1963 (1) SA 102 (AD); *Quathlamba (Pty) Ltd v Minister Of Forestry* 1972 (2) SA 783 (N); *Bronte Hotel (Pvt) Ltd v Low* 1974 (2) SA 353 (R); *Kritzinger v Steyn En Andere* 1997 (3) SA 686 (C). See also section 9(1) of the Occupational Health and Safety Act No 85 of 1993 which states that “Every employer shall conduct his undertaking in such a manner as to ensure, as far as is reasonably practicable, that persons other than those in his employment who may be directly affected by his activities are not thereby exposed to hazards to their health or safety.” The definition of ‘employer’ in the Act is wide enough to include the state.

228 In *Curtaincrafts (Pty) Ltd v Wilson* 1969 (4) SA 221 (E), the court said that a purchaser of an article is entitled to expect is that the article shall be free from such latent defects as are not to be expected in an article of that quality, price and type, unless he obtains a warranty in expressly wider terms. *Kroonstad Westelike Boere-Ko-Operatiewe Vereniging Bpk v Botha and Another* 1964 (3) SA 561 (A) Liability for consequential damage caused by latent defect attaches to a merchant seller, who was unaware of the defect, where he publicly professes to have attributes of skill and expert knowledge in relation to the kind of goods sold.

16 The patient's constitutional rights to life, bodily and psychological integrity, human dignity, privacy, freedom and security of the person, freedom of religion, belief and opinion, and access to health care services will be respected, protected, promoted and upheld by the public provider²²⁹.

It is submitted that most of these terms would be the same for private sector providers.

4.11 Issues Involving Contracts for Health Care Services

If the question of whether or not the provision of ordinary health care services is based on the law of contract is rather murky, it is submitted that the same question when applied to emergency medical treatment is murkier still. Provinces do charge for emergency medical services, including ambulance services, and they also charge for various kinds of emergency medical treatment rendered at health establishments. As stated previously the English law doctrine of consideration forms no part of the South African law of contract and the fact that a payment for services is required does not automatically imply the existence of a contract either. The fact of the matter is that even in the private sector, the inference of a contractual relationship between provider and patient tends to take place after the event at a time when a need arises to scrutinise the nature of the relationship more closely. It is submitted that there is a different dimension to 'trade' in health services compared to other non-essential or more commercial commodities, access to which is not so strictly regulated or controlled by law both in terms of who may supply them and the conditions for

See also *Crawley v Frank Pepper (Pty) Ltd* 1970 (1) SA 29 (N) A seller is obliged to disclose all material latent defects which unfit or partially unfit the *res vendita* for the purpose for which it was intended to be used. By operation of the Aedilician Edicts, as expounded and adopted in our law, into every contract of sale there is imported a warranty by the seller against such latent defects. Although a seller may contract out of his obligations to disclose and out of the statutorily imported warranty against latent defects, the existence of which he does not know at the time of the sale, if he purports to contract out of his obligation to disclose and of the implied warranty against material latent defects unfitting, or partially unfitting, the *res vendita* for the purpose for which it is sold, and those defects are present to his mind at the time of the sale, but he remains silent about them although he must know that to disclose their existence would cause a prospective buyer either not to purchase at all or to insist on a lower price than he otherwise would pay, he will be given the 'replication of fraud' (*de dolo replicationem*).

See also *Holmdene Brickworks (Pty) Ltd v Roberts Construction Co Ltd* 1977 (3) SA 670 (A) where it was held that a merchant who sells goods of his own manufacture or goods in relation to which he publicly professes to have attributes of skill and expert knowledge is liable to the purchaser for consequential damages caused to the latter by reason of any latent defect in the goods. Ignorance of the defect does not excuse the seller. Once it is established that he falls into one of the above-mentioned categories, the law irrebuttably attaches this liability to him, unless he has expressly or impliedly contracted out of it. The liability is additional to, and different from, the liability to redhibitorian relief which is incurred by any seller of goods found to contain a latent defect. Broadly speaking, a defect may be described as an abnormal quality or attribute which destroys or substantially impairs the utility or effectiveness of the *res vendita* for the purpose for which it has been sold or for which it is commonly used. Such a defect is latent when it is one which is not visible or discoverable upon an inspection of the *res vendita*.

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This is an obligation imposed upon the state by section 7(2) of the Constitution.

supply, which are not so immediately necessary for the continued or improved health or wellbeing of the person requiring them.

In the case of an emergency, it would not usually be feasible to argue a contractual intention on the part of the patient or the provinces sufficient for the establishment of a contractual relationship because even the patient is very often incapable of forming such an intention before the services are rendered. *Ex post facto* ratification and consent to a contractual relationship is a possibility but even in the private health context it is not a comfortable fit. The nature of the services rendered and the goods supplied²³⁰ in health care services are for the most part such that they cannot be returned should a patient decide after the event, not to accept them or ratify the relationship with the provider. It could be argued that a contract could arise in a situation where the patient is not the contracting party but is for instance a child or an old person for whom the contracting party is responsible, but there is the possibility of counterarguments of duress²³¹ or even undue influence, which may have a fair chance of success in emergency situations. Even in non-emergency situations providers of health care services are often in a position of considerable power relative to the consumer. A person who requires surgery for instance usually does feel strong and well and could in many instances not be in a position to act as rationally or reasonably as would a healthy person. He or she is quite often literally at the mercy of the health care provider who is attending to them and may, depending upon the circumstances, be mentally and physically incapacitated to a considerable extent²³². In

²³⁰ Many of the goods used in the delivery of healthcare services are consumables such as medicines and disinfectants, swabs, dressings and bandages, sutures, needles and syringes, X-Ray film etc.

²³¹ The court in *Paragon Business Forms (Pty) Ltd v Du Preez* 1994 (1) SA 434 (SE) noted that “In *Arend and Another v Astra Furnishers (Pty) Ltd* 1974 (1) SA 298 (C) at 305 *in fine*-306B Corbett J (as he then was) dealt with the requirements of duress as follows: ‘Reverting to the defence raised by first defendant, it is clear that a contract may be vitiated by duress (*metus*), the *raison d’être* of the rule apparently being that intimidation or improper pressure renders the consent of the parties subject to duress no true consent . . . Duress may take the form of inflicting physical violence upon the person of a contracting party or of 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.
- (iii) 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.’

has been pointed out by, amongst others, Christie in his work *The Law of Contract* 2nd ed at 368, it is impossible to produce a precise and exact formula to be applied to determine when a contract will be set aside or not enforced on grounds of duress (compare, for example, the requirements of duress set out in Joubert (ed) *Law of South Africa* vol 5 para 138 with those as laid down in the Arend’s case *supra* and quoted above).”

²³² One of the earliest cases involving undue influence in South African law is *Preller And Others v Jordaan* 1956 (1) SA 483 (A) in which an elderly farmer in his declaration against his former medical practitioner and the latter’s son and daughter averred that at a time when he was old and sick and bodily, spiritually and mentally weak and exhausted, he had been influenced in an improper and unlawful manner by his doctor, who was also his adviser, to give and transfer to him four farms to be administered by him for the benefit of the farmer’s wife and the labourers on the farm, and that he

*BOE Bank Bpk v Van Zyl*²³³ the court discussed the difference between duress and undue influence²³⁴ and commented that although there was no absolute boundary between these concepts, South African law had not yet developed to the extent that a single overarching defence such as 'misuse of circumstances' was generally recognised.

Another aspect of contracts for health services is that the consumer is not in a position to evaluate the quality of the services he or she receives or the correctness or accuracy of the health advice given. Health economists call it information asymmetry²³⁵. By far

would never have done so had he not been so weak and exhausted and totally under the influence of the doctor. The court held that the grounds of *restitutio in integrum* in the Roman-Dutch Law are wide enough to cover the case where one person obtains an influence over another which weakens the latter's resistance and makes his will pliable, and where such a person then brings his influence to bear in an unprincipled (gewetelose) manner in order to prevail upon the other to agree to a prejudicial (skadelike) transaction which he would not normally have entered into of his own free will. It said that the words 'undue influence', or such words as 'onbehoorlike beïnvloeding' ('improper influence'), constitute an altogether suitable name for the ground of action which exists in these circumstances. The court held that the exception taken by the doctor had rightly been dismissed.

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BOE Bank Bpk v Van Zyl 1999 (3) SA 813 (C)

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The court observed at p 824-825: "Daar bestaan egter geen waterdigte skeiding tussen die verskillende kontraktuele aanvegtingsgronde, en veral tussen dwang en onbehoorlike beïnvloeding, nie. (Sien by *Savvides v Savvides and Others* 1986 (2) SA 325 (T) op 329F-G; Wessels *The Law of Contract in South Africa* 2de uitg band 1 /s 1209); Van der Merwe, Van Huyssteen *et al Kontraktereg - Algemene Beginsels* (Juta & Kie, 1994) op 72; Lubbe G 'Voidable Contracts' in Zimmerman en Visser *Southern Cross - Civil Law and Common Law in South Africa* op 261 ev). Lubbe (op cit op 293-4) beskryf die situasie treffend as 'the collapse of conceptual barriers between undue influence and *metus*'.

Meerdere skrywers staan dan ook 'n enkele oorkoepelende aanvegtingsgrond voor, te wete 'die onbehoorlike verkryging van wilsooreenstemming' of 'misbruik van omstandighede'. (Sien Van der Merwe, Van Huyssteen *et al* (op cit op 72-3 en 96 ev) en vgl ook Van Huyssteen 'Onbehoorlike Beïnvloeding en Misbruik van Omstandighede in die Suid-Afrikaanse Verbintenisreg' op 127 ev). Ons regsontwikkeling het egter nog nie die stadium bereik waar 'n enkele oorkoepelende aanvegtingsgrond algemeen erken word nie. Hierdie is ook nie die geleentheid of die plek om enige verdere stukrag aan hierdie moontlike ontwikkeling in ons reg te verleen nie. Vir doeleindes hiervan aanvaar ek dat die regsfigure van dwang en onbehoorlike beïnvloeding in die huidige stand van ons reg steeds afsonderlike en selfstandige aanvegtingsgronde daarstel. Wat die fundamentele onderskeid tussen die twee gronde betref, is daar 'n skaarste aan gesag by ons. Die verskillende vereistes vir die onderskeie aanvegtingsgronde word egter wel gereeld geformuleer. (Sien by Wessels (op cit /s 1167); *Broodryk v Smuts NO* 1942 TPD 47 op 51-2; *Arend v Astra Furnishers* (*supra* op 306A-B); *Christie Law of Contract in South Africa* 3de uitg op 343-4 in verband met dwang; en *Patel v Grobbelaar* (*supra*) en *Hofer and Others v Kevitt NO and Others* (*supra*) in verband met onbehoorlike beïnvloeding.) Die verskil tussen dwang en onbehoorlike beïnvloeding word kernagtig soos volg gestel deur Kerr *The Principles of the Law of Contract* 4de uitg op 245: 'Undue influence differs from *metus* in that it may be exercised without any threat being issued or menace being present.' Meer volledig en diepgaande is die bespreking deur H Lubbe (op cit te 289), wat daarop wys dat daar dikwels in ons regspraak op hierdie regsfiguur van onbehoorlike beïnvloeding teruggeval is 'where contracts were concluded in response to threats and pressure below the level of *metus* as traditionally understood by the courts'. Die tipe van gevalle waar hierdie verweer normaalweg aanwending vind, word dan soos volg deur die geleerde skrywer geklassifiseer (*ibid*): 'It has often been resorted to in cases involving persons of limited intellectual capacity who, physically and psychologically isolated from the outside world, fall prey to shady and unscrupulous characters. The former often face evidential difficulties when seeking relief from oppressive transactions on grounds such as mental incompetence, misrepresentation, duress, or other traditional defences. As far as both the memory of past events and the ability to communicate these to the court is concerned, the traditional defences often demand too much of the disadvantaged party. The doctrine of undue influence was resorted to in a number of cases in order to counter such evidential difficulties.'"

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It has been defined as a "Condition in which at least some relevant information is known to some but not all parties involved. Information asymmetry causes markets to become inefficient, since all the market participants do not have access to the information they need for their decision making processes." <http://www.investorwords.com/cgi-bin/getword.cgi?2461> See also generally *Journal of Health Politics, Policy and Law: Special Issue Kenneth Arrow and the Changing Economics of Health Care* http://www.ihcpar.rutgers.edu/rwjf/downloads/research_in_profiles_iss03_apr2002.pdf and Atlas S 'Diagnosis Critical' <http://www-hoover.stanford.edu/publications/digest/033/atlas.html> who states that the patient-doctor relationship is uniquely important to medical care because of the extreme nature of the information gap between patient and physician (i.e. the buyer and the seller. No other industry has such asymmetry of information, and perhaps no other information asymmetry is so permanent...As medical care becomes even more technologically advanced, highly complex diagnostic and therapeutic algorithms will become commonplace. This asymmetry of information makes it crucial that physicians have an established relationship with their patients. This will help ensure that appropriate medical care is offered and accepted, while minimizing concerns for profit that are standard in other industries." Naci Mocan H and the National



the majority of patients are given no choice as to the medication prescribed for them or the nature of the health services that are rendered to them even in the private sector. They are in any event not always in a position to make informed choices in a rational and objective manner. They are not therefore by any means on an equal footing with the expert provider of health care services in the negotiation of a contract. Yet South African law, unlike many other jurisdictions, is curiously slow to regulate any aspect of the relationship so as to ensure a better balance between the parties.

It may be argued that contract is not the best legal mechanism for the delivery of public health services in any event and that particularly in the context of public health services, contractual relationships should not generally be inferred in the absence of clear evidence to the contrary²³⁶. A sound reason for this might be that contract is essentially a mechanism of the free market which promotes competition and operates on the principle that suppliers who deliver bad or substandard service will not last long because consumers will vote with their feet. In the context of health care services, due to information asymmetry and the vulnerability of consumers of health care services, the markets do not operate in the same way as they do in respect of other goods and services. Unfortunately this logic is not in keeping with the case-by-case approach to contracts used in our law. The courts are unlikely to make a general inference about contracts for health services in the public sector but are more likely to prefer to consider only the particular facts of the case before them although obviously a similar case in the same province and governed by the same statutory terms and conditions is likely in practice to yield the same result.

A third issue is that contracts for health services do not generally undertake to cure the patient or even relieve symptoms except where this is stated expressly in clear and unambiguous terms but the expectation or belief of the patient in receiving or consenting to the services is likely to be some kind of relief of even a cure – otherwise

Bureau of Economic Research observe in a paper entitled 'Can Consumers Detect Lemons? Information Asymmetry in the Market for Child Care': "In his seminal paper, Akerlof (1970) shows that in a market with asymmetric information between buyers and sellers, adverse selection is likely to result. If it is difficult for buyers to assess the quality of the product, and if quality is costly to produce, sellers of high quality products will not be able to command higher prices for higher quality. As a result, high quality products will withdraw from the market, leaving the 'lemons' behind."
<http://econ.cudenver.edu/mocan/papers/InformationAsymJuly2003.pdf>

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Courts in any event are unlikely to infer a contractual relationship unless there is some fairly firm evidence to the contrary. Furthermore if there is clear evidence to the contrary then contract is by definition not to be implied. It is express. Implied contracts must therefore exist in the absence of firm evidence of the existence of a contract. They are apparently creatures of public policy as perceived by the courts in combination with their assessment of the evidence on a balance of probabilities.

why would he bother?²³⁷ The South African law of contract espouses the principle of the 'reasonable man' in much the same way as does the English law²³⁸. Despite this

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Steyn J 'Contract Law: Fulfilling the Reasonable Expectations of Honest Men' 113 (1997) *The Law Quarterly Review* p 433 notes that a thread runs through English contract law that effect must be given to the reasonable expectations of honest men. He observes that while it is a defensible position for a legal system to give predominance to the subjective intentions of the parties, this is not the English way. English law adopts the external standard which is that of the reasonable man. He notes that the proposition can be restated so as to say that the law must respect the reasonable expectations of contracting parties. In considering what these are he observes that the expectations that will be protected are those that are, in an objective sense common to both parties and that the law of contract is generally not concerned with the subjective expectations of a party. In the case of a contract for health services it would seem from the case law that the reasonable expectations of the patient do not usually include the promise of a cure on the part of the provider. Strauss (fn 94 *supra*) discusses this question at p 40 and refers to the English case of *Thake and Another v Maurice* [1986] 1 All ER 497 (CA) in which the English Court of Appeal refused to come to the conclusion that there had been a guarantee of success where a doctor had performed an unsuccessful vasectomy on a married man. It must be noted, however, that the husband and wife in this case succeeded in contract and in tort because the defendant surgeon had failed to warn of the slight risk that the husband's vasectomy might not leave him permanently sterile. The facts in this case were that the first plaintiff signed a form stating that he consent to undergo a vasectomy operation which was duly carried out. The second plaintiff subsequently became pregnant and gave birth to a baby girl. The plaintiffs brought an action against the defendant claiming that their contract with the defendant was a contract to sterilise the first plaintiff and that the contract had been breached when he became fertile again, alternatively that they were induced to enter into the contract by a false warranty or innocent misrepresentation that the operation would render the first plaintiff permanently sterile or in the further alternative that the defendant had failed to warn them that there was a small risk that the first plaintiff might become fertile again. There was no suggestion that the defendant had not performed the operation properly and at the time of the operation it was known in medical circles that in rare cases the effect of the operation could be reversed naturally. Neill LJ gave judgment as follows: "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 take reasonable skill and care. The question for consideration is whether in the circumstances of the instant case the defendant further undertook that he would render Mr Thake permanently sterile by means of this operation... It is not in dispute that the task of the court is to seek to determine objectively what conclusion a reasonable person would have reached having regard to (a) to the words used by the defendant, (b) the demonstration which he gave and (c) the form which Mr and Mrs Thake were asked to sign. Counsel for the plaintiffs placed particular reliance on the following matters (1) that on more than one occasion the defendant explained to the plaintiffs that the effect of the operation was 'irreversible', subject to the remote possibility of later surgical intervention, and counsel pointed out that this explanation was reinforced by the statement in the form 'I understand that the effect of the operation is irreversible'... For my part, however, I remain unpersuaded... It is the common experience of mankind that the results of medical treatment are to some extent unpredictable and that any treatment may be affected by the special characteristics of the particular patient. It has been well said that 'the dynamics of the human body of each individual are themselves individual.' I accept that there may be cases where, because of the claims made by a surgeon or physician for his method of treatment the court is driven to the conclusion that the result of the treatment is guaranteed or warranted. But in the present case I do not regard the statements made by the defendant to the effect of his treatment as passing beyond the realm of expectation and assumption. It seems to me that what he said was spoken partly by way of warning and partly by way of what is sometimes called 'therapeutic reassurance'. (As quoted in Kennedy and Grubb *Medical Law* 3rd ed p1556.) Strauss also refers to the South African case of *Behrmann and Another v Klugman* 1988 WLD unreported in which the South African court said it found the reasoning by the English judges 'very persuasive'. This case also involved an unsuccessful vasectomy. The court held that even if the doctor used the phrase 'end of the road' or 'you will not have another child', it was not intended in the context as irreversible other than to describe the nature of the operation and was not intended to give a guarantee as to the permanent success of the operation. The court found that no breach of contract by the doctor was established. Strauss also cites the English case of *Eyre v Measday*, [1986] 1 All ER 488 (CA) an unsuccessful sterilisation operation in which a court rejected the female patient's claim for damages even if the doctor had told the woman that the operation "must be regarded as a permanent procedure". In the case of *Greaves & Co (Contractors) Ltd v Baynham Mickle and Partners* [1975] 3 All ER 99 CA, Lord Denning stated that "The law does not usually imply a warranty that he will achieve the desired result, but only a terms 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." (Quoted by Strauss at p41)

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In *Ridon v Van der Spuy and Partners (Wes-Kaap) Inc* 2002 (2) SA 121 (C) the court held as follows at p138-139: "... even in the absence of subjective consensus, the so-called 'reliance theory' (the theory of quasi-mutual assent) may in appropriate circumstances form an alternative basis for contractual liability. In the case of *Sonap Petroleum (SA) (Pty) Ltd (formerly known as Sonarep (SA) (Pty) Ltd) v Pappadogianis* 1992 (3) SA 234 (A), Harms AJA considered the leading cases and the opinions of academic writers on the reliance theory (at 238I - 241D) and came to the following conclusion (at 239I - J): 'In my view, therefore, the decisive question in a case like the present is this: did the party whose actual intention did not conform to the common intention expressed, lead the other party, as a reasonable man, to believe that his declared intention represented his actual intention? . . . To answer this question, a three-fold enquiry is usually necessary, namely, firstly, was there a misrepresentation as to one party's intention; secondly, who made that misrepresentation; and thirdly, was the other party misled thereby?' In *Steyn v LS4 Motors Ltd* 1994 (1) SA 49 (A), the Appellate Division again confirmed its adherence to the reliance theory of contractual liability, while at the same time emphasising that, consensus being the essence of contract, subjective intention cannot be ignored: 'Where it is shown that the offeror's true intention differed from his expressed intention, the outward appearance of agreement flowing from the offeree's acceptance of the offer as it stands does not in itself or necessarily result in contractual liability. Nor is it in itself decisive that the offeree accepted the offer in reliance upon the offeror's implicit representation that the offer correctly reflected his intention. Remaining for consideration is the further and crucial question whether a reasonable man in the position of the offeree would have accepted the offer in

discrepancy between the expectations of the patient and the undertaking of the provider, the patient usually has little or no choice in seeking the services of the provider. In the public sector, patients classified as ‘public patients’ in terms of the various regulations cited above do not even have a choice as to which particular provider renders the services. In many instances, their opportunities to ‘shop around’ if they are dissatisfied with the advice or treatment they have been given are significantly restricted if they exist at all. Since the nature of the services rendered at a public health establishment are predetermined and there are often clinical protocols and guidelines which are uniformly implemented across all public health establishments, the power of the patient to ‘negotiate’ the terms of a contract for services falling outside of the predetermined services and clinical guidelines and protocols is virtually non-existent. The position is: these are the services on offer – take them or leave them. In reality in most cases involving health care services, the element of choice reflected in the second half of this statement is no choice at all. The constitutional court in *TAC*²³⁹ reflected these sentiments in the following words:

“Here we are concerned with children born in public hospitals and clinics to mothers who are for the most part indigent and unable to gain access to private medical treatment which is beyond their means. They and their children are in the main dependent upon the State to make health care services available to them.”

It is submitted that the tendency of the English courts to interpret contracts for health services as not including guarantees of a cure or the achievement of the object of the treatment is not always reconcilable with either South African public policy or the law of contract as it applies to other suppliers of goods and services²⁴⁰. In *Edouard v Administrator Natal*²⁴¹ Thirion J observed:

the belief that it represented the true intention of the offeror, in accordance with the objective criterion formulated long ago in the classic dictum of Blackburn J in *Smith v Hughes* (1871) LR 6 QB 597 at 607. Only if this test is satisfied can the offeror be held contractually liable’ (per Botha JA at 61C - E). (See further the discussion of the Steyn case by Lewis in 1994 *Annual Survey of South African Law* at 127 - 9, and of Lewis in 1998 *Annual Survey of South African Law* at p 176 - 9.)” See also *Sonap Petroleum (SA) (Pty) Ltd (formerly known as Sonarep (SA) (Pty) Ltd) v Pappadogianis* 1992 (3) SA 234 (A); *Fourie NO v Hansen and Another* 2001 (2) SA 823 (W); *Nasionale Behuissingskommissie v Greyling* 1986 (4) SA 917 (T); *Multilateral Motor Vehicle Accidents Fund v Meyerowitz* 1995 (1) SA 23 (C); *Road Accident Fund v Mothupi* 2000 (4) SA 38 (SCA); *Maritime Motors (Pty) Ltd v Von Steiger and Another* 2001 (2) SA 584 (SE); *Steyn v LSA Motors Ltd* 1994 (1) SA 49 (A); *Horty Investments (Pty) Ltd v Interior Acoustics (Pty) Ltd* 1984 (3) SA 537 (W); *Distillers Corp Ltd v Modise* 2001 (4) SA 1071 (O)

239 *Minister of Health and Others v Treatment Action Campaign* (No 2) 2002 (5) SA 721 (CC) see para 79 page 750

240 Thirion J in *Edouard v Administrator, Natal* fn 145 *supra* observed at p 384-385: “There is every reason why a party, who, when he enters into a contract, foresees the likelihood that his breach of the contract would result in loss of a particular kind to the other party, should be held liable for such loss when it does eventuate as a consequence of his breach. In this connection the following remarks of Innes CJ in *McCullough & Whitehead v Whiteaway & Co* 1914 AD 599 at 625 are in point: ‘Now, that the document was one-sided and harsh admits of no doubt, but I am not aware of any principle of our law by which, on that ground alone, an undertaking deliberately and knowingly entered into could be repudiated.’ It is furthermore a principle of general application to contracts that, if the kind or type of loss likely to be caused by the breach of the contract was within the reasonable contemplation of the parties when the contract was made



“Where sterilisation was sought to prevent the birth of a handicapped child and a normal and healthy child is born, the parents’ claim for damages in respect of the maintenance of the child might fail on the ground that such loss was not in contemplation of the contracting parties. Considering the ease with which doctors would be able to protect themselves against liability by warning the woman of the danger that the operation might not result in sterility, *there seems to be no reason why the Court should extend to them a special protection against their own negligence; be it in a delictual or contractual context. Pharmacists or manufacturers who make extravagant claims as to the effectiveness of the products they sell would have only themselves to blame.*”(writer’s italics).

There seems to be a degree of logical dissonance about the fact that where the sterilisation operation was not performed the person upon whom it should have been performed has a legally recognisable claim but where it was performed on the understanding that it is ‘irreversible’ only to fail one or two years later there can be no such claim because in ‘rare cases’ the sterilisation has been known to fail. From a layperson’s, i.e. the patient’s point of view, the reason for a healthy person seeking to be sterilised is so that he or she can no longer participate in the conception of a child. There are, however, other ways of contraception which may be generally regarded as less reliable than sterilisation. Presumably one of the considerations in the mind of someone who has opted to be sterilised is not only that he or she no longer wants to be able to conceive a child but also that he or she no longer wants to have to use other forms of contraception. A person who has undergone surgery for sterilisation would not be expecting to have to continue to use other forms of contraception – otherwise there would be little point in being sterilised. The patient who is under anaesthetic in an operating theatre is in no position to appreciate what is happening or see to it that a particular procedure has been done or done correctly. Even when he or she regains consciousness very often the only evidence available is a surgical wound and the information supplied by the surgeon as to what was done.

and therefore not too remote, it is immaterial that the magnitude or extent of the loss is such that it was not within the reasonable contemplation of the parties. *Wroth and Another v C Tyler* [1973] 1 All ER 897 (Ch) at 922. For the position in delict see *Botes v Van Deventer* 1966 (3) SA 182 (A)... The argument that liability in wrongful birth actions might have an adverse influence on professional standards or might limit the number of practitioners willing to undertake sterilisation operations is nothing but a make-weight. The sterilisation operation is a fairly simple surgical procedure and it would be a simple matter for the doctor to explain to the patient that there is, despite the operation, a possibility that she might still fall pregnant. It would be easy for the doctor to contract out of liability. Fears that recognition of wrongful birth claims lead to an unmanageable extension of liability or difficulties in the field of assessment of damages have not withheld the Courts in England from recognising such claims. See *Thake and Another v Maurice* [1986] 2 WLR 337 (CA) ([1986] 1 All ER 497); *Emeh v Kensington and Chelsea and Westminster Health Authority* [1984] 3 All ER 1044 (CA).



The question of whether or not a person should be liable for damages whether in contract or in delict is often a question of public policy as to where the risk should lie. In the case of a sterilisation operation the question is whether it should lie with the patient or the surgeon. The English court in *Thake* in refusing to accept that the surgeon would have guaranteed a successful outcome effectively concluded that the risk should lie with the patient. Neill LJ in that case observed that –

“it is the common experience of mankind that the results of medical treatment are to some extent unpredictable and that any kind of treatment may be affected by the special characteristics of the particular patient.”

Neill LJ seemed to be drawing a very fine distinction in observing that while both plaintiffs and the defendant expected that sterility would be the result of the operation and the defendant appreciated that that was the plaintiffs’ expectation, this did not mean 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 it would have the desired result. If the nature of the contractual undertaking is sterilisation it is difficult to see how this differs in principle from a guarantee of sterilisation. The court seems to be saying that the nature of the undertaking was not sterilisation *per se* but a surgical operation designed to effect sterilisation which seems to be splitting hairs in favour of the surgeon²⁴². Neill LJ did find for the plaintiffs in the end but the arguments in his judgment concerning the court’s construction of the contractual relationship between a provider and patient unduly favour the provider. The fact that in rare cases the effect of a vasectomy could be reversed naturally should not be a

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The dissenting judgment of Kerr LJ seems to pick up on this point in the following observations: “On this appeal it was common ground that the court’s task was to determine objectively the terms of the contract whereby the defendant offered and agreed to operate on the male plaintiff. What would a reasonable person in the position of Mr and Mrs Thake have concluded in that regard? Was it merely that the defendant would perform a vasectomy operation subject to the duty implied by law that would do so with reasonable skill and care? Or was it that the defendant would perform this operation so as to render Mr Thake permanently sterile? Counsel for the defendant submitted that, even if the latter was the correct objective construction of the terms of the offer made by the defendant, it was nevertheless not so understood by Mr and Mrs Thake. He said that this was merely what they believed would be the result of the operation, not what they believed the defendant had undertaken to do...But in my view no such further question arises here, since it is plain on the evidence that Mr and Mrs Thake intended that Mr Thake should be rendered permanently sterile and believed that this is what the defendant had agreed to do.” (As quoted in Kennedy and Grubb *Medical Law* 3rd ed). Kerr LJ also found in favour of the plaintiffs. Kerr LJ distinguished between different kinds of medical treatment as follows: “The considerations which lead me to this conclusion can be summarised as follows. First, we are here dealing within something in the nature of an amputation, not treatment of an injury or disease with inevitably uncertain results. The nature of the operation was he removal of parts of the channels through which sperm had to pass to the outside in such a way that the channels could not reunite... On the evidence in this case the position is quite different, in my view, from what was in the mind of Lord Denning MR in *Greaves & Co (Contractors) Ltd v Baynham Meikle & Partners* [1975] 3 All ER 99 at 103-104, [1975] 1 WLR 1095 when he said: ‘The surgeon does not warrant that he will cure the patient.’ That was said in the context of treatment or an operation designed to cure, not in the context of anything in the nature of an amputation.”

factor which weighs in on the side of the surgeon. It should rather be seen as supportive of the patient's claim. Such cases are *rare*. One cannot help but ask why the patient as the layperson should carry the risk of this rare occurrence when it is the doctor, the expert, who is in the business of sterilisations and is profiting on the basis of his alleged expertise and skill? If the fact that such cases are rare counts in favour of the doctor who is an expert, who has held himself out as an expert to the patient, a layperson, and who is the only person who is likely to know what he actually did or failed to do in relation to a sterilisation operation, the chances of the patient's ever being able to prove that the doctor acted in breach of contract are slim to non-existent. If the fact that such cases are rare counts in the patient's favour, however, then the doctor must discharge an onus. He must have adequate records of what he did that day. He must be able to show that he used a surgical procedure that is generally accepted as being suitable for its intended purpose. If the doctor has not acted in breach of contract in such a situation it should not be difficult for him to show this on a balance of probabilities. In *Thake* the court observed that if the defendant had given his usual warning the objective analysis of what he conveyed would have been quite different.

In another context, the South African law of contract does not hesitate to impose the risk upon the person who is skilled or an expert and is trading on or in that skill or expertise. In *Jaffe & Co (Pty) Ltd v Bocchi And Another*²⁴³ the court observed at p 363:

"The seller who is an *artifex* is placed in a special category. See Voet, 21.1.10. He is fully liable for consequential damages even though ignorant of the latent defects. The South African Provincial Divisions have gone further. They have followed Pothier where he says in his treatise on the contract of sale:

'There is one case in which the seller, even if he is absolutely ignorant of the defect in the thing sold is nevertheless liable to a reparation of the wrong which the defect causes the buyer in his other goods; and this is the case where the seller is an artisan or a tradesman who sells the manufacture of his own trade, or of the kind of dealing of which he makes a business.'

Then he quotes certain examples and proceeds:

'It is the same in regard to a dealer whether he is or is not the maker of the articles which he sells. By the public profession which he makes of his trade he renders himself responsible for the goodness of the merchandise which he sells for the use to which it is destined. If he is the manufacturer he ought to employ in his business none but good workmen for whom he is responsible. If he is not the manufacturer he ought to expose for sale none but good articles. He ought to have knowledge of his wares, and ought to sell none but good.'"

²⁴³ *Jaffe & Co 1961 (4) SA 358 (T)*

The basis for this rule of contract law is clearly public policy²⁴⁴. Hiemstra J states at p 364:

“With humble respect I agree with the statement of Schreiner, J.A., in *Hackett's* case at p. 692 where he said:

‘The decisions in the Provincial Divisions . . . broadly speaking recognise the justice of the generalisation that a seller who manufactures or deals in a kind of goods should be treated as having given the buyer of such goods from him his expert assurance that the goods are free from latent defects. It seems to me that this recognition accords with the present day needs of the community.’

In *Ciba-Geigy (Pty) Ltd v Lushof Farms (Pty) Ltd En 'n Ander*²⁴⁵ the court held that a merchant-dealer who publicly professes to have expert knowledge in respect of the type of product that he sells is liable to the purchaser under the *actio empti* if the latter should suffer consequential damage as a result of a latent defect in the *res vendita*. It said that a latent defect is defined as an abnormal quality or attribute which destroys or substantially impairs the utility or effectiveness of the *res vendita* for the purpose for which it has been sold or for which it is commonly used²⁴⁶.

Consequential damages are greater in extent than ordinary damages. Under the aedilitian remedies it is contrasted with redhibitorian relief which is relief for the return of the purchase price paid for the defective goods²⁴⁷.

²⁴⁴ In *Holmdene Brickworks (Pty) Ltd v Roberts Construction Co Ltd* 1977 (3) SA 670 (A), Corbett JA observed at p 682: “The legal foundation of respondent's claim is the principle that a merchant who sells goods of his own manufacture or goods in relation to which he publicly professes to have attributes of skill and expert knowledge is liable to the purchaser for consequential damages caused to the latter by reason of any latent defect in the goods. Ignorance of the defect does not excuse the seller. Once it is established that he falls into one of the above-mentioned categories, the law irrefutably attaches this liability to him, unless he has expressly or impliedly contracted out of it. (See Voet, 21.1.10; Pothier, *Contrat de Vente*, para. 214; *Kroonstad Westelike Boere Ko-op. Vereniging v Botha*, 1964 (3) SA 561 (AD); also *Bower v Sparks, Young and Farmers Meat Industries Ltd.*, 1936 NPD 1; *Odendaal v Bethlehem Romery Bpk.*, 1954 (3) SA 370 (O).) The liability is additional to, and different from, the liability to redhibitorian relief which is incurred by any seller of goods found to contain a latent defect (see *Botha's* case, *supra* at p. 572).”

He then went on to question whether the legal foundation of the claim was in fact the law of contract or the law of delict in the following words at p686-687: Counsel for both parties argued the matter on the basis that the liability of the manufacturer/seller for consequential damages arising from a latent defect in the *res vendita* is founded upon breach of contract. It is by no means clear that this is so. If the liability be regarded as one flowing from an implied warranty or undertaking, imported by law, that goods sold by a manufacturer are free of latent defects (see *Hackett v G. & G. Radio and Refrigerator Corporation*, 1949 (3) SA 664 (AD) at pp. 691 - 2; *Jaffe & Co. (Pty.) Ltd. v Bocchi and Another*, 1961 (4) SA 358 (T) at pp. 364, 368; cf. *Minister van Landbou-Tegniese Dienste v Scholtz*, 1971 (3) SA 188 (AD) at pp. 196 - 7), then the remedy is contractual. If, on the other hand, the manufacturer/seller is held liable on the ground that he is taken to have knowledge of the defect (see *Erasmus v Russell's Executor*, 1904 T.S. 365 at pp. 373 - 4; *Seggie v Philip Bros.*, 1915 CPD 292 at p. 306; *Marais v Commercial General Agency Ltd.*, 1922 T.P.D. 440 at pp. 444 - 5) and that the sale of defective goods with such imputed knowledge is treated as being a case of implied fraud or something cognate to fraudulent misrepresentation (see Mackeurtan, *Sale of Goods*, 4th ed., p. 265; De Wet and Yeats, *Kontraktereg*, 3rd ed., p. 235), or if the ground of liability be the fault, or *culpa*, of the seller in that, being the manufacturer of the goods, he ought to have knowledge of his wares (*Hackett's* case, *supra*, judgment of Court a quo, cited in *Kroonstad Westelike Boere Ko-op. Vereniging v Botha*, *supra* at p. 570; also *Button v Bickford, Smith & Co.*, 1910 W.L.D. 52; *Evans and Plows v Willis & Co.*, 1923 CPD 496 at pp. 503 - A 5), then the remedy would seem to be delictual rather than contractual. The question whether it be breach of contract or delict would affect the basis upon which damages are computed and in practice might lead to different results.

²⁴⁵ *Ciba-Geigy* 2002 (2) SA 447 (SCA)

²⁴⁶ Paragraph [48] at E 465G - J.)

²⁴⁷ *Consol Ltd v/a Consol Glass v Twee Jonge Gezellen (Pty) Ltd And Another* 2002 (6) SA 256 (C), Bignault J commented: “Mr Duminy (for plaintiff) submitted that, in the context of the clause in question, liability for consequential loss or

The question of the applicability of section 27(1) of the Constitution to the private health sector seems to be fairly clear in the sense that, if the services are available in the private health sector anyone should have access thereto. It is not even necessary to consider the provisions of section 8 of the Constitution in this regard and the vexed question of the horizontal application of the Bill of Rights. The state does not have the capacity to provide the health service needs of the entire population and the private sector is therefore an essential component of the health system in South Africa. The fact that the private sector can impose conditions upon such access, such as payment, does not detract from a general right of access and is perfectly acceptable up to a point. That point, it is submitted, is where the conditions imposed are so onerous upon the patient, or so biased in favour of the provider, that they effectively deny access without protecting any legally recognisable interest²⁴⁸ of the provider (or where the interest of the provider, when weighed against that of the patient does not justify, on constitutional and public policy terms, the undue preference given in the contract to the provider's interest) or where the conditions themselves are unconstitutional in the sense that they unjustifiably infringe or limit other constitutional rights of the patient such as the right to equality, the right to human dignity, the right to bodily and psychological integrity or the right to freedom and security of the person.

4.13 Summary and Conclusions

The law of contract, from the point of view of the patient in particular, is not an ideal vehicle for relationships involving health service delivery as the case discussions that follow in chapters five (public sector) and 6 (private sector) will demonstrate. The power of a patient to bargain is greatly diminished both as a result of the nature of the services involved and the patient's physical and mental status as well as the expert and economic power that health professionals and health establishments respectively hold to a much greater extent by comparison. It will be seen in the two subsequent

damage is anything which goes beyond the replacement of defective goods. As presently framed, he submitted, the entire counterclaim (as amended) is a claim for consequential loss. This is borne out by the formulation of the alternative claim, in para 3.8 of the counterclaim (as amended), where the full amount of the damages are described as consequential damages. In my view plaintiff's submission on this issue is correct. The meaning of the term consequential loss or damage is unfortunately not precise. In one sense it is contrasted with direct damage. Visser and Potgieter *Law of Damages* at 55 refers to a view that direct loss means the immediate or direct consequence(s) of a damage-causing event, while consequential loss is damage that flows from such direct loss. In the context of relief under the aedilician remedies, however, a claim for consequential damages is contrasted with redhibitorian relief, ie relief for the return of the purchase price paid for the defective goods."

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As determined by public policy and the legal convictions of the community



chapters that concepts such as contractual fairness and public policy considerations with regard to contracts are issues that South African courts flirt with but show less convincing signs of espousing in a clear and systematic way especially in the area of health service delivery within the private sector. The Constitution it is submitted adds a distinct gloss on the law of contract concerning health care services generally and access to emergency medical treatment in particular. If the law of contract is to be the legal vehicle by means of which people exercise their rights of access to health care services, including reproductive health care, and emergency medical treatment, the courts are going to have to change their tendency to view such contracts as purely commercial transactions that are no different to contracts for any other kind of service. The Constitution does not preclude the horizontal application of the rights in the Bill of Rights and the fact that the language of section 27(1) refers to a right of *access* as opposed to a direct right to health care services suggests that private sector providers of health care services may well find themselves faced with fairly convincing arguments in the future that this right in particular has a horizontal application especially in circumstances where the state simply does not have the capacity to accommodate everyone who is in need of health care. The Constitution, it is submitted, strongly supports the inclusion of certain implied terms in contracts for the delivery of health care services that relate for instance, to quality of care as a feature of access and a patient's right to be treated with due respect for his or her dignity and privacy. These points and others will be highlighted in the following two chapters as the relevant case law is discussed in more detail.