

## Chapter 13

### Constitutional issues surrounding the Law of Contract and the impact the Constitution has on exclusionary clauses in hospital contracts

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#### 13.1 Introduction

Since the *Constitution of the Republic of South Africa* <sup>1</sup> is the supreme law of the Republic, all law be that the common law, be that the statutory law, is subordinate to the *Constitution*. <sup>2</sup>

The *Constitution* is also said to affect not only the relationship between the State and other government structures and its citizens, but also private relationships between business enterprises and their clients. It includes, as will be argued in due course, the relationship between hospitals and patients. The new legal order in South Africa, with its overarching *Constitution*, emphasizes values in a way that the pre-1994 legal system had not catered for. It has also been stated that the values represent the spirit of the law, whilst the *Constitution* and more especially, the *Bill of Rights*, in many respects embodies the spirit of

<sup>1</sup> Act No 108 of 1996.

<sup>2</sup> Currie and De Waal *The Bill of Rights Handbook* 5ed (2005) 7-8 note that "*the Constitution, in turn, shapes the ordinary law and must inform the way legislation is drafted by the legislators and interpreted by the courts and the way the courts develop the common law.*" They also state that "*any law or conduct that is not in accordance with the Constitution, either for procedural or substantive reasons, will therefore not have the force of law*". See also *The Executive Council of the Western Cape Legislature v President of the Republic of South Africa* 1995 (4) SA 877 (CC) Para 62.

the law.<sup>3</sup> The specific values the *Constitution* and more especially, the *Bill of Rights*, as will be seen from this chapter promotes, are those that underlie an open and democratic society based on human dignity, equality and freedom.

Insofar as the relationship between the *Constitution* and the *Law of Contract* is concerned, the same values that, underlie the *Bill of Rights* and which affect the spheres of law in general, also affects the law of contract. As was stated before, the *Constitution* permeates all law in South Africa, including the common law that regulates the enforcement of contracts. Whilst the importance of the historical background of South African contractual law has been emphasized in the preceding chapters, both the courts, and especially, a host of legal writers, have also pointed to the need to break with the past and, to retain from it, only that which is defensible. South Africa has a legal system which has always been premised upon precedent, which has created some form of turbulence and some uncertainty, especially, with the advent of our constitutional state.<sup>4</sup> This has resulted in the transformation of the South African legal system, not only in terms of procedural law but also the substantive law. This has resulted in an alignment with constitutional principles in the new constitutional order. To this end, traditional legal doctrines, methods of interpretation and legal principles stand in line to be tested against the new standards set by the *Constitution*. This is then referred to as 'transformative constitutionalism.'<sup>5</sup>

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<sup>3</sup> Pearmain "A Critical Analysis of the Law of Health Service Delivery in South Africa" *Unpublished LLD Thesis University of Pretoria* (2004).

<sup>4</sup> De Vos "A Bridge Too Far? History as Context in the Interpretation of the South African Constitution". *South African Journal of Human Rights* (2001) 17 *SAJHR* 1 at 3-4, expresses this tension in the following terms: "The fact that the text of the 1996 Constitution is often vague, ambiguous and seemingly contradictory, means that it cannot provide a self-evident and fixed meaning to those who read it. Instead, it requires interpretation, and to do so it seems necessary to invoke sources of understanding and value external to the text and other legal materials. Most judges, lawyers and legal academics in South Africa seem profoundly uncomfortable with the notion that judicial decision-making in the constitutional sphere is not (always) aimed merely at discovering a 'true', 'objective' or 'original' meaning of the text and hence is not based (solely) on predictable and neutral principle. For if this is so, the interpreter of the constitutional text will (often) have to rely on other, subjective and extra textual factors - perhaps even the interpreter's own personal, political and philosophical views to give meaning to that text. The discomfort flows from the fact that most judges, lawyers and legal academics in South Africa broadly adhere to the traditional liberal school of adjudication, a tradition that jealously guards the boundary between law and politics" quoted with approval in Pearmain (2004) 115.

<sup>5</sup> Klare "Legal Culture and Transformational Constitutionalism" (1998) 14 *SAJHR* 146 argues that the 1996 Constitution can be understood as establishing a long-term project described as 'transformative constitutionalism' in terms of which the Constitution is seen as a transformative, dynamic document that requires continual reinvention to make sense of a changing world. It is a project with no instant solutions, requiring constitutional enactment, interpretation and enforcement committed to transforming South African social and political institutions and power relationships in a democratic, participatory and egalitarian direction. He points out that "transformative constitutionalism connotes an enterprise of inducing large scale social change through non-violent political processes grounded in law. I have in mind a transformation vast enough to be inadequately captured by the phrase 'reform', but something short of or different from 'revolution' in any traditional sense of the word." It

Consequently, there is thus great value in exploring and considering, in this chapter, constitutional legal principle and the underlying values in relation to factual situations that arise in the conclusion of contracts. Such an exercise will give direction to the focal point of this thesis in determining whether the entering into a medical contract in which the patient exonerates a hospital and its staff from liability flowing from the hospital or its staff's negligence causing damages to the patient would be inconsistent with the *Constitution* and invalid? An exercise undertaken in this chapter, although in the abstract, is likely to be fruitful when explored conceptually, in a rational and methodical way, so as to arrive at deductions and inferences which can be of considerable value in their practical applications. Since the study undertaken in this thesis involves a number of different branches of law including medical law, contract law, delict and constitutional law, it is of paramount importance to understand the constitutional principles with regard to these various branches. As constitutional law affects the conclusion of contracts, it is critical to gain a greater understanding of when and how the common law, of which the law of contract is an integral part, can be developed.

In this chapter, constitutional issues surrounding the law of contract will be looked at. What will also be considered is the possible impact of the *Constitution* or constitutional principles on exclusionary clauses in hospital contracts. What will be included for discourse in this chapter is the constitutional approach to the law of contract. This includes a discussion of how the *Constitution* and the *Bill of Rights* have impacted on the law, in general, in South Africa. The discourse also underlines the "value" approach South African law has adopted since the introduction of the new South African constitutional order. A great part of the introductory remarks have already focused on the impact the constitutional values have had on the South African legal system, including, the law of contract. It was previously stated and needs to be emphasized again, the common law to which the law of contract belongs, is subject to constitutional control. From the introductory remarks it is also clear that the common law which regulates the enforcement of contracts, must promote the values that underlie the *Bill of Rights*. The primary values identified include openness, dignity, equality and freedom. What has also emerged, amongst the legal writers and to a limited extent the courts, is that other values, including, fairness and good faith, as well as normative values and normative medical ethics, ought also to be adopted and promoted, especially in medical contracts.

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is submitted that the South African legal system itself must therefore be seen as being in a considerable state of flux as traditional legal doctrines, methods of statutory interpretation and legal principles stand in line to be tested against the new standard set by the Constitution. Uncertainty, at least in the beginning, is the price one pays for a new legal order" quoted with approval in Pearmain (2004) 115.

What is also comprehensively discussed in this chapter is the influence of the *Bill of Rights* on contract law principles. From this discourse it is clear that, since the *Constitution* first came into operation, the *Bill of Rights* has had a significant impact on the enforceability of contracts. It is especially the values of freedom and equality which play a fundamental role in determining the validity and enforceability of contracts.

Whereas the freedom of contract and its corollary of *pacta sunt servanda* in the pre-constitutional dispensation, played a significant role, in the new constitutional order, although the courts leave space for the doctrine to operate, the courts at the same time, allow courts to declare to enforce contractual terms that are in conflict with the constitutional values, even though the parties may have consented to them. Factors such as unfairness and unreasonableness have begun to play a significant role with the courts.

This chapter also considers the influence of values of equality and dignity and how they impact on the common law principle of *pacta sunt servanda* in a constitutional context. What follows is also a discourse on the influence of communal values and community interests and how they impact on the doctrine of *pacta sunt servanda* in the new constitutional order. What is significant is the fact that, in the new constitutional order, constitutional values of equality and dignity may prove to be decisive when the issue of the parties' relative bargaining position is an issue.

In this chapter, the aspect of validly waiving or limiting a contractual right is also considered against the background of certain rights in the *Bill of Rights*, they being regarded as inalienable and incapable of waiver. To this end, the validity of exclusionary clauses in hospital contracts, in which the hospital and/or its staff is exonerated from liability arising from their negligence, is considered, given especially, the fact that the right to healthcare is guaranteed by the constitutional order. In South Africa healthcare services are regulated by both the common law and statutory law. Factors which influence the common law, include, medical ethics governed by professional rules, codes and the *Hippocratic Oath*, which ultimately controls professional standards. What is significant, from medical ethics, is that the patient's interests are primary, especially, when weighed against the commercial interests of the medical practitioner or hospital. The welfare of the patient, likewise, must outweigh the private and personal consideration of the medical practitioner or hospital. From a constitutional point of view, normative ethics, in which the medical practitioner/hospital undertakes to do no harm and to act in the best interest of the patient, must be seen as, to a great extent, a human rights issue. The medical practitioner/hospital has an obligation not to harm the patient and to maintain, instead, a standard of due care

and skill. As will be seen from this chapter, disclaimers against medical negligence in hospital contracts would amount to an unreasonable/unfair/unethical acceptance, on the part of the patient, to contract to his/her potential harm. In a constitutional context, it would be inconsistent with the constitutional values. Factors which influence the statutory law include the fact that the licensing of private hospitals is regulated by statutory controls. One of the strict requirements for a private hospital to obtain and maintain a license is to show that a reasonable degree of care and skill will be attained and is being maintained by the hospital. This has to serve the best interests of the patient. It will be submitted, in due course, that once a license is granted, the continued licensing of the hospital is dependant on just that. It will also be submitted that a failure to maintain these standards would lead to the license being revoked. Other legislation applicable includes the *Nursing Act*, which requires from them the maintenance of high standards of reasonable care and skill and which serves the best interests of the patient.

The general public also has the expectation that they will be treated by a medical practitioner and/or hospital in a professional manner and with professional standards which will cause them no harm. This ethical conduct referred to earlier and the maintenance of professional standards must be upheld in treating patients or when surgery is conducted. Any attempt to compromise same, as will be seen in the succeeding chapter, would be a denial of adequate healthcare services and regarded as inconsistent with constitutional values and against public policy or the legal convictions of the community.

In this chapter, the significant role that public policy played, prior to the adoption of the new constitutional order and continues to play post the introduction of the Constitution and the *Bill of Rights* will be looked at. From the discourse in this chapter it is clear that a contract will not be enforced where its enforcement would be against public policy. This has repeatedly been highlighted by both the South African legal writers and the courts alike. But, as much as the principle has been aimed at protecting a contracting party in appropriate circumstances, what the courts have emphasized is that they will not exercise such power hastily or rashly and only in the clearest of cases. What stood out during the pre-constitutional era is that, although the courts had the power to declare contracts or contractual provisions contrary to public policy, the courts would not merely do so just because the contract or its terms offend 'one's individual sense of propriety and fairness'. During this era it was continuously emphasized that 'public policy generally favours the utmost freedom of contract'. Whilst it is generally accepted that public policy will continue to play a key role in the post-constitutional era, strong voices have gone up that the over-cautious approach by the courts in the past should be replaced by a strategy that any

provision or agreement, which is clearly at odds with the values enshrined in the Bill of Rights, should be treated as *contra bonos mores*. It has also been suggested that the values underlying fundamental rights and protected in the Bill of Rights, should be considered as important policy factors determining public policy. In this regard, it has been suggested that the principle of *pacta sunt servanda* should be interpreted to conflict as little as possible with fundamental rights, including, equality, the standard of care and medical ethics, in medical contracts, fairness and dignity. Other factors which, some of the legal writers suggest, influence public policy include, the unequal bargaining power of the parties, unjust and unreasonable clauses and good faith. There is also a strong call, from some of the legal writers, that the sanctity of contract must now also be constitutionally scrutinized against the values that animate the *Constitution*.

It will be noticed from this chapter that the South African courts have, to some degree, undergone some change in their approach when assessing conduct which ought to be found to be contrary to public policy. Some courts have identified certain aides, including normative values in which a balance has to be struck between the interests of the parties and the conflicting interests of the community. Other courts encourage the courts to consider fundamental values, including human dignity and the achievement of equality and the advancement of human rights.

More recently, in the contractual domain, the position has changed, albeit slightly. Whilst the courts still focus on the significance of contractual autonomy, they have also begun to caution against the excessive application of freedom of contract. Such an approach, it is submitted, leaves space for the doctrine of *pacta sunt servanda* still to operate. But, at the same time, allows courts to decline to enforce contractual terms that are in conflict with the constitutional values, even though the parties may have consented to the terms. The Constitutional Court,<sup>6</sup> in a very recent judgement, used Section 34 of the Constitution as a fundamental value impacting on public policy.

Although the jurisprudence concerning the influence of the *South African Constitution* on the law of contract is sparse and not well developed, in the last few years, however, more and more legal writers,<sup>7</sup> through their publications, have given some content to the

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<sup>6</sup> *Barkhuizen v Napier* 2007 (5) SA 323 (CC).

<sup>7</sup> See in this regard the writings of Tladi "*Breathing constitutional values into the law of contract: Freedom of Contract and the Constitution*" *De Jure* (2002) 306; Pearman "A critical analysis of the Law on Health Service Delivery in South Africa" - *An unpublished doctoral thesis* (2004) University of Pretoria 114; Van Aswegen "The implications of a Bill of Rights for the law of contract and delict." (1995) *SAJHR* 40; Hopkins "Standard-form

jurisprudential body. In this chapter the most relevant provisions of the *Bill of Rights* and how they impact on the law of contract, will be looked at. The sections include, Sections 8, 9, 34, 38 and 39. From the discussion of section 8 it is clear that the *Constitution* recognises that the rights in the *Bill of Rights* may also be enforced against private parties, be they, natural persons or juristic persons, through the direct and indirect 'horizontal' operation of rights in private disputes between the parties. Constitutional Law, therefore, applies to the law of contract by the application of any right with horizontal application under Section 8(2) of the Bill of Rights. A difference of opinion, however, exists whether the Bill of Rights applies directly or indirectly. A popular view is that it applies indirectly.

The commitment to equality in terms of the *Constitution* is fundamental in the new constitutional order. Section 9 of the *Bill of Rights* provides for the right to equality and its corresponding duties. The rationale for the recognition of the right to equality is said to be focused on the unjust domination by the stronger contracting parties, often big enterprises or monopolies, to the detriment of the weaker contracting parties. Although the South African legal jurisprudence is not rich with case law regarding the influence of Section 9 to the constitutional commitment to equality in contract, more recently, both the South African Court of Appeal<sup>8</sup> and the Constitutional Court,<sup>9</sup> have left traces of the direction that the courts may follow in the future. It has been shown, by the said courts that the Constitutional values of equality and dignity may prove to be decisive in contractual disputes. But, the courts require the party who rely on the inequality in bargaining power to prove the inequality between the two contracting parties. The popular view amongst the South African legal writers<sup>10</sup> seems to be, despite the fact that the inequality of bargaining power has never been a free-floating ground upon which a contracting party may rely to

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contracts and the evolving idea of private law justice: A case of democratic capitalist justice versus natural justice" *TSAR* (2003) 1 150; Bhana and Pieterse "Towards a reconciliation of contract law and constitutional values: Brisley and Afrox revisited (2005) 123 *SALJ* 865; Tladi "One step forward, two steps back for constitutionalising the common law: *Afrox Healthcare v Strydom* (2002) 17 *SAPR/PL* 473; Hawthorne "The principle of equality in the law of contract" 1999 (58) *THRHR* 157; Carstens and Kok "An assessment of the use of disclaimers by South African hospitals in view of constitutional demand, foreign law and medico-legal considerations" (2003) 18 *SAPR/PL* 430; Hopkins "Constitutional rights and the question of waivers: How fundamental are fundamental rights? (2001) 16 *SAPR/PL* 122.

<sup>8</sup> *Napier v Barkhuizen* 2006 (4) SA 1 (SCA); 2006 (9) BCLR 1011 (SCA).

<sup>9</sup> *Barkhuizen v Napier* 2007 (5) SA 323 (CC).

<sup>10</sup> See especially, the writings of Currie and De Waal *The Bill of Rights Handbook* (2005) 337; See also the writings of Jansen and Smith "Hospital Disclaimers: *Afrox Healthcare v Strydom* (2003) *Journal for juridical science* 28(2) 210, 217; Van den Heever "Exclusion of Liability in Private Hospitals in South Africa" *De Rebus* (April 2003) 47-48; Tladi (2002) 17 *SAPR/PL* 473; Bhana and Pieterse (2005) 123 *SALJ* 865.

recile from a contract, in terms of the *Constitution*; regard must be had to the right to equality, as enshrined in the *Bill of Rights*. Some writers believe the principle of equality can give content to the existing open concept of public policy. Others believe it ought to be a defence on its own.

In this chapter, the effect of Section 34 on the validity of exclusionary clauses or indemnity clauses, in which one of the contracting parties waives or limits his/her right to have a dispute settled by a court of law, is also considered. From the discourse in this chapter it is clear that Section 34, as contained in the *Bill of Rights*, gives expression to a foundational value in guaranteeing everyone the right to seek the assistance of the courts. The rationale for the existence of this foundational value is founded on the principle that we need to live in a stable and orderly society, free of self-help.<sup>11</sup> From this chapter it will also be seen that prior to the introduction of the *Constitution*, the common law also sought to protect potential litigants from being deprived of having a dispute adjudicated by a court of law. Any attempt to deny a contracting party such a right would be seen as contrary to public policy.<sup>12</sup> The introduction of Section 34 of the *Constitution* has actually strengthened the legal position. It appears, therefore, that a blanket deprivation of access to the courts, in a contract containing an exclusionary clause, would be inconsistent with the values of the *Constitution* and against public policy.

Section 36, which deals with the justification of limiting constitutional rights, is of paramount importance for the research undertaken in this thesis. What is highlighted in this chapter is that constitutional rights and freedoms are not absolute. A right may be limited if it is shown that it is a law of general application and it is reasonable and justifiable in an open and democratic society, based on human dignity, equality and freedom.<sup>13</sup> Several criteria, as will be seen in this chapter, must be present before it can be said that the limitation is reasonable and justifiable. The purpose of the limitation is also of significant importance.

Another relevant section, which will be considered in this chapter and which has had a

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<sup>11</sup> See especially, the innovative and persuasive reasoning of Hopkins "Exception clauses in contracts" *De Rebus* (June 2007) 22. See also the majority judgement of Ncgobo J in the Constitutional Court judgement of *Barkhuizen v Napier* 2007 (5) SA 323 (CC).

<sup>12</sup> See the cases of *Nino Bonino v De Lange* 1906 (TS) 120; *Schierhout v Minister of Justice* 1925 (AD) 417; *Barkhuizen v Napier* 2007 (5) SA 323 (CC).

<sup>13</sup> Section 36 of the *Constitution* recognizes the restrictions. See also the writings of Currie and De Waal (2005) 164ff.

marked influence on the development of the common law, is Section 39. This section serves as an aide in developing the common law, where no law exists or law reform is necessary, especially where the competing rights conflict with the values in the *Constitution*. From this chapter it will become clear that although some of the South African judges have shown a cautious reluctance to use Section 39 as an aide in developing the common law,<sup>14</sup> there can be no denial that, in some leading cases, the Constitutional Court<sup>15</sup> relied heavily on foreign law when interpreting the *Bill of Rights* and developing the common law. Whereas, on the one hand, certain judges fear that, when receiving foreign law, they may come from different social structures and milieu, as well as a difference in historical backgrounds, on the other hand, other judges believe they should adapt the common law, by using foreign law, to reflect the changing social, moral and economical fabric of the country.

Where the competing rights conflict with the values in the *Constitution*, from this chapter it will become clear that, although some of the South African judges have shown a cautious reluctance to use Section 39 as an aide in developing the common law, there can be no denial that, in some leading cases,<sup>16</sup> the Constitutional Court relied heavily on foreign law when interpreting the Bill of Rights and developing the common law. On the one hand, judges fear that when receiving foreign law, such law may come from different social structures and milieu. A difference in historical backgrounds may also exist between the two countries.<sup>17</sup> On the other hand, judges believe they should adapt the common law by using foreign law to reflect the changing social, moral and economic fabric of the country.

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In this chapter a brief discussion will also take place on how the *Constitution* influences the

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<sup>14</sup> *Qozeleni v Minister of Law and Order and Another* 1994 (2) SALR 340 at 348; *Park-Ross and Another v The Director, Office of Serious Economic Offences* 1995 (2) BCLR 198 (C) 208-209; See especially, the remarks of Kriegler RJ in *Bernstein v Bester* 1996 4 BCLR 449 (CC); 1996 (2) SA (CC) Para 133.

<sup>15</sup> *S v Makwanyane* 1995 (3) SA 391 (CC) Para 9; See especially, the leading case of *Carmichele v Minister of Safety and Security* 2001 (4) SA 938 at 954ff in which the court relied heavily on foreign law in developing common law.

<sup>16</sup> *S v Makwanyane* 1995 (3) SA 391 (CC) Para 9; *Carmichele v Minister of Safety and Security* 2001 (4) SA 938 at 954ff.

<sup>17</sup> See especially the remarks of Kriegler in *Bernstein v Bester* 1996 4 BCLR 449 (CC); 1996 (2) SA (CC) Para 133.

<sup>18</sup> *S v Makwanyane* 1995 (3) SA 391 (CC) Para 9; *Carmichele v Minister of Safety and Security* 2001 (4) SA 938 at 954ff.

right to healthcare. Before this, however, can take place, brief attention is also paid in this chapter, to International Law and the right to healthcare. From the brief discourse it will be seen that the right to healthcare is recognized by *Public International Law*.<sup>19</sup> It is also recognized in the *International Human Rights Law*.<sup>20</sup> But, despite the recognition which the right to healthcare has received internationally, it remains an ideal, instead of a practical reality. Many factors influence this, ranging from the differences in domestic and other circumstances, etc. For that reason, the South African courts have adopted a very conservative approach.

In this chapter the South African *Constitution* and the right to healthcare, as previously stated, will be looked at. From the discourse in this chapter it is clear that the South African *Constitution* contains a number of references to healthcare services and medical treatment. It is also clear that there is no all embracing section in the *Constitution* which encapsulates the right to healthcare. Certain rights enshrined in the *Bill of Rights* are inextricably intertwined with the Constitutional right to healthcare. These rights include the right to life, the right to dignity, and the right to emergency medical treatment.

In so far as the right to life is concerned, it is necessary that the delivery of healthcare services has to be maintained in order to fulfil the right to life.<sup>21</sup> But, in South African law, where the *Constitution* is applied, certain limitations are sometimes placed on the delivery of healthcare services. When it comes to prolonging life, as opposed to protecting life, different values are applied.

The right to dignity, as with the right to life, is central to the provisions of the South African *Constitution*. Both these rights rank foremost in the hierarchy of rights in terms of the *Constitution*. As a constitutional right and value, it has been suggested that these rights are inalienable and any attempt to waive these rights would be inconsistent with the values of the *Constitution*.<sup>22</sup> The South African *Constitution* also provides for the right to emergency treatment. Therefore, a person who has, unexpectedly, met with a catastrophe,

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<sup>19</sup> See the discussion of Pearmain "A critical analysis of the law on health services delivery in South Africa" *A Doctoral Thesis University of Pretoria* (2004) 51.

<sup>20</sup> Pearmain (2004) 51.

<sup>21</sup> Pearmain (2004) 118; Currie and De Waal (2005) 280.

<sup>22</sup> See the very constructive comments by Hopkins "Constitutional rights and the question of waiver: How Fundamental are Fundamental Rights?" (2001) 16 *SAPR/L* 122 at 129.

should not be refused ambulance or other emergency services. Section 27(3)<sup>23</sup> contains a right and a duty to seek emergency medical treatment. Although it is generally applicable between State hospitals and patients, there is authority that Section 27(3) could horizontally also apply to the duty of private hospitals as well.<sup>24</sup>

### 13.2 The Constitutional approach to the Law of Contract

The *Constitution* of the Republic of South Africa<sup>25</sup> has heralded in a new dispensation in our country, affecting not only the relationship between the State and other government structures and its citizens, but also private relationships between business enterprises and their clients.<sup>26</sup>

One of the concepts which underlies the *Constitution* and which influences constitutional reconstruction, reconciliation and development, is that of values.<sup>27</sup>

It is especially the Constitutional court that has promoted the values which underlie an open and democratic society. In this regard, the Constitutional court has committed itself to a purposive approach to the interpretation of the *Bill of Rights*.<sup>28</sup> As the *Constitution* is the

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<sup>23</sup> The *Constitution of South Africa*.

<sup>24</sup> Currie and De Waal (2005) 553; Christie *Bill of Rights Compendium* (2002) 3H-40.

<sup>25</sup> Act No 108 of 1996. Also referred to as the 1996 *South African Constitution* because of the fact that it is much more than an ordinary Act.

<sup>26</sup> Tladi "Breathing Constitutional values into the Law of Contract: Freedom of Contract and the Constitution" *De Jure* (2002) 306 expresses the view that the *South African Constitution* is one of the most egalitarian constitutions in the world which "*presents a clear break from the past and are at odds with the values which dominated in the apartheid era.*"

<sup>27</sup> Several of the academic writers have described the influence of Constitutional values in different ways. Cockrell "Rainbow Jurisprudence" (1996) *SAJHR* 1 states that: *A convenient starting point is to focus on the one word which resonates like a leitmotiv throughout the judgements of the Constitutional Court in the past year: 'values'.* Botha "The values and principles underlying the 1993 Constitution" (1994) 9 *SAPL* 233 state that: "*The Constitution is a repository of values*" and goes on to identify the following values in the constitutional text: national unity; limited government; liberty and equality; and pluralism. Van der Walt "Tradition on trial: A critical analysis of civil-law tradition in *South African Property Law*" (1995) 11 *SAJHR* 169 at 191-192 acknowledges those "*constitutional values*" and suggests that "*the Constitution must be interpreted in terms of values which take the past into account, but in doing so it looks towards the future, towards reconstruction and reconciliation in an "open and democratic society based upon freedom and equality"* (at 192). The writer adds: "*The Constitutional Court's pre-occupation with the intrusion of 'values' into the adjudicative process provides us with an important clue for understanding the changes that have occurred at a deep level within the South African legal system over the past year.*" The writer concludes: "*..... In essence my argument will be that the explicit intrusion of constitutional values into the adjudicative process signals a transition from a 'formal vision of law' to a 'substantive vision of law'.*"

<sup>28</sup> See De Waal and Currie, Erasmus 5ed (2005) 148 and the cases referred to therein footnote 12, where it is

Supreme law of the Republic of South Africa, all law or conduct inconsistent with the *Constitution* is, therefore, invalid. To this end, constitutional values have a profound and pervading impact on the way that law is interpreted and applied in South Africa. Moreover, in the new South Africa, the new legal order emphasizes values which, in a way, the pre-1994 legal system did not.<sup>29</sup> The values today represent the spirit of the law, the

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observed that the purposive approach is also sometimes referred to as "value oriented" or "teleological". According to the court in *Baloro and Others v University of Bophuthatswana and Others* 1995 (4) SA 197 (B), referring to the *Interim Constitution*, (Act 200 of 1993): "Chapter 3 contains at least one section (s35) which deals with its interpretation in explicit terms. According to s35 (1) a court interpreting the provisions of the chapter is firstly required to ("a ..... Court ..... shall") promote the values which underlie an open and democratic society based on freedom and equality. This formula opens the door to the evolution of a teleological approach to the interpretation of chapter 3 which, amongst others, allows for the interpretive adaptation of the human rights norms enshrined in it to constantly changing circumstances." Ackerman J in *Ferreira v Levin No and Others, Vryenhoek and Others v Powell NO and Others* 1996 (1) SA 984 (CC) stated: "A teleological approach, also requires that, the right to freedom be construed, generously and extensively." In *S v Makwanyane and Another* (1995) (3) SA 394 (CC) Para 325, p506, O'Regan J, adopting such a teleological approach, observed the value as follows: "Respect for the dignity of all human beings is particularly important in South Africa. For apartheid was a denial of a common humanity. Black people were refused respect and dignity and thereby the dignity of all South Africans was diminished. The new Constitution rejects this past and affirms the equal worth of all South Africans. Thus recognition and protection of human dignity is the touchstone of the new political order and is fundamental to the new Constitution. In my view exactly the same approach needs to be adopted in the case of the right to freedom." In *Thoroughbred Breeders' Association v Price Waterhouse* 2001 (4) SA 551 (SCA) Olivier J, commenting on the virtues of the teleological approach stated at p623 that: "The last-mentioned approach, in particular, not only `encapsulates in a synthesis the meritorious aspects of other theories and excludes their limitations (*Devenish Interpretation of Statutes* (1992) at 53) but also gives expression to the fundamental principles and ethos of the legal system as a whole: it is a value-coherent approach which best accords with the values of our Constitution." O'Regan J in *S v Makwanyane and Another* 1995 (3) SA 391 (CC) Para 325, p506 states: "In giving meaning to s9, we must seek the purpose for which it was included in the Constitution. This purposive or teleological approach to the interpretation of rights may at times require a generous meaning to be given to provisions of chap 3 of the Constitution and at other times a narrower or specific meaning. It is the responsibility of the courts, and ultimately this Court, to develop fully the rights entrenched in the Constitution. But that will take time. Consequently any minimum content which is attributed to a right may in subsequent cases be expanded and developed."

<sup>29</sup> See Pearmain "A critical analysis of the law on health service delivery in South Africa" - *An unpublished doctoral thesis* (2004) University of Pretoria 114. This view was expressed in several constitutional dicta. See for instance the judgement of Mohamed J in *S v Makwanyane and Another* (fn 4 supra) at 487 where he states: "In some countries the Constitution only formalizes, in a legal instrument, a historical consensus of values and aspirations evolved incrementally from a stable and unbroken past to accommodate the needs of the future. The South African Constitution is different: it retains from the past only what is defensible and represents a decisive break from, and a ringing rejection of, that part of the past which is disgracefully racist, authoritarian, insular, and repressive, and a vigorous identification of and commitment to a democratic, universalistic, caring and aspirationally equalitarian ethos expressly articulated in the Constitution. The contrast between the past which it repudiates and the future to which it seeks to commit the nation is stark and dramatic." See also the same judgement at p498 where he states: "The Constitution makes it particularly imperative for courts to develop the entrenched fundamental rights in terms of a cohesive set of values, ideal to an open and democratic society. To this end, common values of human rights protection the world over and foreign precedent may be instructive." At p505, O'Regan J observes that: "In interpreting the rights enshrined in chap 3, therefore, the Court is directed to the future: to the ideal of a new society which is to be built on the common values which made a political transition possible in our country and which are the foundation of its new Constitution. This is not to say that there is nothing from our past which should be retained. Of course this is not so. As Kentridge AJ described in the first judgement of this Court (*S v Zuma and Others* 1995 (2) SA 642 (CC) (1995) 1 SACR 568), many of the

*Constitution* and, more especially, the *Bill of Rights*.<sup>30</sup>

The specific values the *Constitution* promotes are those that underlie an open and democratic society, based on human dignity, equality and freedom.<sup>31</sup>

In so far as the relationship between the common law and the *Constitution* is concerned, it has been stated before that the common law is subject to constitutional control.<sup>32</sup>

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*rights entrenched in s25 of the Constitution concerning criminal justice are long-standing principles of our law, although eroded by statute and judicial decision. In interpreting the rights contained in s25, those common law principles will be useful guides. But generally s35 (1) instructs us, in interpreting the Constitution, to look forward not backward, to recognize the evils and injustices of the past and to avoid their repetition. In Ryland v Edros 1997 (2) SA 690 (C) at p709, the court stated that: "I agree with the submission that the values of equality and tolerance of diversity and the recognition of the plural nature of our society are among the values that underlie our Constitution. In my view those values `irradiate', to use the expression of the German Federal Constitutional Court cited earlier, the concepts of public policy and boni mores that our Courts have to apply. Contrary to public policy (as opposed to those that are contra bonos mores) are contracts which might redound to the public injury. See Voet 1.14.16. The distinction is clearly put by Aqualius in the article to which I have already referred (1941) 58 SALJ 335 at 346. In my opinion the `radiating' effect of the values underlying the new Constitution is such that neither of these grounds for holding the contractual terms under consideration in this case to be unlawful can be supported. In S v Jordan and Others (Sex Workers Education and Advocacy Task Force and Others Amici Curiae) 2002 (6) SA 642 (CC), at p670 the court observed that: "The Constitution itself makes plain that the law must further the values of the Constitution. It is no answer then to a constitutional complaint to say that the Constitutional problem lies not in the law but in social values when the law serves to foster those values. The law must be conscientiously developed to foster values consistent with our Constitution. Where, although neutral on its face, its substantive effect is to undermine the values of the Constitution, it will be susceptible to constitutional challenge."*

<sup>30</sup> The relevant sections of the *Constitution* include: Sections 9 (equality), 22 (freedom of trade, occupation and profession), 23 (labour relations), 24 (environment), 25 (Property), 26 (housing), 27 (healthcare, food, water and social security), section 32 (the right of access to information), section 33 (the right to just administrative action) and section 41 (co-operative government) all of which contemplate legislative measures and expressly, in the case of sections 32, 33 and 41 mandate legislation to give effect to the principles enunciated in the *Constitution*. Section 39(2) of the *Bill of Rights*, provides that a court, tribunal or forum interpreting legislation and developing the common law must promote the spirit, purport and objects of the *Bill of Rights*. According to Pearmain (2004) 51 the same holds true, subject to the provisions of section 36, for Parliament when exercising its legislative power. (Section 44 (4) of the *Constitution* states that "when exercising its legislative authority, Parliament is bound only by the *Constitution*, and must act in accordance with, and within the limits of, the *Constitution*. Section 36(2) states that `except as provided in subsection (1) or in any other provision of the *Constitution*, no law may limit any right entrenched in the *Bill of Rights*."

<sup>31</sup> Section 1 of the *Constitution* provides: "The Republic of South Africa is one, sovereign, democratic state founded on the following values: (a) Human dignity, the achievement of equality and the advancement of human rights and freedoms (b) non-racialism and non-sexism (c) supremacy of the constitution and the rule of law (d) universal adult suffrage, a national common voters roll, regular elections and a multi-party system of democratic government, to ensure accountability, responsiveness and openness." Section 7 provides: "The *Bill of Rights* is a cornerstone of democracy in South Africa. It enshrines the rights of all people in our country and affirms the democratic values of human dignity, equality and freedom." Section 39(1) requires that "the rights in the *Bill of Rights* must be interpreted in such a way that the values that underlie an open and democratic society based on human dignity, equality and freedom are promoted."

<sup>32</sup> In this regard Chaskalson, stated in "The Impact of Seven Years of Constitutionalism on Law and Government in South Africa" <http://kas/org/Publications/SeminarReports/Constitution%20and%20Law%20iv/chaskalson.pdf> that

Academic writers have also aired their views on the extent to which the *Constitution* permeates the prevailing law and governs private relations.<sup>33</sup>

In so far as the effect of the Constitutional values on the *Law of Contract* is concerned, it has been stated, over and over before, that all law in South Africa, including the common law, that regulates the enforcement of contracts, must promote the values that underlie the *Bill of Rights*.<sup>34</sup>

Besides the recognition of values such as openness, dignity, equality and freedom what is mooted is that other values underlying the *Constitution* including fairness and good faith

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*the Constitutional Court has stated in The Pharmaceutical Manufacturers Association of South Africa in re: The ex parte Application of the President of the Republic of South Africa 2000 (3) BCLR 241 (CC) Para 44 that: There are not two systems of law, each dealing with the same subject matter, each having similar requirements, each operating in its own field with its own highest court. There is only one system of law. It is shaped by the Constitution which is the supreme law, and all law, including the common law, derives from the Constitution and is subject to constitutional control.*" He also observes that in *Carmichele v Minister of Safety and Security and Another* 2001 (1) SA 489 (SCA) the court said that "*where the common law deviates from the Bill of Rights the courts have an obligation to develop it by removing that deviation.*"

<sup>33</sup> See for example Van Aswegen 1995 *SAJHR* 40; Visser "A successful invasion of the Private Law" 1995 *THRHR* 745; Botha and Carpenter "The Constitutional attack on Private Law: Are the Fears Well Founded?" 1996 *THRHR* 126; Springman and Osborne "Du Plessis is not Dead: South Africa's 1996 Constitution and the Application of the Bill of Rights to Private Disputes" 1999 *SAJHR* 25; Rautenbach "The Bill of Rights Applies to Private Law and Binds Private Persons" 2000 *TSAR* 296; Van der Walt "Die Toekoms van die Onderskeid tussen Publiekreg en Privaatreg in Die Lig van die Horisontale Werking van die Grondwet (deel 1)" 2001 *TSAR* 416.

<sup>34</sup> See Hopkins *TSAR* (2003) 1 150 at 157. The writer holds the view that the values include openness, dignity, equality and freedom. The writer however, suggests that besides the aforementioned values, the courts must also broaden the values to include fairness and reasonableness. See also Cockerell: "Private Law and the Bill of Rights: A threshold issue of Horizontality" *Bill of Rights Compendium* (1997). See also Christie *Bill of Rights Compendium* (1997) 3H quoting Devenish *A Commentary on the South African Constitution* (1998) 101-102, Davis *Democracy and Deliberation: Transformation and the South African Legal Order* (1999) 162 holds the view that the *Constitution* "*seeks to infuse all South African Law with the spirit of its fundamental values so that the legal system can promote a society based on human dignity, freedom and equality*". The writers Bhana and Pieterse (2005) 123 *SALJ* 865 states that whilst acceptance must be given to the values of freedom and equality nonetheless caution the writers at (879), liberty and contractual freedom is not immune from limitation. Consequently the writers' state: "*It is accordingly clear that the value of freedom does not equate with complete individual liberty and does not found an independent right to unlimited contractual liberty. What is also clear is that the meaning of the value of freedom in the 1996 Constitution is substantially less than its meaning in classical liberal theory. In particular, the value of freedom is reined in significantly by its interactions with the constitutional values of equality and dignity, as will now be contemplated.*" The writers emphasize in particular the value of equality when they state (at 880): "*To this end, the value of equality (and the right in which it finds concrete expression) aids the transformation of South African society into an ultimately more egalitarian one through measures which may, to varying extents, limit a variety of individual liberty interests. In the contractual realm, for instance, such liberty-limiting measures include provisions of the Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000. This Act declares both the imposition of contractual terms, conditions or practices that have the effect of perpetuating the consequences of past unfair discrimination and the unfair limiting or denial of contractual opportunities to be practices which may amount to (prohibited) unfair discrimination.*"

also be recognized.<sup>35</sup>

Strong arguments have also gone up to promote the adoption of normative values and normative medical ethics in, especially, medical contracts.<sup>36</sup>

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<sup>35</sup> See Tladi (2002) 17 *SAPR/PL* 473 at 477. Besides recognizing freedom as a Constitutional value, the writer suggests that other values underlying the Constitution *inter alia* fairness, dignity and equality, especially the drive towards substantive equality should also be recognized. For the influence of the value of equality see also Hawthorne 1999 (58) *THRHR* 157 at 166-167; Hawthorne "Public Policy and Micro-Lending - Has the Unruly horse died?" (2003) 66 *THRHR* 116. The legal writers also plead for the reintroduction of the value of good faith in contract. According to Bhana and Pieterse (2005) 890 this will ensure a just and equitable law of contract.

<sup>36</sup> Bhana and Pieterse (2005) 890 ff. persuasively, argue that: "*The law of contract, as a branch of the common law, is equally meant to embrace normative and constitutional values so as to adapt to the changing needs of the community. It is therefore difficult to discern a cogent explanation for contract law's apparent need for more certainty and its attendant 'elevated' status.*" Carstens and Kok in (2003) 18 *SAPR/PL* 430 at 449 also convincingly argue that the practice of especially disclaimers in hospital contracts under the influence of a value-driven Constitution now dictates that normative medical ethics and broader medico-legal considerations ought to be considered when the purposive approach is adopted. Value statements in the *Constitution* have often been invoked by our courts to throw light on contractual issues. In one of the first cases involving the sanctity of contract in the Constitutional scheme of things Cameron JA in *Brisley v Drotsky* 2002 (4) SA 1 relying on the value of freedom explained the position as follows: "*The Constitution's values of dignity and equality and freedom require that the courts approach their task of striking down contracts or declining to enforce them with perceptive restraint. One of the reasons is that contractual autonomy is part of freedom. Shorn of its obscene excesses contractual autonomy informs also the constitutional value of dignity..... The Constitution requires that its values be employed to achieve a careful balance between the unacceptable excesses of contractual "freedom" and securing a framework within which the ability to contract enhances rather than diminishes our self-respect.*" The Supreme Court of Appeal per Brand JA in the much discussed case of *Afrox Healthcare Bpk v Strydom* 2002 (6) SA 21 (SCA) recognizes that Constitutional values do play a role in deciding contractual matters. Besides recognizing the Constitutional value that "*everyone has a right to medical care" as envisaged by section 27(1) of the Constitution, also points out that section 27(1) (a) is not the only Constitutional value relevant to the present case. Brand JA quotes with approval the passage formulated by Cameron JA in *Brisley v Drotsky* (supra) where it was stated: "The constitutional values of dignity and equality and freedom require that the Courts approach their task of striking down contracts or declining to enforce them with perceptive restraint contractual autonomy is part of freedom. Shorn of its obscene excesses, contractual autonomy informs also the constitutional value of dignity.*" Brand JA, states that the constitutional nature of contractual freedom embraces in its turn the principle *pacta sunt servanda*. He notes that this principle was expressed by Steyn CJ in *SA Sentrale Ko-op Graanmaatskappy Bpk v Shifren en Andere* as follows: "*Die elementêre en grondliggende algemene beginsel dat kontrakte wat vryelik en in alle erns deur bevoegde partye aangegaan is, in die openbare belang afgedwing word.*" In the light of these considerations, said Brand JA, the respondent's position that a contractual provision in terms of which a hospital is indemnified against the negligent actions of its nursing staff is in principle contrary to the public interest cannot be accepted. More recently, the Supreme Court of Appeals in the case of *Napier v Barkhuizen* 2006 (4) SA 1 (SCA); 2006 (9) BCLR 1011 (SCA) highlighted that contractual claims are now subject to the *Constitution*. It also accepted at Para 7 that a contractual term that is contrary to public policy is unenforceable and that public policy "*..... now derives from the founding constitutional values of human dignity, the achievement of equality and the advancement of human rights and freedoms, non-racialism and non-sexism.*" However, it found that the evidence placed before it by way of a stated case was "extremely slim" for it to determine whether these constitutional values have been impeached.

But the Supreme Court of Appeals also cautioned at Para 12: "*that the fact that a term in a contract is unfair or may operate harshly does not, by itself, lead to the conclusion that it offends the values of the Constitution.*" Here, it emphasized the principles of dignity and autonomy which "*find expression in the liberty to regulate one's life by freely engaging in contractual arrangements.*" The court at paragraph 13 also suggested that the correct approach in considering the values of the *Constitution* would be to "*employ its values to achieve a balance that*

The values identified, generally include, human dignity, the achievement of equality and the advancement of human rights and freedoms. The writers have also, as discussed above, pleaded for the re-introduction of good faith in contract to be elevated as a free-floating and independent value. There are also those writers, as seen above, who have, quite correctly, suggested that normative ethical and medico-legal considerations ought to be added to the list of values to be used in appropriate situations.

### 13.3 The Influence of the Bill of Rights on the principles of the law of contract

Since the *Constitution of the Republic of South Africa Act*, 148 of 1996 came into operation; it has, as seen hereinbefore, impacted on the enforceability of contracts. The *Bill of Rights* embodied in Chapter 2 of the *Constitution*, contains various sections, namely; Section 7-39 and defines various Constitutional rights which affect the validity and enforceability of contracts. It has been stated before that any contract that infringes any of these rights will, generally, be unenforceable.<sup>37</sup> As was stated earlier, any interpretation of the *Bill of Rights* must promote the values that underlie an open and democratic society based on human dignity, equality and freedom.<sup>38</sup> In so far as the freedom aspect is concerned, the freedom referred to includes the freedom of contracting parties to contract in whatever manner and with whomever, unless restricted by some particular rule of law.<sup>39</sup> The same notion of the concern of the law of contract to voice this freedom and to enforce

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*strikes down the unacceptable excesses of 'freedom of contract', while seeking to permit individuals the dignity and autonomy of regulating their own lives.*" (Para 12) The Supreme Court of Appeal also accepted that the constitutional values of equality and dignity may prove to be decisive when the issue of parties' relative bargaining positions is an issue. In an appeal to the Constitutional Court in the case of *Barkhuizen v Napier* 2007 (5) SA 323 (CC) Ngcobo J in the majority judgement commented as follows to the role the Constitution plays in respect of contracts, namely: "*All law, including the common law of contract, is now subject to constitutional control. The validity of all law depends on their consistency with the provisions of the Constitution and the values that underlie our Constitution.*" The court goes on to say: "*The application of the principle pacta sunt servanda is, therefore, subject to constitutional control.*" The court does recognize the role fairness, justice and reasonableness plays in contract law, but, consequently holds that public policy ensures their existence. As to the recognition of good faith, the court rejects the idea that good faith ought to serve as one of the constitutional values governing the law of contract. In this regard the court states: "*As the law currently stands good faith is not a self-standing role, but an underlying value that is given expression through existing rules of law.*" Quoting the authority Hutchinson "Non-variation clauses in contract: Any escape from the Shifren straitjacket?" (2001) 118 SALJ 720 at 743-4 and quoted with approval in Brisley above at Para 22, the court suggests "*Good faith has a creative, a controlling and a legitimating or explanatory function. It is not, however, the only value or principle that underlies the law of contracts.*"

<sup>37</sup> Christie "The Law of Contract and the Bill of Rights" Chapter 3H in the *Bill of Rights Compendium* (2004) repeated in Christie *The Law of Contract in South Africa* (2006) 347.

<sup>38</sup> Christie (2006) 347.

<sup>39</sup> Christie "The Law of Contract and the Bill of Rights" Chapter 3H in the *Bill of Rights Compendium* (2004) 7.

agreements, finds expression in the maxim *pacta sunt servanda*. Freedom of contract is thus a corollary of *pacta sunt servande*, since each principle involves the other.<sup>40</sup> Consequently, in the section that follows, the influence of the *Bill of Rights* on the maxim *pacta sunt servanda* will be investigated. Part of the notion of freedom of contract and the maxim *pacta sunt servanda* is the belief that a contracting party may freely waive or limit a right by way of an agreement. What will be considered in this section as well is to what extent may constitutional rights be waived or excluded? What will be considered further is, whether a constitutional right is capable of being waived? Since certain South African writers hold the view that any attempts to waive a fundamental right are contrary to public policy, as some rights are inalienable,<sup>41</sup> what will be considered in this section is whether a waiver in a hospital contract, exonerating a hospital and its staff for liability arising from their negligence, is invalid and unenforceable.

Since the *South African Constitution* was born out of seriously considered public opinion stemming from widespread consultation and negotiation prior to its drafting and widespread approval, public policy plays a fundamental role and is deeply rooted in our *Constitution* and the values which underlie it.<sup>42</sup> For that reason, the role of public policy in the new constitutional dispensation will also be looked at.

### 13.3.1 The maxim *pacta sunt servanda*

The maxim *pacta sunt servande*, ever since it was first reinforced by the English courts, as far back as 1875, in the case of *Printing and Numerical Registering Company v Sampson*<sup>43</sup>

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<sup>40</sup> Christie "The Law of Contract and the Bill of Rights" Chapter 3H in the *Bill of Rights Compendium* (2004) 7.

<sup>41</sup> Hopkins (2001) 16 *SAPR/PL* 122.

<sup>42</sup> See the writings of Christie "The Law of Contract and the Bill of Rights" Chapter 3H in the *Bill of Rights Compendium* (2004) 12. For the host of decisions in which this was held see *Carmichele v Minister of Safety and Security and Another (Centre for Applied Legal Studies Intervening)* 2001 (4) SA 938 (CC); 2001 (10) BCLR 995 (CC) at para 54-6; *Price Waterhouse Coopers Inc and Others v National Potato Co-operative Ltd* 2004 (6) SA 66 (SCA); 2004 (9) BCLR 930 (SCA) at Para 24; *Afrox Healthcare Bpk v Strydom* 2002 (6) SA 21 (SCA) (2002) 4 ALL SA 125 (SCA) at Para 18; *Brisley v Drotzky* 2002 (4) SA 1 (SCA); 2002 (12) BCLR 1229 (SCA) at Para 91; and *Bafana Finance Mabopane v Makwakwa and Another* 2006 (4) SA 581 (SCA); (2006) 4 ALL SA 1 (SCA) at Para 11 quoted with approval in *Barkhuizen v Napier* 2007 (5) SA 323 (CC).

<sup>43</sup> 1875 CR 19 EQ 462. In this case Jessel MR stated: "If there is one thing more than another which public policy requires it is that men of full age and competent understanding shall have the utmost liberty in contracting and that their contracts when entered into freely and voluntarily shall be held sacred and shall be enforced by Courts of Justice." This view was echoed by Van den Heever JA in *Tjollo Ateljees (Edms) Bpk v Small* 1949 (1) SA 856 (A) at 873: "Since the alleged rule (ie *laesio enormis*) encourages a party to divest himself of obligations which he has freely and solemnly undertaken, I do not consider it in harmony either with immanent reason or public policy." The rationale therefore can be found in the working definition of a contract described by Christie *The Law of Contract in South Africa* (2006) 2 repeated in Christie *Bill of Rights Compendium* (2004) 3H5 namely: "A contract is an

has, and continues to play, an influencing role the world over. So great is the influence of the maxim that, even more recently and despite the new constitutional legal order in South Africa, the South African courts have again emphasized the importance of *pacta sunt servanda* in varying degrees.

One of the first cases post the introduction of the interim *Constitution*,<sup>44</sup> in which the Constitutional Court started showing signs of recognizing the freedom of contract as one of the cornerstones of the law of contract in South Africa, is that of *Ferreira v Levin*.<sup>45</sup> In this case, although the court did not deal with a purely contractual issue, but rather a liquidation of a company issue pertaining, *inter alia*, to the rule against self-incrimination in insolvency inquiries, the court balanced this with the protection of the liquidation that protect the interests of the creditors.

The court consequently recognized that in different contexts, greater or lesser weight must be given to the principle of freedom of contract. Ackerman J in this case consequently referred to "*rights of contractual freedom protected by the Constitution.*"

In the case of *Knox d'Arcy Ltd v Shaw*,<sup>46</sup> Van Schalkwyk J, in a case concerning the validity and enforcement of a restraint of trade clause in favour of an employer had to balance the right to engage freely in economic activity with the principle of *pacta sunt servanda*. The court approached the issue, by indicating some of the reasons why some of the rights are weighty, as follows:

*"It must be understood that there is a moral dimension to a promise which is seriously given and accepted. It is generally regarded as immoral and dishonourable for a promisor to break his trust and, even if he does so to escape the consequences of a poorly considered bargain, there is no principle that inheres in an open and democratic society, based upon freedom and equality, which would justify his repudiation of his obligations. On the other hand, the enforcement of a bargain (even one which was ill-considered) gives recognition to the important constitutional principle of the autonomy of the individual."*

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*agreement intended to be enforceable in law and the law of contract exist to give effect to the intention."* The rationale can also be found in the work of Sir Frederick Pollock *The Principles of Contract* (1905) 1 in which he states: "*The Law of Contract may be described as the endeavour of public authority, a more or less imperfect one according to the nature of the case, to establish a positive sanction for the expectation of good faith which has grown up in the mutual dealings of men of average right-mindedness.*"

<sup>44</sup> *The Constitution of the Republic of South Africa Act 200 of 1993.*

<sup>45</sup> 1996 1 SA 984 (CC) Para (65).

<sup>46</sup> 1996 2 SA 651 (W) 660I-661A; 1995 12 BCLR (CC) 1702.

But it was Cameron JA, in the Supreme Court of Appeal's judgement of *Brisley v Drotsky*,<sup>47</sup> in a case concerning an order of eviction from rented premises where the landlord, having entered into an agreement of lease, seeks to have the lessee evicted. The court's response included constitutional principle which is encapsulated in the following comments: "*The Constitution's value of dignity and equality and freedom require that the courts approach their task of striking down contracts or declining to enforce them with perceptive restraint. One of the reasons is that contractual autonomy is part of freedom. Shorn of its obscene excesses, contractual autonomy informs also the constitutional value of dignity. The Constitution requires that its values be employed to achieve a careful balance between the unacceptable excesses of contractual "freedom", and securing a framework within which the ability to contract enhances rather than diminishes our self-respect.*"<sup>48</sup>

In this case, Harms JA emphasized that only contracts that were patently incompatible with public policy could be regarded as void and unenforceable when he stated, at 16A-B:

*"Om eenklaps aan regters 'n diskresie te verleen, om kontraktuele beginsels te verontagsaam, wanneer hulle dit as onredelik of onbillik beskou, is in stryd met hierdie werkswyse. Die gevolg sal immers wees dat die beginsel van pacta sunt servanda grotendeels verontagsaam sal word omdat die afdwingbaarheid van kontraktuele bepalinge sal afhang van wat 'n bepaalde regter in die omstandighede as redelik en billik beskou."*

In the subsequent, much criticized judgement of *Afrox Healthcare v Strydom*,<sup>49</sup> a case concerning the validity of an exclusionary clause in a hospital contract, in which the hospital exonerated itself and its staff from liability for its negligence, the court, per Brand JA, relies on freedom of contract as encapsulated in the common law maxim *pacta sunt servanda* for its conclusion. The Court noted that freedom is one of the values underlying the *Constitution*. Relying on the case of *Brisley v Drotsky*, the Court declared that the freedom of contract is, in fact, a constitutional value, as it forms part of freedom.

Brand JA cited with approval the dictum of Steyn CJ in the case of *Shifren*<sup>50</sup> in which it was stated:

*"die elementêre en grondliggende beginsel dat kontrakte wat vryelik en in alle erns deur bevoegde partye*

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<sup>47</sup> 2002 12 BCLR 1229 (SCA) Para 94.

<sup>48</sup> *Brisley v Drotsky* 2002 12 BCLR 1229 (SCA) Para 94.

<sup>49</sup> (2002) 4 ALL SA 125 (SCA) 133.

<sup>50</sup> *SA Sentrale Ko-op Graanmaatskappy Bpk v Shifren* 1966 (4) SA 760 (A) 767A.

*aangegaan is, in die openbare belang afdwing word."*

But, notwithstanding the value placed on the maxim *pacta sunt servanda* by, especially, the Supreme Court of Appeal in the cases of *Brisley v Drotsky*<sup>51</sup> and *Afrox Healthcare v Strydom*,<sup>52</sup> the judgements have come under scathing attacks from many South African academic writers. Many grounds for disagreeing with the fore stated dicta in these cases have been advanced. Some of the main opposition to the dicta includes the skewed value being placed upon the common law principle of *pacta sunt servanda* in a constitutional context.<sup>53</sup>

What is suggested by some legal writers is that the community interests, or communal values, ought to weigh heavier than personal autonomy.<sup>54</sup>

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<sup>51</sup> (2002) 12 BCLR 1229 (SCA).

<sup>52</sup> (2002) 4 ALL SA 125 (SCA) 133.

<sup>53</sup> The writers Bhana and Pieterse *SALJ* (2005) 122 865 are very critical in that the classical liberal theory in which individual autonomy, freedom of contract and individual liberty is augmented. The writers go on to state that *"liberty is not, and indeed should not be, immune from limitation."* They add: *"It is accordingly clear that the value of freedom does not equate with complete individual liberty and does not found an independent right to unlimited contractual liberty. What is also clear is that the meaning of the value of freedom in the 1996 Constitution is substantially less than its meaning in classical liberal theory. In particular, the value of freedom is reined in significantly by its interaction with the constitutional values of equality and dignity."* The writers also raise concern at the ease at which the Supreme Court of Appeal favoured a classical liberal understanding of freedom of contract. In this regard the writers conclude that the classical concept of contractual liberty does not enjoy unequivocal constitutional support. Other writers who have stated before that freedom of contract has never been an absolute freedom include Hawthorne "Closing of the Open Norms in the Law of Contract" (2004) 67 (2) *THRHR* 294 pointing to the writings of Murray and Lubbe Farlam and Hathaway *Contract, Cases, Materials, Commentary* (1988) 37; Grove "Die Kontraktereg, Altruïsme, Keusevryheid en die Grondwet 134 (2003) *De Jure* 146. For contrary views see Jordaan "The Constitution's Impact on the Law of Contract in Perspective" 50 (2004) *De Jure* 61-62. The writers Bhana and Pieterse (2005) *SALJ* 865, 879ff also express concern at the lack of insight by the court in the value of equality and the value of dignity. In this regard the writers argue: *"Even if one accepts (which we do not) Cameron JA's contention that inequality in bargaining power is irrelevant when considering the Shifren principle, that does not render irrelevant the impact of the value of equality on the matter. At the very best, it should have been acknowledged that the value of equality has an indirect impact on the matter conceding that the classical concept of contractual liberty does not enjoy unequivocal constitutional support."* As to the assertion by Brand JA in *Afrox v Strydom* that not only does freedom of contract form part of the Constitutional values of freedom and dignity, it constitutes an independent constitutional value in itself, the writers persuasively argue that not only is this assertion erroneous, it indicates an ideological value judgement that is *"out of step with the constitutional text, context and ethos."* The writers add *"the elevation of contractual freedom to the status of constitutional value seems unfounded."*

<sup>54</sup> See the writings of Pretorius "Individualism, Collectivism and the Limits of Good Faith" 2003 (66) *THRHR* 638 at 640-642 who convincingly argues that the modern approach ought to focus on collectivism an antithesis of individualism. The writer stresses communal values as opposed to personal autonomy. According to the writers, it displays a commitment to ethics of altruism in terms of which the interests of others are considered. This according to the writer ties in *"with the rise of consumer protection and consumer welfarism which promote the collective principles within contract law which counter individualistic stance ....."* The writer also emphasizes the concern of other academic writers when he states: *"The over-emphasis of traditional contract ideology runs counter to an ever-growing body of academic literature as well as those cases which recognize the possibility of*

Some of the writers argue that although the Supreme Court of Appeal held that freedom of contract promotes the constitutional values, this is not always applicable, as freedom as a constitutional value has to be balanced with other values underlying the *Constitution*.<sup>55</sup>

Following the principle adopted in *Brisley v Drotosky*<sup>56</sup> and *Afrox v Strydom*,<sup>57</sup> the Supreme Court of Appeal in *Napier v Barkhuizen*<sup>58</sup> also accepted that contractual claims are subject to the *Constitution*. The Supreme Court of Appeal cautioned that the fact that a term in a contract is unfair or may operate harshly "*does not, by itself, lead to the conclusion that it offends the values of the Constitution*". The court also emphasized the principles of dignity and autonomy, which the court states: "*find expression in the liberty to regulate one's life by freely engag[ing] [in] contractual arrangements*". What the Constitution requires of the courts, the Supreme Court of Appeals held, is that they "*employ its values to achieve a balance that strikes down the unacceptable excesses of 'freedom of contract', while seeking to permit individuals the dignity and autonomy of regulating their own lives.*" The Supreme Court of Appeal further, with regard to the *pacta sunt servanda* rule, emphasized "*that intruding on apparently voluntarily concluded arrangements is a step that Judges should countenance with care, particularly when it requires them to impose their individual conceptions of fairness and justice on parties' individual arrangements.*"

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*the principle of good faith functioning as corrective measure to a harsh contract in appropriate circumstances.*"

<sup>55</sup> The writer Tladi (2002) 17 *SAPR/PL* 473 at 477 highlights the values of fairness, dignity and equality, especially the drive towards substantive equality. In this regard, the writer persuasively argues that freedom of contract when abused by the stronger party resulting in unreasonable and unjust contracts undermine the values of equality and dignity that are supposed to permeate our constitutional dispensation. The writer is especially, critical of Brand JA's dictum in *Afrox Healthcare v Strydom* for ignoring the principles of reasonableness, justice, equity and good faith. In this regard the writer is critical of Brand JA dismissing those principles as mere "*abstract ideas*" which the writer approximates "*these values to which our constitution requires the common law to strive towards*". See also the comments made by Hawthorne "The End of bona fides" (2003) 15 *SA Merc LJ* 271 at 277. See further the comments of Hopkins *TSAR* (2003-1) 150 at 155 wherein the writer argues that: "*The sanctity of contract rule has prevented our courts from applying equitable solutions in situations where the contract is clearly unfair, harsh and oppressive.*" The writer suggests that "*although the common law sanctity of contract rule has once epitomized contractual justice, in the new constitutional dispensation, the sanctity of contract must also be constitutionally scrutinized against the values that animate the Constitution.*" The writer also convincingly argues that "*the freedom to contract can never serve as a justification for enforcing a private agreement that has the purpose and effect of limiting the other party's fundamental rights*". In a further article Hopkins (2001) 16 *SAPR/PL* 122 at 133-135 convincingly argues that certain rights as in *Shifren* in the constitution era inalienable and cannot be limited or waived.

<sup>56</sup> (2002) 12 *BCLR* 1229 (SCA) Para 94.

<sup>57</sup> (2002) 4 *ALL SA* 125 (SCA) 133.

<sup>58</sup> 2006 (4) *SA* 1 (SCA); 2006 (9) *BCLR* 1011 (SCA) Para 10.

However, the Supreme Court of Appeal accepted that the constitutional values of equality and dignity may prove to be decisive when the question of the parties' relative bargaining positions is an issue.

Since the decision of the Supreme Court of Appeal,<sup>59</sup> the Constitutional Court, in *Barkhuizen v Napier*<sup>60</sup> was also confronted in dealing with the validity of a time-bar clause. Turning, to the value of the maxim *pacta sunt servanda*, the Constitutional Court, per Ngcobo J delivering the majority judgement, stated: "*I do not understand the Supreme Court of Appeal as suggesting that the principle of contract pacta sunt servanda is a sacred cow that should trump all other considerations*".

The court continues:

*"All law, including the common law of contract, is now subject to constitutional control. The validity of all law depends on their consistency with the provisions of the Constitution and the values that underlie our Constitution. The application of the principle pacta sunt servanda is, therefore, subject to constitutional control."*

The court then looked at the approach previously adopted by the Supreme Court of Appeal and concludes that the approach followed is not the proper approach to adjudicating the constitutionality of contractual terms. The court suggested the proper approach:

*"..... is to determine whether the term challenged is contrary to public policy as evidenced by the constitutional values, in particular, those found in the Bill of Rights."*

This approach, according to the court, leaves space for the doctrine of *pacta sunt servanda* to operate, but, as the court puts it, at the same time allows courts to decline to enforce contractual terms that are in conflict with the constitutional values, even though the parties may have consented to them.

This, it is submitted, is a significant shift from the stance taken by Cameron JA in the *Brisley case* and Brandt JA in the *Afrox case*, in which freedom of contract was elevated to a constitutional value. The court also holds:

*"While it is necessary to recognise the doctrine of pacta sunt servanda, courts should be able to decline the*

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<sup>59</sup> *Napier v Barkhuizen* 2006 (4) SA 1 (SCA); 2006 (9) BCLR 1011 (SCA).

<sup>60</sup> 2007 (5) SA 323 (CC).

*enforcement of a time limitation clause it would result in unfairness or would be unreasonable.”*<sup>61</sup>

It will be argued in the succeeding chapter that when one assesses the validity of exclusionary clauses in hospital contracts, regard must be had firstly to communal values as opposed to the personal autonomy of hospitals. Applying this principle, regard will be had to a commitment to ethics in terms of which the interests of others are considered. Normative ethics, as with community convictions, also dictate that the obligation by a medical practitioner/hospital which flows from his/her/its duty of care, whether contractually or generally is to exercise a standard of care expected of a reasonable doctor or specialist in his/her class. The same follows for hospitals.

What will also be argued in the succeeding chapter is that as the principle of *pacta sunt servanda* is subject to constitutional control and the principle cannot trump over, *inter alia*, the values of equality and dignity, the fact that a patient stands in an unequal bargaining position to that of a medical practitioner/hospital causes the contractual liberty of a contracting party to be scrutinized against the values that animate the *Constitution*. To this end, it will be argued that freedom of contract, when abused by the stronger party, resulting in unreasonable and unjust contracts, as is the case of exclusionary clauses in hospital contracts, it undermines the values of equality and dignity and ought to be found to be inconsistent with the values enshrined in the *Constitution* and the *Bill of Rights*.

### 13.3.2 Waiving or limiting a contractual right

An important question that needs to be answered is, to what extent can the rights enshrined in the *Bill of Rights* be waived or limited? Put differently, can a fundamental right be validly waived? An example of the waiver of a fundamental right can be found in the South African criminal law where an accused person, who has a constitutional right to silence, decides to make a confession or pleads guilty to the charge.<sup>62</sup> The rationale for the acceptance of a waiver in these circumstances lies in the sound administration of justice or, as it was stated in *S v Lavhengwa*:<sup>63</sup>

“..... Even if the rule permitting an adverse inference impinged upon the right of the accused to remain silent,

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<sup>61</sup> *Barkhuizen v Napier* 2007 (5) SA 323 (CC). See also the comment of Sachs J in a minority judgement who confirms that the jurisprudential pedestal, on which the maxim *pacta sunt servanda* had once occupied, has been singularly narrowed in the great majority of democratic societies.

<sup>62</sup> Hopkins (2001) 16 *SAPR/PL* 122; Currie and De Waal (2005) 751.

<sup>63</sup> 1996 (2) SA SALR 453 (W).

*it is in any event probably a justifiable limitation.*"<sup>64</sup>

In other instances two of the rights in the *Bill of Rights*, which stand out above the others in order of importance, are said to be inalienable by the authorities. They include the rights to life and dignity.<sup>65</sup>

*Hopkins*<sup>66</sup> persuasively argues that, despite recognising that some of the rights in the Bill of Rights ought to be regarded as inalienable and incapable of waiver, there are, however, rights, according to the writer, which can be alienated. The rights most affected are said to be freedom rights.<sup>67</sup>

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<sup>64</sup> *S v Lavhengwa* 1996 (2) SALR 453 (W); See also the principles enunciated in *S v Boesak* 2001 (1) SA 912 (CC); *S v Thebus* 2003 (6) SA 505 (CC) Para 55.

<sup>65</sup> *Hopkins* (2001) 16 *SAPR/PL* 122 at 129. See also the comments by Chaskalson P in *S v Mawayane* 1995 (3) SA 391 (CC) Para 144 in which he stated: "*The rights to life and dignity are the most important of all human rights and the source of all other personal rights in Chapter 3. By committing ourselves to a society founded on the recognition of human rights we are required to value these two rights above all others.*" The Constitutional court then looked at *inter alia* the Hungarian law and quotes with approval the two factors stressed therein, namely, the relationship between the rights of life and dignity. The court consequently stated: "*First, the relationship between the rights of life and dignity, and the importance of these rights taken together. Secondly, the absolute nature of these two rights taken together. Together they are the source of all other rights. Other rights may be limited, and may even be withdrawn and then granted again, but their ultimate limit is to be found in the preservation of the twin rights of life and dignity. These twin rights are the essential content of all rights under the Constitution. Take them away, and all other rights cease.*" In the case of *S v Makwanyane* the Attorney-General (as he was known) argued that "*the right to life and the right to human dignity were not absolute concepts. Like all rights they have their limits. One of those limits is that a person, who murders in circumstances where the death penalty is permitted by section 277, forfeits his or her right to claim protection of life and dignity.*" The court consequently rejected this argument. The court held: "*But subject to this, the rights vest in every person, including criminals convicted of vile crimes. Such criminals do not forfeit their rights under the Constitution and are entitled, as all in our country now are, to assert these rights, including the right to life, the right to dignity and the right not to be subjected to cruel, inhuman or degrading punishment. Whether or not a particular punishment is inconsistent with these rights depends upon an interpretation of the relevant provisions of the Constitution, and not upon a moral judgement that a murderer should not be allowed to claim them.*" The importance of dignity is stated by O'Regan J in the case of *S v Makwanyane* at Para 327 as follows: "*Without dignity, human life is substantially diminished.*" O'Regan J goes on to pronounce, in the same case at Para 328 that the prime value of human dignity could be stated in the following terms: "*The importance of dignity as a founding value of the new Constitution cannot be over emphasized. Recognizing a right to dignity is an acknowledgement of the intrinsic worth of human beings; human beings are entitled to be treated as worthy of respect and concern. This right therefore is the foundation of many of the other rights that are specifically entrenched in Chapter 3 (now Chapter 2) in the Final Constitution.*"

<sup>66</sup> See *Hopkins* (2001) 16 *SAPR/PL* 122.

<sup>67</sup> Currie "Bill of Rights Jurisprudence" 1999 *Annual Survey of South African Law* 54-55 quoted with approval by *Hopkins* "Constitutional rights and the question of waiver: How fundamental are fundamental rights?"(2001)16 *SAPR/PL* 122 at 124. Currie suggests that freedom rights (such as the right to freedom of religion) can for example be waived when he explains this by stating: "*This is because freedom rights can be positively or negatively exercised. Just as one can exercise the right to freedom of expression by choosing to remain silent, one is free to practice one's religion and equally free to choose not to. A waiver therefore amounts, as it were, to an undertaking to exercise the right negatively. The undertaking in clause 20(b) [of the contract of sale] not to make calls to prayer would be similar to a contractual undertaking not to disclose certain information, or not to work in*

In order to find answers to the key issue, or core, of this thesis, namely, whether an exclusionary clause in a hospital contract, in which the hospital or other healthcare provider exonerates himself/herself and/or its staff from liability arising from their negligence, is invalid, it is important that we shall look briefly at the aspect of whether the key to the answer does not lie in the fact that the right to health care services, being a fundamental constitutional right, can be regarded as inalienable, resulting in the right being incapable of being limited or waived? To find a possible answer we need to assess, briefly, the effect of the right to healthcare services. S27 of the *Bill of Rights* provides:

"Healthcare, food, water and social security

27(1) everyone has the right to have access to-

(a) Healthcare services, including reproductive healthcare;

.....

(c) The State must take reasonable legislative and other measures, within its available resources, to achieve the progressive realisation of each of these rights.

(3) No one may be refused emergency medical treatment."

Healthcare services, in this regard, it is submitted, are regulated by both common law <sup>68</sup>

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*one's chosen profession, or to perform nude on stage, or to attend religious instruction in a private school. These are respectively waivers of the rights to freedom of expression, to occupational freedom, to privacy and to freedom of religion. There should, in principle, be no objection to enforcing contractual undertakings such as these since they are not violations of a constitutional right."*

<sup>68</sup> From the critical discussion in Chapter 2, it is clear that hospitals and other healthcare providers are ethically obliged by their professional rules to take due and proper care and exercise their mandate and professions with diligence. The promotion and maintenance of medical standards are embodied in the *Hippocratic Oath*, the *Declaration of Geneva*, and other codes of medical ethics. The underlying rationale for the promotion and maintenance of the standards stems from the philosophy that respect for human life needs to be maintained. See Smit "Die Geneeskunde en die Reg" *De Jure* 117-119; Mason and McCall Smith *Law and Medical Ethics* (1991) 3-6. So entrenched are these professional ethics and standards that they have existed for many centuries, including, the Ancient period, the Greek period, the Roman era, the pre-modern era and finally, the modern era. It is the *Hippocratic Oath* which has become the touchstone of modern medical ethics and which has governed the conduct of medical practitioners for many centuries. The *Hippocratic Oath* also very much influenced the doctor-patient relationship and continues to do so in modern times. It therefore remains the prevailing ethos of how doctors ought to behave towards their patients. The belief in ethics was so strong that Plato advocated that the doctor's duty should be placed for the good of the people at the expense of his interest. See Chapman *Physicians, Law and Ethics* (1984) 40. The authors quote Hammurabe's belief "*that the strong may not oppress the weak*" at page 5 of their writings. Medical humanism was also widely advocated in which it was widely believed that where *good and bad are given the same value, medicine is degraded and, in a sense ceases to be a profession*" See Chapman (1984) 40-41. Formalistic regulations to control professional standards in the doctor-patient relationship first saw the light in the Roman system of legal medicine. What emerged according to Amundsen (1993) 17-25 was the control exercised in maintaining standard of care and medical ethics. Measures were put in place to deal with physicians who failed to observe the standard of conduct that the law requires. So strong was the influence of medical ethics that Cronje-Retief (2000) 32 and *Carmi Hospital Law* (1988) 7 state that medical ethics were inspirational in the finding of hospitals. The duty perceived to treat their patients was also derived from medical ethics. England in the early days in particular, regulated the medical profession in order to control ethical conduct

and statutory law<sup>69</sup> requirements. What appeared hereinbefore is the fact that healthcare

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in an endeavour to increase the value of services rendered. See Cronje-Retief (2000) 35; Castiglione (1995) 659-660, Peters et al (1981) 126. The Renaissance period also saw the establishment of the Royal College of Physicians. The idea of a social contract between the physician and patient was created. A set of moral norms was also established for the profession. The patient's interests were viewed to be primal, especially, where it sometimes has to be weighed against the physician's commercial interest. See Chapman (1984) 77. It is particularly Thomas Percival's writings which influenced general thinking in the profession. His writings are quoted with authority by Chapman (1984) 82-83 and Veatch *Medical Ethics* (1997) 9. To this end Percival's ethics included "..... *the physician's concern for the patient's recovery must be uninfluenced by private and personal considerations* ....." The strong commitment to long-standing principles of medical ethics and the maintenance of medical standards remained very much intact in the pre-modern era and continue to do so in the modern era. See in this regard the writings of the English writers Jones (1998) 18; Mason and McCall-Smith (1991) 14-17; the American writings of Ficarra quoted in Sanbar et al (1995) 147ff; Skegg (1988) 8 and the South African writing of Beauchamp and Childress (2001) 1-7, 27; Veatch (1997) 21, Strauss (1996) 181, Steyn (2003) 67-68. It is especially the writers Carstens and Kok (2003) 449-451 who persuasively argue that in the Constitutional state wherein we find ourselves, the role of normative medical ethics is "a protective measure of human rights" namely "to do no harm" and to act in the best interest of the patient." To this end, the writers argue that disclaimers against medical negligence in hospital contracts would amount to an unreasonable/unfair/unethical acceptance on the part of the patient to contract to his/her potential harm. After all, the medical practitioner (and hospital) is ethically bound not to harm. The right to have access to healthcare services, it is submitted, notionally brings about such a right, but, it also brings about an obligation on the part of the medical practitioner and/or hospital not to harm the patient. Constitutionally therefore, this obligation to maintain a standard of due and skill cannot be compromised.

<sup>69</sup> In so far as statutory controls are concerned, the regulations published in the *Government Gazette* on the 1st February 1980 No 2948 No 6832 control the reasonable degree of care and skill which has to be maintained by private hospitals in securing a license granted to them. Regulation 25(23) of the regulations so published requires that "all services which are reasonably, generally and necessary for adequate care and safety of patients, are maintained and observed." Besides the regulations controlling the professional standards of private hospitals, the conduct of nurses and the setting of professional standards for nurses are reflected in the *Nursing Act*, 1978 (Act No 50 of 1978). Section 29(1) (C) of the Act makes provision for the removal from the register of registered nurses and midwives following on a disciplinary inquiry by the South African Nurses Council. The South African courts have also since as long ago as 1957, not been loath to protect hospitals against the conduct of nurses who deviated from professional standards. Consequently, the courts have held hospitals to be vicariously liable for the conduct of the nurses. This principle featured prominently in the cases of *Esterhuizen v Administrator, Transvaal* 1957 (3) SA 710 (T) and *Dube v Administrator, Transvaal* 1963 (4) SA 260 (W). See also the discussion of this subject in *Mtetwa v Minister of Health* 1989 (3) SA 600 (D) and the discussion thereof in *Lower Umfolosi District War Memorial Hospital v Lowe* 1937 NP 31 and *St Augustine's Hospital (Pty) Ltd v Le Breton* 1975 (2) SA 530 (D). In *Mtetwa* the court expressly refused to follow the approach of Feetham J in *Lower Umfolosi* and stated that: "I accept the proposition that in the performance of their professional duties nurses are not under the control of the hospital authority so as to become its servants, and that the obligation of the hospital authority in regard to the professional work of its nurses is limited to taking reasonable care to assure itself of the professional competence of the nurses, whom it employs."

The court consequently concluded: "They were acting, therefore, in a professional manner and not as domestic servants insofar as they dealt with the hot water bottle, and, that being so, they failed in the carrying out of professional duties for the discharge of which the hospital authority was not responsible."

Nienaber J found in *Mtetwa* that: "The point on which the decisions in the *Lower Umfolosi* case hinged was that a member of the professional staff of a hospital was not a servant proper for whose misdeeds the hospital was accordingly responsible. At the time that was perceived to be a principle of law. Nowadays, I venture to suggest, the question is purely one of fact. The degree of supervision and control which is exercised by the person in authority over him is no longer regarded as the sole criterion to determine whether someone is a servant or something else. The deciding factor is the intention of the parties to the contract, which is to be gathered from a variety of facts and factors. Control is merely one of the indicia to determine whether or not a person is a servant or an independent worker." He held that: "To the extent that the judgement in the *Lower Umfolosi* case purported

professionals are ethically obliged, by their professional rules or codes and by virtue of statutory regulations, to take due and proper care and exercise their professions with diligence. The general public have the expectation that, when they are treated by a medical practitioner and/or hospital, they are treated in a professional manner and with professional standards which will not cause them harm. The ethical conduct and the professional standards they are obliged to uphold in treating patients or when conducting surgery in furthering access to healthcare services, cannot be compromised in any way nor can they, it is submitted, validly be excluded in contract form wherein the patient signs an indemnity clause couched as such to exclude a medical practitioner and/or hospital from liability arising from their own negligence. To do otherwise and allow, especially the hospitals, to exclude their liability would, as *Pearmain*<sup>70</sup> persuasively argues, encourage the patient to go to Joe public for those services. She poses the question: "*What would be the reason for seeking out professional help if it meant that the professional in question was not bound to follow certain ethical rules and standards of practise associated with his profession?*"

It is for that reason that the reasoning of Brand AJ, in the Afrox case, with regard to clause 2 of the exemption clause, exculpating the hospital from liability arising from the nurse's negligence being a *non sequitur*, is questionable. The effect of the judgement is that it leaves patients who are victims of negligence of nurses, without recourse to compensation. The court reasoned that the conduct of the nurses is subject to disciplinary hearings, by the professional council, at the instance of the public. This thinking is correctly criticized in many quarters.<sup>71</sup>

The position advocated by the Supreme Court of Appeal needs to be severely criticized as it

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*to enunciate a universal principle of law, namely that a hospital assumes no responsibility for the negligence of any member of its staff engaged in professional work, it has thus been overtaken by more recent authority, not only by the South African cases referred to but indeed by English ones as well. (See, for instance Gold v Essex County Council (1942) 2 KB 293; Collins v Hertfordshire County Council (1947) KB 598; Cassidy v Ministry of Health (1951) 2 KB 343 (CA); Roe v Minister of Health (1954) 2 QB 66). Professor JC van der Walt suggests (1976 THRHR 399 at 405) that the later English cases have undermined the foundation on which the judgement in the Lower Umfolozi case was based. I agree. The ratio decidendi of that judgement, in my respectful view, is outmoded and accordingly no longer authoritative."*

<sup>70</sup> "A Critical Analysis of the Law on Health Services Delivery in South Africa" *Unpublished LLD Thesis University of Pretoria* (2004) 702.

<sup>71</sup> *Pearmain* (2004) 703 in particular argues that disciplinary hearings as a substitute for civil litigation is but a cold comfort to a patient who has lost the ability to work or to function in society and who has experienced considerable pain and suffering and who has to undergo future medical and hospital expenses as a result of professional negligence. The thinking of the Supreme Court of Appeal in this regard according to the writer is naive, to say the least.

does not keep track with the realities of life.<sup>72</sup> Brand JA, in his argument, almost creates the impression that nurses employed by a private hospital operated as an autonomous body, with the private hospital having no authority to control the nurses, subject, of course, to the nurses facing disciplinary measures, where necessary, by their controlling body namely, the nurses' professional council. This thinking, it is submitted, ignores the principle of vicarious liability which, as seen earlier, is deeply entrenched in the South African Law. The argument by the Supreme Court of Appeal that there is adequate protection for the patient against the risk of professional negligence, as the professional council has a reputation and a competitive edge, is also not acceptable.<sup>73</sup> A citizen's right to claim for damages can never be substituted for disciplinary proceedings conducted by a professional body controlling professional standards.<sup>74</sup>

The inclusion, by *Afrox Healthcare*, in their admission form an exclusionary clause, in an attempt to exonerate the hospital and its staff from liability arising from the breach of their standards, is also in contradiction to their vision and mission statement.<sup>75</sup>

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<sup>72</sup> Pearmain (2004) 706 convincingly argues that an employer who is not vicariously liable for negligence of its employees may be less concerned about taking preventive action to preclude professional negligence even if it takes action to discipline the nurse as an employee after the event. The author also argues that once a nurse is subject to a disciplinary proceeding by her professional body it is too late as the negligent act has already harmed a patient.

<sup>73</sup> As Pearmain (2004) 707 remarks such thinking is a fallacy.

<sup>74</sup> It was held more recently by the Constitutional Court in the *Barkhuizen case* that section 34 of the Bill of Rights "*not only reflects the foundational value that underlie our Constitutional order, it also constitutes public policy.*" Our courts have long held that a term in a contract which deprives a party of the right to seek judicial redress is contrary to public policy. See *Schierhout v Minister of Justice* 1925 AD 417, 424; See also *Nino Bonino v De Lange* 1906 TS 120 at 123-4.

<sup>75</sup> Presently on the website (<http://www.afroxhealth.co.za/>) is a document entitled "Core Values". It reads:

Core Values  
Organizational values are principles or qualities considered worthwhile by an organization. At Afrox Healthcare there is a fundamental commitment to these values throughout the entire organization - merely posting them on a bulletin board and paying them lip service is not tolerated. "Living" these values in our day-to-day business activities provides us with the foundation of what is important to us - namely, providing world-class patient care.

Accountability  
We ensure employees know what they are responsible for and are empowered to deliver.

Collaboration  
We maximize our achievements as a group, not as individuals.

Transparency  
We believe that visible problems can be solved and that informed people make better decisions.

Stretch  
We continuously push the boundaries of performance.

Another entry on the website reads:

Quality  
Afrox Healthcare quest is to maintain world-class quality standards at all its hospital facilities - to the benefit of this patients, employees, supporting medical practitioners and funders, a world-class quality management process. We believe that our unique process of managing quality standards in our hospitals matches and probably exceeds

The guarantee given of the right to access health care services, as provided for by section 27 of the *Constitution*, can also not be compared with the service expected of, say, an electrician who is hired to attend to a household electrical problem. The effect of the judgement in the *Afrox case* is that, despite recognised ethical codes and professional standards, which other suppliers of services do not have, the court seemed to place in its judgement on the same level as commercial enterprises. This, with respect, cannot be the case. After all, the *Constitution* guarantees access to healthcare services, whereas, the *Constitution* does not prescribe to other business services.<sup>76</sup>

It is further submitted that the obligations which arise from the access to healthcare services is inescapable and cannot be excluded by way of contract.<sup>77</sup>

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the best to be found anywhere in the world today.

The Afrox total quality management (TQM) process was launched through the company in 1993, exposing each and every employee to the company's vision for quality management. The Healthcare division then adapted the program to satisfy the unique demands of the healthcare industry. The program incorporates a vision, policies and procedures, critical success factors with supporting key performance indicators and specified activities. It is reviewed and upgraded on an ongoing basis. Continued adherence to these standards has been maintained by encouraging each and every employee to participate fully in the process and contribute in the decision-making processes. All new employees are exposed to the process as part of their induction training. Today, Afrox Healthcare and its member hospitals are reaping the rewards of this visionary approach to quality management. A culture of service excellence, a spirit of teamwork amongst all levels of staff and a continuous quest for improvement are now firmly entrenched. This, in turn, means that patients, funders and supporting medical practitioners can rely on our consistently high standards in all disciplines associated with hospital management, particularly nursing care. We also embarked on a scientific quality improvement program at the Eugene Marais Hospital during 1997. This ward resource management program has now been implemented in most Afrox Healthcare hospitals with both input and output measures based on quality improvement. This program ensures quality care through resource and standards management."

<sup>76</sup> Pearmain (2004) 710 correctly emphasizes that the court incorrectly takes a very narrow view of the issue of access holding that the clause did not interfere with access to healthcare services in that it did not have the effect of barring anyone from obtaining healthcare services. The author also persuasively argues that a narrow construction of the meaning of access to health services should be given, so as to permit them to be rendered in conditions which in themselves put the life or health of the patient at risk. This she believes aligns with the object of the Constitutional right contained in section 27(1) of the *Constitution*.

<sup>77</sup> See in this regard Pearmain (2004) 710-711. The writer suggests that an attempt to compromise the standard of conduct defeating the object of the Constitutional right to access to healthcare is contrary to public policy or to the legal convictions of the community as expressed in the *boni mores*. The writer emphasizes this aspect, especially, where the contracting parties is also in an unequal bargaining position. The writer goes on to state: "*It is extremely difficult to see why the broader community, as opposed to the business community with which the Supreme Court of appeal seemed primarily concerned in this case, would prefer the right to freedom of contract to the right of access to effective and properly delivered healthcare services. It is submitted that the Supreme Court of Appeal demonstrates not only in this case but also in others such as Carmichele a surprising and unfortunate reluctance to take opportunities to align the more traditional common law principles with the Constitution and that within this court, judicial inertia is the order of the day.*" Brand D in `Disclaimers in Hospital Admission Contracts and Constitutional Health Right: Afrox Healthcare v Strydom *ESR Review* Vol. 3 No 2 September 2002 published by the Socio-Economic Rights Project, University of the Western Cape also gave great consideration to Brand JA's recognition of the exemption of healthcare services and critically states: "*The Court's judgement puzzles. The Court's finding that there was equality of bargaining power ignores the self-evident inequality inherent in the contractual relationship. It is submitted that the nature of the service at stake created an unequal bargaining*

### 13.3.3 Public Policy Setting

Public policy has always played a prominent role in determining whether a contract, or contractual provision, will be enforced or not. In this regard, the principle that a contract will not be enforced if its enforcement would be against public policy has repeatedly been highlighted by both the South African legal writers <sup>78</sup> and the courts <sup>79</sup> alike. More recently,

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*position. One cannot do without healthcare services, which are a fundamental constitutional right. Since all private and public hospitals in South Africa use indemnity clauses, it is clear that the respondent had no bargaining power regarding the indemnity clause - if he objected to it he had nowhere else to go and would not have gained access to healthcare services. The Court's reasoning on the clash between the indemnity clause and constitutional values is equally suspect. The Court concluded that, in the absence of the threat of action for damages, disciplinary action by professional bodies and concern for a hospital's reputation ensure that hospitals avoid negligent conduct. The Court's reasoning ignores the fact that the respondent litigated precisely because of negligence that incurred despite these 'sanctions' and that caused the respondent damage, for which he cannot now be compensated."* The writer continues: *"In addition, the case seemed significant because it concerned the indirect horizontal application of a socio-economic right. It allowed the Court an opportunity to demonstrate its regard for constitutional values. However, the judgement raises doubt as to the extent to which the Court considers these values. This observation is most evident in the consideration of whether the indemnity clause offends public policy. This consideration comes down to a balancing of the individual interests of the contracting parties and the general, constitutional interests of the public. The Court opted for the protection of the individual (commercial) interests while ignoring almost completely the fact that the service the parties bargained about was a constitutional right. With regard to the scope of the limits engendered by an indemnity clause, the Court held that those limits should be defined by business considerations such as saving in insurance premiums and competitiveness. The Court missed an opportunity: it again insulated that common law, from constitutional infusion."* Insofar as inalienable rights are concerned Hopkins (2001) 122 at 137 persuasively argues that contracts whose enforcement would entail the violation of a right in the *Bill of Rights* are unenforceable because they are contrary to public policy. Enforcement of such a contract (waiver) so it is further argued by Hopkins would mean in effect, the limitation of a contracting party's constitutional right. The writer further suggests that this can only be done if the reason for the limitation is reasonable and proportionate to the benefit obtained. It is suggested that the right to the access to healthcare, falls into this category of rights which cannot be limited, for such right is inalienable.

<sup>78</sup> Van der Merwe et al (2003) 215; Kerr (1998) 405; Christie (1996) 204; Lubbe and Murray (1988) 238; Naude and Lubbe (2005) 442; Jansen and Smith (2003) 213; Hawthorne (2004) 296; Tladi (2002) 475; Lewis (2003) 333-334; Hawthorne (2003) 274; Carstens and Kok (2003) 435; Jordaan (2004) 60-61; Hopkins (2001) 127-128; Hawthorne (1995) 173; Neels (1993) 690; Fletcher (1997) 3; Pearmain (2004) 502ff.

<sup>79</sup> Insofar as the South African courts are concerned, the courts have also throughout the years pronounced that the courts will not enforce a contract that is against public policy or *contra bonos mores*. The modern law is then founded on the words of Innes CJ in *Eastwood v Shepston* 1902 TS 294 302: *"Now this Court has the power to treat as void and to refuse in any way to recognize contracts and transactions which are against public policy or contrary to good morals. It is a power not to be hastily or rashly exercised; but once it is clear that any arrangement is against public policy, the court would be wanting in its duty if it hesitated to declare such an arrangement void. What we have to look at is the tendency of the proposed transaction, not its actually proved result."* After quoting the above passage in *Sasfin (Pty) Ltd v Beukes* 1989 (1) SA 1 (A) 8 Smalberger JA added: *"No court should therefore shrink from the duty of declaring a contract contrary to public policy when the occasion so demands. The power to declare contracts contrary to public policy should, however, be exercised sparingly and only in the clearest of cases, lest uncertainty as to the validity of contracts result from an arbitrary and indiscriminate use of the power. One must be careful not to conclude that a contract is contrary to public policy merely because its terms (or some of them) offend one's individual sense of propriety and fairness."* The application of public policy to the law of contract was further defined by Hoexter JA in *Botha (now Griesel) v Finanscredit (Pty) Ltd* 1989 (3) SA 773 (A) 782-783C: *"I proceed to consider whether the provisions of clause 7 are, in the language of the majority judgement in the Sasfin case (at 8C-D): "..... clearly inimical to the*

with South Africa becoming a constitutional state, the role of public policy has not disappeared. The role and value of public policy, in the constitutional context, takes many forms and has been the subject of jurisprudential debate amongst many of the South African legal writers.<sup>80</sup> The South African legal writers have been especially critical of the

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*interests of the community, whether they are contrary to law or morality, or run counter to social or economic expedience ....."* and accordingly, unenforceable on the grounds of public policy. In such an investigation (see the remarks of Smalberger JA at 9A-G of the Sasfin case) there must be borne in mind: (a) that, while public policy generally favours the utmost freedom of contract, it nevertheless properly takes into account the necessity for doing simple justice between man and man; and (b) that a court's power to declare contracts contrary to public policy should be exercised sparingly and only in cases in which the impropriety of the transaction and the element of public harm are manifest. So approaching the inquiry in the instant matter, I am not persuaded that the provisions of clause 7 of the suretyships are plainly improper and unconscionable. While at first blush the provisions of clause 7 may seem somewhat rigorous they cannot, I think, having regard to the particular circumstances of the present case, fittingly be described as unduly harsh or oppressive." More recently, the Supreme Court of Appeal in an number of cases including *Brummer v Gorfil Brothers Investments (Pty) Ltd en Andere* 1999 (3) SCA at 420f; *De Beer v Keyser and Others* 2002 (1) SA 827 (SCA) at 837C-E and *Afrox Healthcare Bpk v Strydom* 2002 (6) SA 21 (SCA) used public interest which is often been used inter changeably with public policy to denounce the validity of a contractual provision. To this end, the court repeated the principle accepted and applied in *Sasfin (Pty) Ltd v Beukes* 1989 (1) SA 1 (A) and *Botha (now Griesel) and Another v Finanscredit (Pty) Ltd* 1989 (3) SA 773 (A), Brand JA quoted the dictum of Smalberger JA in the former where he stated: "The power to declare contracts contrary to public policy should, however, be exercised sparingly and only in the clearest of cases, lest uncertainty as to the validity of contracts result from an arbitrary and indiscriminate use of the power. One must be careful not to conclude that a contract is contrary to public policy merely because its terms (or some of them) offend one's individual sense of propriety and fairness. In the words of Lord Atkin in *Fender v St John-Mildmay* 1938 AC 1 (HL) at 12.....' the doctrine should only be invoked in clear cases in which the harm to the public is substantially incontestable, and does not depend upon the idiosyncratic inferences of a few judicial minds ....."

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

<sup>80</sup> It is especially; in developing the common law of contract in conformity with the *Bill of Rights* that many writers suggest, public policy can play a vital role. It is Christie *Bill of Rights Compendium* (1997) 3H-21 who convincingly argue that the *Constitution* itself provides an exceptionally reliable statement of seriously considered opinion, by reason of the widespread consultation and negotiation that preceded the drafting of the Constitution. Christie with reference to the case of *Ryland v Edros* 1997 (2) SA 690 (C) in which Farlam J was able to depart from *Ismail v Ismail* 1983 (1) SA 1006 (A) in which potentially polygamous Muslim marriages had been held contrary to public policy by radiating the effect of many provisions of the interim Constitution from which it was clear that such marriages could no longer be regarded as contrary to public policy. De Vos "Pious wishes or directly enforceable human rights? Social justice and economic rights in South Africa's 1996 Constitution" 1997 SAJHR 67 101 advocates similarly that this can be reached by treating as *contra bonos mores* any provision which is clearly at odds with the basic principles enshrined in the Bill of Rights. Van Aswegen 1994 (57) *THRHR* 448 at 451 on the other hand suggests that the values underlying fundamental rights protected in the Bill of Rights, should be considered as important policy factors determining public policy in the circumstances. The author goes on to state all principles of contract law will have to be interpreted as far as possible in accordance with the values underlying fundamental rights. An example suggested by the author is that the present principle of *pacta sunt servanda* should be interpreted to conflict as little as possible with fundamental rights such as equality etc. It is especially Hawthorne 1995 (58) *THRHR* 157 who opines that the principle of equality is one of the cornerstones of South Africa's Constitution. The author suggests that other policy considerations than the principle of *pacta sunt servanda* (which was once one of the foundations of the classical theory of contract) ought to be considered for example public interest. See also the writings of Christie *Bill of Rights Compendium* 3H-21 who, like Hawthorne, suggests that public policy is the most satisfactory instrument for dealing with cases of inequality of bargaining

Supreme Court of Appeal's approach, in attempting to develop the common law, in reflecting the spirit of the *Bill of Rights*.<sup>81</sup> Included in the considerations suggested by some of the legal writers are the unequal bargaining positions of the parties, unjust and unreasonable clauses, contracts contrary to good faith.<sup>82</sup>

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<sup>81</sup> It is especially, the court's approach in the *Afrox case* that has elicited strong criticism in its use of public policy standards. In this regard Naude and Lubbe (2005) 441 at 443 advances the view that as regard the public policy standard, the court fell back on the elementary principle, virtually elevated into a constitutional value, namely that "*public interest requires the enforcement of contracts freely and earnestly entered into.*" What the authors do advocate however, are broader policy considerations *inter alia* the maintenance of a standard of care and medical ethics. The writers Jansen and Smith (2003) 210 at 217 is also critical of Brand JA in not considering foreign law when considering whether exclusionary clauses in hospital contracts were invalid or not. In this regard the writers suggest that had the court considered foreign law, they would surely, have followed England, America and Germany in pronouncing that such clauses are contrary to public policy. Tladi (2002) 17 *SAPR/PL* 473 is particularly critical of the Supreme Court of Appeal in the *Afrox case* for relying on freedom of contract for its conclusion. The court noted that freedom is one of the values underlying the Constitution. Relying on the *Brisley v Drotzky* case, the court decided that the freedom of contract is in fact a constitutional value as it forms part of freedom. The writer in this regard, suggests that freedom of contract may promote constitutional values in some cases, but not in all. In instances where there is an unequal bargaining power between contracting parties this can lead to 'obscene excesses'. It is for that reason that Tladi suggest at 477 that freedom as a constitutional value has to be balanced with other values underlying the *Constitution*, namely "*fairness, dignity and equality*". The writer suggests that public policy dictates that considerations of unequal bargaining power of the parties, unjust or unreasonable clauses, contracts contrary to good faith ought to be considered when deciding contractual provisions or contracts to be unenforceable.

<sup>82</sup> Support for the development of the open norms of the South African common law to include *bona fides*, public policy and *boni mores* in accordance with the Constitutional mandate, is also promoted by Hawthorne (2003) 15 *SA Merc LJ* 271 at 277. The writers Carstens and Kok (2002) also convincingly argues that the Supreme Court of Appeal made too much of contractual autonomy which is not explicitly recognised in the *Bill of Rights*. Moreover, the writers suggest that contractual autonomy must yield to enhancing access to professional healthcare services. Hopkins *TSAR* (2003) 150 at 157 also persuasively argue that although public policy is a very useful and resourceful body of doctrine, all law in South Africa (including the common law), must promote the value that underlie the *Bill of Rights*. The values suggested by Hopkins, include, openness, dignity, equality and freedom. But, cautions the writer that whereas the common law once valued sanctity of contract as epitomizing contractual justice, it is no longer the case. Sanctity of contract must now also be constitutionally scrutinized against the values that animate the *Constitution*. The *Bill of Rights* according to Hopkins is a guarantee to all South Africans that their fundamental rights will be protected against infringement. An area of concern, raised by the writer, and contracts often entered into between parties to the contract where there is a huge disparity in their bargaining power, for example, in standard-form contracts. Such contracts ought to receive different treatment from the courts, especially, in those where there is no radical difference in bargaining power. A solution suggested by Hopkin is that as public policy is already entrenched in our common law and in particularly the law of contract wherein contracts contrary to public policy are declared unenforceable, the *Bill of Rights* should itself provide for an exceptionally reliable statement of seriously considered public opinion. This solution according to Hopkins is compatible with the rationale behind Section 39(2) of the *Bill of Rights* - that the common law be developed so as to be made compliant with the values that underlie the *Constitution*. To this end, it is argued that any standard-form contract that contains a clause that conflicts with the provisions of the *Bill of Rights* is *prima facie* unenforceable, unless, good cause is shown by the party to the contract relying on the clause. Hopkins also persuasively argues that the enquiry by the judges in adjudicating these matters ought no longer to be restricted to judicial precedent, contractual capacity and the legality of the transaction. Instead, they will have to grapple with issues such as fairness and reasonableness as well. See also Christie "The Law of Contract and the Bill of Rights" *Bill of Rights Compendium* (1997) 3H-7. *Contra* the remarks by Jordaan "The Constitution's impact on the Law of

The role and value of public policy in the constitutional context has also been the subject of jurisprudential debate by the judiciary.<sup>83</sup> But, it has taken some time for the courts,

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Contract in Perspective" 60 2004 *De Jure* 58 who relies heavily on the elaboration of Cameron JA in *Brisley v Drotzky* 2002 (4) SA 1 (A) in which he states: "It is not difficult to envisage situations in which contracts that offend these fundamentals of our new social compact will be struck down as offensive to public policy. They will be struck down because the Constitution requires it, and the values it enshrines will guide the courts in doing so. The decisions of this Court that proclaim that the limits of contractual sanctity lie at the borders of public policy will therefore receive enhanced force and clarity in the light of the Constitution and the values embodied in the Bill of Rights." The writer ought to be criticized though when he states that unequal bargaining position *per se* is not vital to public policy, nor should it be used in isolation from other relevant factors. What the writer loses sight of however is the equality clause enshrined in the *Bill of Rights* and guaranteed by the *Constitution*. This is particularly relevant in instances where the inequality is such that the stronger contracting party abuses the power imbalance to such a degree that the weaker party's rights are infringed.

<sup>83</sup> Since South Africa became a constitutional State in which constitutional democracy reign supreme, public policy as seen in a number of judgements, is now deeply rooted in the *South African Constitution* and the values which underlie it. Commencing with the case of *Carmichele v Minister of Safety and Security and Another (Centre for Applied Legal Studies Intervening)* 2001 (4) SA 938 (CC); 2001 (10) BCLR 995 (CC) at Paras 54-6, a case though not involving contract but the law of delict, the court per Ackerman et Goldstone JJ found that the *Constitution* "..... is not merely a formal document regulating public power. It embodies, like the earlier Constitution, an objective normative value system." The court suggested that it is within the matrix of this objective normative value system that the common law must be developed. As to the development of the common law the court emphasizes the caution previously sounded by the Constitutional Court in the case of *Du Plessis v De Klerk and Another* 1996 (3) SA 850 (CC) 1996 (5) BCLR 658 Para 61 quoting the dictum of Zacobucci J in *R v Salituro* and cited with approval by Kentridge AJ, namely: "Judges can and should adapt the common law to reflect the changing social, moral and economic fabric of the country. Judges should not be quick to perpetuate rules whose social foundation has long since disappeared. Nonetheless there are significant constraints on the power of the Judiciary to change the law in a constitutional democracy such as ours it is the legislature and not the courts which have the major responsibility for law reform..... The Judiciary should confine itself to those incremental changes which are necessary to keep the common law in step with the dynamic and evolving fabric of our society." The proper development of the common law as provided for by Section 39(2) the court suggests, would be: "A balance had to be struck between the interests of the parties and the conflicting interests of the community according to what the court conceives to be society's notions of what justice demands. Under s39(2) of the Constitution concepts such as 'policy decisions and value judgements' reflecting 'the wishes and the perceptions of the people' and 'society's notions of what justice demands' might well have to be replaced, or supplemented and enriched by the appropriate norms of the objective value systems embodied in the Constitution." In the case of *Brisley v Drotzky* 2002 (4) SA 1 (SCA) a case involving a written contract between landlord and tenant, the court relied upon public policy to determine whether the agreement is unenforceable or not. The court first looked at the pre-constitutional dispensation when it remarked at Para 91: "The jurisprudence of the Court has already established that, in addition to the fraud exception, there may be circumstances in which an agreement, unobjectable in itself, will not be enforced because the object it seeks to achieve is contrary to public policy. Public policy in any event nullifies agreements offensive in themselves - a doctrine of very considerable antiquity." The court also looked at the post constitutional era and remarked: "In its modern guise, 'public policy' is now rooted in our Constitution and the fundamental values it enshrines. This includes human dignity, the achievement of equality and the advancement of human rights and freedoms, non-racialism and non-sexuality." The court goes on to state: "It is not difficult to envisage situations in which contracts that offend these fundamentals of our new social compact will be struck down as offensive to public policy. They will be struck down because the Constitution requires it, and the values it enshrines will guide the courts in doing so. The decisions of this Court that proclaim that the limits of contractual sanctity lie at the borders of public policy will therefore receive enhanced force and clarity in the light of the Constitution and the values embodied in the Bill of Rights." The court endorses the cautious approach courts are to take when developing the common law when Cameron JA states: "I share the misgivings the joint judgement expresses about over-hasty or ineffective importation into the field of contract law of the concept of 'boni mores'. The legal convictions of the community - a concept open to misinterpretation and

especially, the Supreme Court of Appeal, to unshackle the ethos of contractual freedom and the sanctity of contract.<sup>84</sup>

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*misapplication - is better replaced as the Constitutional Court itself has suggested, by the appropriate norms of the objective value system embodied in the Constitution. What is evident is that neither the Constitution nor the value system it embodies give the courts a general jurisdiction to invalidate contracts on the basis of judicially perceived notions of unjustness or to determine their enforceability on the basis of imprecise notions of good faith."* And further: *"On the contrary, the Constitution's value of dignity and equality and freedom require that the courts approach their task of striking down contracts or declining to enforce them with perceptive restraint. One of the reasons, as Davis J has pointed out is that contractual autonomy is part of freedom. Shorn of its obscene excesses, contractual autonomy informs also the constitutional value of dignity."* Consequently, the court concluded: *"The Constitution requires that its values be employed to achieve a careful balance between the unacceptable excesses of contractual freedom; and securing a framework within which the ability to contract enhances rather than diminishes our self-respect and dignity. The issues in the present appeal do not imperil that balance."* The Supreme Court of Appeal in a succeeding judgement of *Afrox Healthcare Bpk v Strydom* 2002 (6) SA 21 quoted with approval the principle enunciated in the Carmichele matter in which it was held: *"Where a court develops the common law, the provisions of s39 (2) of the Constitution obliged to have regard to the spirit, purport and objects of the Bill of Rights."* Although the *Carmichele* case involved a matter dealing with a delictual issue the court in *Afrox* held that the same principle can be applied in contractual issues as well where contractual provisions are in conflict with the interests of the community. The court further quotes the dictum of Cameron JA in *Brisley v Drotzky* at Para 91: *"Public policy nullifies agreements offensive in themselves - a doctrine of considerable antiquity. In its modern guise "public policy" is now rooted in our Constitution and the fundamental values it enshrines."* In a subsequent judgement in the case of *Price Waterhouse Coopers Inc and Others v National Potato Co-operative Ltd* 2004 (6) SA 66 (SCA) in which the validity of a champertous agreement to finance the respondent's action against a firm of accountants was challenged, the court stated the common law position with regard to the influence of public policy in determining the validity of contracts or contractual provisions as it appeared prior to the *Constitution* coming into being. (Para 23) The court subsequently also looked at the legal position post the *Constitution* being introduced. With regard to the influence of public policy the court remarked at Para 24 as follows: *"What public policy is and when an agreement is contrary to public policy are often difficult and contentious questions. Once the advent of the Constitution public policy is rooted in the Constitution and the fundamental values it enshrines. (Brisley v Drotzky (supra Para 91); Aprox Healthcare Bpk v Strydom (supra Para 18)). The fundamental values enshrined in the Constitution and the interests of the community or the public are accordingly of the utmost importance in relation to the concept of public policy. Therefore an agreement will be regarded as contrary to public policy when it is clearly inimical to these constitutional values, or the interests of the community, whether it be contrary to law or morality or runs counter to social or economic expedience (Sasfin (Pty) Ltd v Beukes (supra) at 8C-D; Botha (now Griesel) and Another v Finanscredit (Pty) Ltd (supra) at 782I-J). It is important to bear in mind that views about what public policy entails are constantly evolving (Magna Alloys and Research (SA) (Pty) Ltd v Ellis 1984 (4) SA 874 (A) at 891H) and the court must be careful not to conclude that an agreement is contrary to public policy just because some of its terms offend against its sense of propriety and fairness. (Sasfin (Pty) Ltd v Beukes (supra) at 9B-C). It is also important to bear in mind that to decide whether an agreement is against public policy a court must look at the tendency of the proposed transaction, not its actually proved result (Sasfin (Pty) Ltd v Beukes (supra) at 8G-9B; Eastwood v Shepstone 1902 TS 294 at 302)"* Subsequent to the *Price Waterhouse Coopers* case, the Supreme Court of Appeal in the *Bafana Finance Mabopane v Makwakwa and Another* 2006 (4) SA 581 (SCA) was called upon yet again to pronounce on the validity of a clause in a money lending contract i.e. micro-lending agreement whereby the debtor purports to undertake not to apply for an administration order and that the loan debt will not form part of the administration order for which the debtor might apply. The court considered the common law position prior to the enactment of the *Constitution* as enunciated in the case of *Sasfin* and quoted with authority in many cases thereafter, including, more recently the cases of *Brisley*, *Afrox Healthcare* and *Price Waterhouse Coopers*. The court also stated the post Constitutional position of public policy, namely: *"..... public policy is anchored in the founding constitutional values which include human dignity, the achievement of equality and the advancement of human rights and freedoms."*

<sup>84</sup> More recently in a succeeding case of *Napier v Barkhuizen* 2006 (4) SA 1 (SCA); 2006 (9) BCLR 1011 (SCA) the

It was especially the Constitutional Court, in a more recent judgement, which has placed greater emphasis on other values which influence public policy.<sup>85</sup> The Constitutional Court

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Supreme Court of Appeal dealt with a time limitation clause in a short-term insurance policy the respondent having relied on the contention that the clause is unconstitutional in that it violates the right to approach a court for redress. The court accepted that in the post Constitutional era a contractual term that is contrary to public policy is unenforceable and added that public policy " ..... now derives from the founding constitutional values of human dignity, the achievement of equality and the advancement of human rights and freedoms, non-racialism and non-sexism." But, cautions the Supreme Court of Appeal that the fact that a term in a contract is unfair or may operate harshly does not, by itself, lead to the conclusion that it offends the values of the *Constitution*. In this regard the court emphasized the principles of dignity and autonomy which "find expression in the liberty to regulate one's life by freely engaging in contractual arrangements." (Para 12). What the *Constitution* requires of the courts, the Supreme Court of Appeal held, is that they "employ its values to achieve a balance that strikes down the unacceptable excesses of 'freedom of contract', while seeking to permit individuals the dignity and autonomy of regulating their own lives." (Para 12) The Supreme Court of Appeal further explained at Para 13 that this entails "that intruding on apparently voluntarily concluded arrangements is a step that Judges should countenance with care, particularly when it requires them to impose their individual conceptions of fairness and justice on parties' individual arrangements." The court broke the shackles of contractual autonomy when it accepted that the constitutional values of equality and dignity may prove to be decisive when the issue of the parties' relative bargaining positions is an issue.

<sup>85</sup> In the case of *Barkhuizen v Napier* 2007 (5) SA 323 (CC) still unreported and decided on the 4th April 2007 under case number 72/05, the Constitutional Court per Ngcobo J who gave the majority judgement, emphasizes the importance of public policy when he stated: "Public policy represents the legal convictions of the community; it represents those values that are held most dear by the society." The court goes on to state: "Determining the content of public policy was once fraught with difficulties. It is no longer the case. Since the advent of our constitutional democracy, public policy is now deeply rooted in our Constitution and the values which underlie it." The court adds: "..... The founding provisions of our Constitution make it plain: our constitutional democracy is founded on, among other values, the values of human dignity, the achievement of equality and the advancement of human rights and freedoms, and the rule of law. And the Bill of rights, as the Constitution proclaims, "is a cornerstone" of the democracy; "it enshrines the rights of all people in our country and affirms the democratic (founding) values of human dignity, equality and freedom." The court consequently considered the role of public policy when it stated: "What public policy is and whether a term in a contract is contrary to public policy must now be determined by reference to the values that underlie our constitutional democracy as given expression by the provisions of the Bill of Rights. Thus a term in a contract that is inimical to the values enshrined in our Constitution is contrary to public policy and is, therefore, unenforceable." The court also suggested: "The proper approach to the constitutional challenges to contractual terms is to determine whether the term challenged is contrary to public policy as evidenced by the constitutional values, in particular, those found in the Bill of Rights. This approach leaves space for the doctrine of *pacta sunt servanda* to operate, but at the same time allows courts to decline to enforce contractual terms that are in conflict with the constitutional values even though the parties may have consented to them." The court then considered the relationship between public policy and the right of access to the courts as provided for in Section 34 of the *Constitution* which guarantees to seek the assistance of the courts. Section 34 provides: "Everyone has the right to have any dispute that can be resolved by the application of law decided in a fair public hearing before a court ....." The court emphasizes this right when it states: "This is fundamental to the stability of an orderly society. It is indeed vital to a society that, like ours, is founded on the rule of law. Section 34 gives expression to this foundational value by guaranteeing to everyone the right to seek the assistance of a court." (Para 31) And further at Para 33: "Section 34 therefore not only reflects the foundational values that underlie our constitutional order, it also constitutes public policy." The court consequently laid down the following test at Para 36: "The proper approach to this matter is, therefore, to determine whether clause 5.2.5 is inimical to the values that underlie our constitutional democracy, as given expression to in section 34 and thus contrary to public policy." Insofar as time limitation clauses in contracts between private parties are concerned and whether such a clause offends public policy the court held: "What is also apparent from the clause is that it does not deny the applicant the right to seek judicial redress: it simply

placed great emphasis on the bargaining position of the parties, as well as the right of access to the courts which influence public policy.

#### 13.4 Relevant provisions of the Bill of Rights impacting on the Law of Contract

From the foregoing it is clear that in the new constitutional order, the legal order emphasizes values which the pre-1994 legal system did not. It is, especially, the Constitutional Court which encourages the purposive approach to the interpretation of rights. The values today represent the spirit of the law, the *Constitution* and more especially, the values enshrined in the *Bill of Rights*. In so far as the effect of the constitutional values on the law of contract is concerned, it has been stated, over and over before, that all law in South Africa, including the common law that regulates the enforcement of contracts, must promote the values that underlie the *Bill of Rights*. The most significant values include, *inter alia*, dignity, equality and freedom etc.

For the purposes of the research undertaken in this thesis, only the relevant provisions of the *Bill of Rights* impacting on the law of contract will be looked at.

In the first instance it is important to note that the *South African Constitution* does not only apply vertically between organs of the State and Government Departments or citizens of the State, it is significant to note that the *Constitution* also applies horizontally, between private parties, whether natural persons or juristic persons, in private disputes between the parties. In the immediate subsection that follows, a brief investigation will take place as to how the *Constitution* can apply to the law of contract, by the application of any right with horizontal application under Section 8(2) of the *Bill of Rights*.

The next provision of the *Bill of Rights* that needs to be considered is, how the right to equality, recognized by the *Bill of Rights*, impacts on the law of contract. It is, especially, in contractual disputes where an unequal bargaining power exists between the contracting parties and the fact that the inequality of bargaining power has never been recognized as been a free-floating ground for defence, that the solution, perhaps, lies in the strict application of Section 9 of the *Constitution*. This will be investigated more fully in the subsection that follows.

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*requires him to seek judicial redress within the period it prescribes failing which the respondent is released from liability. It is in this sense that the clause limits the right to seek judicial redress." The court consequently held: "I can conceive of no reason either in logic or in principle why public policy would not tolerate time limitation clauses in contracts subject to the considerations of reasonableness and fairness. What is also relevant in this regard is that the Constitution recognizes that the right to seek judicial redress may be limited in certain circumstances where this is sanctioned by a law of general application in the first place, and where the limitation is reasonable and justifiable in the second. The Constitution thus recognizes that there may be circumstances when it would be reasonable to limit the right to seek judicial redress. This too reflects public policy."*

As access to the courts is now guaranteed, as a fundamental right by the *Constitution*, the significance thereof in limiting or waiving a right to have a dispute adjudicated will be considered. Section 34 is particularly relevant in this regard. As Section 34 gives expression to a foundational value, namely, guaranteeing a right to access to the courts, any attempt to limit or exclude that right may very well be declared inconsistent with the *Constitution* and against public policy. This aspect will, briefly, be considered.

The limitation of rights, as provided in terms of Section 36 of the *Constitution*, is an important provision to be considered. It determines whether an infringement can be justified as a permissible limitation of the right. In other words, it provides an answer to the question of whether the limitation is reasonable and justifiable. This aspect will also be considered, very briefly, in the section that follows.

Finally, what is regarded as a relevant provision of the *Bill of Rights*, which impacts on the law of contract and which will be considered in the section that follows is, to what degree foreign law influences the South African courts? Section 39 of the *Constitution* provides that, when interpreting the *Bill of Rights*, courts may consider international law and foreign law. This is significant in finding answers to the focal point of this thesis. It follows, therefore, that a brief discussion of Section 39 and how it impacts on the law of contract will follow.

#### 13.4.1 Section 8 Application of the Bill of Rights

From the research undertaken in this chapter, it appears that no significant inroads have been made in challenging the constitutionality of contractual terms or provisions, however unfair or unreasonable their results. Save for the most recent constitutional court judgement, in the matter of *Barkhuizen v Napier*,<sup>86</sup> the contribution made by our courts in developing the South African jurisprudence in the law of contract, is sparse. It is especially, in the light of the *obiter* remarks made by the Chief Justice, Langa CJ, in the fore stated case that an investigation on how Section 8 of the *Bill of Rights* impact on the law of contract, is indicated.

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<sup>86</sup> 2007 (5) SA 323 (CC). In this case Ngcobo J delivering the majority judgement held that the only acceptable approach to challenging the constitutionality of contractual terms is the indirect application under Section 39(2). See Para 30. The Chief Justice Lange CJ agreed that the indirect application under Section 39(2) may ordinarily be the best method to address the problem. Lange CJ also stated albeit *obiter* that "I am not convinced that Section 8 does not allow for the possibility that certain rights may apply directly to contractual terms or the common law that underlies them."

What strengthens the supposition that the *Bill of Rights* impact on the law of contract is the fact that the *Constitution* recognizes that rights in the *Bill of Rights* may in essence also be enforced against private parties albeit natural persons, or juristic persons, through the direct and indirect 'horizontal' operation of rights in private disputes between parties.<sup>87</sup>

Now that it has been established that the *Constitution* can apply to the law of contract by the application of any right with horizontal application under Section 8(2) of the *Bill of Rights*, the issue to be decided is, whether the *Bill of Rights* applies directly or indirectly to a legal dispute involving a contractual issue? The answer to this, according to the South African legal writers, lies firstly, in whether the criteria required for direct application had been established. The criteria according to *Currie and De Waal*<sup>88</sup> include the following:

"(a) A right of a beneficiary of the *Bill of Rights* has been infringed by (b) a person or entity on which the *Bill of Rights* has imposed the duty not to infringe the right, (c) during the period of operation of the *Bill of Rights* and (d) in the national territory."

Where, on the other hand, the *Bill of Rights* does not apply directly to a dispute because one or more of the criteria set out hereinbefore is not present, it may, according to the authors *Currie and De Waal*,<sup>89</sup> apply indirectly, in that, all law must be developed,

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<sup>87</sup> Sec 8(2) of the *Constitution Act* 108 of 1996 provides: "A provision of the *Bill of Rights* binds a natural or a juristic person if, and to the extent that, it is applicable, taking into account the nature of the right and the nature of any duty imposed by the right." In turn, Sec 8(3) of the *Constitution* provides that when applying any of the provisions of the *Bill of Rights* to a natural person or juristic person and the legislation referred to does not give effect to that right, the common law could be developed. In this regard Section 8(3) provides:

"(3) When applying a provision of the *Bill of Rights* to a natural or juristic person in terms of subsection (2), a court – (a) in order to give effect to a right in the *Bill*, must apply, or if necessary develop, the common law to the extent that legislation does not give effect to that right, and (b) may develop rules of the common law to limit the right provided that the limitation is in accordance with section 36(1)"

The South African legal writers recognize the fact that the *Constitution* can apply to the law of contract by application of any right with horizontal application under section 8(2). See in this regard Pieterse "Beyond the Welfare State: Globalization of the neo-liberal culture and the protection of social and economic rights in South Africa" *Still LR* 2003.1 3 at 9; Toady *De Jude* (2002) 306 at 307-308; Carstens and Kok (2003) 18 *SAPR/PL* 430 at 438-440; Grove 2003 *De Jure* 134 at 139-140; Hawthorne 2004 67 (2) *THRHR* 294; Christie *Bill of Rights Compendium* 3H-7; Bhana and Pieterse *SALJ* (2005) 865 at 869-870; Cheadle and Davis "The Application of the 1996 Constitution in the Private Sphere" *South African Journal on Human Rights* Vol.12 (1996) 19 at 30-34; De Vos *South African Journal on Human Rights* Vol. 13 (1997) Para 5; Chaskalson et al "Constitutional Law of South Africa 1999 as revised 10-58ff; Currie and De Waal 2005 at 53 who have reservations whether S8(2) apply to private hospitals as "the duty imposed by the right (Access to healthcare services S27(1) and emergency medical treatment S27(3)) is too burdensome to impose on private individuals."

<sup>88</sup> *The Bill of Rights Handbook* (2005) 32. The authors hold the view that in disputes in which the *Bill of Rights* act as directly applicable law, it overrides ordinary law and "..... any conduct that is inconsistent with it and, to the extent that ordinary legal remedies are inadequate or do not give proper effect to the fundamental rights, the *Bill of Rights* generates its own remedies."

<sup>89</sup> op cit. The writers Currie and De Waal relying upon the *Carmichele matter*, reason that the indirect application is

interpreted and applied in a way that conforms to the *Bill of Rights*.

A difference of opinion exists amongst the South African legal writers<sup>90</sup> on whether the application, under Section 8(2) of the *Bill of Rights*, applies horizontally, alternatively, whether it applies indirectly, in contractual disputes.

#### 13.4.2 Section 9 - The Constitutional Commitment to Equality

The *South African Constitution* provides for the commitment to equality, however difficult the achievement may be in certain circumstances.<sup>91</sup> But, despite the difficulties, the *Constitution* expects the courts, lawyers and academic writers to grapple with these difficulties in achieving equality.<sup>92</sup> The *Constitution* also prescribes that the type of society that it wishes to create is one based on equality, dignity and freedom.<sup>93</sup>

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founded on the fact that the *Constitution* and the *Bill of Rights* establish an 'objective normative value system'. The set of values must therefore be respected whenever the common law or legislation is interpreted, developed or applied. The authors add that when the right is directly applied, the *Bill of Rights* does not override ordinary law or generate its own remedies. Rather, the *Bill of Rights* respects the rules and remedies of ordinary law, but, demands furtherance of its values mediated through operation of ordinary law.

<sup>90</sup> The most significant writings have come from Grové "Die Kontraktereg, Altruïsme, Keusevryheid en die Grondwet" 136 (2003) *De Jure* 140 who holds the views that where Sections 8(2) and 8(3) are read together it is clear that the Constitution provides for the indirect horizontal application of the *Bill of Rights*. The writer also holds the view that although there is no legislation as provided for in Section 8(3) (a), nonetheless, the courts are obliged to develop the common law in order to ensure fundamental rights enshrined in the *Bill of Rights* are protected (For authority the court relies on the case of *Carmichele v Minister of Safety and Security (Centre for Legal Studies Intervening)* Page 955. Tladi (2002) 17 *SAPR/PL* is of the view that both Sections 39(2) and 8(2) of the *Constitution* emphasize the fact that the common law is not immune from constitutional scrutiny. The writer further states that these provisions serve to remind one that there is a constitutional duty on the courts (not only the Constitutional Court) to infuse constitutional values into the common law. The writer also seems to work with the indirect horizontal approach. Hawthorne (2003) 15 *SA Merc LJ* 271 holds the view that in the absence of legislation regulating the law of contract Sections 8(2) and (3) apply indirectly and horizontally. See also Carstens and Kok *SAPR/PL* (2003) 430 at 439-440. Tladi (2002) *De Jure* 306 at 308 expresses the opinion that the *Constitution* can apply to the law of contract in at least three ways, firstly, by the explicit horizontal application of Section 9(4). Secondly, by application of any right with horizontal application under Section 8(2); thirdly, by the operation of Section 39(2) requiring the promotion of the object, spirit and purport of the *Bill of Rights* in the interpretation and development of the common law. Pieterse *Stell LR* (2003) 3 at 9 share his view namely the *Bill of Rights* may in principle also be enforced against private parties through direct and indirect "horizontal operation of rights in private disputes". The writer strengthens his view by emphasizing that horizontally enforceable rights must triumph over individual liberty in the furtherance of collective social interests.

<sup>91</sup> The authors Currie and De Waal (2005) 230 describes the idea of equality as "..... a difficult and deeply controversial social ideal". According to the authors the difficulty lies in determining the similarity of the people's situation and secondly, to determine what constitutes similar treatment of people who are, similarly situated.

<sup>92</sup> Currie and De Waal (2005) 231. See also Section 1 of the *Constitution Act* 108 of 1996 which provides:  
"The Republic of South Africa is one, sovereign, democratic state founded on the following values:  
(a) Human dignity, the achievement of equality and the advancement of human rights and freedoms."

<sup>93</sup> In this regard Section 9(1) provides "everyone is equal before the law and has the right to equal protection and

A clear distinction is drawn between the two forms which equality takes, namely, formal and substantial equality.<sup>94</sup> In the former instance, the law is said to treat individuals in like circumstances alike, whereas, in the latter instance, the law is required to ensure the equality of outcome.<sup>95</sup>

Another characteristic of the two forms equality takes is this, whereas the formal equality does not take actual social and economic disparities between groups and individuals into account, with substantive equality, an examination of the actual social and economic conditions of groups and, individuals are considered to determine whether the constitutional commitment to equality is being upheld?<sup>96</sup>

The right to equality is said to protect the equal worth of bearers of the right.<sup>97</sup> All natural persons are bearers of the right.<sup>98</sup> The right to equality, in the *South African Constitution*, describes the duties of those who are bound by the right in Sections 9(1) and 9(3), whereas Section 9(2) contains the requirements for measures to promote equality for those who have been unfairly discriminated against in the past.<sup>99</sup>

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*benefit of the law.*" It is especially Currie and De Waal op cit who stresses the importance of the equality right in the post-apartheid order as means to implement measures to correct the wrongs of the past. The authors Chaskalson et al *Constitutional Law of South Africa* 1996 and Supplemented Revision Service 5, 1999 at 14-55 states that as equality is a core value of the *Constitution*, the *Constitution* recognizes the injustices of the past seeking to found a society based on democratic values, social justice and fundamental human rights.

<sup>94</sup> Currie and De Waal (2005) 232-233; Hawthorne (2002) 114 at 119.

<sup>95</sup> Currie and De Waal (2005) 233.

<sup>96</sup> Currie and De Waal (2005) 333 are of the view that a substantive conception of equality is supportive of these fundamental values. They are also of the view that a purposive approach to constitutional interpretation means that s9 must be read as grounded on a substantive conception of equality.

<sup>97</sup> Christie *Bill of Rights Compendium* (2002) 1A-88 put the equal worth of human beings to include human dignity, life, physical and psychological integrity etc.

<sup>98</sup> Christie op cit 1A 89.

<sup>99</sup> Christie op cit 1A-89; In this regard the provisions of the Equality clause provide:

*"Equality*

9. (1) *everyone is equal before the law and has the right to equal protection and benefit of the law.*
- (2) *Equality includes the full and equal enjoyment of all rights and freedoms. To promote the achievement of equality, legislative and other measures designed to protect or advance persons or categories of persons, disadvantaged by unfair discrimination may be taken.*
- (3) *The state may not unfairly discriminate directly or indirectly against anyone on one or more grounds, including race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language and birth."*

From the wording of the provisions it is clear that Sec 9(1) covers all forms of unequal treatment that do not

Those who are bound by the rights as provided for, by the provisions of Section 9 of the *Constitution*, cannot escape from such duties except if they successfully invoke the general limitation clause.<sup>100</sup> Since the *Constitution* first came into being, the South African courts had to decide the issue of equality in many matters pertaining to, *inter alia*, race, gender and sex, marital status, sexual orientation, HIV/Aids, affirmative action, municipal rates and taxes etc.<sup>101</sup> The courts have, thus far, not been called upon to decide the issue of equality in a contractual dispute.

For the purposes of the research undertaken in this thesis, the question needs to be begged, to what extent may a contracting party, who was admitted to a private hospital and who signed an agreement containing an exemption clause, absolving a hospital and its staff from liability flowing from the negligence of the staff and who consequently suffers damages, renege from the agreement by having the agreement set aside for being in conflict with the constitutional values of equality and dignity? Although the South African courts have, to date, not decided the issue,<sup>102</sup> there is sufficient authority amongst the South African legal

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1A- amount to unfair discrimination. Sec 9(3) deals with unfair discrimination, direct, or, indirect. See Christie op cit 89.

<sup>100</sup> See Currie and De Waal (2005) 237 who hold the view that the general limitation clause as contained in s36 of the *Constitution* and which applies to all the rights listed in the *Bill of Rights*, also applies to Section 9 of the *Constitution*. The authors suggest a two stage test to determine if certain conduct or a provision of the law, has infringed a right in the *Bill of Rights*. The first stage is to determine whether that right has in fact been infringed. The second stage commences once it has been shown that a right has been infringed. The respondent is required to show that the infringement is a justifiable limitation of the right. This then entail showing that the criteria set out in s36 are satisfied i.e. the right has been limited by law of general application for reasons that are reasonable and justifiable in an open and democratic society, based on human dignity, equality and freedom. See in this regard *Harksen v Lane NO* 1998 (1) SA 300 (CC) Para 53; See also Christie op cit 1A-91; Chaskalson op cit 14-65 to 14-66.

<sup>101</sup> See the discussion of this issue in which the applicable cases are cited in Christie op cit 1A-89.

<sup>102</sup> Traces of the direction the South African Court of Appeal and the Constitutional Court may take when confronted with the legal question posed in the text have been revealed by the Supreme Court of Appeal in *Napier v Barkhuizen* 2006 (4) SA 1 (SCA); 206 (9) BCLR 1011 (SCA) in which the court held that the constitutional values of equality and dignity may prove to be decisive when the issue of the parties' relative bargaining positions is an issue. It was held by the court that the critical question is whether the applicant in effect was forced to contract with the insurer on terms that infringed his constitutional rights to dignity and equality and in a way that requires the court to develop the common law of contract so as to invalidate the terms in question. The court however, concluded that it was not possible to make any conclusion in this aspect in the light of the scanty evidence before it (Para 14). This follows the Supreme Court of Appeal's recognition of unequal bargaining power being a factor which together with other factors, plays a role in the consideration of public policy in the case of *Afrox v Strydom* 2002 (6) SA 21 (SCA); (2002) 4 ALL SA 125 (SCA) Para 18. Although the court found ultimately that on the facts there was no evidence of an inequality of bargaining power, this does not detract from the principle enunciated in that case, namely, that the relative situation of the contracting parties is a relevant consideration in determining whether a contractual term is contrary to public policy. This principle was endorsed in the

writers that the *Bill of Rights* in the *Constitution*,<sup>103</sup> which defines the constitutional rights, may very well hold the key as any contract or contractual provision that infringes any of these rights will generally be unenforceable.<sup>104</sup>

Although at common law, the inequality of bargaining power has never been a free-floating ground upon which a contracting party may rely to have an agreement set aside,<sup>105</sup> in terms of the *Constitution*;<sup>106</sup> regard must be had to the right to equality enshrined in the *Bill of Rights*.<sup>107</sup>

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Constitutional Court judgement in the case of *Barkhuizen v Napier* 2007 (5) SA 323 (CC) Para 59 per Ngcobo J delivering the majority judgement. Sachs J in a minority judgement is very critical of the universal influence of standard form contracts in which the supplier of goods or services present to the customer on a "take-it-or-leave-it" basis. The customer is usually in an unequal bargaining position. They also sign without knowing the full implications of their act. Sachs J Para 140 also expresses the opinion that clauses in a standard form contract that are unreasonable, oppressive or unconscionable are inconsistent with the values of an open and democratic society that promotes human dignity, equality and freedom.

<sup>103</sup> Act 108 of 1996.

<sup>104</sup> Christie *The Law of Contract in South Africa* (2006) 347.

<sup>105</sup> Christie (2006) 15.

<sup>106</sup> Act 108 of 1996.

<sup>107</sup> Christie (2006) 15; In terms of Section 9(1) of the Bill of Rights "*Everyone is equal before the law and has the right to equal protection and benefit of the law.*"

Christie *Bill of Rights Compendium* (2002) 3H-20 hold the view that Section 9 of the Constitution considered with the *Promotion of Equality and Prevention of Unfair Discrimination Act* 4 of 2000, are concerned not with theoretical equality but with effective equality. According to the author an acceptance of the general right of equality before the law leads to the belief that one should counter inequality of bargaining power. In this regard the author relies heavily on the English law, especially, the dictum of Lord Denning in *Lloyds Bank Ltd v Bundy* (1975) 1 QB 326 (CA) and the Australian case of *Commercial Bank of Australia Ltd v Amadio* (1983) 151 Cir 447. Hawthorne 1995 (58) *THRHR* 157 at 176 considers the principle of equality provided for in the erstwhile *Interim Constitution*, namely, Section 8 as the cornerstone of the Constitution. The writer predicts that the principle of equality will have a significant effect on the development of the law of contract. For that reason the writer provides for the inclusion of the doctrine of inequality into the law of contract to prevent the continued unjust domination. He believes that the principle of equality can give content to the existing open concept of public policy. This, is very much supported by Christie *Bill of Rights Compendium* (2002) 3H-23. The writer states that by using public policy to give effect to the constitutional and statutory right of equality before the law, the courts will be able to handle any otherwise unclassifiable cases of injustice that may arise from inequality of bargaining power. Other legal writers who have criticized the lack of recognition of measures to counter the inequality of bargaining power include Naude and Lubbe (2005) 441 at 460-461. The writers hold the view that in hospital exemption contracts there is an imbalance between the interests of the parties which causes the patient to be an object of commercial law. The writers are especially, critical of the dismissal of the Supreme Court of Appeal in the case of *Afrox v Strydom* of the fact that the unequal bargaining position of the parties was not proved. Other writers who have also been very critical of the *Afrox* judgement concerning the court's failure to decide the case on the principle of inequality of bargaining power include Jansen and Smith (2003) 217-218; Van Heerden (2003) 47-48; Tladi (2002) 477 promotes the drive towards substantive equality when he states that freedom as a constitutional value has to be balanced with other values underlying the *Constitution* such as fairness, dignity and equality. The writer argues that as far as freedom of contract is concerned, when abused by the stronger party to

What has been suggested by the legal writers is that, in the light of Section 9 of the *Constitution*,<sup>108</sup> public policy now recognises a general right (not limited to cases of discrimination) of equality before the law and that, in contract, where an inequality of bargaining power, has on the facts of a case led to the infringement of this right, the *caveat subscriptor* rule will be relaxed when the necessity of preventing the infringement outweighs the necessity of enforcing the contract.<sup>109</sup>

#### 13.4.3 Section 34: Access to Courts

The next aspect to be looked at is what is the effect of significantly limiting or waiving a right to have a dispute settled by a court of law, especially now that access to the courts is guaranteed as a fundamental right by the Constitution?<sup>110</sup>

This guaranteed right to access to the courts, it is submitted, is founded upon the emphasized values in the new South African constitutional order, as eluded to earlier on in this Chapter.<sup>111</sup> It has as a pedestal, constitutionalism, bolstered by the specific entrenchment of the rule of law.<sup>112</sup>

The rule of law, in turn, in terms of Section 34 of the *Constitution*, gives expression to a foundational value, namely, guaranteeing to everyone the right to seek the assistance of a court<sup>113</sup> and further, guaranteeing orderly and fair resolutions of disputes by courts or

achieve unreasonable and unjust contracts, undermines the value of equality and dignity that are supposed to permeate our constitutional dispensation. The writer adds that when people go to hospitals in need of medical care, they are not in a position to negotiate their contract. "*It seems unconscionable to use this inability to bargain to exclude all liability .....*" See also the supporting writings of Bhana and Pieterse (2003) 22.

<sup>108</sup> Act 108 of 1996.

<sup>109</sup> Christie *Bill of Rights Compendium* (2002) 3H-22. Other writers who have come out in favour of developing public policy includes De Vos "Pious wishes or directly enforceable human rights? Social Justice and Economic Rights in South Africa's 1996 Constitution" 1997 *SAJHR* 67 101.

<sup>110</sup> Section 34 of the *Constitution Act* 108 of 1996 under the heading 'Access to Courts', provides:  
"*Everyone has the right to have any dispute that can be resolved by the application of law decided in a fair public hearing before a court or, where appropriate, another independent and impartial tribunal or forum.*"

<sup>111</sup> op cit. fn 7.

<sup>112</sup> Section 1 of the *Constitution* provides:

*"The Republic of South Africa is one, sovereign, democratic state founded on the following values:  
(c) Supremacy of the constitution and the rule of law."*

<sup>113</sup> To this end the authors Currie and De Waal (2005) 704 states that "*a fundamental principle of the rule of law is anyone may challenge the legality of any law or conduct.*" The authors also emphasize the fact that the purpose of

independent and impartial tribunals.<sup>114</sup>

Now that we have a greater understanding of the principles underlying the rule of law and the purpose of Section 34 of the *Constitution*, we need to give brief consideration to exemption clauses, limitation clauses or waivers as devices which limit the right of access to court as provided for in Section 34. Put differently, what effect do exemption clauses, limitation clauses or waivers have on Section 34, which gives expression to a foundational value, namely, guaranteeing a right to access to the courts? This can never be satisfactorily answered without having regard to the common law in South Africa. Our common law has always acknowledged the right of a litigant to approach a court of law where he/she/it feels aggrieved and where either a contractual or delictual infringement has taken place.

The South African courts have, for decades, held that a term in a contract which deprives a party of the right to seek judicial redress is contrary to public policy.<sup>115</sup> Since the

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Section 34 has as its grounding the higher value of the rule of law in that "..... *It promotes the peaceful institutional resolution of disputes and to prevent the violence and arbitrariness that results from people taking matters in their own hands*" and further "..... *By insisting on the resolution of legal disputes by fair, independent and impartial institutions [it] prohibit the resort to self-help*". What this Section does according to Currie and De Waal is to provide "*access, independence, impartiality and fairness.*"

<sup>114</sup> See in this regard the attitude of the Constitutional Court in *Chief Lesapo v North West Agricultural Bank and Another* 2000 (1) SA 409 (CC); 1999 (12) BCLR 1420 (C) at Para 22 in which the court stated: "*The right of access to court is indeed foundational to the stability of an orderly society. It ensures the peaceful, regulated and institutionalised mechanisms to resolve disputes without resorting to self-help. The right to access to court is a bulwark against vigilantism, and the chaos and anarchy which it causes. Construed in this context the rule of law and the principle against self-help in particular, access to court is indeed of cardinal importance*" and quoted with approval in *Zondi v MEC for Traditional and Local Government Affairs and Others* 2005 (3) SA 589 (CC); 2005 (4) BCLR 347 (CC) at Para 63 in which the court with reference to Section 34 also held: "*Section 34 is an express constitutional recognition of the importance of the fair resolution of social conflict by impartial and independent institutions. The sharper the potential for social conflict, the more important it is, if our constitutional order is to flourish, that disputes are resolved by courts.*" More recently in another Constitutional Court matter of *Barkhuizen v Napier* 2007 (5) SA 323 (CC) at Para [31] put the position as follows: "*Our democratic order requires an orderly and fair resolution of disputes by courts or other independent and impartial tribunals. This is fundamental to the stability of an orderly society. It is indeed vital to a society that, like ours, is founded on the rule of law. Section 34 gives expression to this foundational value by guaranteeing to everyone the right to seek the assistance of a court.*" The court at Para [33] relying on public policy concluded: "*Section 34 therefore not only reflects the foundational values that underlie our constitutional order, it also constitutes public policy.*"

<sup>115</sup> This principle was first enunciated in a case decided in 1906. In the matter of *Nino Bonino v De Lange* 1906 (TS) 120 the court considered whether in contracts of pledge a clause stipulating for the right of *parate executis* in which the pledge can realize and execute upon the pledged property without obtaining the judgment of any court was valid or not? The court consequently held it was a contract against public policy and void. The same principle was applied in the Appellate Division (as it was known then) case of *Schierhout v Minister of Justice* 1925 (AD) 417 in which the court held: "*If the terms of an agreement are such as to deprive a party of his legal rights generally, or to prevent him from seeking redress at any time in the Courts of Justice for any future injury or wrong committed against him, there would be good ground for holding that such an undertaking is against the public law of the land.*" In a number of other cases the South African courts have also considered whether certain sections incorporated in legislation and in contracts hampered the ordinary rights of an aggrieved person to seek the assistance of the courts? Consequently, in the following cases, the denial of a right to seek the assistance of a court was considered to be contrary to public policy and in conflict with common law. See *Administrator, Transvaal and Others v Traub and Others* 1989 (4) SA 729 (A) at 764E; *Avex Air (Pty) Ltd v Borough of Vryheid*

introduction of the *Constitution*, it appears that Section 34 has not changed the common law position.<sup>116</sup>

What, then, is the position with regard to a contractual provision, containing an exclusionary clause, in which a contracting party undertakes to exonerate the other contractual party from liability arising from the other party's negligence? This position remains uncertain, notwithstanding academic writings<sup>117</sup> and the guidelines laid down by

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1973 (1) SA 617 AD at 621F-G; *Stokes v Fish Hoek Municipality* 1966 (4) SA 421 (C) at 423h-424C; *Gibbons v Cape Divisional Council* 1928 CPD 198 at 200; and *Benning v Union Government (Minister of Finance)* 1914 AD 29 at 31.

<sup>116</sup> Christie *Bill of Rights Compendium* (2002) 3H-50 summarizes the position as follows: "Section 34 cannot have been intended to change this common law position, as it expressly provides for a fair public hearing before another independent and impartial tribunal or forum where appropriate." Considering whether an arbitration agreement would fall into this category, Christie, states: *An arbitration agreement would undoubtedly make such a hearing appropriate, because, by agreeing to arbitration, the parties have expressed a preference for that method of resolving their dispute.*" With regard to self-help agreements in the form of *parate executie* the author suggests that any such agreement must be carefully examined so that it can be determined whether its effect is to contravene the common law and Section 34 by ousting the jurisdiction of the courts. The common law position was restated by Harms JA in *Bock v Duburora Investments (Pty) Ltd* 2004 2 SA 242 (SCA) 247-248 as: "The principles concerning *parate executie* (immediate execution) are trite. A clause in a mortgage bond permitting the bondholder to execute without recourse to the mortgager or the court by taking possession of the property and selling is void." Harms JA then highlights two judgements of the Constitutional Court namely *Chief Lesapo v North West Agricultural Bank* 2000 1 SA 409 (CC) and *First National Bank of South Africa Ltd* 2000 3 SA 626 (CC) and states the unconstitutionality of these type of clauses: "I find it difficult to extend the proscription of these statutory provisions by the Constitutional Court to *parate executie* of movables which are lawfully in the possession of the creditor. This procedure does not authorize a creditor to bypass the courts and "seize and sell the debtor's property of which the debtor was in lawful and undisturbed possession"; it does not entitle the creditor to 'take the law into his or her hands'; it does not permit 'the seizure of property against the will of a debtor in possession of such property'. And since the debtor may seek the protection of the court if, on any just ground, he can show that, in carrying out the agreement and effecting a sale, the creditor acted in a manner which prejudiced him in his rights, the creditor cannot be said to be judge in his own cause." The Constitutional Court has also held that a statutory time-bar on the enforcement of pre-existing rights may, if it is unreasonably short, contravene section 34. See in this regard *Mohlenu v Minister of Defence* 1996 12 BCLR 1559 (CC), 1997 1 SA 124 (CC); *Maise v Greater Germiston Transitional Local Council* 2001 4 SA 491 (CC).

<sup>117</sup> The legal writer Hopkins in a most recent publication "Exemption clauses in contracts" *De Rebus* June 2007 22 at 24 suggests that if one were to take the proposition seriously that the *Bill of Rights* is an accurate statement of public policy "..... then it follows that contracts which violates provisions of the *Bill of Rights* (if enforced) without good reason should be deemed unconstitutional and therefore in violation of public policy with the result that they should be unenforceable." The author is critical of the approach adopted by the Supreme Court of Appeal in the cases of *Afrox Healthcare Bpk v Strydom* 2002 (4) SA 125 (SCA) 133 and *Johannesburg Country Club v Stott* 2004 (5) SA 511 (SCA) which involved exemption clauses. The writer suggests that in these cases the question of exemption clauses were not adequately tested against the constitution. He also holds the view that the legal team for the patient in *Afrox* case selected the wrong right when challenging the unconstitutionality of the contractual provisions. Whereas in *Afrox*, the writer reasons, the exemption clause could never have resulted in the limitation of the right to access to health, in the *Stott* case, he argues, the SCA wrongly implicated the right to life clause. For that reason the writer argues "It is crucial to determine, upfront, exactly what right is limited if the contract is upheld". In other words, one has to ask the right questions: What right will be limited if the contract is allowed to stand? The answer lies in the nature and scope of exemption clauses - "Exemption clauses according to Hopkins page 29 "prevent a potential plaintiff from suing a potential defendant in a court of law or in any other tribunal or forum." They are devices which limit the right to access to court as provided for in terms of

the Constitutional Court in the recent decision of *Barkhuizen v Napier*.<sup>118</sup> It will, however,

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Section 34 of the *Constitution*. For courts to enforce exemption clauses in a contract, effectively closes the doors of the courts to injured parties. This Hopkins adds, is contrary to the provisions of Section 34 of the *Constitution*. The second part of the enquiry is whether or not the limitation of the constitutional right should nevertheless be allowed to stand because it is reasonable and justifiable? For a right to be limited in the particular circumstances s36 of the *Constitution* needs to be invoked that a person's constitutional rights may be limited where it is 'reasonable and justifiable' to do so in a free and open democracy based on human dignity, equality and freedom. (s36) Although exemption clauses in contracts will always amount to a limitation of the Constitutional right contained in section 34, it does not according to Hopkins at page 25 mean that all exemption clauses are unconstitutional and therefore in violation of public policy. The answer lies in whether the limitation of a constitutional right can be justified? Here Hopkins at page 29 correctly draws a distinction between exemption clauses prevalent in some industries which are justified and others which can quite simply never be justified. Hopkins also suggests that the basis for deciding the validity of exemption clauses could no longer be decided under the traditional sanctity of contract, but, will always be a constitutional call. It will therefore be up to the party seeking to exclude itself from liability to justify to the court why, in that particular case, there is a reasonable and justifiable basis for having the exemption clause in the contract.

<sup>118</sup> The *Barkhuizen case* 2007 (5) SA 323 (CC) decided in the Constitutional court succeeds an earlier decision in the Supreme Court of Appeal decision of *Napier v Barkhuizen* 2006 4 SA 1 (SCA) concerning a contract that creates rights and contains an agreed time-bar on the enforcement of these rights as has become custom in many short-term insurance policies. Although Cameron JA stated that when weighing up whether section 34 had been contravened, evidence may show the agreed time-bar is unreasonable and infringes on constitutional rights (at Para 10), he concluded in this: "*The Plaintiff's rights to insurance cover arose from his contract with the defendant, which in creating his right stipulated at its inception that a claim, to be enforceable, had to be instituted within 90 days of repudiation. The access-to-courts provision in the Bill of Rights does not prohibit this.*" (Para 37). In *Barkhuizen v Napier* Ngcobo J delivering the majority judgement emphasized the value of Section 34 of the Constitution which "*not only reflects the foundational values that underlie our constitutional order, it also constitute public policy*". The court consequently considered the common law position of an aggrieved person's right to seek the assistance of a court of law and whether the time-bar clause 5.2.5 was contrary to public policy and unenforceable? As to the nature of the clause, the court stated: "*What is also apparent from the clause is that it does not deny the applicant the right to seek judicial redress; it simply requires him to seek judicial redress within the period it prescribes failing which the respondent is released from liability. It is in this sense that the clause limits the right to seek judicial redress.*" As to the question whether public policy tolerates time limitation clauses in contracts, the court found that time limitations are a common feature "*both in our statutory and contractual terrain*". The court goes on to state that the effect of these time-bar clauses is that they do not bar potential litigants from instituting action through the courts although "*they deny the right to seek the assistance of a court once the action gets barred because the action was not instituted within the time allowed.*" Ngcobo J quoting from the *Mohlomi v Minister of Defence* 1997 (1) SA 124 (CC) 1 1996 (12) BCLR 1559 (CC) decision, emphasized the importance of these clauses when he stated: "*Rules that limit the time during which litigation may be launched are common in our legal system as well as many others. Inordinate dealings in litigating damage the interests of justice. They protract the disputes over the rights and obligations sought to be enforced, prolonging the uncertainty of all concerned about their affairs. Nor in the end is it always possible to adjudicate satisfactorily on cases that have gone stale. By then witnesses may no longer be available to testify. The memories of ones whose testimony can still be obtained may have faded and become unreliable. Documentary evidence may have disappeared. Such rules prevent procrastination and those harmful consequences of it. They thus serve a purpose to which no exception in principle can cogently be taken.*" (Para 11). Consequently the court held: "*I can conceive of no reason either in logic or in principle why public policy would not tolerate time limitation clauses in contracts subject to the considerations of reasonableness and fairness. What is also relevant in this regard is that the Constitution recognizes that the right to seek judicial redress may be limited in certain circumstances where this is sanctioned by a law of general application in the first place, and where the limitation is reasonable and justifiable in the second. The Constitution thus recognizes that there may be circumstances when it would be reasonable to limit the right to seek judicial redress. This too reflects public policy.*"

The court also weighed up the principle of freedom of contract and the need to ensure access to the courts and concluded: "*In approaching this question, a court will bear in mind the need to recognize freedom of contract but*

be argued in the succeeding chapter, that hospital contracts containing exemption clauses in which the patient indemnifies or exonerates a hospital from liability, notwithstanding the negligence of the hospital's staff, would fall in the category of contracts which violate provisions of the *Bill of Rights* without good reason. It will also be contended that such an agreement should be declared to be unconstitutional and therefore, in violation of public policy, with the result they should be declared unenforceable.

#### 13.6.4 Section 36: Limitation of rights

It is generally accepted that constitutional rights and freedoms are not absolute.<sup>119</sup> Although some rights may justifiably be infringed, it is believed that the reason for limiting a right needs to be exceptionally strong<sup>120</sup> in order to determine whether an infringement can be justified as a permissible limitation of the right. The South African courts work with what is known as a two-stage approach.<sup>121</sup> Besides having to determine whether a right has been infringed by law or conduct,<sup>122</sup> the court will also have to establish whether the limitation of that right is justifiable.<sup>123</sup>

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*the court will not let blind reliance on the principle of freedom of contract override the need to ensure that contracting parties must have access to courts.*" (Para 55).

<sup>119</sup> Section 36 of Act 108 of 1996 recognizes restrictions of the rights enshrined in the *Bill of Rights*. The limitations provided by the Constitution read: 36(1) "*Limitation of rights :The rights in the Bill of Rights may be limited only in terms of law of general application to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors, including - (a)the nature of the right; (b)the importance and extent of the purpose of the limitation;(c)the nature and extent of the limitation;d)the relation between the limitation and its purpose; and (e) less restrictive means to achieve the purpose. Sec36 (2) provides "Except as provided in subsection (1) or in any other provision of the Constitution, no law may limit any right entrenched in the Bill of Rights."*

According to Currie and De Waal (2005) 163 Fn1 Section 36 only applies to the rights in the *Bill of Rights*. Provisions elsewhere in the Constitution cannot be limited by reference to Section 36. See also, *Van Rooyen v S (General Council of the Bar of South Africa Intervening)* 2002 (5) SA 246 (CC) Para 35 in which it was held that judicial independence cannot be subjected to limitation.

<sup>120</sup> Currie and De Waal (2005) 164 in this regard state that the limitation must serve a purpose that most people would regard as compellingly important and further that there is no other 'realistically available' way in which the purpose can be achieved with restricting rights. *S v Mandela* 2000 (3) SA 1 (CC) Para 32.

<sup>121</sup> Currie and De Waal (2005) 166 put the test down as the following: The first question that is asked is whether a right in the *Bill of Rights* has been infringed by law or conduct of the respondent. If the answer is in the affirmative the next question to be answered is whether the infringement can be justified as a permissible limitation of the rights?

<sup>122</sup> This stage according to Currie and De Waal (2005) 166 is ascertained through the interpretation of the provisions of the law and the *Bill of Rights*.

<sup>123</sup> This according to Currie and De Waal (2005) 167 involves a far more factual enquiry than the question of interpretation. Appropriate evidence need to be lead to justify a limitation of a right and that it is 'reasonable' or

Before a court will legitimately limit a right in the *Bill of Rights*, it must be shown firstly, that it is a law of general application<sup>124</sup> and secondly, it is reasonable and justifiable in an open and democratic society, based upon human dignity, equality and freedom.<sup>125</sup>

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'justifiable' in an open and democratic society based on human dignity, equality and freedom. The type of evidence that need to be lead according to the authors, include, sociological or statistical data to justify the legislative restriction on society, unless, of course, the purpose of a limitation and the relationship between the limitation and its purpose is self-evident. See also, *S v Meaker* 1998 (8) BCLR 1038 (W). Where the justification rests on factual and/or policy considerations the respondent must put such material before the court. Failure to do so, may lead to a finding that the limitation is not justifiable.

<sup>124</sup> Currie and De Waal (2005)168; Christie *Bill of Rights Compendium* 1A-67.

<sup>125</sup> The law of general application is said to be an expression of a basic principle of liberal political philosophy and of constitutional law better known as the rule of law. Currie and De Waal (2005) 168. The authors opine that there are two components to this principle namely, in the first place, the government that has lawful authority, has the power to make law. Once it is established that it is a law made by government, the next question is what forms of law qualify as 'law of general application?' In this regard a wide interpretation is given to the meaning of 'law'. It appears therefore that all forms of legislation (delegated and origin) qualify as 'law'. *Carbi-Odam v MEC for Education (North West Province)* 1998 (1) SA 745 (CC) Para 27. In this case the Constitutional Court held that subordinate legislation applying to all educations in South Africa was a law of general application as does common law (both private law and public law rules) and customary law. See *Du Plessis v De Klerk* 1996 (3) SA 850 (CC) pares 44 and 136. Currie and De Waal (2005) 169 hold the view however, that a mere policy or practice (even of an organ of state) cannot qualify as 'law'. See also *Hoffman v South African Railways* 2001 (1) SA 1 (CC) Para 41. In this case the Constitutional Court held that a policy of an organ of state that HIV positive persons are not qualified for employment as airline cabin attendants was not a law of general application. Although the limiting of rights is performed mostly by the legislature, Currie and De Waal (2005) 169 point out that the courts also have the power to develop limitations by virtue of their power to develop the common law. Section 8(3)(b) of the *Constitution* specifically authorizes the courts in cases of direct horizontal application of the *Bill of Rights* to the common law, provided, that limitation is in accordance with Section 36. Cheadle et al *South African Constitutional Law: The Bill of Rights* (2002) 698-9 hold the view that rights can also be limited in cases of the indirect application of the *Bill of Rights*. See *S v Mamabolo* 2001 (3) SA 409 (CC) in which the court applied the reading-down rule to save the common law offence of scandalizing the court in the form of contempt *ex facie curiae* from constitutional invalidity. The court in this case acknowledged a limitation to the right of freedom of expression. The second component according to Currie and De Waal (2005) 169 relates to the character of quality of the law that authorizes a particular action. What is expected is that the law must be sufficiently clear, accessible and precise that those who are affected by it can ascertain the extent of their rights and obligations. See *Dawood v Minister of Home Affairs* 2000 (3) SA 936 (CC) Para 47. What is expected is that the law applies impersonally, equally to all and it must not be arbitrary in application. Currie and De Waal (2005) 169-170. Section 36 therefore prevents laws that are personal, unequal or arbitrary in application from qualifying as legitimate limitations of rights. The rationale for the second component is set out by Ackerman J in *S v Makwanyane* (Fn 9 supra) Para 156 as: "We have moved from a past characterized by much which was arbitrary and unequal in the operation of the law to a present and future in a constitutional state where state action must be such that it is capable of being analyzed and justified rationally. The idea of the constitutional state presupposes a system whose operation can be rationally tested against or in terms of the law ....." In the case of *De Lille v Speaker of the National Assembly* 1998 (3) SA 430 (C) the court looked at the requirements of equality and non-arbitration when considering the punitive suspension of a member of parliament by an ad hoc committee of the National Assembly. The High Court held that the suspension was a violation of the rights to freedom of expression just administrative action and access to courts. The court also held that the violation was not justifiable under the limitation clause because it was not authorized by law of general application in that the rules and standing orders of parliament laws of general application.

Section 36 contains a set of relevant factors which courts are obliged to take into consideration when determining the question of reasonableness and justifiability of a limitation. This includes:

- (i) the nature of the right;
- (ii) the importance of the purpose of the limitation;
- (iii) the nature and extent of the limitation;
- (iv) the relation between the limitation and its purpose; and
- (v) less restrictive means to achieve the purpose.

Insofar as the nature of the right is concerned, the proportionality required by s36 involves weighing up the harm done by a law against the benefits that the law serves to achieve.<sup>126</sup> The importance of the purpose of the limitation is a significant factor in determining the reasonableness and justifiability of a limitation.<sup>127</sup>

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<sup>126</sup> As to the meaning of reasonableness and justifiability Currie and De Waal (2005) 176 suggest that the rationale behind this amount to this, the law must be reasonable in that it should not invade rights any further than it needs to in order to achieve its purpose. In order to satisfy the limitation test, the authors Currie and De Waal (2005) 176, suggest that it must be shown that the law in question serves a constitutionally acceptable purpose and that there is sufficient proportionality between the harm done by the law (the infringement of fundamental rights) and the benefits it is designed to achieve (the purpose of the law). The Constitutional Court in *S v Makwanyane* (Fn 9 Supra) Para 104 adopted the following approach to the application of the general limitation clause: "*The limitation of constitutional rights for a purpose that is reasonable and necessary in a democratic society involves the weighing up of competing values and ultimately an assessment based on proportionality.*" The court acknowledged that different rights have different implications. There is therefore no absolute standard which can be laid down for determining reasonableness and necessity. The court also acknowledged that principles can be established, but, cautions the court "*the application of these principles to particular circumstances can only be done on a case-by-case basis. This is inherent in the requirement of proportionality, which calls for the balancing of different interests. In the balancing process, the relevant considerations will include the nature of the right that is limited, and its importance to an open and democratic society based on freedom and equality, the purpose of which the right is limited and the importance of that purpose is such a society; the extent of the limitation, its efficiency and particularly where the limitation has to be necessary, whether the desired ends could reasonably be achieved through other means less damaging to the right in question .....*" The foretasted paragraph according to Currie and De Waal (2005) 177 has become a standard reference when the Constitutional Court considers the legitimacy of limitation. See *S v Mbatha* 1996 (2) SA 464 (CC) Para 14; *S v Bhulwana* 1996 (1) SA 388 (CC).

<sup>127</sup> See Currie and De Waal (2005) 178 suggest a court must assess what the importance of a particular right is in the overall constitutional scheme. A right that is of particular importance to the *Constitution's* ambition to create an open and democratic society based on human dignity, freedom and equality will carry a great deal of weight in the balancing of rights against justifications for their infringement. The authors use the case of *S v Makwanyane* (Fn 9 supra) as an example how the court went about in balancing a right against the justification for its infringement. The court considered the death penalty and whether it is justified given that the death penalty infringed the rights to life, to human dignity and to freedom from cruel, inhuman or degrading punishment? In the light thereof the death penalty to be constitutional would have to qualify as a reasonable and justifiable limitation of the three rights. In order to ascertain whether the death penalty qualifies as a reasonable and justifiable limitation the court balanced the benefits it was designed to achieve against the harm it did - the violation of the three rights. The court consequently attached great weight to the three rights and emphasized their importance in an open and democratic society based on freedom and equality in stating: "*The rights to life and dignity are the most important of all human rights, and the source of all other personal rights in the Bill of Rights. By committing ourselves to a society founded on the recognition of human rights we are required to value these two rights above all others. And*

The nature and the extent of the limitation is also a necessary part of the proportionality enquiry, for the proportionality enquiry, entails that the infringement of rights should not be more extensive than is warranted by the purpose, the limitation seeks to achieve. A further factor to consider in deciding whether the limitation is reasonable and justifiable is to look at the relationship between the limitation and its purpose.<sup>128</sup>

A limitation would only serve as a legitimate limitation of a right, where the law that infringes the right is reasonable and justifiable.<sup>129</sup> In other words, there must be a good reason for the infringement. The proportionality test, when applied, weighs up the harm done by the infringement and the beneficial purpose that the law is meant to achieve. Where the law does not serve the purpose that it is designed to serve, or marginally contribute to achieve its purpose, it can never be an adequate justification for an infringement of fundamental rights.<sup>130</sup>

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*this must be demonstrated by the State in everything that it does, including the way it punishes criminals.*" The court held that this meant that very compelling reasons would have to be found to justify the limitation of such important rights. No compelling reasons were found however in this case.

<sup>128</sup> Currie and De Waal (2005) 179 states that a limitation of rights that serves a purpose that does not contribute to an open and democratic society based on human dignity, equality and freedom cannot therefore be justifiable. It was held in the case of *S v Makwanyane* that despite the state's argument that the death penalty serves the purposes of deterrence to violent crimes; preventing the recurrence of violent crimes; retribution for violent crimes, the court clearly found difficulty with the third purpose of the death penalty as retribution was not considered to be a purpose fitting the type of society that the constitution wished South Africa to be. The Constitution envisaged a society based on values of reconciliation and ubuntu and not vengeance and retaliation; which "..... Can never be a worthy purpose of punishment in the enlightened society to which we South Africans have now committed ourselves." (Para 185). According to Currie and De Waal (2005) 182 the test here is to ensure that the limitation does not do more damage to rights than is reasonable for achieving its purpose. It was put in the following terms by the Constitutional Court in the case of *S v Mananela* 2000 (3) SA 1 (CC) Para 34 namely a law that limits rights, should not use a sledgehammer to crack a nut. In the *Makwanyane* case (Fn 9 Supra) 236 the Constitutional Court, although finding nothing untoward with the purposes of deterrence and prevention of recurrence of violent crime, nevertheless found difficulty with the retribution purpose. Consequently it was held that the death penalty has grave and irreparable effects on the rights concerned. The court with regard to the nature and extent of the limitation held that the inroads that the death penalty made on the rights to life, dignity and freedom from cruel punishment, could not be more severe. Currie and De Waal (2005) 182 also hold the view that to serve as a legitimate limitation of a right, a law that infringes the right must be reasonable and justifiable. What it means is that there must be good reason for the infringement. According to the authors there must be proportionality between the harm done by the infringement and the beneficial purpose that the law is meant to achieve. In the case of *S v Mankwanyane* (Fn 9 Supra) 184 the court considered this principle and came to a finding that there was no satisfactory evidence establishing a connection between the death penalty and a reduction in the incidence of violent crime. The court per Didcott Para 184 held: "*The protagonists of capital punishment bear the burden of satisfying us that it is permissible under S33(1), to the extent that their case depends upon the uniquely deterrent effect attributed to it, they must therefore convince us that it indeed serves such a purpose. Nothing less is expected from them in any event when human lives are at stake lives which may not continue to be destroyed on the mere possibility that some good will come of it .....*"

<sup>129</sup> Currie and De Waal (2005) 182-183

<sup>130</sup> Currie and De Waal (2005) 183

A further legitimacy requirement for the limitation of a fundamental right is that the benefit must be in proportion to the scope of the limitation. Therefore, a law that invades rights more than is necessary to achieve its purpose, is evidently disproportionate.<sup>131</sup>

A section 36(1) enquiry therefore, consists of the following, where it is established that a law of general application infringes a right protected by the *Bill of Rights*. The State or person relying on the law may argue that the infringement constitutes a legitimate limitation of the right.<sup>132</sup> As rights are not absolute, they may be infringed, but only when the infringement is for compelling good reasons. A compelling good reason will be present only where the infringement serves a purpose that is considered legitimate in a constitutional democracy that values human dignity, equality and freedom above all other considerations.

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#### **13.4.6 Section 39: Interpretation of the Bill of Rights**

##### **13.4.6.1 The Influence of Foreign Law on the South African Courts**

From the earlier discussion in this chapter it is clear that the constitutional values have a profound and prevailing impact on the way the law is interpreted and applied in South Africa.<sup>134</sup> In this new constitutional order, values such as human dignity, equality and freedom in particular, are emphasized.<sup>135</sup> As was also stated earlier, the common law is subject to constitutional control. For that reason, it has been stated over and over before, that all law in South Africa, including, the common law, must promote the values that underlie the *Bill of Rights*.<sup>136</sup> It has, further, also been stated on numerous occasions that, where necessary, the common law has to be developed in this constitutional order to reflect the spirit, purport and objects of the *Bill of Rights*.<sup>137</sup>

What has also emerged in the new constitutional order is that judges today, unlike in the legal order which prevailed prior to the constitutional state coming into being, can develop

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<sup>131</sup> Currie and De Waal (2005) 184

<sup>132</sup> Currie and De Waal (2005) 185

<sup>133</sup> Currie and De Waal (2005) 185.

<sup>134</sup> op cit fn 29.

<sup>135</sup> op cit fn 31.

<sup>136</sup> op cit fn 36.

<sup>137</sup> op cit fn 40.

the common law where no law exists or law reform is necessary, i.e. where the competing rights conflict with the values in the *Constitution*.<sup>138</sup>

The *Constitution*<sup>139</sup> in this regard provides several aids to interpreting the *Bill of Rights* when courts are confronted with weighing up competing rights. The aids include the use of both international law and foreign law.

From the remarks made by the Constitutional Court in *S v Makwanyane*,<sup>140</sup> one gains the

<sup>138</sup> Tladi (2002) 17 *SAPR/PL* 473; Hawthorne (2003) 15 *SA Merc LJ* 271 at 272; Carstens and Kok (2003) 18 *SAPR/PL* 430 at 445 - 446; Hopkins *TSAR* (2003-1) 150 at 157; Tladi *De Jure* (2001) 306 at 307; Grove (2003) 134 at 140; Christie *Bill of Rights Compendium* 3H-7; Currie and De Waal (2005) 159; See also *Carmichele v Minister of Safety and Security* 2001 (4) SA 938 at 952-953. For a discussion of the attitudes in the apartheid era that they were not 'makers of law' but merely the 'adjudicators of law' see Hugh Corder *Judges at Work: The Roles and Attitudes of the South African Appellate Judiciary 1910-50* (1984); John Dugard *Human Rights and the South African Legal Order* (1978); C F Forsyth *In danger of Their Talents: A Study of the Appellate Division of the Supreme Court of South Africa from 1950-80* (1985); Victor Soutwell 'Working for Progressive Change in South African Courts' (1995) 28 (*CILSA*) 261 at 266 quoted by De Vos "Pious wishes or directly enforceable human rights? Social and economic rights in South Africa's 1996 Constitution" *South African Journal on Human Rights* (1997). It is stated that "*Judges were able to lull themselves into believing that they had no choice when interpreting racist and oppressive statutes. It was the body of statutory law which contained the law of apartheid and no more.*" The writer De Vos holds the view that it seemed the same road which some of the Constitutional Court judges had also walked. He uses several dicta of the Constitutional Court to support his view namely: In *S v Zuma* 1995 (4) BCLR 401 (SA) (CC) Kentridge AJ, while admitting that general language does not have a single 'objective' meaning, nevertheless warns that the main task of the judiciary should remain the interpretation of a written instrument and that a less rigorous approach may entail the danger that the Constitution may be taken to mean whatever one wishes it to mean (at 412F-G); Also in *S v Makwanyane* 1995 (6) SA 665 (CC) where Kriegler J remarks: "*In answering the question the methods to be used are essentially legal, not moral or philosophical. The incumbents are Judges, not sages; their discipline is the law, not ethics or philosophy and certainly not politics*" (at 747F-748A). For an extensive discussion on the jurisprudence of the Constitutional Court, see Alfred Cockrell 'Rainbow Jurisprudence' (1996) 12 *SAJH R* 1-38. Cockrell argues that the judges of the Constitutional Court had by and large failed to go beyond the formulation of formal reasons for their decisions and had not engaged in the moral and political reasoning required when making the difficult decisions about matters of political morality. But, notwithstanding some of the judges' hesitancy to move with the times, some of the judges changed their mindset. It was Kentridge AJ in *Du Plessis v De Klerk* above Fn 99 who quoted with approval the Canadian dictum in *R v Saliture* (1992) 8 CRR 2d 173 (1991) 3 SCR 654 wherein it was stated: "*Judges can and should adapt the common law to reflect the changing social, moral and economic fabric of the country. Judges should not be quick to perpetuate rules whose social foundations have long since disappeared. Nonetheless there are significant constraints on the power of the judiciary to change the law. In a constitutional democracy such as ours it is our legislature and not the courts which have the major responsibility for law reform. The judiciary should confine to show incremental changes which are necessary to keep the common law in step with the dynamic and evolving fabric of our society.*"

<sup>139</sup> *The Constitution of the Republic of South Africa Act* 108 of 1996.

<sup>140</sup> Chapter 2 of the *Bill of Rights* provides as follows:

"*Interpretation of Bill of Rights*"

39. (1) *When interpreting the Bill of Rights, a court, tribunal or forum:*
- (a) *must promote the values that underlie an open and democratic society based on human dignity, equality and freedom;*
  - (b) *must consider international law; and*
  - (c) *may consider foreign law.*
- (2) *When interpreting any legislation, and when developing the common law or customary law,*

distinct impression that the Constitution permits reference for purposes of interpretation to international human rights law in general.<sup>141</sup>

Apart from international law, the courts, as previously stated, may also consider foreign law when interpreting the *Bill of Rights*, especially when developing the common law.<sup>142</sup>

But, as will be seen in the discussion below several High Court judges have cautioned against the use of foreign law, alternatively, the usage thereof where necessary, should be

*every court, tribunal or forum must promote the spirit, purport and objects of the Bill of Rights  
....."*

When interpreting the *Bill of Rights*, a court, tribunal or forum must therefore consider international law. See Blake "The world's law in one country: the South African Constitutional Court's use of public international law" 1998 SALJ 668; Botha "International law in the Constitutional Court" 1995 SAYIL 668 as quoted in Christie *Bill of Rights Compendium* (2002) 1A-21. According to the learned author the rule is peremptory, but, except where international agreements and international law are law in South Africa, a court is not obliged to apply international law, it must merely consider it. The learned author relies on ss231, 232 and 233 of the *Constitution* which indicate that the *Constitution* "..... is the primary source of the protection of human rights in South Africa, in principle, international agreements become part of South African law only after they have been enacted as Acts of parliament and customary international law is law in the Republic unless it is inconsistent with the Constitution or an Act of parliament. See *LS v AT 2001 2 BCLR 152 (CC), 2001 1 SA 1171 (CCO par [27])*"

It is especially, the Constitutional Court in *S v Makwanyane* 1995 (3) SA 391 (CC) Para 9 who emphasizes that both binding and non-binding public international law may be used as tools of interpretation when it stated: "*International agreements and customary international law provide a framework within which ..... (The Bill of Rights) can be evaluated and understood, and for that purpose decisions of tribunals dealing with comparable instruments, such as the United Nations Committee on Human Rights, the Inter-American Commission on Human Rights and the European Court of Human Rights and in appellate cases, reports of specialized agencies such as the International Labour Organisation may provide guidance as to the correct interpretation of particular provisions.*"

<sup>141</sup> The Constitutional Court in *S v Makwanyane* as suggested by Currie and De Waal (2005) 160 relied heavily on the work of John Dugard. (Fn 36 of the Judgement) "The Role of International Law in interpreting the Bill of Rights" (1994) 101 SAJHR 208. The eminent author Dugard with reference to Section 39(1) suggests that a court should not merely consider a treatise to which South Africa is a party or customary rules that have been accepted by South African courts, but also to national conventions; international custom generally accepted as law; general principles of law recognized by civilized nations; judicial decisions relevant. Dugard *International Law* (2000) 25 with reference to the case of *CC Maynard et Alii v The Field Cornet of Pretoria* (1894) 1 SAR 214 at 233 quoted the words of Chief Justice Kotze who declared that municipal law : "*Must be interpreted in such a way as not to conflict with the principles of international law ..... It follows from (this), as put by Sir Henry Maine, "that the state which disclaims the authority of international law places himself outside the circle of civilized nations.*" Emphasizing the importance of international law in this regard the author states: "*South Africa's new constitutional order, which requires courts to interpret all legislation, and particularly the Bill of Rights, to accord with international law, and the nation's commitment to the Rule of Law and Human Rights, sets the scene of renaissance of international law both in South Africa's foreign policy and in the jurisprudence of its courts.*"

<sup>142</sup> See Christie *Bill of Rights Compendium* (2002) 1A-21 - 1A-22; Currie and De Waal (2005) 160. It is especially the Constitutional Court per Chaskalson P (as he was known then) who in the case of *S v Makwanyane* Fn 9 Para 37 who set the tone for the courts to use foreign law when laying down the following guidelines: "*In dealing with comparative law, we must bear in mind that we are required to construe the South African Constitution, and not an international instrument or the constitution of some foreign country, and that this has to be done with due regard to our legal system, our history and circumstances, and the structure and language of our own Constitution. We can derive assistance from public international law and foreign case law, but we are in no way bound to follow it.*"

used with great circumspection. The reasons advanced often include the different contexts within which other constitutions were drafted, the different social structures and milieu existing in these countries, compared with those in this country. Also the different historical backgrounds are often included.<sup>143</sup>

But, it is also clear from the authorities, that the South African courts, especially, the Constitutional Court, have heard the constitutional call to develop the South African law by making use of foreign law.<sup>144</sup>

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<sup>143</sup> In this case the court dealt with the application of section 35(1) of the *Interim Constitution Act* 200 of 1993, the equivalent of Section 39(1) (b) of the *Final Constitution Act* 108 of 1996. The South African courts have throughout the years although not hesitant to consider foreign law, been cautious in receiving foreign law. It is especially, during the operation of the interim Constitution Act 200 of 1993 that the courts per several High Court judges cautioned against the use of foreign law alternatively, the usage thereof where necessary, with great circumspection. The reasons often advanced were the "different contexts within which other Constitutions were drafted, the different social structures and milieu existing in those countries compared with those in this country, and the different historical backgrounds against which the various Constitutions came into being." See in this regard *Queen v Minister of Law and Order and Another* 1994 (2) SALR 340 E at 348; *Park-Ross and Another v The Director, Office for Serious Economic Offences* 1995 (2) BCLR 198 (C) 208-209; *Berg v Prokureur-Generaal van Gauteng* 1995 (11) BCLR 1441 (T) at 1446; *Potgieter en 'n Ander v Killian* 1995 (11) BCLR 1498 (N); *Nortje and Another v Attorney-General of the Cape and Another* 1995 (2) BCLR 236 (C) at 247; *Shabalala v Attorney-General of Transvaal* 1995 (1) SA 608 (TPD) at 640-641. The pre 1996 *Constitution* era however, did have courts that were more progressive in their thinking. It was the Ciskeian Division (as it was known then) in the case of *Matinkinca and Another v Council of State, Ciskei and Another* 1994 (1) BCLR (CK) who stated: "The Constitution must not be read in isolation but within the context of a fundamental humanistic constitutional philosophy. In that regard, the preamble (if any) and the manifold structures of the Constitution could be indicative of such a humanistic philosophy. The value judgement must objectively be articulated and identified. In the process of such objective identification regard must be had to the contemporary norms, aspirations, expectations and sensitivities of the population as expressed in inter alia, the Constitution. Furthermore (and still in the process of such objective articulation), values emerging in the 'civilised international community' should be taken cognizance of." But, post 1996 the Constitutional Court in *Sanderson v Attorney-General, Eastern Cape* 1998 (2) SA 38 (CC) Para 26 summed up the position when considering foreign law as follows: "Comparative research is generally valuable and is all the more so when dealing with problems new to our jurisprudence but will develop in mature constitutional democracies. Both the Interim and the Final Constitutions, moreover, indicate that comparative research is either mandatory or advisable... nevertheless the use of foreign transplants requires careful management.....". In the Constitutional Court case of *Bernstein v Bester* 1996 4 BCLR 449 (CC), 1996 2 SA (CC) par [133], Kriegler J (Didcott J concurring) stated: "I however wish to discourage the frequent and, I suspect, often facile resort to foreign 'authorities'. Far too often one sees citation by counsel of, for instance, an American judgement in support of a proposition. The precepts of section 35(1) of the (Interim) Constitution are also clear: where applicable, public international law in the field of human rights must be considered, and regard may be had to comparable foreign case law. But that is a far cry from blithe adoption of alien concepts or inapposite precedents" See also *Ferreira v Levin; Vryenhoek v Powell* 1996 1 BCLR 1 (CC), 1996 1 SA 984 (CC) par (190). The Constitutional Court in commenting on the use of foreign precedents in applying constitutional provisions also suggested in *S v Mamabolo* 2001 5 BCLR 449 (CC); 2001 3 SA 409 (CC) Para [36] that the following approach be adopted, namely: "Before one could subscribe to a wholesale importation of a foreign product one needs to be persuaded, not only that it is significantly preferable in principle, but also that its perceived promise is likely to be substantiated in practice in our legal system and in the society it has been developed to serve. More pertinently, it would have to be established that (the importation) was consonant with our South African constitutional value system."

<sup>144</sup> A number of the High Courts in South Africa have considered and recognized international and foreign law authorities which they expressed to be useful and instructive in incorporating in their judgements. Some of the cases include but are not restricted to the following: See *S v Scholtz* 1997 (1) BCLR 103 (NMS); *S v Mathebula*



*and Another* 1997 (1) BCLR 123 (W); *Fraser v Children's Court, Pretoria North and Others* 1997 (2) BCLR 153 (CC); *Chinamora v Angwa Furnishers (Pty) Limited and Another (Attorney-General intervening)* 1997 (2) BCLR 189 (ZS); *Du Preez v Attorney-General of the Eastern Cape* 1997 (3) BCLR 329 (E); *Fose v Minister of Safety and Security* 1997 (7) BCLR 851 (CC); *Coetzee and Others v Attorney-General, Kwazulu Natal and Others* 1997 (9) BCLR 989 (C); *S v K* 1997 (9) BCLR 1283 (C); *S v Coetzee and Others* 1997 (4) BCLR 437 (CC); *Du Preez and Another v Truth and Reconciliation Commission* 1997 (4) BCLR 531 (A); *Elliott v Commissioner of Police and Another* 1997 (5) BCLR 670 (ZS); *President of the Republic of South Africa and Another v Hugo* 1997 (6) BCLR 708 (CC); *S v Naidoo and Another* 1998 (1) BCLR 376 (E); *S v J* 1998 (4) BCLR 424 (SCA); *National Coalition for Gay and Lesbian Equality and Others v Minister of Justice and Others* 1998 (6) BCLR 726 (W); *New National Party of South Africa v Government of RSA and Others* 1999 (4) BCLR 457 (C); *National Media Ltd and Others v Bogoske* 1999 (1) BCLR 1 (SCA). In the case of *Carmichele v Minister of Safety and Security* 2001 (4) SA 938 at 954ff the Constitutional Court relied heavily on foreign law to develop the common law in particular in the field of delictual liability by extending the general duty of care in accordance with spirit, purport and objects of the Bill of Rights as intended in Section 39(2) of the *Constitution*. In this case the court found the prosecution and the police had a duty imposed on them not to perform any act infringing on the dignity, equality and freedom of citizens but rather to provide appropriate protection to everyone through and structures designed to afford such protection. Where such rights are infringed, the court held there is no ground for immunity of public officials from delictual causes by the public. This case is filled with foreign law cases ranging from Canadian Law, English Law and American Law and the European Court of Human Rights. The said cases pioneered the Constitutional Court in developing the common law. In the first instance the court supported the dictum of Tacobucli J in the Canadian decision of *R v Saliture* (1992) 8 CRR (2d) 173 (1991) 2 GCR 654 quoted with approval in *Du Plessis v De Klerk* 1996 (3) SA 850 (CC) 1996 (5) BCLR 658 at paras [15] - [24] wherein the iudex discussed the role judges should play in adopting the common law. In this regard the iudex held: "*Judges can and should adapt the common law to reflect the changing social, moral and economic fabric of the country. Judges should not be quick to perpetuate rules whose social foundation has long since disappeared. Nonetheless there are significant constraints on the power of the Judiciary to change the law. In a constitutional democracy such as ours it is the Legislature and not the courts which have the major responsibility for law reform. The Judiciary should confine itself to those incremental changers which are necessary to keep the common law in step with the dynamic and evolving fabric of our society.*" The court also relied on International Law considered consistent with the rights enshrined in our Constitution aimed at the wellbeing of the South African population. The court consequently looked at the provisions of the *European Convention on Human Rights (Convention)*. Article 2(1) of the *Convention* provides that: "*everyone's right to life shall be protected.*" To this and the court held that: "*This corresponds with our Constitution's entrenchment of the right to life.*" The court also adopted with approval the principle enunciated in the European Court of Human Rights' case of *Osman v United Kingdom* 29 EHHR 245 at 305 Para 115 in which it was held: "*It is common ground that the State's obligation in this respect extends beyond its duty to ensure the right to life by putting in place effective criminal law provisions to deter the commission of offences against the person backed up, by law enforcement machinery for the prevention, suppression and sanctions of breaches of such provisions. It is thus accepted by those appearing before the Court that Art 2 of the Convention may also imply in certain well-defined circumstances a positive obligation on the authorities to take preventive operational measures to protect an individual whose life is at risk from the criminal acts of another individual.*" The court also looked with approval to the English law decision of *Barrett v Enfield London Borough Council* (1999) 3 ALL ER 193 (H in which Lord Browne-Wilkinson stated: "*(1) Although the word "immunity" is sometimes incorrectly used, a holding that it is not fair, just and reasonable to hold liable a particular class of defendants whether generally or in relation to a particular type of activity is not to give immunity from a liability to which the rest of the world is subject. It is a prerequisite to there being any liability in negligence at all that as a matter of policy it is fair, just and reasonable in those circumstances to impose liability in negligence .....*" The European Court of Human Rights also considered this principle in *X and Others v United Kingdom* EHHR Case no 29392/95 delivered 10 May 2001 unreported. The European Court held that the immunity approach effectively precluded the Plaintiff's from having "..... available to them an appropriate means of obtaining a determination of their allegations that the local authority failed to protect them from inhuman and degrading treatment and the possibility of obtaining an enforceable award of compensation for the damages suffered thereby." This was found to contravene the provisions of Art 13 of the *Convention* and the Court consequently made an award of damages to the appellants. The general obligation to develop the common law appropriately as stated in *Carmichele v Minister of Safety and Security (Centre for Applied Legal Studies intervening)* has been quoted with approval in many cases which have

Having considered the influence which foreign law may have as an aide in developing the South African common law in the new constitutional order, it is disappointing that Brandt JA, in the controversial dictum of *Afrox v Strydom*, ignored this aide at the court's disposal. It will, however, be argued in the succeeding chapter that, by ignoring the application of section 39 available to the court in developing the common law, especially, the law of contract in the new constitutional order was to ignore the challenges the *Constitution* has brought with it.

### 13.5 International healthcare and the right to healthcare

The right to healthcare is recognized in the public international law sphere but expressed in different ways in a number of different international instruments.<sup>145</sup>

Various factors have, however, been identified as militating against the use of a single international instrument which recognizes the right to healthcare.<sup>146</sup> But, despite the lack of

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since been decided in our courts. See *Fourie and Another v Minister of Home Affairs and Others* 2005 (3) SA 429 (SCA) 436. In this case the court relied heavily on foreign law to decide the issue of the validity of marriage between two persons of the same sex. In fact, the decision ultimately reached by the court is steeped in the influence of foreign case law and International law. In *Barkhuizen v Napier* 2007 (5) SA 323 (CC) it is especially, Sachs J in a minority judgement who relies heavily on International law in an attempt to develop contractual jurisprudence in South Africa. Sachs J with reference to Section 39(1) of the *Constitution* seeks guidance from international practice when he remarks at Para [162]: "*In considering the standards of contractual behaviour required by public policy in South Africa, attention should be paid to the manner in which standard form contracts are being dealt with in other open and democratic societies.*" In this regard Sachs J relied on the *Unfair Contract Terms Act 1977* and Art 3 of the European Council Directive on *Unfair Terms in Consumer Contracts Council Directive 93/13/EEC OJL 095/29* (5 April 1993) which provides: "*A contractual term which has not been individually negotiated shall be regarded as unfair if, contrary to the requirement of good faith, it causes a significant imbalance in the parties' rights and obligations arising under the contract, to the detriment of the consumer.*" Sachs J also refer to the development in South American countries when he states: "*It appears that a number of South American countries have also enacted legislation since 1990 providing for consumer protection against unfair contracts similar to legislation existing in so-called first world countries. According to the SALRC these statutes were heavily influenced by the Mexican Consumer Protection Law of 1974 and the Brazilian Consumer Protection Code of 1990, as well as Spanish and French consumer protection law.*"

<sup>145</sup> Pearman (2004) 51 demonstrates the recognition of the right to healthcare in the public international sphere by referring to the preamble to the *Constitution of the World Health Organization* adopted in 1946 which provides: "*The enjoyment of the highest attainable standard of health is one of the fundamental rights of every human being without distinction of race, religion, and political belief, economic or social conditions.*" More recently Art 12 *The Right to the highest attainable standard of physical and mental health of the International Convention on Economic Social and Cultural Rights* (ICESCR) has been reviewed under the auspices of the United Nations published under General Comment 14 'The Right to the highest attainable standards of Health' UN Doc E/C12/2000/4 (2000). Currie and De Waal (2005) 591 are of the opinion the comment on the Right to Healthcare though broader than S27 of the *South African Constitution* will serve as an aid in interpreting the South African *Bill of Rights*.

<sup>146</sup> Pearmain (2004) at 51 identifies a number of factors including (1) the variety of language used in the various international instruments makes it difficult to identify the content of the rights recognized. (2) the question of interpretation *inter alia* whether the textual approach need to be adopted poses difficulties.

a uniform international instrument, it appears however, that, from the commentaries on the ICES or document, there is a single right to health in International Human Rights law.<sup>147</sup> However noble the idea may be to strive for a uniform instrument, as *Pearmain*<sup>148</sup> correctly points out, it remains but a goal, an ideal, rather than a practical reality.<sup>149</sup>

For that reason then, it has been suggested that when one has to examine the right to healthcare services in terms of Section 27 of the *Constitution*, in the light of International law, direct comparisons and inferences of direct relationships between domestic rights and international rights are not always possible.<sup>150</sup>

The South African approach currently amounts to this, while South Africa recognises the basic principle of a right as contained in an instrument of public international law, the content of the right is subject to interpretation with regard to domestic legal and other circumstances.<sup>151</sup>

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<sup>147</sup> Pearmain (2004) at 51, states that this right to healthcare embraces a wide range of socio-economic factors including food and nutrition, housing etc.

<sup>148</sup> Pearmain (2004) at 51 states that domestic legal systems still tend to approach the question of rights from a perspective of what is presently attainable. See also the cases of *Minister of Health and Others v Treatment Action Campaign and Others (No2)* 2002 (5) SA 721 (CC); *Government of the Republic of South Africa v Grootboom and Others* 2001 (1) SA 46 (CC); *Soobramoney v Minister of Health, Kwazulu-Natal* 1998 (1) SA 765 (CC). The eminent author Pearmain (2004) 54 also convincingly argues that: "..... an overly idealistic interpretation by the judiciary of the socio-economic rights granted in the Bill of Rights would diminish the effective value of the right in question by elevating it beyond the realms of what is practical and achievable. One ends up with judgements which, although laudable in their intentions and limitless in their scope, are not realistically capable of implementation."

<sup>149</sup> Pearmain (2004) at 55 eloquently puts i.e. that: "..... domestic rights must be considered for the most part in the light of present realities rather than that of dreams of the future."

<sup>150</sup> Pearmain (2004) at 55.

<sup>151</sup> See Pearmain (2004) at 55; The Constitutional Court in a number of cases also points to the socio-economic rights interpretation. See Madala J in *Subramoney* who stated that: "Some rights in the Constitution are the ideal and something to be strived for. They amount to a promise in some cases, and an indication of what a democratic society aiming to salvage loss, dignity, freedom and equality should embark upon. They are values which the Constitution seeks to provide nurture and protect for a future South Africa." And further: "In its language, the Constitution accepts that it cannot solve all our society's woes overnight, but must go on trying to resolve these problems." The Constitutional Court pointed out in *Ex parte Chairperson of the Constitutional Assembly: In re Certification of the Constitution of the Republic of South Africa* 1996 (1996) (4) SA 744 (CC) at Para 78) in dealing with an objection that socio-economic rights are not justifiable, that "At the very minimum, socio-economic rights can be negatively protected from improper invasion." The content of the right may change as circumstances change, but it must have some degree of content in the present. In the TAC case the court, referring to *Soobramoney*, explicitly recognised the fact that "the corresponding rights themselves are limited by reason of the lack of resources". This observation, coupled with the fact that the test is one of reasonableness, leads to the inevitable conclusion that the content of the right may be subject to fluctuation, depending upon changing circumstances and the availability of resources. This is why, as Yacoob J stated in *Grootboom* (Fn 37 supra at 61) "The question is therefore not whether socio-economic rights are justiciable under our Constitution, but how to enforce them in a given case. This is a very difficult issue which must be carefully explored on a case-by-case basis."

For that reason, the Constitutional Court has adopted a cautious and conservative approach to the application of international legal principles within South Africa.<sup>152</sup> It has also been acknowledged that whilst the principles enshrined in the *Constitution* may well be consistent with those of international law in a general way, it is still to the *Constitution* that one must turn when wanting to apply those principles to particular circumstances in the South African context.<sup>153</sup>

### 13.6 The South African Constitution and the Right to Healthcare

In order to ascertain how the *Constitution* impacts on the law of contract and more specifically, exclusionary clauses exonerating a hospital and its staff from liability arising from the staff's negligent conduct in providing healthcare services, it is important to get a better understanding of the nature of the rights, conferred by the *Constitution*, with regard to healthcare services. This will also provide possible answers to the question of whether the right to healthcare and maintaining standards of conduct may be alienated.

The *South African Constitution*<sup>154</sup> contains a number of references to healthcare services and medical treatment.<sup>155</sup>

There is no single, all embracing, section in the *Constitution* which encapsulates the right to healthcare. This is said to flow from the fact that the rights in the *Bill of Rights* are not distinct legal concepts, but rather elements of a system of fundamental rights that are inextricably intertwined.<sup>156</sup> According to *Pearmain*<sup>157</sup> there is a suite of rights which, when

<sup>152</sup> See *Pearmain* (2004) at 107-108 who emphasizes that although the role of international law in interpreting the provisions of the *Bill of Rights* has been acknowledged this role has not been overplayed by South African Courts. The precept of local conditions and the country's history has often been placed on the foreground.

<sup>153</sup> *Pearmain* (2004) at 109 with reference to Section 2 of the *Constitution* states that: "*International law does not override the Constitution for the purposes of the South African legal system. Section 2 of the Constitution clearly states that: "This Constitution is the supreme law of the Republic; law of conduct inconsistent with it is invalid, and the obligations imposed by it must be fulfilled."*

<sup>154</sup> Act 108 of 1996.

<sup>155</sup> "*Healthcare, food, water and social security*  
27(1) *Everyone has the right to have access to-*  
(a) *Healthcare services, including reproductive healthcare;*  
.....  
(c) *The State must take reasonable legislative and other measures, within its available resources, to achieve the progressive realization of each of these rights.*  
(3) *No one may be refused emergency medical treatment."*

<sup>156</sup> See *Pearmain* (2004) at 117 who quotes the case of *Government of the Republic of South Africa and Others v*

viewed collectively, could be said to constitute a right to health.

Consequently, each of the rights will be discussed, briefly, with regard to their relevance relating to healthcare services. This will give us a greater understanding of the rights that relate specifically to the delivery of healthcare services, which is important to the central focus of this thesis.

### 13.6.1 Life

The right to life, when measured in the hierarchy of fundamental rights, is rated by both legal writers <sup>158</sup> and the South African courts, <sup>159</sup> as the most important of all human rights. What is also important to understand is that the term "right to life" should not be given a narrow meaning i.e. a mere organic meaning, but broader, which includes the right to live as a human being, to be part of a broader community, to share in the experience of humanity. <sup>160</sup>It is for that reason that the delivery of healthcare services has to be

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*Grootboom and Others* 2001 (1) SA 46 (CC) in which the court observed at p83: "But s26 is not the only provision relevant to a decision as to whether state action at any particular level of government is reasonable and consistent with the Constitution. The proposition that rights are interrelated and are all equally important is not merely a theoretical postulate. The concept has immense human and practical significance in a society founded on human dignity, equality and freedom. It is fundamental to an evaluation of the reasonableness of State action that account is taken of the inherent dignity of human beings."

<sup>157</sup> (2004) at 117 Pearnain includes in the suite of rights the following rights namely: the right to life (Sec 11), the right to dignity (Sec 10), the right to bodily and psychological integrity (sec 12(2), the right to privacy (Sec 14), the right to an environment that is not harmful to health or wellbeing (sec 24(a), the right to emergency medical treatment, the right to access to health care services (Sec 27(a), and the rights to sufficient food and water and social security including appropriate social assistance (Sec 27(1)(b)and(c).

<sup>158</sup> Currie and De Waal (2005) 280; Pearnain (2004) 118 states that the right to life has been characterized as the most fundamental of all human rights.

<sup>159</sup> It is especially the Constitutional Court in the case of *S v Makwanyane* 1995 (3) SA 391 (CC) which dealt with the constitutionality of the death penalty who described the right to life and dignity as the most important of all human rights. In this case the different judges expressed themselves differently to the importance of this right. Kriegler J Para 215 stated "*in the hierarchy of values and fundamental rights guaranteed under [The Bill of Rights] I see [the right to equality, dignity and freedom] as ranked below the right to life .....*" Langa J Para 219 describes this right as follows: "*[The right to life is] the most fundamental of all rights, the supreme human right!*" O'Regan J at Para 224 also observed: "*The right to life is, in one sense, antecedent to all the other rights in the Constitution. Without life, in the sense of existence, it would not be possible to exercise rights, or to be the bearer of them. But the right to life was included in the Constitution not simply to enshrine the right to human being, to be part of a broader community, to share in the experience of humanity. This concept of human life is at the centre of our constitutional values. The Constitution seeks to establish a society where the individual value of each member of the community is recognised and treasured. The right to life is central to such a society. The right to life, thus understood, incorporates the right to dignity. So the rights to human dignity and life are entwined. The right to life is more than existence - it is a right to be treated as a human being with dignity, without dignity, human life is substantially diminished. Without life, there cannot be dignity.*"

<sup>160</sup> Pearnain (2004) 118; Christie *Bill of Rights Compendium* (2002), states that the right to life protects the physical-

maintained in order, therefore, to respect, protect and to fulfil the right to life.<sup>161</sup> But, there are limitations placed, sometimes, upon the delivery of healthcare services, to carry out the duty when it comes to prolonging life, as opposed to protecting life through emergency medical treatment.<sup>162</sup>

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biological existence of human beings.

<sup>161</sup> In this regard Pearmain (2004) 118-119 emphasized this duty by the State subject to certain limitations.

<sup>162</sup> The limitation is very well illustrated in the case of *Soobramoney v Minister of Health, Kwazulu-Natal* 1997 (12) BCLR 1606 (CC) in which the court firstly recognized: "The state has a constitutional duty to comply with the obligations imposed on it by section 27 of the Constitution." But, emphasized the court that "it has now been shown in the present case, however, that the State's failure to provide renal dialysis facilities for all persons suffering from chronic renal failure constitutes a breach of those obligations." Relying upon the availability of resources to support the limitation of the duty to provide access to healthcare Chaskalson P quoting with approval from an English decision of *R v Cambridge Health Authority, Ex parte B* (1994) ALL ER 129 CA in which the British Court of Appeal stated: "I have no doubt that in a perfect world any treatment which a patient, or a patient's family, sought would be provided if doctors were willing to give it, no matter how much it cost, particularly when a life was potentially at stake. It would however, in my view, be shutting one's eyes to the real world if the Court were to proceed on the basis that we do live in such a world. It is common knowledge that health authorities of all kinds are constantly pressed to make ends meet. They cannot pay their nurses as much as they would like; they cannot provide all the treatments they would like; they cannot purchase all the extremely expensive medical equipment they would like; they cannot carry out all the research they would like; they cannot build all the hospitals and specialist units they would like. Difficult and agonizing judgements have to be made as to how a limited budget is best allocated to the maximum advantage of the maximum number of patients. That is not a judgement which the court can make." then observed that: "The provincial administration which is responsible for health services in Kwazulu-Natal has to make decisions about the funding that should be made available for health care and how such funds should be spent. These choices involve difficult decisions to be taken at the political level in fixing the health budget, and at the functional level in deciding upon the priorities to be met. A court will be slow to interfere with rational decisions taken in good faith by the political organs and medical authorities whose responsibility it is to deal with such matters." Para 29. The court also rejected the right to life argument which claimed that on the basis of the right to life, everyone requiring life-saving treatment that was unable to pay for such treatment herself or himself was entitled to have the treatment provided at a state hospital without charge. Chaskalson P stated in this regard that: "In our Constitution the right to medical treatment does not have to be inferred from the nature of the state established by the Constitution or from the right to life which it guarantees. It is dealt with directly in s27. If s27(3) were to be construed in accordance with the appellant's contention it would make it substantially more difficult for the state to fulfill its primary obligations under ss27(1) and (2) to provide healthcare services to 'everyone' within its available resources. It would also have the consequence of prioritizing the treatment of terminal illnesses over other forms of medical care and would reduce the resources available to the state for purposes such as preventative health care and medical treatment for persons suffering from illnesses or bodily infirmities which are not life threatening. In my view, much clearer language than that used in s27 (3) would be required to justify such a conclusion." Para 19. The court consequently held that the state's failure to provide renal dialysis to all persons suffering from chronic renal failure did not constitute a breach of its constitutional obligations as reflected in section 27(1). See also the judgement of Thirion J in *Clarke v Hurst* 1992 (4) SA 630 (D) in which it was shown that it may be lawful to withhold or discontinue medical treatment of a patient who is in a persistent and irreversible vegetative state, in conformity with the patient's wishes expressed in a "living will" while still in good health. Outside the common law, in terms of the *Choice on Termination of Pregnancy Act* 92 of 1992 a woman is permitted to contract for the termination of her pregnancy. The validity of this provision was challenged in the *Christian Lawyers Association of South African v Minister of Health* 1998 (4) SA 1113 (T); 1998 (11) BCLR 1434 (T) on the ground that section 11 of the *Bill of Rights* which provides that "everyone has the right to life" the challenge however, failed as the proper interpretation of section 11 "everyone" does not include an unborn foetus.

As the availability of resources will determine the limitation placed upon the right to healthcare, it has been stated before that the right to life takes on, somehow, the nature of a socio-economic right.<sup>163</sup>

In order to find answers to the question surrounding the central theme of this thesis, the question may be posed whether an exemption clause in a hospital admission form exonerating a hospital or its staff from liability for the death of, or for personal injury or harm to the patient arising from the hospital or its staff's negligence will be declared unenforceable on the ground that it violates public policy, regard must be had to the patient's entrenched right to life. Strong voices have gone up that, as the twin rights to life and human dignity rank the highest in the hierarchy of other human rights, these rights are inalienable.<sup>164</sup>

*Hopkins*<sup>165</sup> convincingly argues that once it is accepted that the right to life and dignity are inalienable rights, it follows that any waiver which, either directly or indirectly, must be invalid and consequently, unenforceable. In contract therefore, where a contracting party exonerates a hospital or its staff from liability, despite the loss of life arising from the negligence of the hospital and/or staff members, it is submitted that such a waiver would be unenforceable as it is inconsistent with the constitutionally entrenched right to life.

### 13.6.2 Dignity

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<sup>163</sup> Pearmain (2004) 120; Currie and De Waal (2005) 290; See *Soobramoney v Minister of Health, KwaZulu-Natal* Para 15 in which the court dealt with an application for life-saving medical treatment in the context of the socio-economic right to healthcare. This was confirmed in *Khoza v Minister of Social Development* 2004 (6) SA 505 (CC).

<sup>164</sup> It is especially *Hopkins* (2001) 16 *SAPR/L* 122 at 129 in relying on the *S v Makwanyane* 1995 (3) SA 391 (CC) Para 136 of the judgement that despite the Attorney-General's (as he was known then) argument that the right to life and the right to human dignity were not absolute concepts and that like all rights they have their limits, i.e. a person who murders in circumstances where the death penalty is permitted, the criminal loses his/her right to claim protection of life and dignity, the court did not buy into this argument and held that even criminals who commit vile crimes they do not forfeit their rights under the Constitution and they are entitled, as all in our country now are, to assert these rights, including the right to life, the right to dignity and the right not to be subjected to cruel, inhuman or degrading punishment.

<sup>165</sup> (2001) 130 the writer persuasively argues that inalienable rights are incapable of limitation as it neither passes the requirement of reasonableness nor proportionality. See the comments of Harms JA in the Supreme Court of Appeal in the case of *The Johannesburg Country Club v Stott* 2004 (5) SA 511 (SCA) 518-519 in which the court seem to indicate that there ought to be winds of change, especially, with regard to the validity of exemption clauses. Reference to the potential of regulating these types of clauses in contract is made by the court in pointing to the *Unfair Contract Terms Act* 1977 as it is applied in England. In this regard *Christie* (2002) 3H-41 suggests that a strong case could be presented to the Constitutional Court for overruling the *Afrox* case.

From what was stated during the discussion on the right to life, both the right to life and dignity are central in the founding provisions of the *South African Constitution* and both rank foremost in hierarchy of rights in terms of the *Constitution*.<sup>166</sup>

Although dignity is a difficult concept to define, human dignity has been described, however, as the source of a person's innate rights to freedom and to physical integrity from which a number of other rights flow.<sup>167</sup> It has also been observed that there is a close connection between health and human dignity. Health is equally essential for life as it is for human dignity. As human dignity features both in the *Constitution*<sup>168</sup> and the *Bill of Rights*,<sup>169</sup> it is therefore, a constitutional value and a right.<sup>170</sup> Poor health, therefore, affects both the enjoyment of the rights to life and human dignity.<sup>171</sup>

That being the case, it needs to be repeated from our discourse hereinbefore, that both these rights are inalienable and any attempt to waiving those rights would be inconsistent with the values of the *Constitution* and protected by the *Bill of Rights*, therefore against public policy and unenforceable.<sup>172</sup>

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<sup>166</sup> Section 1(a) of Act 108 of 1996 provides the Republic of South Africa is founded on the values of 'human dignity, the agreement of equality and the advancement of human rights and freedom'. See also Currie and De Waal (2005) 272 who recognizes that human dignity is a central value of the 'objective, normative value system'. The same sentiment is expressed by Pearmain (2004) 120; Chaskalson 'Human dignity as a foundational value of our Constitutional Order' (2000) 16 *SAJHR* 193, 196 expresses the importance of human dignity in the Constitutional Order as "The affirmation of [inherent] human dignity as a foundational value of the Constitutional Order places our legal order firmly in line with the development of Constitutionalism in the aftermath of the Second World War". The Constitutional Court in *S v Makwanyane* Supra 507 describes the value of dignity as: "The importance of dignity as a founding value of the new Constitution cannot be overemphasized. Recognizing a right to dignity is an acknowledgement of the intrinsic worth of human beings: human beings are entitled to be treated as worthy of respect and concern" and "The rights to life and dignity is the most important of all human rights, and the source of all other personal rights in Chap 3. By committing ourselves to a society founded on the recognition of human rights we are required to value these two rights above all others" at 451.

<sup>167</sup> Currie and De Waal (2005) 272.

<sup>168</sup> In *National Correlation for Gay and Lesbian Equality v Minister of Justice* 1999 (1) SA 6 (CC) Para 30 the court held that human dignity also provides the basis for the right to equality i.e. everyone must be treated as equally worthy of respect.

<sup>169</sup> Section 1(a) of Act 108 of 1996.

<sup>170</sup> Section 10 of the *Bill of Rights* provide: "Everyone has inherent dignity and the right to have their dignity respected and protected."

<sup>171</sup> Pearmain (2004) 120.

<sup>172</sup> Pearmain (2004) 120 with reference to the medical negligence case of *Clarke v Hurst* 1992 (4) SA 630 (D) 653 in which Thirion J observed:  
"As it was put in 58 *US Law Week* 4936: Medical advances have altered the physiological conditions of death in ways that may be alarming: highly invasive treatment may perpetuate human existence through a merger of body and machine that some might reasonably regard as an insult to life rather than its continuation."

The right to dignity has also been said to serve as a useful cross-check on some of the other sections of the *Bill of Rights*. In this regard *Christie*,<sup>173</sup> with reference to the inequality of bargaining power, suggests that although not every case will produce a result that demands the intervention of the courts, there are however, instances where the result of certain contracts will produce a result that demands the intervention of the court, as the result is such that it impairs the weaker party's dignity.<sup>174</sup> It has also been suggested that the infringement of a party's right to human dignity would also be a strong reason, on public policy grounds, to interfere in the contractual relationship.<sup>175</sup>

It is submitted that where, for example, a patient signs an admission form containing an exclusionary clause when entering a hospital for medical treatment or surgery and, due to the hospital and/or its staff's negligence, the patient is reduced, for example, to a wheelchair, the validity of the exemption clause, it is further submitted, can be challenged on the basis that the patient's right to dignity had been infringed, which results in the provision of the contract entered into being inconsistent with the constitution and against public policy.

### 13.6.3 Emergency medical treatment

The *South African Constitution* provides for emergency medical treatment.<sup>176</sup> A person who find himself/herself in a dire state of emergency through illness or a sudden catastrophe, for example, through an accident or been a victim of crime and which calls for immediate medical attention, should not be refused ambulance or other emergency services which are available and should not be turned away from a hospital which is able to provide

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<sup>173</sup> *Bill of Rights Compendium* (2002) 3H-24.

<sup>174</sup> Van Aswegen "Freedom of Contract and Constitutional Rights: A noteworthy decision of the German Constitutional Court" 1995 *THRHR* 696 in suggesting the development of common law by using foreign law in terms of Section 39(1)(c) quotes what the writer calls an instructive case in the German Constitutional Court in which an oppressive contract of surety-ship was challenged on the grounds that it violated the surety's human dignity and private autonomy, and that freedom of contract should not be allowed to obscure a misuse of power by market controlling enterprises against subordinate contractual parties. The court upheld the challenge but observed that legal certainty would forbid a too eager intervention in contractual relationships.

<sup>175</sup> *Christie* (2002) 3H-24. See also the case of *Coetzee v Dimitis* 2001 1 SA 1254 (C) in which the National Soccer League could not rely on its oppressive regulations to which a professional player had agreed because they infringed his right to have his dignity respected and protected. *Christie* op cit also suggest that the right to human dignity may in itself be decisive in a contractual dispute. An example used by the author involves an actress who is required by her contract of employment to perform in a manner that infringes her human dignity. Should the actress refuse to perform, her refusal, may be justified and her right to dignity will be weighed against *pacta sunt servanda*.

<sup>176</sup> See Hopkins (2001).

the necessary treatment.<sup>177</sup> The nature and effect of this “available-and-able” qualification makes it clear that the Constitutional provision, as provided for in Section 27(3), is said to create a positive Constitutional obligation, on the state, to ensure that emergency medical facilities are made available so that no one in an emergency situation can be turned away.

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From the cases considered, it is clear that the right flowing from section 27(3) and the corresponding duty that flow there-from, usually takes place between state hospitals and patients. The question may be posed; can this right and corresponding duty apply to patients who seek emergency medical treatment in private hospitals?

Legislatively<sup>179</sup> and constitutionally<sup>180</sup> there is authority that there is a duty on private

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<sup>177</sup> Section 27(3) provides that “no one may be refused emergency medical treatment.” See also *Currie and De Waal* (2005) 592; *Pearmain* (2004) 126 states that a right not to be refused emergency medical treatment is a fundamental element of a right to health because it relates to the protection of life itself without which a right to health cannot be appreciated or enjoyed. The writer also regards the right of access to emergency medical treatment as part of a minimum one of the right to health.

<sup>178</sup> *Currie and De Waal* (2005) 593 state that the right that flow from Section 27(3) is not to be arbitrarily excluded from that which already exists. Sachs J in *Soobramoney* Para 51 sums up the value of this right as follows: “The special attention given by S27 (3) to non-refusal of emergency treatment relates to the particular sense of shock to our notions of human solidarity occasioned by the turning away from hospital of people battered and bleeding or of those who fall victim to sudden and unexpected collapse. It provides reassurance to all members of society that accident and emergency departments will be available to deal with the unforeseen catastrophes which could befall any person, anywhere and at any time.” The court at Para 18 aptly illustrates the type of situation in which the right in terms of S27 (3) applies, by referring to the Indian case of *Paschim Banga Khet Mazdoor Samity and Others v State of West Bengal* (1996) AIR SC 2426. One of the claimants had suffered serious head injuries and brain haemorrhage as a result of having fallen off a train. He was taken to various state hospitals and turned away, either because the hospital did not have the necessary facilities for treatment, or on the grounds that it did not have room to accommodate him. As a result he had been obliged to secure the necessary treatment at a private hospital. According to the Constitutional Court in *Soobramoney* Para 18 the claimant could in fact have been accommodated in more than one of the hospitals which turned him away. According to the court this is precisely the sort of case which would fall within s27 (3). It is one in which emergency treatment was clearly necessary. The occurrence was sudden, the patient had no opportunity of making arrangements in advance for the treatment that was required, and there was urgency in securing the treatment in order to stabilize his condition. The treatment was available but denied. But the Constitutional Court in *Soobramoney* Para 21 disappointingly held that the situation of a person suffering from chronic renal failure and requiring dialysis two to three times a week to remain alive was not an emergency calling for immediate remedial treatment. Instead it was an ongoing state of affairs resulting from an incurable deterioration of the applicant’s renal function. Accordingly s27 (3) did not apply for him to be admitted on a dialysis program. But Chaskalson P in this case gave a common sense interpretation to the right not to be refused emergency medical treatment: “The purpose of the right seems to be to ensure that treatment is given in an emergency, and is not frustrated by reason of bureaucratic requirements or other formalities. A person who suffers a sudden catastrophe which calls for immediate medical attention should not be refused ambulance or other emergency services which are available and should not be turned away from a hospital which is able to provide the necessary treatment. What the section requires is that remedial treatment that is necessary and available be given immediately to avert that harm.”

<sup>179</sup> Section 5 of the *National Health Act* 61 of 2003 provides that public and private health care providers or health establishments may not refuse anyone emergency medical treatment.

<sup>180</sup> From a constitutional perspective *Currie and De Waal* (2005) 593 with reference to S8 (2) of the *Bill of Rights* 3.3

hospitals to render emergency medical treatment which does not include routine medical treatment or free services.<sup>181</sup>

### 13.7 Summary and Conclusions

It is evident from the scope of this chapter that the impact of the *Constitution* on the law in general is far-reaching and profound. The *Constitution* is also said to affect not only the relationship between the State and other government structures and its citizens, but also, private relationships between business enterprises and their clients. It includes therefore, the relationship between hospitals and patients, including private hospitals and their patients.

Besides the impact of the *Constitution* on the law in general, it is evident from this chapter that the *Constitution* and especially the *Bill of Rights*, also impact on the law of contract.

It is clear from the discourse in this chapter that the jurisprudence, in respect of the constitutional approach to the law of contract, is sparse and hitherto under-developed. Although the South African courts have not done much to enhance the jurisprudence, the South African legal writers have made some significant contributions in developing the said jurisprudence.

The scope of their writings emphasize the influence of the *Bill of Rights* on contractual law principles, including, the maxim *pacta sunt servanda*, the waiving or limiting of contractual rights and the effect of public policy in the new constitutional dispensations. It is evident, in this chapter that the maxim *pacta sunt servanda* has, for centuries and continues to play,

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(b) (iii) in Chapter 3 which relate to conduct of private persons or juristic persons state that the right may be applied horizontally, entailing a duty for private hospitals. This view is supported by Christie *Bill of Rights Compendium* (2002) 3H-40 who states that section 27(3) has an unrestricted application and applies to medical practitioners in private practice and private hospitals. To give effect to section 27(3) the writer suggests that it will be necessary to develop the common law further and to impose a duty in delict on other medically qualified persons to render assistance in medical emergency. It also appears that Christie supports the stance taken by the court a quo in the *Afrox case*. It was held in the court a quo that as a patient had exercised his right of access to healthcare services, a private hospital could not rely on an exemption clause in its admission form without drawing the patient's attention to the clause and explaining its impact and significance. On appeal however the Supreme Court of Appeal held that section 27 did not have the effect and had to be read with the constitutional value of freedom of contract. See however the short answer to this approach as noted by Harms JA in *Johannesburg Country Club v Stott* 2004 (5) SA 511 (SCA) 518-519 in which the court mooted for possible change to the law when dealing with exemption clauses. In particular the court referred to the English position in the law of contract in which the *Unfair Contract Terms Act 1977* play a significant role.

<sup>181</sup> Currie and De Waal (2005) 593 also state that emergency treatment may not be refused because of lack of funds, but payment for treatment may be sought after the treatment has been provided.

an influencing role in contract law, universally. But a welcome line was drawn quite recently when the Constitutional Court declared that the principle of *pacta sunt servanda* is not a sacred cow that should trump all other considerations.

From the discussions in this chapter it is also clear that, whilst at common law contractual autonomy played a crucial role when certain rights are waived or limited, this position has changed since the introduction of the new constitutional order. It is advocated, by certain legal writers, that certain rights, as enshrined in the *Bill of Rights*, are inalienable and incapable of waiver. One of these rights is said to be the right to healthcare which is regulated by professional rules, ethics and other professional codes. In addition, the right to healthcare is also controlled by statutory law, on which private hospitals are dependant for the obtainment and maintenance of the licensing of the hospitals. One of the fundamental duties, in this regard, is for hospital to maintain reasonable standards of care and not to harm the patients in any way. In terms of the *Constitution*, access to healthcare services, including standards of care are guaranteed. It can therefore be argued that as obligations to maintain standards of care are derived from the *Constitution* and are inescapable, these obligations cannot be excluded by way of contract.

It is also evident, in the discussions in this chapter, that public policy continues to play a fundamental role as an aide to measure the conduct of governmental organs, businesses and citizens. It is especially in the law of contract that public policy continues to make its presence felt in aiding to determine which contracts, or contractual provisions, fall foul of the law of general application and since the introduction of the Constitution, to be inconsistent with the *Constitution*. It is also evident from this chapter that in the new constitutional dispensation, the values underlying fundamental rights protected in the *Bill of Rights* are considered as important policy factors, determining public policy. Besides the values of freedom, human dignity and equality, it has been suggested that values such as reasonableness, fairness, normative values and ethics and the right to access to the courts ought, also, to be considered as factors which may, very well, in certain circumstances, influence public policy.

The scope of this chapter also deals with selective provisions of the *Bill of Rights* and how they impact on the law of contract. They include, *inter alia*, sections 8, 9, 34, 36 and 39. What were also discussed very briefly are the *South African Constitution* and the right to healthcare. These discussions include to what extent the right to life, dignity and emergency treatment impact on health care. From the provisions of the *Bill of Rights* chosen for the discourse in this chapter, it is clear that, especially sections 9, 34 and 39

will play a fundamental role in our discussion in the succeeding Chapter 14 in determining whether exclusionary clauses in hospital contracts, exonerating hospitals or their staff from liability arising from their negligence, causing damages to a patient, ought to be declared invalid as against public policy and inconsistent with constitutional values. The subsequent Chapter 14 will focus on the core focal point of the research undertaken. The discourse in this chapter will consider, in detail, the attitude of the different jurisdictions chosen, towards the validity of exclusionary clauses in hospital contracts. This chapter will serve as a legal vehicle, by means of which the South African position is measured. The succeeding chapter will also serve as a vehicle for possible legal reform. What will also be considered is whether the South African courts should be seized with the judicial task of bringing about possible legal reform or whether the legislature ought to step in, in bringing about the much needed reform?

Consequently, the effect of exclusionary clauses in hospital contracts is the subject of the next chapter.

## Chapter 14

### Legitimacy of exclusionary clauses in medical contracts: Conclusions, Comparative Analysis and Recommendations.

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#### 14.1 Introduction

Since the inception of standard form contracts and since it has now world wide become the order of the day, standard form contracts or contracts of adhesion as it is also known, are today found in all walks of life, ranging from commerce, insurance, transport, communications, public services for example warehousing, garage-keeping, parking etc. It has also found its way into medical contracts.

One of striking features of these forms of contracts, as was stated earlier, is that they usually contain exclusionary or exculpatory or exemption clauses. An outstanding characteristic of these types of clauses is that they are utilized to exclude unforeseen risks, or exclude one of the contracting parties against liability for tort and/or contract, where personal injury is sustained by one of the contracting parties. This has sparked off, as was seen in the previous Chapters, much criticism, especially, in jurisdictions such as England, the United States of America and South Africa, to which this thesis has been restricted. It is, especially, public policy which has often been used to invalidate exclusionary or exculpatory clauses.

Various other rules, as was seen earlier, have been adopted in the aforementioned countries to curb the unfairness these types of clauses bring with them, methods of interpretation and construction, standards of notice to be given in respect of certain terms etc.

Besides the use of these type of clauses in commercial and other business contracts, exclusionary clauses or exculpatory clauses (sometimes referred to as indemnity clauses), also found their way into hospital contracts or contracts designed by other health care providers, including, doctors, wherein the hospital or other health care providers enter into an agreement with the patient.

Exclusionary, or exculpatory, or indemnity clauses have, for many years, especially in the jurisdictions of the United States of America and South Africa, been widely included in admission forms used by hospitals and other health care providers.

In South African hospitals, especially private hospital, the usual procedure with the admission of patients, is for the clerical staff to make an entry on the admission form (which also serves as a consent form) of the type of treatment or operation which will be undertaken. Some private hospitals make use of an exemption form containing an exclusionary or exculpatory clause, which is signed, depending on the situation, by the patient or his or her parents, guardians or wards or immediate family as a condition of admission to the hospital. Though these clauses may vary in wording their effect it is submitted, are the same.

A typical exemption clause, contained in such an admission form, used by a private hospital, the St George's Hospital in Port Elizabeth, provides:

*"I absolve the hospital and/or its employees and/or agents from all liability for and I hereby indemnify each of them against any claims which may be made by any person (including a dependant of the patient for damage or loss of any nature whatsoever including consequential loss or special damage of any kind) arising directly or indirectly out of any injury (including fatal injury) sustained by or any harm caused to the patient or any disease (including fatal injury) sustained by or any harm caused to the patient or any disease (including terminal disease) contracted by the patient whatever the cause may be excluding only wilful default on the part of the hospital, its employees or agents."*<sup>1</sup>

The following admission form, including an indemnity clause, is used by the Sandton Medi-Clinic, which reads:

*"I, the undersigned, hereby consent to the administration of a general anaesthetic and to the performance of an operation upon ..... (The patient) for Haemorrhoidectomy and excision of polyps.*

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<sup>1</sup> Admission form used at St George's Hospital, Port Elizabeth 2007.

*Therefore, by signing this consent to operation form, a patient and any person who signs this form on behalf of such patient, indemnify the Medi -Clinic Group of Companies, as well as their employees, officials and agents against all liability to such patient and to the person who signs this form on behalf of such patient, for any loss or damage which originates from any cause whatsoever.*

*I hereby authorize Medi -Clinic Limited to destroy in any manner which they deem fit any tissue or part of my/the patient's body which may be removed during an operation to be performed on me/the patient in this hospital." <sup>2</sup>*

Because of the United Kingdom's unique public health system, namely, the NHS System, these types of clauses have not been included in their contracts. These types of contracts, including exclusionary clauses or exculpatory clauses, are frequently included in agreements concerning private hospitals or private agreements involving private health care providers, in countries such as South African and the United States of America. The said clauses, besides their wide inclusion, have, nonetheless, often formed the subject of lively academic debate and legal scrutiny, especially in the United States of America, but, more recently, also in South Africa.

What follows in the discussions hereinafter, includes, the controversy that surrounds the circumstances under which, a contract containing an exculpatory clause, is signed without a contracting party, being familiar with the contents and without the contents being brought to his/her attention. It also covers the legal effect thereof, in especially, the United States of America and South Africa.

At the outset, it can be stated, without any reservation, the aim of the hospital and health care provider, in including an exclusionary or exculpatory clause in such a contract, is to escape liability which, often has a far reaching effect on the plaintiff more specifically, in denying him the opportunity of suing the hospital or health care provider for the personal injury and/or damages which the patient had suffered as a result of the former's negligence.

The position with regard to the legitimacy of exclusion clauses in medical contracts seems to be well settled in the United States of America. It appears that most legal writers are against them and most courts in the United States of America have struck down, or severely limited, attempts by hospitals and other health care providers, to use written clauses containing exclusionary clauses, to exclude or to reduce their liability for negligence.

The underlying reasons for the courts' attitude, as well as that of the legal writers, have

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<sup>2</sup> Admission form used at Sandston Medic-Clinic, Sandston Gating 1996.

often, ranged from it being offensive to public policy and violative to public interest, which exists to protect the patient against the practise of minimum levels of performance in the practise of medicine. Further, the hospital's/other health care provider's duty of care is inalienable, for, to hold otherwise, would result in the hospital/other health care provider being given a license to practise negligently, which, in turn, will result in the standards not been upheld.

Another major reason advanced, is that the patient do not stand upon equal footing of equality with that of the hospital/other health care provider. The patient is regarded as the weaker party, who is in a disadvantageous position, when entering into the contract with the hospital/other health care provider.

The position in England seems to be fairly settled as well. Although there are no legal writings on hand, nor, has there been judicial pronouncement on the legitimacy of exclusion clauses in medical contracts, it has been argued that the health system in England does not encourage the creation of private hospitals, where these types of agreements are promoted. Besides, even if a clause was to be inserted in a hospital/other health care provider contract with a patient, excluding liability for personal injury and damages arising from the hospital/health care provider's negligent conduct, English legislative measures in the form of the Unfair Contract Terms Act 1977, protect the patient in that, the clause will be pronounced unenforceable. In this regard the Act places a prohibition on the exclusion or restriction of liability for death or personal injury resulting from negligence, ensuring that a claim for damages under these circumstances remains an inalienable right.

The South African legal position remains less certain, in that, what follows from the discussions surrounding the legitimacy of exclusion clauses in medical contracts, there appears to be a huge divide between the judicial thinking with special reference the cases of *Burger v Medi-Clinic Limited* decided in the WLD (1999) (Unreported) in case number 97/25429, *Afrox Healthcare Bpk v Strydom* 2002 (6) SA 21 (SCA), *Napier v Barkhuizen* 2006 (4) SA 1 (SCA); 2006 (9) BCLR 1011 (SCA) and the subsequent Constitutional Court judgement of *Barkhuizen v Napier* 2007 (5) SA 323 (CC) 66 and the thinking of the South African legal writers. From what follows, it also appears that it may be more feasible and in the interests of fairness, that an attempt be made, in South Africa, to follow the example set by England in 1977, namely, to introduce legislative measures as means to regulate standard terms hurtful to contracting parties. Moreover, attempts should be made to curb terms which are aimed at excluding or restricting the liability resulting from, particularly, the conduct of hospitals and other health care providers, for death or personal injury, resulting

from their negligence.

## 14.2 Application of exclusion clauses in different jurisdictions

### 14.2.1 SOUTH AFRICA

#### 14.2.1.1 Legal Writings

In South Africa, it is generally accepted by the legal writers that exclusion clauses in, especially, hospital contracts, seek to protect the hospital against mishaps occurring in connection with the conduct of the nursing staff, doctors employed by the hospitals, or the general handling of the patient. It is also accepted that some of these clauses are couched in such wide wording, that they purport to protect the hospital and its staff against claims, based upon gross negligence, recklessness or intentional acts performed by hospital staff.<sup>3</sup>

There appears, however, to be a significant difference of opinion, today, amongst the South African legal writers, regarding the legal effect of exclusion clauses when incorporated in hospital contracts, in South Africa. Two schools of thought have emerged in this regard. The first school relies heavily on the doctrine of freedom of contract and the maxim *pacta sunt servanda*, wherein, the individual is free to decide whether, with whom, and on what terms he/she is to contract. In addition, once the agreement has been concluded, the enforcement of the contractual obligation is executed, consistent with freedom of contract and consensuality. Ardent supporters of this approach include the author *Hahlo*,<sup>4</sup> who holds the view:

*So he knew that he was signing a document which contained terms of his contract. Just below the items he had filled in, but above the space for his signature, he saw what he himself described as a long "passage". The merest glance at it would have shown him that it commenced with the words: "I hereby agree." But "he did not bother to read it." Yet he signed. He knew that he was assenting to something and indeed to something in addition to the terms he had himself filled in. If he chose not to read what that additional something was, he was, with his open eyes, taking the risk of being bound by it. He cannot then be heard to say that his ignorance of what was in it was a justus error."*<sup>5</sup>

*Burchell and Schäfer*<sup>6</sup> adopt a similar conservative and restrictive approach when assessing the validity of exemption or exculpatory clauses, when they state:

*"If a patient signed a form containing such a clause the maxim caveat subscriptor applies; let the signatory beware. The patient will escape the effect of the clause only by proving operative mistake or misrepresentation, or*

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<sup>3</sup> Van Dokkum "Hospital consent forms" *Stellenbosch Law Review* (1996) 1, 2; Burchell and Schaffer "Liability of hospitals for negligence" *Businessman's Law* (1977) 109; Strauss *Doctor, Patient and the Law* (1991) 305.

<sup>4</sup> "Unfair Contract terms in Civil Law Systems" (1981) Vol. 98 *SA Law Journal* 70-71.

<sup>5</sup> Hahlo "Unfair Contract terms in Civil Law Systems" (1981) Vol. 98 *SA Law Journal* 70-71.

<sup>6</sup> "Liability of Hospitals for Negligence" *Businessman's Law* (1977) 109.



he may, despite the operation of the clause, recover damages from the hospital for intentional or possible grossly negligence conduct on the part of its servants or staff. Obviously, the patient could still recover damages from the negligent doctor or nurse, for example, since they are not parties to the contract. Although in America such an exemption or exculpatory agreement between hospital and patient is regarded as invalid in certain States, our courts are not at liberty to declare these clauses invalid. The most that our courts can do is to place as narrow an interpretation upon such an agreement as possible. However, these exemption clauses which are signed by patients entering a private hospital are often worded in such explicit terms that there is little room for restrictive interpretation." <sup>7</sup>

A similar view is expressed by *Van Aswegen*, <sup>8</sup> when relying on the general principle of party autonomy or freedom of contract, wherein he states:

"..... Legal subjects are free to regulate their legal position by agreement subject to generally applicable legal rules. This includes the freedom to exclude or limit the ambit of any form of liability for breach of contract. This freedom is, however, limited. Any choice which is *contra bonos mores* is therefore invalid. In accordance with this general proposition, a professional is in general free to regulate his liability towards his client by means of agreement, and so-called exclusion or limitation clauses is a general feature of contracts between professionals and clients. Such clauses can in principle apply to delictual and contractual liability, and consequently there is no inherent difference between liability for breach of contract and delict in this regard." <sup>9</sup>

*Van Oosten* <sup>10</sup> also holds the view in similar terms that:

" ..... provided they are stated in unambiguous terms, exemption clauses are enforceable unless they exclude liability for intentional medical malpractice in which case they will be regarded by the courts as *contra bonos mores* and, hence null and void." Whether or not a clause excluding liability for gross medical negligence will be upheld is according to the writer "..... At least, open to doubt." <sup>11</sup>

The other school of thought rely more greatly on aspects such as fairness, equity, ethics, social and moral values and other factors in denouncing the validity of exclusionary clauses in a contract, in which a patient consents to releasing a hospital/other health care provider, including, a medical practitioner, from a legal obligation to show due skill and care. The

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<sup>7</sup> Burchell and Schäfer "Liability of hospitals for negligence" *Businessman's Law* (1977) 109. See also van Dokkum "Hospital consent forms" *Stellenbosch Law Review* 1996 (2) 251 set out the South African position with regard to Hospital Consent Forms as follows: "Our courts sets limits on, and interpret, exemption clauses narrowly or restrictively. Permissibility is determined by public policy, but the courts apply this approach with great care and circumspection." See further Turpin "Contract and Imposed Terms" (1956) *South African Law Journal* 251.

<sup>8</sup> "Professional Liability" *An unpublished thesis University of South Africa* (1966).

<sup>9</sup> Van Aswegen "Professional liability" *An unpublished thesis University of South Africa* (1966).

<sup>10</sup> *Encyclopedia* (1996) 88.

<sup>11</sup> Van Oosten *Encyclopaedia* (1996) 88. See also Strauss (1991) 305; Claassen and Verschoor *Medical Negligence* (1992) 102-103; Burchell and Schaffer (1977) 109-115.

writers *Gordon, Turner and Price*,<sup>12</sup> as long ago as 1953, persuasively argue that "in the so-called "contracting out" of liability cases, involving medical practitioners, although consent may be clearly established, it may be of only very limited effect," that is, "consent can only protect the surgeon against a claim for assault" and further "any attempt by a practitioner to contract out of liability for malpractice may be considered at least probable, that the courts would declare such a contract void as against public policy, leaving the patient's right to sue for damages unimpaired."

The writers continue to argue that "society cannot allow a medical practitioner to take such an advantage of his patient in regard to whom he stands in a position of such power."<sup>13</sup>

In a similar vein, relying upon societal dictates, the authors *Strauss and Strydom*,<sup>14</sup> as far back as 1967, persuasively argue that the trust position of the medical practitioner in relation to the patient, in which the medical practitioner, through his/her expert knowledge, dominates the relationship, in that the patient is dependant upon the medical practitioner's judgement and conduct, result in societal dictates, demanding that in executing his/her profession, the medical practitioner ought not be allowed to relax the degree of care and skill expected of him/her as a practitioner, notwithstanding, the patient consenting thereto. To allow that, would be tantamount to giving the patient the authority to licence the practitioner to deviate from recognised medical norms and ethics. This clearly so it is persuasively argued, would be against public policy or the so-called *boni mores*.

In this regard, the authors opine that exclusionary clauses in contracts concerning a doctor are *de lege ferenda* when they write:

"Wat eersgenoemde soort afstanddoening betref, meen ons dat hier presies dieselfde oorweginge geld as by die verweer van vrywillige aanvaarding van risiko en dat sodanige afstanddoening teenoor 'n geneesheer as kragteloos behandel moet word omdat dit teen die goeie sedes indruis. Indien die pasient al by voorbaat 'n moontlike latere aanspreek op skadevergoeding weens 'n geneesheer se nalatige optrede kan prysgee, sou dit daarop neerkom dat hy as't ware die medikus "lisensieer" om sy praktyk nalatiglik te beoefen. Geneeshere sou maklik misbruik kon maak van sodanige afstanddoenings deur eenvoudig by voorbaat alle pasiente 'n skriftelike afstanddoening te laat teken. So 'n praktyk sou 'n miskennening wees van die vertrouensposisie waarin the geneesheer hom vanweë sy deskundige kennis bevind."<sup>15</sup>

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<sup>12</sup> *Medical Jurisprudence* (1953) 153ff, 188ff.

<sup>13</sup> Gordon, Turner and Price *Medical Jurisprudence* (1953) 153ff, 188ff.

<sup>14</sup> *Die Suid-Afrikaanse Geneeskundige Reg* (1967) 317ff.

<sup>15</sup> Strauss and Strydom *Die Suid-Afrikaanse Geneeskundige Reg* (1967) 317ff.

I am, respectfully, of the opinion, that the approach adopted by the authors mentioned just hereinbefore, accords with the modern day approach, wherein significant value is attached to social and moral values, as well as the constitutionally acquired values, founded upon fairness, reasonableness and equity. It is submitted, although reference is made by the authors to the position of the medical practitioner, the same ought to apply to hospitals and other health care providers. It is also submitted should the patient be allowed to abandon a potential claim for damages flowing from the negligent conduct of a physician, or hospital for that matter, it will result in the medical practitioner/hospital/other health care provider, being given a license to practise negligently, it is furthermore submitted, should this be allowed, medical practitioners/hospitals/other health care providers, may easily abuse such abandonment of rights, by getting their patients to sign written abandonments. To allow such practise will result in recognition being given to the breach of the position of trust, which the medical practitioner/hospital/other health care provider occupies, arising from his expert knowledge.

More recently, the validity of an exclusionary clause in a hospital contract, excluding a hospital for liability and arising from both ordinary negligence and gross negligence, received the extensive attention of the modern South African legal writers. This arose from the much controversy surrounding the aforementioned Supreme Court of Appeal's judgement in *Afrox Healthcare Bpk v Strydom* 2002 (6) SA 21 (SCA). In this judgement, the court found, *inter alia*, that the admission document signed by the patient (Respondent), on admission to the hospital, and containing an exemption clause "*absolving the hospital and/or its employer and/or agents from all liability and indemnifying from any claim instituted for damages or loss flowing from any injury or damages caused to the patient through negligence excluding intentional omission*", to be valid.

The court, with regard to exclusionary and indemnity clauses, found that these type of clauses should be adjudged by adopting the common legal approach and that such clauses should be interpreted restrictively. Furthermore, the standard to be applied in respect of exclusionary clauses was, according to the court, "*no different to that applicable to other contractual terms*". Public policy considerations, according to the court, ought to dictate. It was further held that the respondent had not relied on gross negligence on the part of the appellant's nursing staff in his pleadings. Consequently, the court left open the question of whether the contractual exclusion of a hospital's liability for damages, caused by the gross negligence of its nursing staff, was in conflict with the public interest. Moreover, the court consequently held that the contractual provision, in terms of which a hospital excluded liability for the negligent conduct of its nursing staff, was not against public interest as

contended by the respondent and therefore valid.

The modern South African legal writers attack the dictum of Brand JA in the *Afrox case* on several grounds, including the following:

The writers *Carstens and Kok* <sup>16</sup> convincingly argue that disclaimers in hospital contracts, which have traditionally been assessed within the framework of the law of contract, may also be assessed with reference to medico-legal considerations. According to them, under the influence of a value-driven Constitution in South Africa, it is healthy to consider broader medico-legal considerations, including, medical ethics and medical law. <sup>17</sup> In this regard, the authors persuasively argue that the ethical canons/instruments, implemented and upheld through centuries, commencing with the Hippocratic Oath and continuing with the Declaration of Geneva (1968), give guidelines *"for the ethical practice of medicine/protection of human rights within a medical context would be, on strict interpretation, be against the use of disclaimers."* <sup>18</sup>

For that reason, the authors persuasively argue that a hospital/medical practitioner/other health care provider, by accepting and treating a patient, are, first and foremost, required 'to do no harm' and 'to act in the best interest of the patient'. <sup>19</sup>

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<sup>16</sup> "An assessment of the use of disclaimers by South African hospitals in view of Constitutional demands, Foreign Law and medico-legal considerations" (2005) 78 *SAPR/PL* 430 18.

<sup>17</sup> Carstens and Kok (2005) 78 *SAPR/PL* 430 18 who is in favour of the notion that any assessment of law within a medico-legal context (such as disclaimers against medical negligence in hospital contracts) should be interpreted on a holistic inter-and-multidisciplinary approach as, by analogy, persuasively been argued by Steyn "The Law of malpractice liability in clinical psychiatry" Unpublished *L.L.M. dissertation UNISA* (2003) 3-27.

<sup>18</sup> Carstens and Kok (2005) 78 *SAPR/PL* 450 cites with approval the authorities. In terms of the Hippocratic Oath, which in part, reads as follows: *"I will prescribe regimen to the good of my patients according to my ability and my judgement and never do harm to anyone"*? The Hippocratic Oath according to Carstens and Kok is often acknowledged by both physicians and lay people, to be the foundation of medical ethics for physicians in the West. The Declaration of Geneva (1968) which reads in part as follows: *"I will practice my profession with conscience and dignity, the health of my patient will be my first consideration."* International Code of Medical Ethics and The Declaration of Helsinki (as revised in 2000) (which, although dealing with biomedical research involving human subjects), reads in part as follows: *"It is the mission of the medical doctor to safeguard the health of the people."* For a comprehensive discussion of these codes/instruments see Mason and McCall-Smith (1991) 439-446; See also Roth "Medicine's Ethical Responsibility in Veatch (Ed) Cross Cultural Perspectives in Medical Ethics (1989) 150 wherein the writer opines at 153 that *"medical ethics have, over years, acquired a rather philosophical character ..... it has its roots in a societal concept of summum bonum, with interesting modifications such as that expressed in the repeated maxim primun non nocere"* which means medical ethics have its roots in the highest order which cannot be compromised.

<sup>19</sup> Carstens and Kok (2005) 78 *SAPR/PL* 450. See also Veatch (1989) 2; Beauchamp and Childress (1994) 3.

They go further to state that ethics are a reflection on the moral intuitions and moral choices that people make.<sup>20</sup> For that reason, it is argued that societal moral dictates, would indicate:

" ..... disclaimers against medical negligence in hospital contracts would amount to an unreasonable/unfair/unethical acceptance on the part of a patient to contract to the possibility of harm (in the form of personal injury/death resulting from medical malpractice) by an attending medical practitioner (albeit in the hospital setting) who is ethically bound not to do harm." <sup>21</sup>

In so far as the effect of medical law/health care law on exclusionary clauses in hospital contracts is concerned, and with regard being had to the object the said law aims to protect, several writers have convincingly argued before, that a patient is in a disadvantageous position when entering into agreements, with the hospitals, containing exclusionary clauses. From a public policy viewpoint, therefore, the validity of exemption clauses is an undesirable feature.<sup>22</sup>

The fore stated, it is argued, is in line with the strong views held by legal writers against exemption clauses in broad terms where the parties to the contract stand in an unequal bargaining position. In this regard *Van der Merwe et al*<sup>23</sup> remarked:

*"Exemption clauses have become the object of suspicion, in as much as they are said to enable contractants who are in a strong bargaining position to exploit the weaker co-contractants."* <sup>24</sup>

The authors go on to state that an exemption clause may fail for lack of consensus between the parties. If there is no consensus the clause will be invalid where one of the parties has abused the other party's circumstances to such proportions that consensus has, in effect, been improperly obtained.<sup>25</sup>

The writers *Bhana and Pieterse*<sup>26</sup> are especially critical of the Supreme Court of Appeal's

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<sup>20</sup> Carstens and Kok (2005) 78 *SAPR/PL* 450; Veatch (1989) 2-7; Beauchamp and Childress (1994) 3; Mason and McCall-Smith (1991) 4.

<sup>21</sup> Carstens and Kok (2005) 78 *SAPR/PL* 450; Veatch (1989) 2-7; Beauchamp and Childress (1994) 3; Mason and McCall-Smith (1991) 4.

<sup>22</sup> Strauss (1991) 305; Claassen and Verschoor (1992) 103.

<sup>23</sup> *Contract - General Principles* (2003) 274.

<sup>24</sup> Van der Merwe et al (2003) 274.

<sup>25</sup> Van der Merwe et al (2003) 275.

<sup>26</sup> "Towards a reconciliation of contract law and constitutional values: Brisley and Afrox Revisited" (2005) 122 *SALJ*

abstract approach in determining, both, the existence and effect of the unequal bargaining power between contracting parties. In this regard, the writers correctly argue that the court failed to take proper account of the normative considerations of good faith, fairness and equality that were in play in the circumstances. The writers also convincingly argue where the contracting parties stand in an unequal bargaining position, the weaker party cannot contract out of his fundamental rights as set out in the Bill of Rights.

*Van den Heever*,<sup>27</sup> with regard to the unequal bargaining position of the patient in relation to the hospital, quite correctly opines that any patient who is admitted to hospital for serious illness, trauma or even for elective surgery (the cause of which often results in the patient believing that he or she has no choice but to undergo the requisite treatment), is not in an equal bargaining position with the hospital, as he or she will often be incapable of negotiating the terms of his or her admission under these circumstances. The same holds, thus, for family members (signing on behalf of a patient) who, under such stressful and traumatic circumstances, are more concerned about their loved ones receiving the assistance they need than worrying about the fine print.

Support for this view is expressed by *Jansen and Smith*,<sup>28</sup> who opines that true consensus is not possible, under the circumstances, due to the unequal bargaining position of the parties.

*Tladi*<sup>29</sup> also expresses the view that "*freedom of contract, when abused by the stronger party to achieve unreasonable and unjust contracts undermines the values of equality and dignity that are supposed to permeate our constitutional dispensation*".

And further:

*"When people go to hospitals in need of medical care, they are not in a position to negotiate their contract. It seems unconscionable to use this inability to bargain to exclude all liability, save intention, as the clause in question purports. The Court confidently assumes that the use and scope of indemnity clauses can be curbed by business considerations (at 8). This laissez-faire attitude ignores the reality that most hospitals (if not all) have such indemnity clauses in their admissions forms. The result of this is that a patient cannot decide to hop on to*

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865 at 888.

<sup>27</sup> "Exclusion of Liability of Private Hospitals in South Africa" *De Rebus* (April 2003) 47-48.

<sup>28</sup> "Hospital Disclaimers: Afrox Healthcare v Strydom" 2003 *Journal for Juridical Science* 28(2) 210, 218.

<sup>29</sup> "One step forward, two steps back for Constitutionalising the Common Law: Afrox Healthcare v Strydom" (2002) 17 *SAPR/PL* 473, 477.

another hospital if he or she is dissatisfied with the contractual arrangement. One of the reasons for the heed to 'constitutionalise' the common law is to protect the weak and the exploited. The clause complained of exploits the lack of bargaining power of patients to escape a duty of care owed under the common law." <sup>30</sup>

More recently, legal writers have also persuasively argued that "for reasons of public policy, hospitals should take full responsibility for sub-standard negligent performance of services, organisational failures and systemic defects." For that reason, an exemption clause is seen as constituting a *pactum de non petendo in anticipando*, whereby the parties envisage the commission of an unlawful act. In such an event, the aggrieved party agrees not to institute an action which he would otherwise have enjoyed. <sup>31</sup>

The fore stated, according to some of the South African legal writers, should never be tolerated. It is argued that in the hospital-patient relationship, akin to that of the doctor-patient relationship, a duty to take care and to act reasonably arises the minute the patient enters into an agreement with the hospital or medical practitioner or other health care provider. Flowing from this relationship, so it is argued, there also arises a position of trust between the parties. Once a position of trust is created between the parties concerned, the hospital/medical practitioner/other health care provider may not breach that position of trust by conducting himself/herself in a negligence manner without incurring liability. <sup>32</sup> It is submitted further, that the duty to take care and to act reasonably, is inalienable and cannot be excluded by way of exclusionary clauses to hospital contracts.

In this regard, *Naude and Lubbe* <sup>33</sup> suggest the parties could, therefore, not modify the consequences of a contract, in a manner opposed to the naturalia of the contract itself. The naturalia of the contract is founded in the duty to take care, which arises from the relationship between the medical caregiver and the patient. <sup>34</sup> The legal writers persuasively

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<sup>30</sup> Tladi "One step forward, two steps back for Constitutionalising the Common Law: Afrox Healthcare v Strydom" (2002) 17 *SAPR/PL* 473, 477.

<sup>31</sup> See Cronje-Retief (2000) 474; Van den Heever (2003) 47-48 quoted in Carstens and Kok (2005) 78 *SAPR/PL* 454.

<sup>32</sup> It is especially those writers who argue that the type of contract which exists between doctor and patient is one of a contract of mandate, who advance the argument that from such agreement a position of trust is created. See Strauss and Strydom (1967) 111; De Wet and Van Wyk (1992) 348. The writers opine that in creating the trust position, the doctor undertakes to execute his or her duties with the necessary good faith and with the utmost care and skill.

<sup>33</sup> "Exemption Clauses - A Rethink occasioned by Afrox Healthcare Bpk v Strydom" (2005) 122 *SALJ* 444.

<sup>34</sup> Naude and Lubbe (2005) 122 *SALJ* 444, 447.

argue, to allow a medical service provider to exempt the degree of skill expected of him/her/it and which is part of the primary or essential obligation undertaken by him/her/it, would be contrary to the essence of the basic contractual purpose of the parties to such a contract.<sup>35</sup>

Moreover, the writers also persuasively argue that to recognise exemption clauses in admission forms, under these circumstances, would amount to an erosion of the patient's trust in the required professional standards of the medical service provider.<sup>36</sup>

The legal writers, *Naude and Lubbe*,<sup>37</sup> rightfully support the idea that an agreement to obtain medical care is not a simple commercial contract or transaction. What is at stake here is not the patient's patrimonial interest (unlike an ordinary commercial contract), but, the patient's bodily inviolability. As it is, so it is persuasively argued, that to allow such an agreement to be put on the same footing as a commercial agreement, whilst there is an imbalance between the interests of the parties, would be to allow an improper, unconscionable advantage been gained over the patient. A further issue arising from these types of contracts in a commercial sense, which further serves as criticism to the *Afrox dictum*, is the fact that a large proportion of the South African population is seldom, if ever, exposed to commercial contracts. This factor, coupled with language difficulties, implies that many South Africans would not expect to encounter such a clause (let alone understand the implications thereof.)<sup>38</sup>

I am, respectfully, of the opinion that the answer should be in the affirmative, when *Jansen*

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<sup>35</sup> Naude and Lubbe (2005) 122 *SALJ* 444, 456-459.

<sup>36</sup> Naude and Lubbe (2005) 122 *SALJ* 444, 456.

<sup>37</sup> "Exemption Clauses - A Rethink occasioned by *Afrox Healthcare Bpk v Strydom* (2005) 122 *SALJ* 444 at 460-463 quoting the authority Jan Hendrik Esser, *Who cares? Reflections on Business in Healthcare* Unpublished LLM Thesis, University of Stellenbosch (2001) 72 who writes that a patient in seeking healthcare services looks for virtues like compassion, integrity and trust-worthiness. See also Van den Heever (April 2003) 47; De Rebus *Jansen and Smith* (2003) 28 (2) 214 at 218; Hawthorne "Closing of the open norms in the Law of Contract" (2004) 67 (2) *THRHR* 294, 299.

<sup>38</sup> *Jansen and Smith* (2003) 28 (2) 210 at 218. Similar views are expressed by Carstens and Pearmain *Foundational Principles of South African Medical Law* (2007) 458ff, 467. The writers hold the view that the court in the *Afrox* case should have distinguished between suppliers of healthcare services and other suppliers of services. By not distinguishing between these to extreme type of services will lead to a patient who might as well go to Joe Public for the same services. Yet the service supplied by other commercial enterprises are clearly not the same as healthcare suppliers who are ethically expected to provide in terms of their professional rules to take due and proper care and exercise their professional skill in the interests of the patients.

and Smith<sup>39</sup> pose the question: "In the light of the abovementioned, could it thus not be expected that at the very least, a private hospital should be placed under a legal duty to draw a patient's attention to and explain the consequences of, the exemption." <sup>40</sup>

Support for the above is also found in the writings of Tladi,<sup>41</sup> when the writer suggests:

*"The purpose of development of the common law in light of constitutional values would prohibit such an exploitation of unequal bargaining power. At the very least a proper development of the common law in terms of the Constitution, would require hospitals to inform the patients on admission and explain the consequences of such a clause as held by the High Court in Strydom v Afrox Healthcare."* <sup>42</sup>

The Supreme Court of Appeals, in the case of *Afrox Healthcare v Strydom*,<sup>43</sup> is also criticised by Tladi<sup>44</sup> for its "dismissal of the principles of reasonableness, justice, equity and good faith in contract law".<sup>45</sup>

The author Cronje-Retief<sup>46</sup> also comes out strongly against the use of exemption clauses in hospital contracts, based on public policy and public interests, when she writes:

*" ..... big institutions, corporations or other groups with unrestricted financial resources and adequate insurance exempt themselves from liability of such contracts, are effectively contra bonos mores, against public policy and/or public interest and should be declared invalid by our courts."* <sup>47</sup>

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<sup>39</sup> "Hospital Disclaimers: Afrox Healthcare v Strydom" 2003 *Journal for Juridical Service* (2003) 28 (3) 210 at 218.

<sup>40</sup> Jansen and Smith "Hospital Disclaimers: Afrox Healthcare v Strydom" 2003 *Journal for Juridical Service* (2003) 28 (2) 210 at 218; Carstens and Pearmain (2007) 467 pose a similar question why a lay person entering a hospital expect such a clause in an admission document?

<sup>41</sup> "One step forward, two steps back for Constitutionalizing the Common Law: Afrox Healthcare v Strydom" (2002) 17 *SAPR/PL* 473, 477.

<sup>42</sup> Tladi "One step forward, two steps back for Constitutionalizing the Common Law: Afrox Healthcare v Strydom" (2002) 17 *SAPR/PL* 473, 477.

<sup>43</sup> 2002 (6) SA 29 (A).

<sup>44</sup> "One step forward, two steps back for Constitutionalizing the Common Law: Afrox Healthcare v Strydom" (2002) 17 *SAPR/PL* 473, 477.

<sup>45</sup> Tladi "One step forward, two steps back for Constitutionalizing the Common Law: Afrox Healthcare v Strydom" (2002) 17 *SAPR/PL* 473, 477.

<sup>46</sup> The legal Liability of Hospitals *Unpublished LLD Thesis Orange Free State University* (1997) 434.

<sup>47</sup> Cronje-Retief The Legal Liability of Hospitals *Unpublished LLD Thesis Orange Free State University* (1997) 440-441. Support for Cronje-Retief's contention is found in Van den Heever (April 2003) 47-48 in which it is stated: "Hospitals should take responsibility for sub-standard negligent provision of services, organizational failure and systemic defects ..... The present untenable position in which a victim of a medical accident finds himself

The legal writer *Pearmain*<sup>48</sup> holds the view that there are certain obligations from which hospitals/medical practitioners/other health care providers cannot escape, especially where the bargaining power of the contracting parties is so unequal as to be non-existent on the side of the one, usually the patient.

*Bhana and Pieterse*<sup>49</sup> are equally critical of Brand JA's reasoning in the *Afrox* case. More particularly, the writers believe the learned judge, in following Cameron JA's dictum in the *Brisley* case, pertaining to the Constitutional value of contractual freedom and extending the principle to include; "*not only does freedom of contract form part of the Constitutional values of freedom and dignity, but it also constitutes an independent Constitutional value in itself*" is patently wrong. The writers add, such assertion "*wrongly indicates an ideological value judgement that seems out of step with the Constitutional text, context and ethos.*" It is, respectfully, submitted that, given the consumer welfarism drive and the international movement away from the traditional ethos of contractual freedom and sanctity of contract, (including the strong views recently expressed by the South African legal writers and academics) to a more value laden approach, including standards of fairness, reasonableness and equity, the approach adopted by Brand JA is out of step with such movement.

#### 14.2.1.2 Case Law

Although exclusion clauses or waiver clauses, also known as "owner's risk" clauses, are fairly common in agreements pertaining, for example, to insurance, finance, transport and storage of goods, many private hospitals in South Africa, have also incorporated exclusion clauses or waivers in their consent forms which they require patients or their parents, guardians or wards to sign prior to treatment. The validity of exclusion clauses or waiver clauses in the general contracts, as fore stated, was challenged in the South African courts for many decades. Although, as previously stated, it has become standard practise to include exclusion clauses in admission forms used by, especially, private hospitals, the legitimacy of the existence and application of these type of clauses and/or agreements was never questioned in the South African courts until 1999, in the case of *Burger v Medi-Clinic*

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*should in the public interest and with due regard to considerations of public policy be appropriately addressed either by the court, legislature or the hospitals themselves.*" See also Carstens and Pearmain (2007) 468 who opine that the rights to freedom of contract should not be preferred to the right to access to health care.

<sup>48</sup> "A Critical analysis of the Law of Health Service delivery in South Africa" *An unpublished LLD Thesis University of Pretoria* (2004) 492ff; See also Carstens and Pearmain (2007) 467.

<sup>49</sup> "Towards a reconciliation of contract law and contractual law values: *Brisley* and *Afrox* revisited" (2005) 122 *SALJ* 865, 879.

*Ltd.*<sup>50</sup> The facts of this case can be stated as follows:

The plaintiff, a former patient of the respondent hospital, sued the hospital owner for damages in the amount of R1 061 114 arising from the nursing staff's alleged negligence or gross negligence.

The patient had been admitted, in 1996, to the hospital, to undergo a haemorrhoid operation. The day after the operation, the patient vomited a blackish liquid and experienced nausea, faintness, dizziness, sweating, yawning and motionlessness. He was pale and his breathing was shallow. The patient later alleged that the nursing staff had failed to take reasonable steps to prevent him from suffering a vasovagal syncope, falling and injuring himself. He claimed that the staff, with full knowledge of his symptoms, discharged him from hospital, without first contacting his doctor. The patient attempted to go to the bathroom on his own, lost consciousness and fell on his head, fracturing his right cheekbone with consequent concussion, pain, depression and permanent disfigurement.

In their plea, the hospital denied most of the patient's allegations except for admitting that they had failed to inform the patient that he should not leave his bed and walk on his own. They also denied liability. As a special defence, the hospital relied on an indemnity clause in the operation consent form and claimed that the plaintiff had indemnified the defendant against any liability arising from his admission to the said clinic and for any injury or loss suffered pursuant to such admission and his treatment in that clinic.

The document is headed "Consent to Operation" and the content included the following:

*"I, the undersigned hereby consent to the administration of a General/Local anaesthetic and to the performance of an operation upon Mr DD Burger (The Patient) for Haemorrhoidectomy and excision of polyps Surgeon Dr D Grolman.*

*Therefore, by signing this consent to operation form, a patient and any person who signs this form on behalf of such patient, indemnify the Medi-Clinic Group of Companies, as well as all their employees, officials and agents against all liability to such patient and to the person who signs this form on behalf of such patient, for any loss or damage which originates from any cause whatsoever.*

*I hereby authorise Medi-Clinic Limited to destroy in any manner which they deem fit any tissue or part of my/the patient's body which may be removed during an operation to be performed on me/the patient in this hospital."*

The facts agreed by the parties, for purposes of the adjudication of the special plea, were the following:

1. The plaintiff signed the "Consent to Operation" on 17 April 1996, in the terms as

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<sup>50</sup> Unreported case decided in the WLD (1999) Case No 97/25429.

quoted above;

2. The defendant is the party covered by the indemnity;
3. The word "operation" in the quoted indemnity is to be taken to mean the actual surgical procedure in the theatre;
4. The incident which gave rise to the plaintiff's damages was not caused by any negligent act in the theatre.

In his replication, the plaintiff raised four defences to the special plea, only three of which were persisted with during argument.

1. That the clause indemnifies the defendant only in respect of the performance of the actual surgical procedure in theatre and that the loss in question was caused by conduct unrelated to the surgical procedure;
2. That the indemnity does not protect the defendant in respect of gross negligence on the part of its employees;
3. That the indemnity clause is *contra bonos mores* and therefore void.

On behalf of the patient, it was argued, in court, that the clause indemnified the hospital only in respect of the actual surgical procedure in theatre and that the patient's loss was caused by conduct unrelated to the surgical procedure. It was further agreed that the indemnity clause did not protect the hospital in respect of gross negligence on the part of its employees and that, in any event, the clause was *contra bonos mores* (against public policy) and therefore void.

Snyders J considered the principles enunciated in *Cardboard Packing Utilities v Edblo Transvaal Ltd* 1960 (3) SA 178 founded in *Canada Steamship Lines Ltd v The King* 1952 AC at 208. The relevant summary appears at 179 F-H.

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

(2) *If there is no express reference to negligence, the court must consider whether the words used wide enough, in their ordinary meaning, to cover negligence on the part of the servants of the proferens. If doubt arises at this point, it must be resolved against the proferens in accordance with Art. 1019 of the Civil Code of Lower Canada:*

*"In case of doubt, the contract is interpreted against him who has stipulated and in favour of him who has contracted the obligation." (This article expresses the South African Law on the method or construction of a document.)*

(3) *If the words used are wide enough for the above purpose, the court must then consider whether the*

*head of damage may be based on some ground other than negligence. The other ground must not be so fanciful or remote that the proferens cannot be supposed to have desired protection against it; but subject to his qualification, the existence of a possible head of damage other than that of negligence is fatal to the proferens even if the words used are prima facie wide enough to cover negligence on the part of his servants."*

Applying the above principles Snyders J found:

*"In casu there is no express reference to negligence in the exemption clause. The wording are, however, very wide, and in the absence of any limitation to those words there arises no doubt that it has to be read to include the negligence of the defendant and its employees. There also does not appear to be another possible head of damage based on some other ground than that of negligence. The clause should therefore be given its ordinary meaning, which results in the conclusion that the words are wide enough to embrace the negligence and the gross negligence of the defendant and its employees, officials and agents. In the matter of Government of the RSA v Fibre Spinners and Weavers (Pty) Ltd 1978 (2) SA 794 AD the same conclusion was reached on very similar wording."*

The court, furthermore, had to deal with the question of whether public policy demands that the clause be held to be unenforceable. Snyders J found:

*"On behalf of the plaintiff reliance for this contention was placed on various authors, none of whom suggests that such a finding is open to a South African court. To the contrary, they refer to the situation in some American States and then suggest that the question is deserving of the attention of the South African Legislator as our courts are not at liberty to declare these clauses invalid."*

The court referred to the case *Sasfin (Pty) Ltd v Beukes* 1989 (1) SA 1 (AD) at 7I-9G, in which public policy was discussed. Snyders J emphasized the principle of contractual freedom in concluding:

*"In applying those principles, it is clear that in the present case a conclusion that the relevant provision is contrary to public policy, is not possible. At best for the plaintiff, the potential unfairness of a situation in which a patient, desperate for hospitalisation is faced with having to sign an indemnity as a precondition of admission, was emphasized during argument. Not only does that situation not warrant the conclusion that it is contrary to public policy, it has not been raised as a fact in the current instance. In such a situation other remedies might in any event avail a patient. No suggestion has been made in this case that the current facts should not be regarded to indicate an agreement between two parties with full freedom to enter into the agreement under consideration. I am therefore unable to conclude that the current agreement is against public policy." <sup>51</sup>*

An appeal <sup>52</sup> was subsequently lodged and heard by the full bench of the same division of

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<sup>51</sup> *Burger, Douglas Desmond v Medi-Clinic Limited* 1999 (WLD) Unreported judgement 6-7.

<sup>52</sup> *Burger, Douglas Desmond v Medi-Clinic Limited* 2000 (WLD) Unreported Appeal under case no. A5034/99.

the High Court, in which the court upheld the appeal.

Relying on the principles enunciated in *Cardboard Packing Utilities v Edblo Transvaal Ltd* 1960 (3) SA 178 (WLD) received from the case of *Canada Steamship Lines Ltd v The King* 1992 AC at 208 and followed in the court a quo, the Court of Appeal analyzed the "consent to operation" form and came to the conclusion that the correct interpretation of its wording was that it covered only incidents "*arising out of or related to the administration of the anaesthetic or the operation*". The Court of Appeal consequently found that the trial court's finding that "*by reason of the indemnity the plaintiff's claim had to be dismissed*" was incorrect, as what happened in the ward was, accordingly, not covered by the indemnity.

The Court of Appeal focused exclusively on the interpretation of the "consent to operation" form and ruled that it was unnecessary to deal with the issue of public policy.

The Court of Appeal has, thus, not ruled that such a disclaimer of liability by a hospital is null and void, as such. This means that the trial judge's ruling still provides authority for the proposition that such a disclaimer is legally enforceable.

It is, respectfully, submitted that both the court a quo and the Court of Appeal missed out on a golden opportunity to pronounce that these types of clauses in hospital contracts were invalid.

In a subsequent case, in that of *Strydom v Afrox Health Care Limited*,<sup>53</sup> the court was asked to pronounce on the validity of an exclusionary clause in a hospital contract.

The facts briefly state included: The plaintiff, a 50-year old male, sued the defendant who is the owner of the Eugene Marais Hospital, for alleged damages which the plaintiff suffered, alleged to be R2 million, as a result of negligence on the part of the employees of the defendant in their treatment, whilst he was a patient at the Eugene Marais Hospital.

The defendant pleaded that the relationship between the parties was governed by a contract, partly oral and partly in writing. The written part thereof contained a clause, in terms of which the plaintiff indemnified the defendant against any liability arising from his admission to the said hospital.

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<sup>53</sup> (2001) 4 ALL SA 618 (T).

The relevant clause in the admission form includes:

*"Terms and Conditions of Admission*

*I acknowledge and agree that any medical practitioner or any medical professional who treats the patient is not an employee or agent of the hospital but an independent practitioner and the hospital is not in any way responsible or liable for any acts or omissions of breach of contract of the medical practitioner.*

*I absolve the hospital of all liability for any loss and/or damage of whatever nature arising in delict or for breach of contract, including but not limited to consequential loss or damage, arising directly or indirectly out of any act of omission and/or breach and/or injury (including fatal injury) sustained by and/or harm caused to the patient or any disease (including a terminal disease) contracted by patient whatever the cause may be excluding only wilful default on the part of the hospital, his employees or agents.*

*I hereby indemnify the hospital against any claim, award, judgement, cost and expenses which may be made or awarded suffered by the hospital resulting from or connected with the treatment of the patient."*

The plaintiff, moreover, pleaded that the relevant contract was unenforceable in law because the said clause was *contra bonos mores*, it being against public policy. It was also pleaded that the principle of *bona fide*, demand that the employees of the defendant should have pointed out to the plaintiff the existence of such clause and the implication thereof. The reasons advanced included that, the defendant was providing essential health services, which services were a basic right the plaintiff was entitled to. Having regard to the circumstances and the nature of the contract the parties were concluding, there was a legal duty on the officials or employees of the defendant to pertinently draw the attention of the plaintiff to the said clause and in particular its implication. Where they failed to do so, or, they were negligent in not doing so, their failure, would create a false representation to the plaintiff. The representation entailed that they brought the plaintiff under the impression that the medical personnel of the defendant and its staff would treat the plaintiff in a professional and experienced manner. Furthermore, if they failed, the defendant would be held liable for consequential damages suffered as the result of breach of contract through the defendant's personnel's failure to comply with their contractual obligation. Another factor that can be advanced is that the said personnel knew of the said clause and the nature thereof, and that their misrepresentation was false, alternatively, they have been aware thereof and that therefore, the said clause is not applicable on the contractual relationship of the parties.

The court, in deciding that the exclusion clause in the admission form at the Eugene Marais Hospital was invalid, as against *contra bonos mores* relied heavily, *inter alia*, on the dictum of Grosskopf JA, in *Venter v Credit Guarantee Insurance Corporation of Africa Ltd*,<sup>54</sup> wherein the court lays down the following test in determining whether a contract is against public policy or *contra bonos mores* or not, namely:

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<sup>54</sup> 1996 (3) SA (AD) 966.

1. Has there been full disclosure of relevant factors
2. Was the other party satisfied with the terms of the other; and
3. Were the terms accepted; and
4. Were the rights of the other party not compromised or were there no potential prejudice."

Mavundla AJ, with regard to the duty of the court in cases concerning public policy, relied on the case of *Stembridge v Stembridge* 1998 ALL SA (2) (4) (DACLD) citing Innes CJ in *Eastwood v Stepstone* 1902 TS. 294 at 302 in which it was held:

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

As to the nature of public policy the court referred to the dictum of Magid J in the *Stembridge case*, in which it was stated:

*"Public policy cannot, it seems to me, be static. As more change so too does public policy. The function of the courts when questions of public policy arise is, as Lord Watson said in Nordenfeld v Maxim Nordenfeld Goods and Emulsifiers Company Limited (1984) AC 535 (HL) at 554.*

*"..... not necessarily to accept what was held to have been the rule of policy of a hundred and fifty years ago, but to ascertain, with as clear an approach to accuracy as circumstances permit, what is the rule of policy for the then present time."*

And further, quoting the dictum of Innes J (as he then was) puts it much better in *Blower v Noorden* 1909 TS 609-905 and quoted in *Eerste Nasionale Bank van Suid-Afrika Beperk v Saayman NO* 1997 (4) SA 302 at 320 B-C where he says:

*"There comes time in the growth of every living system of law when old practice and ancient formulae must be modified in order to keep in touch with the expansion of legal ideas, and to keep pace with the requirements of changing conditions." (Vide also Janse van Rensburg v Grieve Trust CC 2000 (1) SA 315 at 324E)*<sup>55</sup>

But the court also refers to the approach of the Appellate Division (as it was known then) in the case of *Sasfin (Pty) Ltd v Beukes* 1969 (1) SA (A) at 71-79G in which Smalberger JA at 9B points out that the public policy, generally, favours the utmost freedom of contract, and that the power to declare contracts contrary to public policy should be exercised sparingly and only in the clearest of cases.

The court consequently found that the clause complained of was *contra bonos mores* and

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<sup>55</sup> *Strydom v Afrox Health Care Limited* (2001) 4 ALL SA 618 (T).

of no force or effect in law. Although the motivation of the court in finding for the plaintiff was, with respect, not judicially sound, nor particularly well constructed, its finding, it is submitted, was just and effectively correct.

In this case the court made findings and assumed facts which is, respectfully, worthy of criticism, the judgement being superficial in texture and lacking in depth.

What it did result in, was that the last word on hospital or professional disclaimers had not been spoken. No wonder in less than one year after this judgement, in the Transvaal Provincial Division, the Supreme Court of Appeals, was asked to decide on the validity of exclusionary clauses in private hospital contracts. In the case of *Afrox Health Care Bpk v Strydom*,<sup>56</sup> the facts briefly stated, revealed that Afrox is the owner of a private hospital.

The respondent had been admitted to this hospital for an operation and remained in the hospital for post-operative medical treatment. Upon admission, a contract had been concluded between the parties. During the post-operative medical treatment, certain negligent conduct by one of the hospital's nursing staff caused the respondent to suffer damages.

The pre-admission agreement concluded between the parties involved a written agreement which contained an indemnity clause. It reads:

"2.2 *Ek onthef die hospitaal en/of sy werknemers en/of agente van alle aanspreeklikheid en ek vrywaar hulle hiermee teen enige eis wat ingestel word deur enige persoon (insluitende gevolgskaide of spesiale skade van enige aard) wat direk of indirek spruit uit enige besering (insluitende noodlottige besering) opgedoen deur of skade berokken aan die pasient of enige siekte (insluitende terminale siekte) opgedoen deur die pasient wat ook al die oorsaak/oorsake is, net met die uitsluiting van opsetlike versuim deur die hospitaal, werknemers of agente."*

According to the respondent, it was a tacit term of this agreement that the appellant's nursing staff would treat him in a professional manner and with reasonable care. After the operation, certain negligent conduct by a nurse led to complications setting in, which caused the respondent to suffer damages.

The respondent argued that the negligent conduct of the nurse had constituted a breach of contract by the appellant and instituted an action, holding appellant responsible for the damages suffered.

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<sup>56</sup> 2002 (6) SA 29A.

The appellant, on the other hand, relied on the exemption clauses contained in the admission document, which the respondent had signed during his admission to the hospital, providing that the respondent *'absolved the hospital and/or its employees and/or agents from all and indemnified them from any claim instituted by any person (including a dependant of the patient) for damages or loss of whatever nature (including consequential damages or special damages of any nature) flowing directly or indirectly from any injury (including fatal injury) suffered by or damage caused to the patient or any illness (including terminal illness) contracted by the patient whatever the causes are, except only with the exclusion of intentional omission by the hospital, its employees or agents'*.

The appellant therefore relied on such clause to avoid liability.

The respondent advanced several reasons why the provisions of the exclusion clause could not operate against him. The respondent contended, *inter alia*, that the relevant clause was contrary to the public interest, that it was in conflict with the principles of good faith or *bona fides* and that the admission clerk had had a legal duty to draw his attention to the relevant clause, which he had not done.

The grounds upon which the respondent based his reliance on the public interest were the alleged unequal bargaining positions of the parties at the conclusion of the contract, as well as, the nature and ambit of the conduct of the hospital personnel, for which liability on the part of the appellant was excluded and the fact that the appellant was the provider of medical services. The respondent alleged that, while it was the appellant's duty as a hospital to provide medical treatment in a professional and caring manner, the relevant clause went so far as to protect the appellant from even gross negligence on the part of its nursing staff. This was, it was contended, contrary to the public interest.

The respondent argued further that s 39(2) of the Constitution obliged every court, when developing the common law, to promote the spirit, purport and object of the Bill of Rights. The effect of s 39(2) was therefore that, in considering the question of whether a particular contractual term conflicted with the public interest, account had to be taken of the fundamental rights contained in the Constitution. It was argued that the relevant clause conflicted with the spirit, purport and object of s 27(1)(a) of the Constitution, which guaranteed each person's right to medical care, and as such was accordingly in conflict with the public interest.

As an alternative, the respondent argued that, even if the clause did not conflict with the public interest, it was still unenforceable as it was unreasonable, unfair and in conflict with

the principle of *bona fides* or good faith. As a further alternative, it was argued that the respondent had, when signing the admission document, been unaware of the provisions of the clause. The evidence was that the respondent had signed the document without reading it, even though he had had an opportunity to do so. The respondent contended that the admission clerk had had a legal duty to inform him of the content of the clause and that he had failed to do so. The respondent's reason for contending that such a legal duty existed was that he did not expect a provision such as the one contained in the relevant clause in an agreement with a hospital. The provincial division had found for the respondent.

The vexed issues argued by the respondent as to why clause 2.2 was unenforceable as against public policy, included the following:

- (a) The clause was contrary to the public interest;
- (b) The clause was in conflict with the principles of good faith;
- (c) The admission clerk had a legal duty to draw his attention to clause 2.2 at the time of the conclusion of the contract and he failed to do so.

The Supreme Court of Appeals, per Brand JA, set about its judgement as follows:

With regard to the public interest, Brand JA stated that a contractual provision which is unfair, on the basis that it is in conflict with the public interest, is legally unenforceable and that this principle was accepted and applied in *Sasfin (Pty) Ltd v Beukes*<sup>57</sup> and *Botha (now Griesel) and Another v Finanscredit (Pty) Ltd*.<sup>58</sup> Brand JA quoted the dictum of Smalberger JA in the former, where he stated:

*"The power to declare contracts contrary to public should, however, be exercised sparingly and only in the clearest of cases, lest uncertainty as to the validity of contracts result from an arbitrary and indiscriminate use of the power. One must be careful not to conclude that a contract is contrary to public policy merely because its terms (or some of them) offend one's individual sense of propriety and fairness. In the words of Lord Atkin in Fender v St John-Mildmay 1938 AC 1 (HL) at 12.....*

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

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

Brand JA pointed out that these cautionary words were emphasized, more recently, in

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<sup>57</sup> 1989 (1) SA 1 (A).

<sup>58</sup> 1999 (3) SA 773 (A).

*Brummer v Gorfil Brothers Investments (Pty) Ltd en Andere*,<sup>59</sup> *De Beer v Keyser and Others*,<sup>60</sup> *Brisley v Drotsky*.<sup>61</sup> He said that, concerning exclusionary or indemnity clauses in South African law the position is, such clauses, although valid and enforceable, must be restrictively interpreted.<sup>62</sup> He observes that these types of clauses have become the rule rather than the exception in standard contracts and that the limits of such clauses are apparently determined largely by business considerations such as savings in insurance premiums, competitiveness and the possibility of scaring off prospective clients. Brand JA stated that the fact that exclusionary clauses, as a category, are enforced does not mean that a specific exclusionary clause cannot be declared, by the court, as being contrary to the public interest and therefore unenforceable. The standard used with regard to exclusionary clauses does not differ from that applicable to other clauses, which are alleged, due to considerations of public interest, to be unenforceable. The three grounds upon which the respondent based his arguments concerning the public interest were:

- (a) The uneven bargaining position between the parties with respect to the agreement;
- (b) The nature and circumstances of the actions of the hospital staff against which the appellant is being indemnified;
- (c) The fact that the appellant was the provider of medical services.

With regard to (a) above Brand JA stated that it was not obvious, on the face of it, that an inequality in bargaining power between the parties does not, in itself, justify a conclusion that a contractual provision, which is to the advantage of the strongest party, will be in conflict with the public interest. At the same time, he said, it must be accepted that unequal bargaining power is indeed a factor which, together with other factors, can play a role in considerations of the public interest. Nevertheless, the answer to the respondent's invocation of this factor in the present case is that there is absolutely no evidence to show that the respondent, during the conclusion of the contract, was in a weaker bargaining position than that of the appellant.

Brand JA stated that the respondent's second ground of objection, which has relevance to the potential scope of the clause 2.2, linked, to some degree, to his third ground. According

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<sup>59</sup> 1989 (3) SA 319 (SCA) at 420f.

<sup>60</sup> 2002 (1) SA 827 (SCA) at 837 C-E.

<sup>61</sup> 2002 (4) SA (1).

<sup>62</sup> *Government of the Republic of South Africa v Fibre Spinners and Weavers (Pty) Ltd* 1978 (2) SA 794 (A) at 804C-806D and *Durban's Water Wonderland (Pty) Ltd v Botha and Another* 1999 (1) SA 982 (SCA) at 989G-I.

to this ground the respondent's objection was that while the appellant's duty as a hospital was to provide medical treatment in a professional and careful manner, clause 2.2 went so far as to indemnify the appellant against even the gross negligence of its nursing staff. The respondent submitted that this was in conflict with the public interest. The court said that although there was direct support to be found in Strauss, *"Doctor, Patient and The Law"*<sup>63</sup> for the view that the indemnification of a hospital against gross negligence of its nursing staff would be in conflict with the public interest, it must be born in mind in the adjudication of the subjective ground of objection that the respondent did not, in his pleadings, rely upon gross negligence on the part of the appellant's nursing staff. He alleged nothing more than negligence. The question whether the contractual exclusion of a hospital's liability for damages caused by the gross negligence of its nursing staff would be contrary to the public interest, said Brand JA, was thus not the issue in the present case. Brand JA stated that, even if one accepted the submission that it was indeed the case, this would not automatically invalidate clause 2.2. Apparently the provisions of the clause in this case should rather have been interpreted so as to exclude gross negligence. Brand JA quoted the dictum of Innes CJ in *Wells v South African Alumenite Company*<sup>64</sup> where he stated:

*"Hence contractual conditions, by which one of the parties engages to verify all representations for himself, and not to rely upon them as inducing the contract, must be confined to honest mistake or honest representations. However wide the language, the Court will cut down and confine its operations within those limits."*

Brand JA noted, with respect to the third ground upon which the respondent relied, that it was related to the fact that the appellant was a provider of medical services. According to this ground it was generally impermissible for providers of medical services to add an exclusionary clause such as clause 2.2 to a standard contract. In this regard the respondent relied on section 27(1) (a) of the Constitution, in terms of which everyone has a right to medical care. Brand JA stated that, as he understood the judgement of the court a quo, this was the main ground upon which the decision in favour of the respondent was founded. He noted that the respondent did not rely on the fact that clause 2.2 directly violated the constitutional values which are entrenched in section 27(1) (a). Brand J held that even accepting the section 27(1) (a) is horizontally applicable in terms of section 8(2) of the Constitution and therefore binding on a private hospital - which question did not pertinently arise for decision in this case - clause 2.2 did not prohibit the access of any person to

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<sup>63</sup> Strauss (1991) at 305.

<sup>64</sup> 1927 (AD) 65.

medical care. Even from the point of view that section 27(1) bound a private hospital, this section did not, apparently, prevent private hospitals from asking for payment for medical services or imposing legally enforceable conditions on the provisions of such services. The question said Brand J, remained whether clause 2.2 was such a legally enforceable provision or not. According to the respondent's submission, the role of section 27(1)(a) was implied by the provisions of section 39(2) of the Constitution according to which each court was obliged, in the development of the common law, to promote the spirit, purport and objects of the Bill of Rights. The effect of section 39(2), it was argued for the respondent, was that in the consideration of the question of whether a particular contractual provision was in conflict with the public interest, regard had to be had to the fundamental rights which were set out in the Constitution. It was submitted, with regard to the argument, that clause 2.2 was enforceable prior to the Constitution, that it was now in conflict with the spirit, purport and object of section 27(1) (a) and was consequently contrary to the public interest. Brand JA stated that, seeing that the Constitution first came into effect on 4 February 1997, whilst the agreement between the parties arose on 15 August 1995, the first question, in considering this argument, is whether section 39(2) empowers and obliges the court to rely on constitutional provisions, which were not in direct breach, said Brand JA, the constitution having no retrospective power. Transactions which were valid when it commenced, are thus not rendered invalid retrospectively, with regard to the direct application of the Constitution.<sup>65</sup> Brand JA noted that the question concerning the possible retrospective influence of the Constitution, in an indirect manner, as envisaged in section 39(2), had not yet been expressly decided. He noted that the fact that this was not a simple question was evident from *Ryland v Edros*<sup>66</sup> and *Amod v Multilateral Motor Vehicle Accidents Fund (Commission for Gender Equality Intervening)*.<sup>67</sup> Brand JA said he found it unnecessary to give attempt to provide a conclusive answer to this question. In the light of his opinion concerning the effect of section 27(1) (a) on the validity of clause 2.2, he was prepared to accept, in favour of the respondent, that the provisions of section 27(1) (a) should be taken into account, although the relevant agreement was concluded on 15 August 1995 and there was also no matching provision in the interim Constitution. He noted that in *Carmichele v Minister of Safety and Security and Another (Centre for Applied Legal Studies Intervening)*,<sup>68</sup> it was decided that, on the application of

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<sup>65</sup> *Du Plessis and Others v De Klerk and Another* 1996 (3) SA 850 (CC) 1996 (5) BCLR 658 Para (14); *Gardener v Whitaker* 1996 (4) SA 337 (CC); 1996 (6) BCLR 775 Para (13).

<sup>66</sup> 1997 (2) SA 690 (K) at 707G-710C.

<sup>67</sup> 1999 (4) SA 1319 (SCA) at 1329 (A) Para (22).

<sup>68</sup> 2001 (4) SA 938 (CC) at Para (35).

section 39(2) of the Constitution, the determination of what comprises the convictions of the community, for the purposes of the law of delict, could not take place without taking into account the values to which the Constitution subscribes. Brand JA stated that he has no doubt that the same principle also applied to a consideration of whether a particular contractual provision was contrary to the public interest. In this regard he quoted the dictum of Cameron JA *Brisley v Drotsky*.<sup>69</sup> On the application, said Brand JA of this principle, the only constitutional value upon which the respondent could rely was that contained in section 27(1) (a). This led, immediately, to the question: why was clause 2.2 in conflict with section 27(1) (a)? He observed that it was, indeed, correctly conceded by the respondent that clause 2.2 did not stand in the way of the provision of medical services to anyone and that a hospital's reliance on legally acceptable conditions for the provision of medical services was also not in conflict with section 27(1)(a). The respondent's answer to the question posed, was based on the point of departure that, while the constitutional value embodied in section 27(1) (a) did not envisage the mere provision of medical services, but included the provision of such services in a professional and careful - in other words non-negligent - manner, clause 2.2 was in conflict with the values embodied in section 27(1) (a), and was, thus, in conflict with the public interest. The answer to this argument, said Brand JA, was that it was constructed entirely upon a *non sequitur*. Firstly, the appellant's nursing personnel were already bound by their professional code and they were already subject to the statutory authority of their professional body. Secondly, negligent acts by the appellant's nursing staff would not be in the interests of the appellant's reputation and competitiveness as a private hospital. Thirdly, the respondent's argument came down, in effect, to that fact that the appellant's nursing staff, due to the existence of clause 2.2, would be purposefully (or otherwise intentionally) negligent - something which, by definition, amounted to self contradiction. The court pointed out that article 27(1) (a) was not the only constitutional value which was relevant to the case under consideration. It quoted again from Cameron JA in *Brisley v Drotsky* (supra), where it was stated:

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

Brand JA stated that the constitutional nature of contractual freedom embraced, in its turn, the principle *pacta sunt servanda*. He noted that this principle was expressed by Steyn CJ

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<sup>69</sup> 2002 (4) SA (1). According to Cameron JA, "Public policy nullifies agreements offensive in themselves - a doctrine of considerable antiquity. In its modern guise "public policy" is now noted in our Constitution and the fundamental values it enshrines."

in *SA Sentrale Ko-op Graanmaatskappy Bpk v Shifren en Andere*<sup>70</sup> as follows:

*"Die elementêre en grondliggende algemene beginsel dat kontrakte wat vryelik en in alle erns deur bevoegde partye aangegaan is, in die openbare belang afgedwing word."*

In the light of these considerations, said Brand JA, the respondent's position that a contractual provision, in terms of which a hospital was indemnified against the negligent actions of its staff, was, in principle, contrary to the public interest could not be accepted. Brand JA noted the statement of the court a quo that:

*"Section 39 of the Constitution implicitly enjoins every court to develop common law or customary law. In my mind the tendency of lower courts blindly following the path chartered many years ago until altered by the higher Court is not consonant with the provisions of section 39 of the Constitution."*

And said that if the trial court intended, by this, that the principles of *stare decisis*, as a general rule, were not to be used in the application of section 39(2) this was, at least concerning post-constitutional decisions, clearly wrong. He referred to the dicta of Kriegler J in *Ex parte Minister of Safety and Security and Others, In re S v Walters and another*<sup>71</sup> where stated:

*"The Constitution enjoins all courts to interpret legislation and to develop the common law in accordance with the spirit, purport and objects of the Bill of Rights. In doing so, courts are bound to accept the authority and the binding force of application decisions of higher tribunals."*

And in Para (61)

*"High Courts are obliged to follow legal interpretations of the SCA, whether they relate to constitutional issues or to other issues, and remain so obliged unless and until the SCA, itself decides otherwise or this Court does so in respect of a constitutional issue. It should be made plain, however, that this part of the judgement does not deal with the binding effect of decisions of higher tribunals given before the constitutional era."*

Brand JA, stated that; concerning pre-constitutional decisions of the SCA with regard to the common law, and in his view, a distinction should be drawn between three situations that existed in the constitutional context:

1. The situation in which the High Court was convinced that the relevant rule of the common law was in conflict with the constitutional provision. In this instance, the High Court was obliged to depart from the common law. The fact that the relevant

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<sup>70</sup> 1964 (4) SA 760 (A).

<sup>71</sup> 2002 (4) SA 613 (CC).

rule of the common law was laid down pre-constitutionally by the SCA makes no difference. The Constitution was the supreme law and where a rule of common law was in conflict with it, the latter had to give way.

2. The situation in which the pre-constitutional decision of the SCA was based on considerations such as *boni mores* or public interest. If the High Court was of the opinion that such decision, with regard to constitutional values, no longer reflected that *boni mores* or considerations of public interest, then the High Court was obliged to depart there-from. Such a departure, said Brand JA, was not in conflict with *stare decisis* because, in any event, it was accepted that the *boni mores* and considerations of public interest do not remain static.
3. A situation in which a rule of common law, which was laid down in a pre-constitutional decision of the SCA, was not directly in conflict with any specific provisions of the Constitution and was, also, not dependent on changing considerations such as *boni mores* or public interest. Nevertheless the High Court was convinced that the relevant rule, upon the application of section 39(2), should be changed in order to promote the spirit, purport and objects of the Constitution. Was the High Court, in such a situation, empowered to give effect to its convictions or was it still obliged to apply the common law as it was pre-constitutionally, in terms of the principles of *stare decisis*? The answer, said Brand JA, was that the principles of *stare decisis* still applied and that the High Court was not empowered by section 39(2) to depart from the decisions of the SCA, whether they were pre- or post- constitutional. He noted that section 39(2) of the Constitution should be read in conjunction with section 173. According to the latter, recognition was given to the inherent competence of the High Court - together with the SCA and the constitutional court - to develop the common law. In exercising this inherent competence, said Brand JA, the provisions of section 39(2) are of relevance. Before the Constitution, said Brand JA, the High Court, just like the SCA, had the inherent competence to develop the common law. This inherent competence was, however, dependent upon the rules which found expression in the doctrine of *stare decisis*. In the opinion of Brand JA, this rule was neither expressly, nor impliedly, set aside by the Constitution. Section 39(2), he said, contained the underlying implication that the relevant court had the power to amend the common law. The question of whether the relevant court had that capacity was determined by, inter alia, the *stare decisis* rule. Brand J pointed out that the provisions of the Constitution were not just a set of rules but an

entire value system. Brand JA observed that there was, sometimes, mutual tension between the values of the system, which could only be resolved by careful consideration and reconciliation. In implementing this value system, individual judges would differ from each other. In such circumstances, the granting, to every judge, of the capacity, on the grounds of his individual perspective in accordance with the application of this value system, the power to deviate from the decisions of the SCA would, necessarily, lead to a lack of uniformity and certainty.

On the subject of good faith as an alternative basis of the respondent's case, Brand JA observed that this principle found its origin in a minority judgement by Olivier JA in *Eerste Nasionale Bank van Suidelike Afrika Bpk v Saayman NO*.<sup>72</sup> He observed that the SCA, in its majority decision in *Brisley v Drotzky* (supra), put the judgement of Olivier JA in perspective. With regard to the place and role of abstract ideas such as good faith, reasonableness, fairness and justice, the majority of the court in *Brisley* held that; although these considerations underlay the South African law of contract, this did not make them an independent, or 'free-floating', foundation for the setting aside of contractual provisions. Put differently, said Brand JA, these abstract considerations represented the foundation and *raison d'être*, for the present legal rules and could also lead to the formulation and alteration of rules of law, but, that were not themselves rules of law. When it came to the enforcement of contractual provisions, the court had no discretion and did not deal in abstract ideas, but, rather, on the basis of crystallised and established rules of law. Thus, said Brand JA, the alternative basis upon which the respondent relied was, in reality, not an independent basis for his case.

With regard to misrepresentation and mistake, Brand JA stated that; consideration of this alternative, required, that the factual background be set out in more detail. He noted that the respondent's evidence was that he signed the admission document, without reading it, in the place indicated with a cross. The respondent's attention was not drawn to clause 2.2. In the absence of any evidence to the contrary, it had to be accepted, said the court, that the respondent was not aware of the contents of clause 2.2, when he entered into the agreement. Nonetheless, the respondent conceded that he knew that the admission document contained the terms of the contract between himself and the appellant and he did not dispute that he had full opportunity to read the document. In the circumstances, the fact that the respondent signed the document without reading it, did not lead, as a rule, to the result that he was not bound by its contents. Brand JA then referred to the case of

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<sup>72</sup> 1997 (4) SA 302 (SCA) at 318.

*Burger v Central South African Railways*,<sup>73</sup> in which it was held that a person who signed an agreement without reading it, did so at his own risk and was, consequently, bound thereby as though he were aware of its provisions and expressly consented thereto.<sup>74</sup> Brand JA conceded that there were certain exceptions to this general rule and referred, in this regard, to *Christie*.<sup>75</sup> The exception, relied upon by the respondent, was that the admissions clerk had a duty to inform him of the contents of clause 2.2 and that he failed to do so. The respondent conceded that, as a general principle, there was no legal duty upon a contracting party to inform the other of the contents of their agreement. The reason why the respondent alleged that such a duty existed on the admissions clerk was that he, the respondent, did not expect such a clause in an agreement with a hospital. Seeing that a hospital was supposed to supply medical and professional services in a professional manner, the respondent argued that he did not expect that the applicant would try to indemnify itself against the negligence of its own nursing personnel. The answer to this, said Brand JA, was that the respondent's subjective expectations, concerning the contract between himself and the appellant, played no role in the question of whether there was a duty on the admissions clerk to point out clause 2.2 to him. What was of relevance to this question, said Brand JA, was whether a provision, such as clause 2.2, could reasonably be expected, or, if it was, objectively speaking, unexpected. He stated that indemnity clauses, such as clause 2.2, were the rule, rather than the exception, in standard contracts these days (at the time). Notwithstanding the respondent's submission to the contrary, the court said it could see no reason, in principle, to distinguish between private hospitals and suppliers of other services. Thus, it cannot be said that a provision such as clause 2.2 was, objectively speaking, unexpected. There was, thus, no duty, said Brand JA, upon the admissions clerk to bring the clause to the attention of the respondent. Therefore the respondent was bound to the terms of the clause as if he had read it and expressly agreed to it.

The court concluded that the appeal must succeed, with costs, and that the decision of the court a quo should be reversed.

#### 14.2.1.3 Legal Opinion

Hardly any other issue in contract law has, in recent times, received as much attention from

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<sup>73</sup> Burger 1903 RS 571.

<sup>74</sup> Brand JA also referred to *George v Fairmead (Pty) Ltd* 1958 (2) SA 465 (A).

<sup>75</sup> *The Law of Contract* 4th edition at p.202.

academics in South Africa, as the effect of exclusionary or exculpatory clauses in hospital contracts.

Generally, the legal writers accept that the underlying reason for incorporating exclusionary clauses in, especially, hospital contracts is that they seek to protect the hospital against mishaps occurring in connection with the conduct of the nursing staff, doctors employed by the hospitals, or the general handling of the patient.

It is also accepted that some of these clauses are couched in very wide terms, purporting to protect the hospital and its staff against claims based upon negligence, gross negligence, recklessness or intentional acts performed by the hospital staff.<sup>76</sup>

What has emerged, however, is a division in legal thinking regarding the legal effect of exclusion clauses, when incorporated in hospital contracts. Two prominent schools of thought have emerged. The first school of thought belongs to the so-called traditionalists, comprising legal writers such as Hahlo, Burchell and Schäfer, Van Aswegen and Van Oosten. This school of thought relies heavily on the doctrine of freedom of contract and the maxim *pacta sunt servanda*, wherein, the individual is free to decide whether, with whom, and on what terms he/she is to contract. Moreover, once the agreement has been concluded, effect must be given to the agreement. The enforcement of a contractual obligation therefore, executed consistent with freedom of contract and consensuality.<sup>77</sup>

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<sup>76</sup> Van Dokkum "Hospital consent forms" *Stellenbosch Law Review* (1996) 1, 2; Burchell and Schäfer "Liability of Hospitals for Negligence" *Businessman's Law* (1977) 109; Strauss *Doctor, Patient and the Law* (1991) 305

<sup>77</sup> This theory causes Hahlo "Unfair Contract terms in Civil Law Systems" (1981) Vol. 98 *SA Law Journal* 70-71 to remark: "..... He knew that he was assenting to something and indeed to something in addition to the terms he had himself filled in. If he chose not to read what that additional something was, he was, with his open eyes, taking the risk of being bound by it. He cannot then be heard to say that his ignorance of what was in it was a *justus error*." Burchell and Schäfer "Liability of Hospitals for Negligence" *BML* 1977 adopt a very conservative and restrictive approach when assessing the validity of exclusionary clauses in hospital contracts when they hold the view that: "If a patient signed a form containing such a clause the maxim *caveat subscriptor* applies; let the signatory beware. The patient will escape the effect of the clause only by proving operative mistake or misrepresentation, or he may, despite the operation of the clause, recover damages from the hospital for intentional or possible grossly negligent conduct on the part of its servants or staff. Obviously, the patient could still recover damages from the negligent doctor or nurse, for example, since they are not parties to the contract. Although in America such an exemption or exculpatory agreement between hospital and patient is regarded as invalid in certain States, our courts are not at liberty to declare these clauses invalid. The most that our courts can do is to place as narrow an interpretation upon such an agreement as possible. However, these exemption clauses which are signed by patients entering a private hospital are often worded in such exploit terms that there is little room for restrictive interpretation." See also van Dokkum "Hospital consent forms" *Stellenbosch Law Review* 1996 (2) 251 set out the South African position with regard to Hospital Consent Forms as follows: "Our courts set limits on, and interpret, exemption clauses narrowly or restrictively. Permissibility is determined by public policy, but the courts apply this approach with great care and circumspection." See further Turpin "Contract and Imposed Terms" 1956 *South African Law Journal* 251.

The second school of thought holds a dissimilar view. In assessing the validity of exclusionary clauses in a hospital contract, a troupe of South African academics and legal writers,<sup>78</sup> advocate a new ethos of contractual fairness, equity and reasonableness based on social, ethical and moral values. More recently, the constitutional influence has also moved academics and legal writers to advocate, when the validity of exclusionary clauses in contract is assessed, that regard must be had to the Bill of Rights enshrined in the Constitution. But, whatever motivational factors are advanced, legal writers and academics who find themselves in the second group, hold the view that exclusionary clauses in hospital contracts are invalid and unenforceable. It is enlightening to see that, some 50 years ago, the thinking accorded with modern thinking, wherein significant value is attached to social and moral values, founded upon ethical norms, fairness and equity. It is also submitted that, although reference was made then of a medical practitioner, the same position should apply to hospitals and other healthcare providers.

A new trend of academic thinking has emerged post the Supreme Court of Appeal's judgement in the *Afrox case*.<sup>79</sup> *Legal jurisprudence advocated by them and legal opinion expressed by them, has changed the landscape substantially* since the writings of *Professor Hahlo* in 1981, the writings of *Burchell and Schäfer* in 1977, the writings of *Van*

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Van Aswegen "Professional Liability" *An Unpublished thesis - University of Society* (1966) also relies on party autonomy or freedom of contract when assessing the validity of exemption clauses in a professional contract when he remarks: "..... a professional is in general free to regulate his liability towards his client by means of agreement, and so-called exclusion or limitation clauses is a general feature of contracts between professionals and clients. Such clauses can in principle apply to delictual and contractual liability, and consequently there is no inherent difference between liability for breach of contract and delict in this regard."

Van Oosten Encyclopaedia (1996) 88 in similar terms hold: "..... Provided they are stated in unambiguous terms, exemption clauses are enforceable unless they exclude liability for intentional medical malpractice in which case they will be regarded by the courts as *contra bonos mores* and hence null and void." Whether or not a clause excluding liability for gross medical negligence will be upheld is according to the writer "..... at least open to doubt."

<sup>78</sup> But the writers Gordon, Turner, Price *Medical Jurisprudence* (1953) 153ff, 18ff as long ago as 1953 persuasively argue with reference to the so-called "contracting out" of liability cases that: "any attempt by a practitioner to contract out of liability for malpractice may be considered at least probable, that the courts would declare such a contract void as against public policy, leaving the patient's right to sue for damages unimpaired." And further: "Society cannot allow a medical practitioner to take such an advantage of his patient in regard to whom he stands in a position of such power." The writers Strauss and Strydom *Die Suid-Afrikaanse Geneeskundige Reg* (1967) 317ff in a similar view and relying upon societal dictates as well as the trust position the medical practitioner occupies in relation to the patient convincingly argue that a medical practitioner ought not compromise his/her expert knowledge and relax the degree of care and skill even where the patient consents thereto. To allow this, so it is argued by the learned authors would be tantamount to giving the practitioner a license to operate negligently which is contrary to medical norms and ethics. This conduct, according to the learned writers, is against public policy and so-called *contra bonos mores*.

<sup>79</sup> *Afrox Healthcare Bpk v Strydom* 2002 (6) SA 21 (SCA).

*Aswegen* in 1966 and the writings of *Van Oosten* in 1996. The judgement of the Supreme Court of Appeal, delivered by Brand JA, has, since, undergone severe criticism. Several grounds of criticism have been advanced by a number of legal writers and academics. The main strands of criticism vary from medico-legal considerations, including medical ethics and medical law;<sup>80</sup> the unequal bargaining position of the contracting parties;<sup>81</sup> the contract entered into must be seen as a *pactum de non petendo*;<sup>82</sup> the trust position between the hospital and patient;<sup>83</sup> the language difficulties and literacy of contracting

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<sup>80</sup> It is especially, the writings of Carstens and Kok "An assessment of the use of disclaimers by South African hospitals in view of Constitutional demands, Foreign Law and Medico-legal considerations" (2005) 78 *SAPR/PL* 430 who put a premium on medico-legal considerations in assessing the validity of disclaimers in hospital contracts. Referring to the Hippocratic Oath, the Declaration of Geneva, the International Code of Medical Ethics and the Declaration of Helsinki as well as domestic Medical Codes, the writers persuasively argue that medical ethics have its roots in the highest order that cannot be compromised. For that reason healthcare providers including hospitals are first and foremost required 'to do no harm' and to act in the best interests of the patient. See also Roth "Medicine's Ethical Responsibility in Veatch (ed) *Cross Cultural Perspectives in Medical Ethics*" (1989) 150 wherein the writer opines at 153 that "*medical ethics have, over years, acquired a rather philosophical character ..... it has its roots in a societal concept of summum bonum, with interesting modifications such as that expressed in the repeated maxim primum non nocere*" which means medical ethics have its roots in the highest order which cannot be compromised. Beauchamp and Childress *Principles of Biomedical Ethics* (1994) 3. Turning to societal moral dictates the writers Carstens and Kok argue that: "*..... disclaimers against medical negligence in hospital contracts would amount to an unreasonable/unfair/unethical acceptance on the part of a patient to contract to the possibility of harm in the form of personal injury/death resulting from medical malpractice by an attending medical practitioner (albeit in the hospital setting) who is ethically bound not to do harm.*"

<sup>81</sup> Several writers hold the view that as patients are generally in a disadvantages position resultant from the unequal bargaining position in which they find themselves in when entering into the agreement containing the disclaimer, public policy dictates that these type of agreements are invalid and unenforceable. See in this regard Strauss *Doctor, Patient and the Law* (1991) 305; Claassen and Verschoor *Medical Negligence in South Africa* (1992) 103. The authors Van der Merwe et al *Contract - General Principles* (2005) 274-275 hold the view that not only is the patients exploited by the hospitals in entering into such agreements; it is also questionable whether the parties reach consensus where consensus has in effect been improperly obtained. Support for this view is found in the writings of Jansen and Smith "Hospital Disclaimers: Afrox Healthcare v Strydom" 2003 *Journal for Juridical Science* 28 (2) 210, 218. Van den Heever "Exclusion of Liability of Private Hospitals in South Africa *De Rebus* (April 2003) 47-48 points out that the unequal bargaining position stem from the fact that the patient is often incapable of negotiating any terms due to stressful and traumatic circumstances. Likewise, with family members, signing on the patient's behalf.

<sup>82</sup> Several writers including Cronje-Retief *The Legal Liability of Hospitals* (2000) Unpublished LLD Thesis Orange Free State University (1997) 474; Van den Heever "Exclusion of Liability in Private Hospitals in South Africa" 2003 *De Rebus* 47 and quoted in Carstens and Kok "An Assessment of the use of Disclaimers by South African hospitals in view of Constitutional demands, Foreign Law and Medico-legal considerations" (2005) 78 *SAPR/PL* 454 hold the view that an exemption clause in a hospital must be seen as a *pactum de non petendo in anticipando* whereby the parties envisage the commission of an unlawful act often arising from sub-standard negligent performance of services, organizational failures etc. The aggrieved party then agrees not to institute an action which he/she would otherwise have enjoyed. This, according to the writers cannot be tolerated. One of the strongest arguments therefore is that arising from the hospital-patient relationship is the duty of care and to act reasonably undertaken by the hospital. Such standards as seen earlier in the ethical considerations cannot be compromised.

<sup>83</sup> The trust position which flows from the doctor-patient relationship is a consideration which writers espouse to have exemption clauses in hospital contracts declared invalid and unenforceable. It is especially those writers who argue that the type of contract which exists between doctor and patient is one of a contract of mandate, who

parties;<sup>84</sup> the lack of reasonableness, equity and good faith;<sup>85</sup> the Constitutional values founded upon the rights enshrined in the Bill of Rights..

### 14.3.1 ENGLAND

#### 14.3.1.1 Legal Writings

In so far as the English law of contract, relating to medical contracts is concerned, the influence of their *National Health Service Scheme*, places English Law, outside the sphere of the other jurisdictions referred to earlier. Unlike, America and South Africa, English law has not been confronted to deal with private agreements between hospitals and patients or doctors and patients etc.

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advance the argument that from such agreement a position of trust is created. See Strauss and Strydom *Die Suid-Afrikaanse Geneeskundige Reg* (1967) 111; De Wet and Van Wyk *Die Suid-Afrikaanse Kontraktereg* (1979) 348. The writers opine that in creating the trust position, the doctor undertakes to execute his or her duties with the necessary good faith and with the utmost care and skill. The writers argue that once a position of trust is created between the parties concerned. The hospital/other healthcare provider may not breach that position of trust by conducting himself/herself in a negligent manner without incurring liability. It has also been argued that the duty to take care and to act reasonably, is inalienable and cannot be excluded by way of exclusionary clauses to do otherwise, according to Naude and Lubbe "Exemption Clauses - A Rethink occasioned by Afrox Healthcare Bpk v Strydom" (2005) 122 *SALJ* 444 would be contrary to the naturalia of the contract itself which includes the provision of the duty of care alternatively it would be contrary to the essence of the basic contractual purpose of the parties to such a contract. The writers argue that it would further amount to an erosion of the patient's trust in the required professional standard.

<sup>84</sup> A consideration which has recently found huge favour amongst the legal writers, lead, especially, by Naude and Lubbe "Exemption Clauses - A Rethink occasioned by Afrox Healthcare Bpk v Strydom (2005) 122 *SALJ* 444 at 460-463 quoting the authority Jan Hendrik Esser who cares? Reflections on business in Healthcare *Unpublished LLM Thesis, University of Stellenbosch* (2001) 72 is that of ethics. In this regard, they write that a patient in seeking healthcare services looks for virtues like compassion, integrity and trust-worthiness. See also Van den Heever "Exemption of Liability of Private Hospitals in South Africa" *De Rebus* (April 2003) 47; Jansen and Smith "Hospital Disclaimers" Afrox Healthcare v Strydom" 2003 *Journal for Juridical Science* (2003) 28 (2) 214 at 218; Hawthorne "Closing of the open norms in the Law of Contract" (2004) 67 (2) *THRHR* 294, 299, he also stresses the genuine ignorance and language difficulties which the majority of people experience in South Africa. The persuasive argument advanced is that the large proportion of the South African population is seldom exposed to commercial contracts. That fact, together with the fact that most South Africans would not expect to encounter such a clause let alone understand the implications thereof, causes the patient to be placed in an unequal bargaining position and totally disadvantaged. A suggestion made by the writers Jansen and Smith which needs to be supported is that a private hospital should perhaps be placed under a legal duty to draw a patient's attention to and explain the consequences of the exemption clause. See also the view of Tladi "One step forward, two steps back for Constitutionalising of the Common Law: Afrox Healthcare v Strydom" (2002) 17 *SAPR/PL* 473, 477.

<sup>85</sup> The unfairness and unreasonableness of these type of contracts are highlighted by Carstens and Kok "An assessment of the use of disclaimers by South African hospitals in view of Constitutional demands, Foreign Law and Medico-legal considerations" (2005) 78 *SAPR/PL* 450; Veatch *Medical Ethics* (1983) 2-7; Beauchamp and Childress *Principles of Biomedical ethics* (1994) 3; Mason and McCall-Smith *Law and Medical Ethics* (1991) 4. But it is the legal writer Tladi "One step forward, two steps back for Constitutionalising of the Common Law: Afrox Healthcare v Strydom" (2002) 17 *SAPR/PL* 473, 477 who comes out strongly against exclusionary clauses in hospital contracts when he writes that these type of clauses deserve to be dismissed as their acceptance would acknowledge the "dismissal of the principles of reasonableness, justice, equity and good faith in contract law."

In terms of the *National Health Service Scheme*, a general medical service is provided by Government and the terms of service, of both the hospital and doctors, are controlled by medical regulations in providing the relevant medical services to the patients.<sup>86</sup>

It has also been suggested, by some English legal writers, that those patients who receive medical treatment under the *National Health Service Scheme* (which represent the majority) do not enter into a direct contract with the hospital himself/herself, nor, with the general practitioner or other health care provider, such as dentists or dispensing pharmacists.<sup>87</sup>

For that reason, it has also been suggested, actions for medical malpractice are primarily actions based on the tort of negligence. It is considered that in the majority of instances, there is only a weak factual basis for suing in contract.<sup>88</sup>

In the latter instance, even where the private patient has not entered into a strictly defined contract with expressly written terms governing the agreement for medical care, the legal writers are *ad idem* that the implied obligations, in the form of the hospital's/doctor's and/or other health care providers implied contractual duty of care, play a significant role in deciding liability. The duty of care, in contract, is said to be identical to the duty of care owed in tort.<sup>89</sup>

The implied contractual duty, according to *Jackson and Powell*,<sup>90</sup> is based on the moral aspect that accompanies the nature of the work done by the medical practitioner. The moral aspect, in turn, includes the commitment expected of practitioners, which go beyond the general duty of honesty, namely, they are expected to provide a high standard of service to the community which often transcends to a particular client or patient. A leading article published in the Times, January 5, 1980 and quoted by *Jackson and Powell*,<sup>91</sup>

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<sup>86</sup> Kennedy and Grubb *Medical Law Text with Materials* (1994) 64ff; Nelson-Jones and Burton *Medical Negligence Law* (1995) 26; Kennedy and Grubb *Principles of Medical Law* (1998) 283ff; Jones *Medical Negligence* (1996) 18; Jackson and Powell *Professional Negligence* (1997) 590-591; Giesen *International Medical Malpractice Law* (1988) 11.

<sup>87</sup> Nelson-Jones and Burton (1998) 26; Kennedy and Grubb (1998) 286-287. See however the contrary views highlighted by the legal authors. Jones (1996) 18; Jackson and Powell (1997) 590-591.

<sup>88</sup> Nelson-Jones and Burton (1998) 26; Kennedy and Grubb (1998) 287. Jones (1996) 18-19; Jackson and Powell (1997) 594.

<sup>89</sup> Nelson-Jones and Burton (1998) 286; Kennedy and Grubb (1998) 287; Jones (1996) 20; Giesen (1988) 24.

<sup>90</sup> *Professional Negligence* (1997) 2; See Giesen (1988) 14.

<sup>91</sup> *Professional Negligence* (1997) 3.

includes in its definition of the profession, " ..... a high degree of detachment and integrity, and, above all, that they have a strong sense of responsibility and an exceptional commitment to the interests of their clients ..... " <sup>92</sup>

Where, however, private treatment takes place, in respect of which a contractual relationship arises between the hospital and private patient/doctor and private patient/other health care provider and private patient, with express terms being incorporated in a written contract, for example, a consent form, and duly signed by the parties concerned, the obligations of the parties will, therefore, be a matter of construing the terms in the contract in each case. <sup>93</sup>

English legal writers hold a strong view that doctors do not guarantee, or are not expected to guarantee, particular results in the treatment of patients. Nor are they expected, where surgery is conducted. However, what is expected of medical practitioners is the exercise of reasonable care, <sup>94</sup> so much so, that, the eminent author, *Jones*, <sup>95</sup> suggests that medical practitioners cannot, by a contractual term or by a notice, exclude or restrict liability for their actions, where medical practitioners deviate from the exercise of reasonable care. In this regard the author relies upon the *Unfair Contract Terms Act*, <sup>96</sup> which, he believes, may include health care provided under the *National Health Service*, as well.

In invoking Section 2(1) of the *Unfair Contract Terms Act* <sup>97</sup> *Jackson and Powell* <sup>98</sup> opine that "*since the damage resulting from medical negligence is almost always some form of personal injury, doctors are effectively prevented from excluding or restricting liability for negligence.*" The authors continue with reference to the test of "reasonableness" as provided for in Section 11 of the Act <sup>99</sup> to state "*it is thought that it would generally be unreasonable for a professional person to exclude liability altogether for negligence vis. a*

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<sup>92</sup> Jackson and Powell (1997) 3; See also Giesen (1988) 14.

<sup>93</sup> Kennedy and Grubb (1998) 288; Jones (1996) 23-25; Wright (1997) 15-16; Jackson and Powell (1997) 592.

<sup>94</sup> Jones (1996) 24; See also Kennedy and Grubb (1994) 45.

<sup>95</sup> *Medical Negligence* (1996) 24.

<sup>96</sup> 1977 S.2 (1).

<sup>97</sup> *Unfair Contract Terms Act*, 1977, S2 (1).

<sup>98</sup> *Professional Negligence* (1997) 68ff.

<sup>99</sup> *Unfair Contract Terms Act*, S11.

*vis. his client" and to allow this " ..... it would seem contrary to the principles for which the professions stand if they would then contract out of liability." <sup>100</sup>*

Besides what is written, as set out above, and the case law that follows, English law is fairly settled. Unlike South African Law and American Law, which are rich in academic writings and often supporting cases, the English case law is not rich in pronouncing on the validity of exclusionary clauses, especially, in hospital contracts.

#### 14.3.1.2 Case Law

English case law, as previously stated, unlike other jurisdictions, especially America, is not rich in case law regarding pronouncements on the validity of exclusionary clauses in medical contracts.

What needs, however, to be dealt with here, is the English court's attitude toward upholding the exercise of reasonable care and skill, against the backdrop of excluding oneself, as medical practitioners and/or hospitals, against liability for negligence.

In this regard, what was stated by Tindall C.J., when directing the jury in the case of *Lampher v Phipos*, <sup>101</sup> namely: *"Every person who enters into a learned profession undertakes to bring to the exercise of it a reasonable degree of care and skill. He does not undertake, if he is an attorney, that at all events you shall gain your case, nor does a surgeon undertake that he will perform a cure nor does he undertake to use the highest possible degree of skill,"* <sup>102</sup> still, to a large extent, applies today in English Law. Some time later, in 1925, the position was further stated in the case of *Rex V Bateman*: <sup>103</sup>

*"If a person holds himself out as possessing special skill and knowledge and he is consulted as possessing such skill and knowledge, by or on behalf of a patient, he owes a duty to the patient to use due caution in undertaking the treatment. No contractual relation is necessary nor is it necessary that the service be rendered for reward. The law requires a full and reasonable standard of care and competence. If the patient's death has been caused by the Defendant's indolence or carelessness it will not avail to show that he has sufficient knowledge, nor will it avail to prove that he was diligent in attendance if the patient has been killed by his gross ignorance and unskillful ness."* <sup>104</sup>

Three cases that deal, in particular, with the upholding of the standard of care and skill,

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<sup>100</sup> Jackson and Powell *Professional Negligence* (1997) 69.

<sup>101</sup> (1838) 8 Candy P475.

<sup>102</sup> *Lampher v Phipos* (1838) 8 Cand P475.

<sup>103</sup> (1925) 9 4 LJKB 791.

<sup>104</sup> *Rex v Bateman* (1925) 9 5 LJKB 791.

without compromising the standard, included the following decisions. The first case is that of *Thake v Maurice*.<sup>105</sup> The facts of this case included: The plaintiffs, a married couple, consulted the defendant, a surgeon, privately, in order for the husband to undergo a vasectomy, as they did not wish to have any more children. The defendant explained the procedure to the plaintiffs and he pointed out that, although it was possible to restore the husband's fertility, he could not guarantee it and that the plaintiff's should regard the operation as permanent. The plaintiffs signed a consent form which stated, *inter alia*, "I have been told that the object of the operation is to tender me sterile and incapable of parenthood. I understand that the effect of the operation is irreversible." The operation was carried out and appeared successful. However, almost three years later, the wife discovered that she was pregnant. The operation had naturally reversed itself, by a process known as recanalisation and the husband's fertility had been restored. Subsequently a child was born and the plaintiffs sued the defendant, in negligence and for breach of contract. The plaintiffs claimed that they had not been warned of the risk of reversal and that this was negligent. Further, they claimed a breach of contract, in that; the defendant had guaranteed the success of the operation namely, the husband's infertility. Peter Pain J held that the defendant had not, in fact, warned the plaintiffs of the small risk of reversal. He was liable in negligence for this. Also, Peter Pain J held that the defendant was liable in contract, as he had given a contractual warranty of success.

In a subsequent appeal, the Court of Appeal unanimously upheld the Judge's decision in the court a quo. However, the court, per Nourse and Neil LJJ, reversed the decision in the court a quo on the contract claim. In the Court of Appeal, the court emphasized the inexact nature of medical science and unpredictability of medical treatment and, consequently, held that a doctor would only be held to have guaranteed the success of the operation if he expressly said so, in clear and unequivocal terms, when Nourse LJ observed:

*"The particular concern of this court in Eyre v Measday was to decide whether there had been an implied guarantee that the operation would succeed. But the approach of Slade LJ in testing that question objectively is of equal value in a case where it is said that there has been an express guarantee. Valuable too are the observations of Lord Denning MR in Greaves and Co (Constructors) Ltd v Baynham, Meikle and Partners (1975) 3 ALL ER 99 at 103-104 (1975) WLR 1095 at 1100 which I now quote in full:*

*Apply this to the employment of a professional man. The law does not usually imply a warranty that he will achieve the desired result, but only a term that he will use reasonable care and skill. The surgeon does not warrant that he will cure the patient. Nor does the solicitor warrant that he will win the case."*

The court held that the defendant had only contracted to exercise reasonable care and skill,

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<sup>105</sup> (1986) QB 644; (1986) 1 ALL ER 479 (SA).

which he breached by failing to warn the plaintiffs of the risk of reversal, as was his normal practice, when Norse LJ stated:

*" ..... A professional man is not usually regarded as warranting that he will achieve the desired result, indeed it seems that this would not fit well with the universal warranty of reasonable care and skill, which tends to affirm the inexactness of the science which is professed. I do not intend to go beyond this case of the doctor. Of all sciences medicine is one of the least exact. In my view a doctor cannot be objectively regarded as guaranteeing the success of any operation or treatment unless he says as much in clear and unequivocal terms."*

Neil LJ, in the same case, said: *"It is common ground that the defendant contracted to perform a vasectomy operation on Mr Thake and that in the performance of that contract he was subject to the duty implied by law to carry out the operation with reasonable skill and care."* <sup>106</sup>

In the case of *Eyre v Measday*, <sup>107</sup> the plaintiff underwent a sterilisation operation performed by the defendant. The defendant had explained the nature of the operation (a laparoscopic sterilisation), emphasising that it was irreversible, but, he did not inform the plaintiff that there was a less than one per cent risk of pregnancy occurring, following such a procedure. Both the plaintiff and her husband believed that the operation would render the plaintiff completely sterile. The plaintiff subsequently became pregnant. She issued proceedings, claiming that the defendant was in breach of a contractual term that she would be rendered irreversibly sterile and/or a collateral warranty to that effect, which induced her to enter the contract. It was common ground that the contract was embodied partly in oral conversations and partly in the written consent form, signed by the plaintiff. It was also common ground that the appropriate test as to the nature and terms of the contract was objective, not subjective. This did not depend upon what the plaintiff or the defendant thought were the terms of the contract, but on what the court, objectively considered, the words used by the parties could reasonably be taken to have meant.

The Court of Appeals, per Slade LJ, when analysing the obligations of the doctor to his patient, with whom he had contracted, stated:

*"Applying the Moorlock principle, I think there is no doubt that the plaintiff would have been entitled reasonably to assume that the defendant was warranting that the operation would be performed with reasonable care and skill."*

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<sup>106</sup> *Thake v Maurice* (1986) QB 644; (1986) 1 ALL ER 479 (SA).

<sup>107</sup> (1996) 1 ALL ER 488.

*That, I think, would have been the inevitable inference to be drawn, from an objective standpoint..... The contract did, in my opinion, include an implied warranty of that nature."*

In the case of *Johnstone v Bloomsbury Health Authority*<sup>108</sup> the Court of Appeal considered the *Unfair Contract Terms Act 1977* in deciding whether a clause in an employment contract, providing for the working hours of a doctor under contract with the respondent, was invalid.

The facts, briefly stated, included the following: The plaintiff doctor was employed by the defendant health authority, as a senior house officer, under a contract, which by clause 4(b) stipulated that his hours of duty should consist of a standard working week of 40 hours and an additional availability, on call up, to an average of 48 hours a week over a specified period. The plaintiff, in compliance with the contract, worked some weeks in excess of 88 hours and, as a result of working those hours with inadequate sleep, he became ill. In March 1989 he brought an action against the defendants, seeking, *inter alia*, a declaration that he should not be required to work in excess of 72 hours a week and damages for personal injuries and loss, allegedly suffered as a result of breach, by the defendants, of their duty to take reasonable care for the plaintiff's safety. In July 1989, the master, on the defendant's summons, ordered that those parts of the writ and statement of claim, relating to the requirement to work in excess of 72 hours be struck out as being an abuse of process. The judge allowed the plaintiff's appeal and set aside the master's order.

Thereafter the plaintiff filed a reply, alleging by paragraph 4(1), that if clause 4(b) of the contract created a contractual obligation to work for 88 hours per week, that term was rendered void by section 2(1) of the *Unfair Contract Terms Act 1977*, alternatively (by paragraph 4(ii), that it was contrary to public policy. In June 1990, the defendants successfully applied to the judge to have the paragraph struck out as being an abuse of process.

Consequently, the court considered the *Unfair Contract Terms Act* Sec 2(1) which provided:

*"A person cannot by reference to any contract term or to a notice given to persons generally or to particular persons exclude or restrict his liability for death or personal injury resulting from negligence."*<sup>109</sup>

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<sup>108</sup> (1992) C.A. 333.

<sup>109</sup> *Unfair Contract Terms Act*, Sec 2(1).

In this regard the court stated that the defendant's liability, if any, was for personal injury resulting from negligence.

Consequently, the court considered Section 13(1) of the Act <sup>110</sup> which provided:

*"To the extent that this Part of this Act prevents the exclusion or restriction of any liability it also prevents (a) making the liability or its enforcement subject to restrictive or onerous conditions; (b) excluding or restricting any right or remedy in respect of the liability, or subjecting a person to any prejudice in consequence of his pursuing any such right or remedy and (to that extent) sections 2 and 5 to 7 also prevent excluding or restricting liability by reference to terms and notices which exclude or restrict the relevant obligations or duty."*

The court continued:

*"Read (the provisions of the 1977 Act) as introducing a "but for" test in relation to the notice excluding liability. They indicate that the existence of the common law duty to take reasonable care ..... is to be judged by considering whether it would exist "but for" the notice excluding liability (at P530). As we have already suggested, if the doctor did not purport to restrict his obligation to the person he is examining, he would, as a matter of law, be held to have undertaken a minimum degree of responsibility qua doctor which would include, for example, advising the person of any significant matters which might affect his health. Consequently, any purported restriction of a doctor's duty, at least as regards this obligation of a minimum degree of responsibility, will be ineffective."*

The court found that *"the more the defendants argue that the contract excludes the common law duty of care, the more they have to accept that the Unfair Contract Terms Act 1977 applies."*

The court, per Stuart-Smith L.J. subsequently concluded however, that in this particular matter, it would be better to adjudicate based upon public policy, when he stated:

*"I have no doubt that it is a matter of grave public concern that junior doctors should be required to work such long hours without proper rest that not only their own health may be put at risk but that of their patients as well. That is the allegation in this case and it seems to me that for the purpose of a striking out application it must be assumed to be true."*

In applying public policy in these types of matters, Stuart-Smith L.J. cautioned:

*"But it does not follow from that fact alone that cause or this contract is contrary to public policy. The courts should be wary of extending the scope of the doctrine beyond the well recognised categories: see Fender v St John-Mildmay (1938) A.C. 11-12 per Lord Atkin. They should be even more reluctant to embark upon a wide-ranging enquiry into matters of public debate where it is plain that there are two views bone fide and firmly held, and where complex considerations of capacity of the National Health Service and public funding are involved."*

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<sup>110</sup> Unfair Contract Terms Act 1977, S13 (1).

The court per Stuart-Smith concluded:

*"For those reasons I am satisfied that a defence of public policy would be unarguable in a court of law, though I would not wish it to be thought that I am in any way detracting from the force of the argument advanced on behalf of the junior doctors generally."* <sup>111</sup>

The principle issue of whether a professional person may exclude or restrict his duty of care was also considered by the *House of Lords* in *Smith v Eric S Bush (A firm)*. <sup>112</sup>

In this case, the court had to consider the effect of a disclaimer, in a report compiled by a surveyor, in which he exempted himself from liability, in terms of the *Unfair Contract Terms Act* being operative.

In this case, the plaintiff applied to a building society for a mortgage to assist her in purchasing a house. The building society instructed the defendants, a firm of surveyors and valuers to carry out a visual inspection of the house and to report on its value and any matter likely to affect its value. The defendants' valuator, who carried out the inspection, noticed that two chimney-breasts had been removed, but he failed to check whether the chimneys above had been left adequately supported. His report stated that no essential repairs were necessary.

The mortgage application form and the valuation report contained a disclaimer of liability, for the accuracy of the report, covering both the building society and the valuator. The plaintiff was also informed that the report was not a structural survey and she was advised to obtain independent professional advice. The building society, pursuant to an agreement with the plaintiff, who paid an inspection fee, supplied a copy of the report to her and she relied upon it and purchased the house without any further survey. The chimneys were not adequately supported and one of them subsequently collapsed. The plaintiff claimed damages from the defendants, who relied, *inter alia*, on the disclaimer in the report and the application form, as exempting them from liability to the plaintiff. The plaintiff claimed that the disclaimer did not exclude the defendants' liability and that the defendants were, in any event, precluded by section 2 of the *Unfair Contract Terms Act 1977* (FN1) from so excluding their liability, since the disclaimer did not satisfy the requirement of reasonableness set out in section 11(3) of the Act.

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<sup>111</sup> *Johnstone v Bloomsbury Health Authority* (1992) C.A. 333, 347.

<sup>112</sup> (1989) 2 ALL ER 514 (1990) 1 A.C. 831.

The court looked at the common law and found *"the common law imposes on a person who contracts to carry out an operation an obligation to exercise reasonable skill and care."*

The court subsequently looked at the position of a plumber who mends a burst pipe and concludes *"he is liable for his incompetence or negligence whether or not he has been expressly required to be careful."*

The court looked at the legal position and stated *"the law implies a term in the contract which requires the plumber to exercise reasonable skill and care in his calling."*

And further *"the common law also imposes on a person who carries out an operation an obligation to exercise reasonable skill and care where there is no contract."*

The court consequently found *"where the relationship between the operator and a person who suffers injury or damage is sufficiently proximate and where the operator should have foreseen that carelessness on his part might cause harm to the injured person, the operator is liable in the tort of negligence."*

Turning to the duty of a professional man, the court held *"the duty of professional men is not merely a duty to use care in their reports. They have also a duty to use care in their work which results in their reports."*

Moreover, the court subsequently considered the effect of the *Unfair Contract Terms Act*<sup>113</sup> in relation to disclaimer of liability involving negligence. Consequently, the court considered Section 1(1) of the Act which defined 'negligence' as the breach *"(a) of any obligation, arising from the express or implied terms of a contract, to take reasonable care or exercise reasonable skill in the performance of the contract, (b) of any common law duty to take reasonable care or exercise reasonable skill ...."*

Section 2 of the Act provided: *"(1) A person cannot by reference to any contract term or to a notice ..... exclude or restrict his liability for death or personal injury resulting from negligence. (2) In the case of other loss or damage, a person cannot so exclude or restrict his liability for negligence except in so far as the term or notice satisfies the requirement of reasonableness."*

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<sup>113</sup> *Unfair Contract Terms Act 1977.*

As to what was reasonable, the court consequently looked at Section 11(3) of the Act of 1977 which provided that, in considering whether it was fair and reasonable to allow reliance on a notice which excluded liability in tort, account must be taken of: "*All the circumstances obtaining when the liability arose or (but for the notice) would have arisen.*"

Consequently, the court identified the following factors, which the court believed should be considered when determining whether an exemption was fair and reasonable, namely:

- (1) The bargaining power of the parties;
- (2) Could it have been reasonably practicable to obtain advice from another source?
- (3) How difficult is the task being undertaken for which liability is being excluded;
- (4) The hardship such exclusion will bring to the party.

The court also considered the fact that the building society, in terms of Section 13 of the *Building Societies Act*,<sup>114</sup> was required, by statute, to obtain a valuation of the property before it advanced any money. The underlying rationale for the requirement was said to be founded "*to protect the depositors who entrust their savings to the building society.*" The Court of Appeal, per Dillon and Glidewell L.JJ and Sir Edward Eveleigh, held that the disclaimer was not fair and reasonable and was ineffective under the *Unfair Contract Terms Act* 1997. The award of damages of \$4, 379, 97, given by the court a quo, was affirmed.

#### 14.3.1.3 Legal Opinion

The influence of the *National Health Scheme* (NHS) in England has caused the relationship between the hospital and patient, in general, to be regulated in the public domain. Unlike its contemporaries in countries such as the United States of America and South Africa, in which relationships between hospitals/doctors and patients are controlled by private agreements, (unless one is dealing with State hospitals), in English law, relationships are controlled by medical regulations.<sup>115</sup>

Moreover, several of the English legal writers have suggested that those patients who receive medical treatment under the *National Health Service Scheme* (which represent the majority of patients in England) do not enter into a direct contract with the hospital

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<sup>114</sup> *Building Societies Act* 1986.

<sup>115</sup> Kennedy and Grubb *Medical Law Text with Materials* (1994) 64ff; Nelson-Jones and Burton *Medical Negligence Law* (1995) 26; Kennedy and Grubb *Principles of Medical Law* (1998) 283ff; Jones *Medical Negligence* (1996) 18; Jackson and Powell *Professional Negligence* (1997) 590-591; Giesen *International Medical Malpractice Law* (1988).

himself/herself, nor, with the general practitioner etc.

It has further been suggested that actions brought in medical malpractice cases are, primarily, brought in tort and not founded in contract.<sup>116</sup> For that reason, the English courts are not confronted as, especially the American courts, or in a limited sense, the South African courts, to deal with exclusionary clauses in private agreements, between hospitals and patients or doctors and patients.

But, notwithstanding the fore stated, the English legal writers are *ad idem* that even if one was to hypothesize a scenario that a private agreement may be inferred from the relationship between the hospital/doctor and patient, the implied contractual duty contained in the contract, cannot be excluded or restricted where the hospital or doctor deviates from the exercise of reasonable care.<sup>117</sup>

Strong arguments are advanced, by the English legal writers, why this duty of care cannot be excluded by way of contractual agreements. It is especially the writers *Jackson and Powell*,<sup>118</sup> who advance the ground that; as the duty is based on a moral aspect that accompanies the nature of the work done by the medical practitioner, the high standard of service to the community and the strong sense of responsibility. in the interests of their clients cannot be absolved in any way.

The writer *Jones*<sup>119</sup> relies upon Section 2(1) of the *Unfair Contract Terms Act*, when suggesting that a medical practitioner cannot, by contractual term or by notice, excuse or restrict liability for their actions, where medical practitioners deviate from the exercise of reasonable care.

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<sup>116</sup> Nelson-Jones and Burton *Medical Negligence Case Law* (1998) 26; Kennedy and Grubb *Principles of Medical Law* (1998) 287. Jones *Medical Negligence* (1996) 18-19; Jackson and Powell *Professional Negligence* (1997) 594.

<sup>117</sup> The legal writers generally agree that the duty of care in contract is identical to the duty of care owed in tort. See in this regard Nelson-Jones and Burton *Medical Negligence Case Law* (1998) 266; Kennedy and Grubb *Principles of Medical Law* (1998) 287; Jones *Medical Negligence* (1996) 20; Giesen *International Medical Malpractice Law* (1988) 14, 24; Jackson and Powell *Professional Negligence* (1993) 2-3.

<sup>118</sup> *Professional Negligence* (1997) 2-3ff; See also Giesen *International Medical Malpractice Law* (1988) 14.

<sup>119</sup> *Medical Negligence* (1996) 24; See also Jackson and Powell *Professional Negligence* (1997) 68ff who also rely on S2 (1) of the *Unfair Contract Term Act* 1977 in holding it would be unreasonable for a professional person to exclude liability altogether for negligence as it would be contrary to the principles for which the profession stand to allow a professional person to contract out of liability.

In so far as case law is concerned, English law is not rich in pronouncing on the validity of exclusionary clauses in medical and hospital contracts. Unlike other jurisdictions, especially the United States of America, English courts have never pronounced on the validity of exclusionary clauses in medical and hospital contracts. But, notwithstanding the absence of *dicta* expressing the court's views on the validity of exclusionary clauses in hospital and medical contracts, what is significant is the emphasis placed by the English courts towards upholding the exercise of reasonable care and skill by hospitals and medical practitioners.<sup>120</sup>

Post the *Unfair Contract Terms Act 1977*, the English courts have also shown that courts will not uphold contractual clauses or agreements, the aim of which is to exclude or restrict liability for death or personal injury resulting from negligence.<sup>121</sup>

It appears, therefore, very settled that, if a matter concerning hospital contracts, including an exclusionary clause exempting a hospital from liability arising from their negligence, were to appear before an English court, the courts will not uphold such agreements.

#### 14.4.1 UNITED STATES OF AMERICA

##### 14.4.1.1 Legal Writings

It was previously mentioned that, a practice has evolved over the years between the doctor and patient or that of the hospital/other health care provider and patient, that the said parties will include in the contract entered into between them, an exclusionary clause, or waiver in which the hospital/healthcare provider seek to relieve itself from liability for negligence.

The effect of including these types of clauses, in the contracts entered into between the hospital and other health care providers and patients, have formed the subject of debate amongst many of the American legal writers.

As was stated previously, generally, waivers of liability and other attempts at exculpating

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<sup>120</sup> See in this regard the very old cases of *Campher v Phipos* (1838) 8 Cand P475; *Rex' v Bateman* (1925) Q 4 LJKB 791; See also the more recent cases of *Thake v Maurice* (1986) QB 644 (1986) 1 ALL ER 479 (SA); *Eyre v Measday* (1996) 1 ALL ER 488 in which it was held that even in the absence of any agreement an implied duty to exercise reasonable care arises.

<sup>121</sup> See *Johnstone v Bloomsbury Health Authority* (1992) C.A. 333 in which the court held that any purported restriction of a doctor's duty, at least as regards this obligation of a minimum degree of responsibility will be ineffective. The House of Lords in the case of *Smith v Eric S Bush (a firm)* (1989) 2 ALL ER 514, (1990) 1 A.C. 831 when considering the obligation of a surveyor to exercise reasonable skill and care relied on Section 2 (1) of the Unfair Contract Terms Act 1977 to determine whether an exemption is fair and reasonable considering *inter alia* the bargaining power of the parties, how difficult was the task undertaken, the hardship the exclusion will bring, the court held the disclaimer was not fair and reasonable and therefore ineffective.

hospitals/health care providers from liability are treated with disfavour by the courts. The reason therefore stems from the fact that public interest requires the performance of such duties. Furthermore, because the parties do not stand upon equal footing, the weaker party, usually the patient would be in a disadvantageous position when entering into the contract with the hospital/other health care providers.<sup>122</sup>

Waivers or exculpatory clauses included in agreements between the patient and hospitals or other health care providers, signed at the time of treatment or surgery, are also regarded as unenforceable, being contrary to public policy, even if these clauses are correctly worded and understood by the patient. Public policy is, then, often used in conjunction with public interests to protect the patient against the practise of the deviation from minimum levels of performance or bad medicine.<sup>123</sup>

Avowing that, logic dictates that, any contractual agreement of a patient to assume the risk of injury from negligent conducts of medical practise is void as against the public policy, the legal writer, *Winston-Smith*<sup>124</sup> uses public interests and the duty of care as motivating factors for his opinion when he states:

*"There can be no doubt that medical practise is affected with a public interest. The duty which a doctor owes to his patient to apply average qualifications to the transaction does not depend on an implied warranty. Such duty is relational, and arises whenever the physician assumes control of the case, whether the service is gratuitous, or directed toward an unconscious or insane person not able to consent. It is product of tort law but also a creature of public policy, designed to hold those practise the healing art to a minimum level of performance. It would be offensive to policy to permit these safeguards to be destroyed by medical practise under "contract waivers"."*<sup>125</sup>

The authors, *Stetler and Moritz*,<sup>126</sup> also rely on the doctor and/or hospital's duty of care, which according to the authors, is an inalienable duty when they state:

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<sup>122</sup> Flam "Healthcare provider as defendant" A Chapter published in *Legal Medicine American College of Legal Medicine* (1991) 127; Furrow et al *Health Law* (1995) 256' Annotation "Validity and Construction of Contract exempting hospital or doctor from liability for negligence to patient" 6 *ALR* 3d 704 at 705' Keller and Keller "Waivers of Liability in Personal Injury" *New York Law Journal* October (1992) 3; American Jurisprudence 57A *AM Jury* 2d 121; Reynolds Comments "Torts - Negligence - Exculpatory Clause" *Kentucky Law Journal* Vol. 58 (1970) 583 at 584.

<sup>123</sup> Winston-Smith "Antecedent grounds of liability in the practice of surgery" *The Rocky Mountain Law Review* Vol. 14 June (1942) No 4 288 at 288-291.

<sup>124</sup> "Antecedent grounds of liability in the practice of surgery" *The Rocky Mountain Law Review* Vol. 14 June (1942) No 4 288 at 288-291.

<sup>125</sup> Winston-Smith "Antecedent grounds of liability in the practice of surgery" *The Rocky Mountain Law Review* Vol. 14 June (1942) No 4 288 at 288-291.

<sup>126</sup> *Doctor Patient and the Law* (1962) 388.

"Generally, a physician cannot avoid liability for negligence, by having a patient sign in advance a contract containing an exculpatory clause. The obligation of a physician to possess and exercise reasonable care in treating a patient is imposed by law. The physician who undertakes the treatment of a patient cannot therefore avoid that obligation by contract." <sup>127</sup>

The inalienable duty, with its accompanying tortuous consequences where the duty is deviated from, is used by the legal writer, *Manner*, <sup>128</sup> as a rationale in denouncing waivers or exculpatory clauses in hospital contracts. The position is summarized by him as follows:

"A waiver is an exculpatory agreement that relieves one party of all or part of its responsibility to another. These waivers, usually in the form of an express contractual agreement, touch off a conflict between contract law and tort law is based on the premises that a person should be able to make a binding agreement as they see fit. Tort law, on the other hand, is based on the idea that a party should be held responsible for his wrongful actions that cause injury to others. This conflict has led to some confusion regarding the validity of waiver in situations such as those discussed here." <sup>129</sup>

The writers *Ginsburg, Kahn, Thornhill and Gambardella* <sup>130</sup> with reference to American case law on waivers or exculpatory agreements in hospital contracts, highlight the following overlapping rationales, which serve as basic principles, influencing the American courts in pronouncing on the validity of these types of clauses namely:

- "(1) Any attempts by health care providers to use written contracts to reduce liability for negligence ought to be struck down as they are deemed to be contrary to public policy;
- (2) Courts have generally not analyzed exculpatory patient/hospital or health care provider agreements in terms of mutuality of bargaining but prefer to look at public intension declaring these types of contracts invalid. More particularly the following overlapping rationales are highlighted namely:
  - (a) Medical care is a necessity of life over which the superior bargaining power of the provider should not prevail;
  - (b) Exculpatory clauses have no place in the practice of the learned profession;
  - (c) Private agreements should not reduce a health care provider's statutory or ethical duties;
  - (d) Health care providers have non-negotiable duty of public service;
  - (e) Health care providers should not be able to violate prevailing standards of care with impunity;
  - (f) Patients cannot be expected to choose among health care providers based on contractual terms affecting the provider's liability for negligence;

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<sup>127</sup> Stetler and Moritz *Doctor Patient and the Law* (1962) 388.

<sup>128</sup> "A high price to compete: The feasibility and effect of waivers used to protect schools from liability for injury to athletes with high medical risks" - *Kentucky Law Journal* (1990-1991)867-881.

<sup>129</sup> Manner "A high price to compete: The feasibility and effect of waivers used to protect schools from liability for injury to athletes with high medical risks" - *Kentucky Law Journal* (1990-1991) 867-881.

<sup>130</sup> "Contractual Revisions to Medical Malpractice Liability Law and Contemporary Problems" Vol. 49 No 2 (1986).

- (g) *There is no assurance that other available and comparable health care providers will not impose similar limitations;*
- (h) *The disparity of bargaining power between provider and patient is too extreme to give any normative weight to the results of bargaining;*
- (i) *The financial risk of personal injury should be borne by a negligent party when that party is in a much superior position and capable of taking measures to prevent or insure against losses.*" <sup>131</sup>

The legal effect of exclusionary clauses in hospital contracts, in the United States of America, is summarized as follows by *Burchell and Schäfer*, <sup>132</sup> namely:

*"The scope of the redress of the plaintiff against the hospital may be severely curtailed where the latter relies on an exemption clause or as it is referred to in America, an exculpatory clause. The effect of such a clause is inter alia that the hospital will not be liable for any injury, loss or damage of whatever nature suffered by the patient arising out of any treatment or attention received or defect in the premises or instruments of the hospital, whether it is due to the negligence of the hospital or its staff or servants or not."*

The writers continue to discuss the criticism levelled, in America, against the effect of the said clauses namely:

*"Strong criticism can be levelled at these type of clauses in that, if these exemption clauses are used extensively and relied upon by private hospitals as conditions of admission, would-be patients will be faced with the unenviable choice of signing away their remedies should they suffer as a result of negligence."* <sup>133</sup>

#### 14.4.1.2 Case Law

The issue of whether waivers, or exculpatory agreements, between physicians or hospitals and patients, are void as contrary to public policy formed the basis for decision-making in a number of cases in America. One of the leading cases in this regard is that of *Tunkl v Regents of the University of California* <sup>134</sup> decided in the Supreme Court of California. In this matter, Hugo Tunkl brought an action to recover damages for personal injuries alleged to have resulted from the negligence of two physicians, in the employ of the University of California Los Angeles Medical Centre, a hospital operated and maintained by the regents of

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<sup>131</sup> Ginsburg, Kahn, Thornhill and Gambardella "Contractual Revisions to Medical Malpractice Liability Law and Contemporary Problems" Vol. 49 No 2 (1986).

<sup>132</sup> "Liability of Hospitals for Negligence" *Businessman's Law* (1977) 109.

<sup>133</sup> Burchell and Schäfer "Liability of Hospitals for Negligence" *Businessman's Law* (1977) 109. The position is set out in "American Jurisprudence" 2d Vol. 40 14 p861 (1969-70) 58 *Kentucky Law Journal* 583 in which it is held that an exculpatory clause will be struck down where public interest requires the performance of duties or the parties do not stand on an equal footing.

<sup>134</sup> 60 Cal. 2d 92, 32 Cal.RPTR. 37, 383 P 2d 441.

the University of California, as a non-profit charitable institution. Mr Tunkl died after the action had been instituted, and his surviving wife, as Executrix, was substituted as plaintiff.

The University of California, at Los Angeles Medical Centre, admitted Tunkl as a patient on June 11, 1956. The regents maintained the hospital for the primary purpose of aiding and developing a program of research and education in the field of medicine; patients were selected and admitted if the study and treatment of their condition would tend to achieve these purposes. Upon his entry to the hospital, Tunkl signed a document setting forth certain "Conditions of Admission". The crucial condition, number six, read as follows:

RELEASE

*The hospital is a non-profit, charitable institution. In consideration of the hospital and allied services to be rendered and the rates charged therefore, the patient or his legal representative agrees to and hereby releases the regents of the University of California and the hospital from any and all liability for the negligent or wrongful acts or omissions of its employees, if the hospital has used due care in selecting its employees.*

It was also contended, on behalf of the plaintiff, that the plaintiff, at the time of signing the release, was in great pain, under sedation, and probably unable to read. At trial, plaintiff contended that the release was invalid, asserting that a release did not bind the releaser if, at the time of its execution, he suffered from so weak a mental condition that he was unable to comprehend the effect of his act.

The jury, however, found against plaintiff on this issue. Since the verdict of the jury established that plaintiff either knew, or should have known, the significance of the release, the appeal raised the sole question of whether the release could stand as a matter of law.

Put differently, the court was asked to interpret and decide on the validity of a release from liability for future negligence, imposed as a condition for admission to a charitable research hospital.

Consequently, the Supreme Court of Appeal considered the validity of exculpatory clauses in general and concluded that; although exculpatory clauses, *per se*, were not invalid, nevertheless, where exculpatory provisions involved "the public interest" they would not be held to be valid. In this regard the court relied upon Section 1668 of the *Civil Code*. This section provided:

*"..... That an agreement between a hospital and an entering patient affects the public interest and that, in*

*consequence, the exculpatory provision included within it must be invalid ....."* <sup>135</sup>

In placing particular contracts within or outside the cadre of those affected with a public interest, the court, subsequently, designed a test to determine when an exculpatory agreement violated public policy. The test consisted of six criteria, namely:

- (1) *the agreement concerns an endeavour of a type generally thought suitable for public regulation;*
- (2) *The party seeking exculpation is engaged in performing a service of great importance to the public, which is often a matter of practical necessity for some members of the public;*
- (3) *such party holds itself out as willing to perform this service for any member of the public who seeks it, or at least for any member of the public coming within certain established standards;*
- (4) *The party seeking the exculpation possesses a decisive advantage of bargaining strength against any member of the public who seeks the services;*
- (5) *in exercising a superior bargaining power, the party confronts the public with a standardized adhesion contract of exculpation and makes no provision whereby those receiving services may pay additional reasonable fees and obtain protection against negligence; and*
- (6) *The person or members of the public seeking such services must be placed under the control of the furnisher of the services, subject to the risk of carelessness on the part of the furnisher, its employees, or its agents."* <sup>136</sup>

With reference to the aforementioned factors, and having regard to the public regulation as contained in the *Californian Health and Safety Code*, <sup>137</sup> the court concluded that the hospital/patient contract clearly fell within the category of agreements affecting the public interests. The court also held that the services of the hospital to members of the public, who were in special need of the particular skill of its staff and facilities, constituted a crucial necessity. By insisting that the patient accept the provision of waiver in the contract, the hospital exercised a decisive advantage in bargaining. There was no room for debate regarding the terms of the contract.

The court also concluded that there was no distinction, in the hospital's duty of due care, between paying and non-paying patients. Consequently, the court quoting from *President and Directors of Georgetown College v Hughes* (1942) 76 U.S. App. D.C. 123, 130 F. 2d 810, 827:

*"To immunize the hospital from negligence as to the charitable patient because he does not pay would be as abhorrent to medical ethics as it is to legal principle."*

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<sup>135</sup> Section 1668 of the Civil Code.

<sup>136</sup> *Tunkl v Regents of the University of California* 60 Cal 2d 92, 32 Cal. RPTR. 37, 383 P 2d 441.

<sup>137</sup> SS 1400-1421, 32000-32508 of the *Californian Health and Safety Code*.

It was also held that the duty of care "*is part of the social fabric, and prearranged exculpation from its negligence must partly rend the pattern and necessarily affect the public interest.*" <sup>138</sup>

The landmark decision of *Tunkl v Regents of the University of California* 60 Cal 2d S2, 32 Cal. RPTR, 33, 383 P. 2d (1963) 441 was also followed in a number of medical negligent cases. In these cases, the defendants sought to rely upon exculpatory clauses to escape liability arising from their own negligence. Despite their contentions, the courts have found that, although not all contracts redistributing the risk of liability from one's own negligence, are void, exculpatory provisions may stand only if it does not involve 'the public interests'.

One of the first cases in which the principles of the *Tunkl case* were followed was that of *Belshaw v Feinstein*. <sup>139</sup> This was an action, by a patient, against a number of surgeons for malpractice.

Dr Bertram Feinstein and Dr Grant Levin were physicians and surgeons practising in San Francisco and specializing in neurosurgery. Each was one of a very few surgeons, in the West, qualified to perform a specialized type of neurosurgery, known as neuro toxic surgery. Both had had extensive training in this field and were recognized as authorities on the subject. These doctors operated the only neuro toxic centre in San Francisco, with the possible exception of one at the University of California, at the time.

The plaintiff (Appellant) sought advice from Dr Feinstein, who examined him. After various tests and examinations, an operation procedure was suggested by Dr Feinstein. In compliance with the pre-operative requirements, plaintiff and his wife executed two written agreements in the same form (one executed before the first operative procedure and the other before the second). These purported to relieve defendants from liability due to any and all untoward risks, or complications, resulting from the neuro toxic surgical procedures. (Plaintiff and Mrs Belshaw testified that they did not read the documents they signed). Consequently, besides the aspect of negligence, the Court of Appeal, California, was also asked to rule on the validity of the written release.

The court, consequently, considered the leading authority on the subject of this type of agreement in *Tunkl v Regents of University of California* (1963) 60 CAL. 2d 92, 32 CAL.

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<sup>138</sup> *Tunkle v Regents of the University of California* 60 Cal. 2d 92, 32 Cal. Rptr 37, 383 P2d 441.

<sup>139</sup> 258 CAL. APP. 2d 711, 65 CAL. RPTR. 788 (1968).

RPTR. 33 383 P. 2d 441, 6 A.L.R. 3d 693, where the court considered the validity of a release from liability for future negligence, imposed as a condition for admission to a charitable research hospital. After reviewing the authorities, the court in the *Tunkl* case held that such an exculpatory provision will stand only if it does not involve 'public interest'. It then held that an exemption from liability is invalid if the transaction exhibits some or all of the following characteristics: (1) It concerns a business of the type generally thought suitable for public regulation; (2) the party seeking exculpation is engaged in performing a service of great importance to the public, which is often a matter of practical necessity for some members of the public; (3) the party holds himself out as willing to perform this service for any member of the public coming within certain established standards; (4) as a result of the essential nature of the service, in the economic setting of the transaction, the party invoking exculpation possesses a decisive advantage of bargaining strength against any member of the public who seeks his service; (5) in exercising a superior bargaining power the party confronts the public with a standard adhesion contract of exculpation, and makes no provision whereby additional reasonable fees may be paid to obtain protection against negligence; (6) as a result of the transaction, the person or property of the member of the public is placed under the control of the party seeking exculpation, subject to the risk of carelessness by that party or his agents. When all or most of these circumstances exist, the Supreme Court in *Tunkl* held, the public policy of this state is violated.

Quoting from the *Tunkl* case, in which it was also held that: *"Since the service involved is one which each member of the public, presently or potentially, may find essential to him, he faces, despite his economic inability to do so, the prospect of a compulsory assumption of the risk of another's negligence. Public policy does not favour 'agreements' which shift the risk of negligence from the actor to the victim, where the latter is not in an equal bargaining position."*

The court in the case *in casu* held that:

*"Obviously the instant releases concerned physicians and a hospital, all suitable for and subjects of public regulation. Defendants, being the only physicians in this area capable of performing neuro toxic surgery and holding themselves out as willing to perform their services for the members of the public needing them constituted a practical and crucial necessity to those members of the public who had special need of the doctor's specialized treatment. The doctors exercised a decisive advantage in bargaining, and when plaintiff signed the release he placed himself completely in the control of carelessness on the part of defendants."*

Consequently the court held that: *"Practically all the reasons given in Tunkl for holding invalid the hospital release agreement apply to the agreements in the case at bench."* And further: *"The cases have consistently held that the exculpatory provision may stand only if*

*it does not involve 'the public interest'. The exculpatory provisions in the instant case definitely involve the public interest. Hence the agreements are void."*<sup>140</sup>

In *Leidy v Deseret Enterprises Inc.*,<sup>141</sup> Mr and Mrs Leidy (the appellants), commenced an action in trespass, and assumpsit, against the appellee, Deseret Enterprises Inc, d/b/a Body Shop Health Spa, for injuries sustained by Mrs Leidy at the Spa.

The appellants alleged that Mrs Leidy had been referred to the Spa, by her doctor, as part of post-operative treatment following surgery on the lumbar area of her spine, but that the treatment she was, in fact, given was directly contrary to her doctor's instructions to the Spa and resulted in various injuries. The Spa and Ms Robinson opposed the appeal on the basis of a provision in the membership agreement, between Mrs Leidy and the Spa, purporting to release the Spa from liability for injuries resulting from its negligence or that of its employees.

The clause provided:

*"Member acknowledges that Body Shop Health Spa has neither made claims as to medical results nor suggested medical treatment to Member. It is expressly agreed that all exercises and use of all facilities shall be undertaken by Member at Member's sole risk and Body Shop Health Spa shall not be liable for any claims, demands, injuries, damages, actions or causes of action whatsoever, to person or property, arising out of or connected with the use of any of the services or facilities of Body Shop Health Spa or the premises where the same are located, including those arising from acts of active or passive negligence on the part of Body Shop Health Spa, its servants, agents or employees and Member does hereby expressly forever release and discharge Body Shop Health Spa from all such claims, demands, injuries, damages, actions or causes of action."*

To this the appellants contended that the clause, purporting to release the Spa from liability for injuries resulting from its negligence, was unconscionable.

The court consequently considered the general approach by the courts and referred to the case of *Crew v Brandstreet*, 134 Pa. 161, 169, and 19 A. 500 (1890), in which the Supreme Court stated:

*"Contracts against liability for negligence are not favoured by the law. In some instances, such as common carriers, they are prohibited as against public policy. In all cases, such contracts should be construed strictly, with every intendment against the party seeking their protection."*

Subsequently the court held however: *"Although not favoured, contracts against liability*

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<sup>140</sup> *Belshaw v Feinstein* 258 CAL. APP 2d 711, 65 CAL. RPTR 788 (1968).

<sup>141</sup> 252 PA. Super 162, 381 A. 2d 164 (1977).

*may nevertheless be valid. Commonwealth v Monumental Properties, Inc, 10 Pa. Cmwltth. 596, 314 A. 2d 333 (1973). Generally stated the contract will be held valid if:*

*(a) "it does not contravene any policy of the law, that is, if it is not a matter of interest to the public or State ....." (Dilks v Flohr Chevrolet, 411 Pa. 425, 192 A. 2d 682, 687 (1963) and authorities therein cited); (b) "the contract is between parties relating entirely to their own private affairs" (Dilks v Flohr Chevrolet, supra pp. 433, 434, 192 A. 2d 682, p. 687); (c) "each party is a free bargaining agent and the clause is not in effect a mere contract of adhesion, whereby (one party) simply adheres to a document which he is powerless to alter, having no alternative other than to reject the transaction entirely". (Galligan v Arovitch 421 Pa. 301, 304, 209 A. 2d 463, 465 (1966); Employers Liab. Assur, Corp. v Greenville Business Men's Asso'n, 423 Pa. 288, 291-292, 224 A.2d 620, 622-623 (1966))"*

Consequently, the court stated:

*"Courts have been particularly sensitive to the public interest in considering contracts that involve health and safety."*

*In instances where " ..... a policy measure obviously intended for the protection of human life; in such event public policy does not permit an individual to waive the protection which the statute is designed to afford him."*

Relying on public policy and quoting the case of *McCurdy's Estate* 303 Pa. 453, 461, 154 A. 707, 709, in which it was stated:

*"Statutes grounded on public policy are those which forbid acts having a tendency to be injurious to the public good. The prime question is whether the thing forbidden is inimical to the public interest. Where public policy requires the observance of a statute, it cannot be waived by an individual or denied effect by courts, since the integrity of the rule expressed by the Legislature is necessary for the common welfare."*

Turning to the facts of the case and assessing the nature and scope of the exclusionary provision, the court held:

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

Turning to the *Physical Therapy Practice Act*, Act of October 10, 1975, P.L. 383, No 110, s1, 63 P.W. s 1301 et seq., which the court held, that provision contained therein reflected the legislature's recognition that a physical therapist was, in a sense, part of the medical profession, the therapist's expertise lay in the same realm as the doctor's, and the therapist's errors could do as much harm as the doctor's.

And further:

*"A physical therapist who as alleged here negligently performs therapy in direct contradiction to a doctor's orders should likewise be "guilty of a breach of duty imposed on him by law to avoid acts dangerous to the lives or health of others." <sup>142</sup>*

The court consequently held the agreement did not relate only to matters of private interest.

The court found that the exculpatory clause was unconscionable and contrary to public policy.

In the case of *Olson v Molzen* <sup>143</sup> the plaintiff engaged the defendant to perform an abortion at defendant's abortion clinic. She signed a form stating, *inter alia*: *"I release Doctor Molzen and his staff from any present or future legal responsibility associated with performing an abortion on me."* The procedure was performed but some month's later plaintiff gave birth to a child.

The plaintiff subsequently sued the osteopath for negligence. The osteopath, Bob Molzen, consequently pleaded that, *inter alia*, the plaintiff signed an exculpatory contract, resultant in him not being liable for damages. The court of first instance, namely Knox County, dismissed the plaintiff's negligence suit against the defendant, Bob Molzen. The Court of Appeal affirmed the decision and the matter were subsequently held by the Supreme Court of Tennessee. The Supreme Court was consequently asked to decide whether an exculpatory contract, signed by patient as condition of receiving an abortion, was invalid as contrary to public policy and could not be pleaded as a bar to patient's negligence suit.

The court held that, in determining whether exculpatory contracts are invalid, the court considers the factors namely:

- "(1) whether the transaction concerns business of a type suitable for public regulation and performing service of importance to the public;*
- (2) whether a party invoking exculpation, possesses decisive advantage of bargaining strength and, in exercising superior bargaining power whether the public, as a result of the transaction, is placed under the control of the party seeking exculpation of which the inferior party agrees to the risk of carelessness."*

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<sup>142</sup> *Leidy v Deseret Enterprises Inc* 252 Pa. Super 162, A. 2d 164 (1977).

<sup>143</sup> 558 S.W. 2d 429 (TENN.S.Ct. 1977).

The court consequently stated:

*"The courts of Tennessee have long recognised that, subject to certain exceptions, parties may contract that one shall not be liable for his negligence to another ..... "Moss v Fortune 207 Tenn. 426, 340 S.W. 2d 902 (1960)"*

The rationale advanced by the court was found in the case of *Trailmobile, Inc v Chazen*, 51 Tenn. App. 576, 370 S.W. 2d 840, 844 (1963) in which it was held that *"the public policy of Tennessee favours freedom to contract against liability for negligence."* 503 S.W. 2d at 190.

But, asserts the court, that, notwithstanding the doctrine of freedom to contract, these types of contracts *"..... do not afford a satisfactory solution in a case involving a professional person operating in an area of public interest and pursuing a profession subject to licensure by the state."*

In drawing a distinction between tradesmen in the market place and professional persons, the court relied on *Williston on Contracts* Para 1751 (3d 1972) in which it is stated:

*"[S]ome relationships are such that once entered upon they involve a status requiring of one party greater responsibility than that required of the ordinary person, and therefore, a provision avoiding liability is peculiarly obnoxious. (Emphasis supplied)"*

Referring to the California Supreme Court judgement of *Tunkl v Regents of University of California* 60 Cal. 2d 92, 32 Cal. Rptr. 33, 383 P. 2d 441 (1963) the court adopted the characteristics laid down in that case when it stated:

*"Tunkl correctly states several characteristics that would render an exculpatory agreement void and the present contract has all of them."*

Referring to the inequality of bargaining power between the parties, the court associated itself with the writings of Prosser, *Law of Torts* 68, at 442 (4th ed 1971) who recognised this dilemma, namely:

*"The courts have refused to uphold such agreements, however, where one party is at such obvious disadvantage in bargaining power that the effect of the contract is to put him at the mercy of the other's negligence."*

And *Williston on Contracts* Para 1791 (3ed 1972) for voiding exculpatory agreement in which he stated:

*"[A] relation often represents a situation in which the parties have not equal bargaining power; and one of them must either accept what is offered or be deprived of the advantage of the relation."*

Consequently the court reasoned *"granted plaintiff could have gone to another doctor, but there is no assurance that any other doctor would not have made a similar demand."* Relying upon "public policy" the court found public policy *"forbids that an exculpatory clause be made a condition of medical treatment."* The court added: *"A professional person should not be permitted to hide behind the protective shield of an exculpatory contract,"* and *"we do not approve the procurement of a license to commit negligence in professional practice."*<sup>144</sup>

In *Emory University v Porubiansky*<sup>145</sup> the Supreme Court of Georgia was faced with the following facts namely:

The respondent, Diane Porubiansky, became a patient at the Emory University School of Dentistry Clinic in 1976. Prior to treatment she was required to execute an "Information-Consent" form. The clinic offered dental services to the public at fees that, on the average, were less than the average price of those of private practitioners. The form explained that patients were accepted, based upon the training needs of the school and that treatment would proceed more slowly than in a private office. There was also a statement that complete dental treatment could not be assured. The last paragraph of this form provided:

*"In consideration of Emory University School of Dentistry performing dental treatment, I do hereby expressly waive and relinquish any and all claims of every nature I or my minor child or ward may have against Emory University, its offices, agents, employees, or students, their successors, assignees, administrators, or executors, and further agree to hold them harmless as the result of any claim by such minor child or ward, arising out of any dental treatment rendered, regardless of its nature or extent."*

The respondent subsequently had an impacted tooth removed by Dr Haddad, an employee of the dental clinic. She alleged that, as a result of negligent treatment, her jaw was broken during the surgical procedure and filed suit against Emory University and Dr Haddad. The defendants denied any negligent treatment and further asserted that the signing of the

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<sup>144</sup> *Olson v Molzen* 558 S.W. 2d 429 (1997) 429 at 432 (1977).

<sup>145</sup> 248 GA 391, 282 S.E. 2d 903 (Supreme Court of Georgia 1981).

information-consent form was a complete bar to the action. The trial court granted summary judgement to the defendants based upon the exculpatory clause in the form.

On appeal, the court was asked to consider whether the exculpatory clause was invalid as against public policy.

The court, firstly, looked at the general position of exculpatory clauses. The court consequently relied upon the doctrine of freedom of contract in their general recognition, when the court stated:

*"All people who are capable of contracting shall be extended the full freedom of doing so if they do not in some manner violate the public policy of this state. We agree that Case property follows the rule stated in Phenix Insurance Co v Clay, 101 Ga. 331. 332. 28 S.E. 853 (1897), that: "It is well settled that contracts will not be avoided by the Courts as against public policy, except where the case is free from doubt and an injury to the public clearly appears." In examining this case we also follow the rule that the courts must exercise extreme caution in declaring a contract void as against public policy and should do so `only in cases free from doubt and where an injury to the public interest clearly appears."*

The court went on to state:

*"Unless prohibited by statute or public policy, the parties are free to contract on any terms and about any subject matter in which they have an interest, and any impairment of that right must be specifically expressed or necessarily implied by the legislature in a statutory prohibition and not left to speculation. Brown v Five Points Parking Ctr. 121 Ga. App. 819, 821, 175 S.E. 2d 901 (1970).*

As to when a contract was deemed to be contrary to public policy, the court stated:

*"A contract cannot be said to be contrary to public unless the General Assembly has declared it to be so, or unless the consideration of the contract is contrary to good morals and contrary to law, or unless the contract is entered into for the purpose of effecting an illegal or immoral agreement or doing something which is in violation of law. Camp v Aetna Ins Co. 170 Ga. 46, 40, 152 S.E. 41 (1929); Brown v Five Points Parking Ctr. supra at p 921, 175 S.E. 2d 901."*

With regard to the position in the State of Georgia, the court held:

*"Except in cases prohibited by statute and cases where a public duty is owed, the general rule in Georgia is that a party may exempt himself by contract from liability to the other party for injuries caused by negligence, and the agreement is not void for contravening public policy. Hawes v Central of Fa. R.D. 117 Ga. App. 771, 162 S.E. 2d 14 (1968)"*

And continued:

*"Historically, our courts have viewed any interference with freedom to contract with considerable caution. In this regard, our Supreme Court has stated:*



*"The power of the courts to declare a contract void for being in contravention of a sound public policy is a very delicate and undefined power, and, like the power to declare a statute unconstitutional, should be exercised only in cases free from doubt ..... The authority of the lawmaking power to interfere with the private right of contract has its limits, and the courts should be extremely cautious in exercising the power to supervise private contracts which the lawmaking power has not declared unlawful."*

It is well settled that contracts will not be avoided, by the courts, as against public policy, except where the case was free from doubt and where an injury to the public interest clearly appeared. *Mut. Life Ins. Co v Durden* Ga. App. 797, 800 (3) 72 S.E. 295 (1911). *"The only authentic and admissible evidence of public policy of a State is its constitution, laws, and judicial decisions."* *Mut. Life Ins. Co v Durden supra* at p800 (3) S.E. 295.

The court consequently looked at the physician/patient relationship and found that the relationship had its foundation in public consideration.

The court also found that, under Georgia law, the practice of dentistry was a regulated profession, licensed by the State, establishing a requirement of minimal standards, and by declaring the malpractice thereof a tort.

With regard to the nature and scope of the requirement of minimum standards, the court concluded:

*"The legislature has established a minimum standard of care for the medical profession. A person professing to practise surgery or the administering of medicine for compensation must bring to the exercise of his profession a reasonable degree of care and skill. Any injury resulting from a want of such care and skill shall be a tort for which a recovery may be had."*

The court also considered the public interests as factor in invalidating exculpatory clauses and found that:

*"There can be no doubt that dental care for our citizens is an invested public duty; the relationship of dentist and patient and the care given to the patient is of legitimate public interest in our state, even when such care is administered in a dental clinic designed for training and teaching."*

The court also found:

*"..... Appellee Emory is engaged in performing a service of great importance to the public, i.e. it provides dental care and educates and trains members of the dental profession."*

Relying on the leading California Supreme Court decision in *Tunkl v Regents of University of California* Ga. Cal. 2d 92, 32 Cal RPTS 33 P 2d 441 (1963) the court went on to state:

*"A professional person should not be permitted to retreat behind the protective shield of an exculpatory clause and insist that he or she is not then answerable for his or her own negligence. We do not approve the procurement of a license to commit negligence in professional practice..... "*

Consequently the court concluded:

*"We find that it is against the public policy of this state to allow one who procures a license to practise dentistry to relieve himself by contract of the duty to exercise reasonable care ....." "*

In the case of *Tatham v Hoke* <sup>146</sup> the plaintiff sued the defendant for negligent performance of an abortion, resulting in her subsequent hospitalisation and surgical treatment. The plaintiff, before treatment, signed an agreement containing an exclusionary clause. Paragraph 13 thereof read as follows:

"INFORMED CONSENT TO TREATMENT, ANAESTHETIC, AND OTHER MEDICAL SERVICES",

executed by plaintiff in North Carolina immediately prior to the abortion:

"13. In the event of any dispute between me and Hallmark, my physician, or other personnel, I agree to make a written claim within thirty (30) days of this date. If such a claim is not timely made I waive any and all rights of recovery such a claim is made, be it for professional liability, personal injury, contract, warranty, or other breach of duty, I agree to submit the claim to binding arbitration. In the event of such arbitration, I understand and agree that Hallmark shall choose one physician arbitrator, I shall choose a second physician arbitrator; a third such arbitrator shall be designated by the American Arbitration Association office in Washington, D.C. The decision of the arbitrators shall be binding upon me without recourse to any other judicial or other tribunal. I further agree that liability shall in no case exceed \$15,000.00 and that I shall post in advance a bond to cover the costs of arbitration and the counsel fees of Hallmark Clinic, its physician(s), or other personnel."

Plaintiff subsequently challenged the entire paragraph as an unenforceable adhesion contract, contrary to the public policy of North Carolina. The court consequently considered the general position of exclusionary clauses in North Carolina and held:

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<sup>146</sup> 469 F. Supp 934 (W.D.N.C.) (1979).



*"The general rule in North Carolina is that contracting parties may, with a few exceptions, agree to limitations on liability for ordinary negligence, with the agreement being strictly construed against the party relying on the agreement. Hall v Sinclair Refining Co 242 N.C. 707, 8 S.E. 2d 396 (1955). All such otherwise valid limiting agreements are void as contrary to public policy; however when they relate to transactions affected with a substantial public interest or coloured by inequality of bargaining powers."*

Relying further on the case of *Hall v Sinclair Refining Co* 242 N.C. 707, 89 S.E. 2d at 398 in which it was held:

*"Also, by the weight of authority the general limitation on the contractual right to bargain against liability for negligence embraces the principle "that a party cannot protect himself by contract against liability for negligence in the performance of a duty of public service, or where a public duty is owed, or public interest is involved, or where public interest requires the performance of a private duty."*

And further:

*"Also, closely related to the public policy test of determining the validity of these exemption clauses is the factor, applied in some decisions, of giving consideration to the comparable positions which the contracting parties occupy in regard to their bargaining strength i.e. whether one of the parties has unequal bargaining power so that he must either accept what it offered or forego the advantages of the contractual relation in a situation where it is necessary for him to enter into the contract to obtain something of importance to him which for all practical purposes is not obtainable elsewhere."*

The court with further reference to Annotation - "Validity and Construction of Contract Exempting Hospital or Doctor from Liability for Negligence to Patient" 6.A.L.R. 3d 704 (1966) identified factors in which the courts have held before, that exculpatory contracts were unenforceable which included those:

- "(a) significantly regulated by public authority;*
- (b) holds himself out to the public as willing to perform the sort of services subject to such regulation;*
- (c) purports to be capable of performing those services in conformity with the standard of care established in the community;*
- (d) provides the services in an atmosphere suggestive of unequal bargaining power; and*
- (e) subjects the patient to precisely the sort of risk made the subject of the exculpatory agreement."*

The court placed great emphasis on the medical services provided by the defendant to the public, which were of public interests.

The court also found that all medical doctors were subject to legislatively mandated licensing requirements, including an established care of professional and personal conduct, which prescribed the standard of care applicable to medical malpractice actions. N.C.G.S.

90-21.12 (CumSupp. 1977)

Referring to the state legislature, who in terms of N.C.G. §90-21.14 (Cum Supp 1977) outlawed the exclusion of liability, when it provided:

*"Nothing in this action shall be deemed or construed to relieve any person from liability for damages for injury or death caused by an act or omission on the part of such person while rendering health care services in the normal and ordinary course of his business or profession."* <sup>147</sup>

The court concluded that the agreement entered into was unenforceable under North Carolina Law as contrary to public policy.

The Kentucky Court of Appeals, in the case of *Meiman v Rehabilitation Centre*, <sup>148</sup> also considered the validity of exculpatory clauses in medical contracts. The facts of this case included: The plaintiff, as a result of her diabetic condition, had her leg amputated in 1965. Three years later, upon applying to defendant Rehabilitation Centre for instruction in the use of an artificial limb, plaintiff was accepted as a "candidate" for rehabilitation. However, as a condition of her acceptance, she, like all other patients at the Rehabilitation Centre, was forced to sign an exculpatory agreement which released the hospital from liability for its own negligence.

This agreement, *inter alia*, provided:

*"I further agree that, I will assume all risks which have been explained to me in detail that result from diagnosis and treatment. I will not assert any claim against the Centre, its employees, or its volunteers that results from unintentional acts or conduct on their part."*

After the plaintiff had signed the agreement actual therapy was begun, and during the third treatment her stump was severely damaged by one of the employees of the Centre. The injured leg was later examined by her doctor, who diagnosed that the fracture precluded any possibility of future use of an artificial limb. The plaintiff then instituted action against the Rehabilitation Centre for negligence.

The defendant relied on the exculpatory clause to escape liability. Although the court acknowledged that, generally, a party may contract against his responsibility, this may only be done in instances where the contracting party, seeking to include an exculpatory clause,

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<sup>147</sup> *Tatham v Hoke* 469 F. Supp 934 (W.D.N.C.) (1979).

<sup>148</sup> 444 S.W. 2d 81 (KY.1969).

neither owed a public duty nor affected the public interests by his actions. Relying on the landmark Case of *Tunkl v The Regents of the University of California* Ga. Cal. 2d 92, 1, 32 Cal APTR. 33, 36, 393 P.2d 441 444 (1963), the Kentucky Court of Appeal endorsed the twin concepts of public interest and equal footing, to strike down the exculpatory clause.

Turning to the case in casu the court held that: *"..... the exculpatory agreement sought to be enforced, between a dental clinic and its patient, implicates both the States interest in the health and welfare of its citizens, as well as the special relationship between physician and patient and that it would be against public policy to uphold such an agreement."*

The court relied upon the following determining factors in deciding that the agreement was against public policy:

Firstly: *"..... The State's substantial interest in protecting the welfare of all of its citizens, irrespective of economic status, extends to ensuring that they are provided with health care in a safe and professional manner..... "*

In this regard: *".....(The) State carefully regulates the licensing of physicians and other health care professionals and monitors such activities to prevent untoward consequences to the public."*

Secondly, referring to the maintenance of minimum standards of professional care, the court stated: *"A similar concern for the enforcement of established minimum standards of professional care provides the underlying rationale for a cause of action for malpractice in favour of those who have been subjected to substandard care. (See, Pike v Honsinger, 155 N.Y. 201, 49 N.E. 760)."*

Recognising the important role public clinics played in medical and dental care and maintaining minimum standards of professional care, the court stated:

*" ..... It cannot serve as a basis for excusing such providers from complying with those minimum professional standards of care which the State has seen fit to establish. It is the very importance of such clinics to the people who use them that would create an invidious result if the exculpatory clause in issue were upheld, i.e. a de facto system in which the medical services received by the less affluent are permitted to be governed by lesser minimal standards of care and skill than that received by other segments of society."*

And further: *"There cannot, however, be any justification for a policy which sanctions an agreement which negates the minimal standards of professional care which have been carefully forged by State regulations and imposed by law."*

Turning to the principle of freedom of contract and the welfare of people, the court subsequently attached greater value to the latter by stating:

*"That freedom of contract may be said to be affected by the denial of the right to make such agreements, is met by the answer that the restriction is but a salutary one, which organized society exacts for the surer protection of its members. While it is true that the individual may be the one, who, directly, is interested in the making of such a contract, indirectly, the state, being concerned for the welfare of all its members, is interested in the maintenance of the rule of liability and in its enforcement by the courts. Johnson v Fargo, 184 N.Y. 379, 77 N.E. 388."*

Turning to public policy considerations, the court subsequently stated:

*"The public policy considerations here are buttressed by the independent obligations owed by defendants to plaintiff arising from the physician-patient relationship between them. This relationship imposes upon the health care provider greater responsibilities than that required in the ordinary commercial market place. In the context of that professional relationship "a provision avoiding liability is peculiarly obnoxious." (15 Williston on Contracts (3rd ed. 1972) section 1751)"*

Although the court recognized the exculpatory agreements had been upheld, especially, in commercial settings or involved activities such as membership in a private gymnasium, the court expressed its reservations about the validity of the provisions in instances where the contracting parties were in an unequal position, creating a substantial opportunity for abuse. Turning to the case at hand, the court held: *"Because of the crucial importance of clinics, such as defendant, to be the population which they serve, their patients cannot be considered to have freely bargained for a sub-standard level of care in exchange for a financial savings. Rather, they, including the plaintiff herein, use such services because they are the only ones which they can afford. This necessity renders illusory a patient's supposed freely given consent to absolve of liability for negligence those from whom he or she seeks treatment. Thus even aside from the deleterious effect which a decision upholding such an agreement could have on the public at large, the individual responsibility bestowed upon defendants by the physician-patient relationship, in the context of the disadvantageous position from which plaintiff necessarily entered into the agreement, militates strongly against its propriety."*

Following *Emory University v Porubiansky* 248 Ca. 391, 393-394, 282 S.E. 2d 903; *Tunkl v Regents of University of California* 60 Cal. 2d 92, 98-101, 32 Cal. Rptr. 33, 37-38, 383 P. 2d 441, 445-446; *Olson v Molzen* 558 S.W. 2d 429; *Meiman v Rehabilitation Centre Inc* 444 S.W. 2d 78, 80 the court held that *"an exculpatory clause of the type here in issue must be held invalid as a matter of public policy."*

Consequently, the court laid down the following golden rule, namely: *"that in some instances such an agreement may be valid, but that in no event can such an exculpatory agreement be upheld where either:*

- (1) *The interest of the public requires the performance of such duties; or*
- (2) *Because the parties do not stand upon a footing of equality, the weaker party is compelled to submit to the stipulation."*

The court subsequently endorsed the principle: *"The general rule is that persons may not contract against the effect of their own negligence and that agreements which attempt to do so are invalid."*

The court concluded by holding: *"The exculpatory contract may not be relied upon as a defence in this action, because it is invalid as being against public policy."*<sup>149</sup>

In a more recent decision in *Ash v New York University Dental Centre*<sup>150</sup> the issue before the court, in a dental malpractice action, was, *inter alia*, the invalidity of an agreement that plaintiff, Arthur Ash, was required to sign as a precondition to him obtaining treatment at defendant, New York University Dental Centre, which prospectively exculpated the various defendants from any liability for negligence in treating plaintiff.

The facts briefly stated include: Plaintiff had previously been a private dental patient of defendant, Dr Charles Lennon. In 1986, while under Dr Lennon's care, plaintiff was informed that he required substantial dental work which would cost over \$6,000. When plaintiff indicated that he could not afford such a fee, Dr Lennon recommended that plaintiff obtain services at New York University Dental Centre, where the work could be done for \$3,000. Lennon advised plaintiff that other dentists, including students and post-graduate students, worked at the clinic, but, that he, Dr Lennon, who served as an instructor at the school, would oversee all work and would try to be present when plaintiff received treatment.

When plaintiff arrived at the clinic on October 15, 1986, to register prior to receiving treatment, he was required to sign a form containing the following provision:

*"In consideration of the reduced rates given to me by New York University, and in recognition of the risks inherent*

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<sup>149</sup> *Meiman v Rehabilitation Centre* 444 S.W. 2d 78 (KY. 1968).

<sup>150</sup> 164 A.D. 2d 366, 564 N.Y.S. 2d 308 (1990).

*in a clinical program involving treatment by students, I hereby release and agree to save harmless New York University, its trustees, doctors, employees and students from any and all liability, including liability for its and their negligence, arising out of or in connection with any personal injuries (including death) or other damages of any kind which I may sustain while on its premises or as a result of any treatment at its Dental Centre or infirmaries."*

The plaintiff testified that he believed the signing of this form was an insignificant registration procedure and he was never told, nor did he imagine, that he was relinquishing any of his legal rights. He was not offered an option of paying an additional fee rather than agreeing to receive treatment. On April 6, 1987, while he was being treated by Dr Lennon and by defendant Dr Prestipino, a post-graduate dental student, the alleged malpractice occurred.

The court commenced its analysis of the legal position of exculpatory clauses in general and stated that it was a long-settled general proposition *"that the law frowns upon an agreement intended to exculpate a party from the consequences of its own negligence and requires that such contracts be subjected to close judicial scrutiny. (Gross v Sweet, 49 N.Y. 2d 102, 424 N.Y.S. 2d 365, 400 N.E. 2d 306)"*

And further the court laid down the general approach of the courts, namely:

*"Because exculpation provisions are not favoured by the law, they are strictly construed against the party relying on them and must be unambiguously expressed in unmistakable language that is clear and explicit in communicating the intention to absolve from negligence the party seeking to be insulated from liability. (Gross v Sweet, supra; Ciofalo v Vic Tanny Gyms, 10 N.Y. 2d 294, 220 N.Y.S. 2d 962, 177 N.E. 2d 925; Boll v Sharp and Dohme, 281 App. Div. 568, 121 N.Y.S. 2d 20, aff'd., 307 N.Y. 646, 120 N.E. 2d 836)"*

As to the general approach by the courts, the court held:

*"Judicial scrutiny of such provisions has frequently, as a threshold issue, focused upon the scope and sufficiency of the language of the particular exculpatory clause involved, including some between health care providers and their patients, and upon finding the subject clause unenforceable by reason of its failure to express an intent to exculpate with sufficient specificity or clarity, exploration of other considerations bearing on the validity of the clause has been unnecessary. (See e.g. Gross v Sweet, supra; Abramowitz v New York University Dental Centre, 110 A.D. 2d 343, 494 N.Y.S. 2d 721; Boll v Sharp and Dohme, Inc 281 App. Div 568, 121 N.Y.S. 2d 20, app. dismd.. 306 N.Y. 669, 116 N.E. 2d 498, aff'd. 307 N.Y. 646, 120 N.E. 2d 836; Valenti v Prudden 58 A.D. 2d 945, 956, 397 N.Y.S. 2d 181; DeVito v New York University College of Dentistry, 145 Misc. 2d 144, 544 N.Y.S. 2d 109; but see Black v New York University, N.Y.L.J. March 6, 1985, p.6, col. 1; Fearn v Columbia University School of Dental and Oral Hygiene, N.Y.L.J. May 15, 1979, p. 10, col. 5)"*

Consequently the court stated:

*"Parenthetically, it may be noted that agreements which purport to grant exemption for liability for gross negligence or deliberate misconduct, no matter how explicitly expressed, are wholly void. (Gross v Sweet, supra)"*

Referring to the influence of public policy in respect of exculpatory clauses, the court stated:

" ..... it has been held that even an agreement that clearly and unambiguously attempts to exempt a party only from liability for ordinary negligence will not be enforced by the courts of this State, if it is found to violate public policy either by way of conflicting with an overriding public interest or because it constitutes an abuse of a special relationship between the parties, or both. (See *Ciofalo v Vic Tanney Gyms*, 10 N.Y. 2d 294, 220 N.Y.S. 2d 962, 177 N.E. 2d 925)"

But, the court did acknowledge that all exculpatory agreements were not invalid when it stated:

"On the other hand, the courts have permitted exculpatory agreements in other contexts. For example, an agreement between a burglar alarm contractor and its customer was upheld in *Florence v Merchants Central Alarm*, 51 N.Y. 2d 793, 433 N.Y.S. 2d 91, 412 N.E. 2d 1317, where the Court relied on the fact that the agreement was entered into in a commercial setting and expressly noted that there was no special relationship between the parties. See also, *Kalisch-Jarcho v City of New York*, 58 N.Y. 2d 377, 461 N.Y.S. 2d 746, 448 N.E. 2d 413." <sup>151</sup>

The validity and enforceability of an exculpatory agreement, executed by a patient before receiving radiation therapy at a hospital in the State of Michigan, also received the attention of the Court of Appeals of Michigan in the case of *Cudnik v William Beaumont Hospital*. <sup>152</sup>

In this case, the plaintiff, Joseph Cudnik, received postoperative radiation therapy, at William Beaumont Hospital, after undergoing surgery for prostate cancer. Before receiving the radiation therapy, Cudnik signed a document that stated, in its entirety, as follows:

*"I hereby consent to and authorize the physicians and staff of the Department of Radiation Oncology at William Beaumont Hospital to administer to me such radium, X-ray, Cobalt 60, or other radioisotope therapy as may in their professional judgement deem to be necessary.  
I have discussed with my physician in the Department of Radiation Oncology, the course of treatment which has been recommended and planned for me and fully understand the benefit that such treatment may provide for me.  
Further, my physician in the Department of Radiation Oncology has fully explained to me the possibilities of reactions and the possible side effects of the treatment.  
I further understand that there is no guarantee given to me as to the results of radiation therapy. Understanding all of the foregoing, I hereby release the physicians and staff of the Department of Radiation Oncology and William Beaumont Hospital from all suits, claims, liability, or demands of every kind and character which I or my heirs, executors, administrators (sic) or assigns hereafter can, shall, or may have arising out of my participation in the radiation therapy treatment regimen."*

The plaintiff, after receiving radiation treatment, returned to Beaumont Hospital complaining of back discomfort, whereupon he was diagnosed as suffering from a post radiation ulcer

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<sup>151</sup> *Ash v New York University Dental Centre* 164 A.D. 2d 366, 564 N.Y.S. 2d 308 (1990).

<sup>152</sup> 207 Mich. App. 378, 525 N.W. 2d 891 (1995).

burn, at the site where he received the radiation therapy.

Both the plaintiff and his wife consequently instituted a medical malpractice action against the defendant hospital. The plaintiff subsequently died, but the case was pursued by his estate. The defendant hospital relied upon the exculpatory agreement executed by the deceased before receiving radiation therapy, precluding the hospital from being liable for inherent risks and unforeseen consequences. The defence was upheld by the court of first instance. In a subsequent appeal, the Michigan Court of Appeals consequently considered the validity and enforceability of exculpatory agreements in hospital contracts.

The appeal court first looked at the general recognition of the doctrine of freedom of contract and the sanctity of contract. Consequently, the court held: *"As a general proposition, parties are free to enter into any contract at their will, provided that the particular contract does not violate the law or contravene public policy. Feldman v Stein Building and Lumber Co 6 Mich. App 180, 184, 148 N.W. 2d 544 (1967); Michigan Ass'n. of Psychotherapy Clinics v Blue Cross and Blue Shield of Michigan 101 Mich. App. 559, 573, 301 N.W. 2d 33 (1980)."*

Analysing the standing of exculpatory agreements or releases, in the eyes of the courts in general, the court recognized:

*"In a variety of settings, this Court has upheld the validity of exculpatory agreements or releases that absolve a party from liability for damages caused by the party's negligence. (FN3). See Dombrowski v Omer, 199 Mich.App. 705, 502 N.W. 2d 707 (1993) (festival event); Paterek v 6600 Ltd 186 Mich.App. 445, 465 N.W. 2d, 342 (1990) (softball facility); St Paul Fire and Marine Ins Co v Guardian Alarm Co 115 Mich.App. 278, 320 N.W. 2d 244 (1982) (security alarm company)."*

But, recognized the Court of Appeals: *"In other cases, however, this Court has declared such agreements unenforceable as being contrary to this state's public policy. See Stanek v Nat'l Bank of Detroit 171 Mich. App. 734, 430 N.W. 2d 819 (1988) (exculpatory clause in a bank's stop payment order held to be invalid on public policy grounds); Allen v Michigan Bell Telephone Co 18 Mich.App. 632, 171 N.W. 2d 689 (1969) (clause limiting liability for damages resulting from a telephone company's failure to include an ad in its Yellow Pages held invalid, because the parties were not in a position of equal bargaining power)."*

The court, however, laid down a prerequisite which ought to be met before such a clause, generally, would be recognized by the courts, namely: *"There is a corollary rule that an exculpatory clause that seeks to absolve a party from liability for its own negligence must*

*be clear and unambiguous. American Empire Ins. Co v Koenig Fuel and Supply Co 113 Mich.App. 496, 499, 317 N.W. 2d 335 (1982)."*

After analysing the provisions of the exculpatory clauses in this case, the court held the agreement was not void for ambiguity.

The Court of Appeal, however, turned to public interest in deciding the validity and enforceability of exclusionary clauses in medical/hospital contracts.

Relying upon the influence of other jurisdictions the court stated:

*"The overwhelming majority of other jurisdictions that have addressed this question have held that such agreements are invalid and unenforceable because medical treatment involves a particular sensitive area of public interest. (FN4) Tunkl v Regents of the University of California 60 Cal.2d 92, 32 Cal.Rptr 33, 383 P.2d 441 (1963); Ash v New York University Dental Centre 164 A.D. 2d 366, 564 N.Y.S. 2d 308 (1990); Smith v Hospital Authority of Walker, Dade and Catoosa Cos. 160 Ga. App. 387, 287 S.E. 2d 99 (1981); Meiman v Rehabilitation Centre, Inc 444 S.W. 2d 78 (Ky.App.1969). Today we join in the view of these jurisdictions."*

Although the Court of Appeals did recognise that an exception to the general rule invalidating exculpatory agreements for medical malpractice did exist, namely; medical malpractice involving experimental procedures, nevertheless, the court held the present case did not involve an experimental procedure.

Recognizing the list of factors enunciated in the *Tunkl case supra* as constituting the "public interest", the court of appeal identified the following factors or relevant characteristics, akin to the Tunkl case, affecting public interest.

Firstly: *"It is clear that hospitals and the medical profession have been thought to be suitable for public regulation. (FN5) M.C.L. 333, 21501 et seq.; M.S.A. 14.15 (21501) et seq.; M.C.L. 333. 17001 et seq.; M.S.A. 14.15 (17001) et seq."*

Consequently the court found that: *"The performance of medical services is of great importance to the public, and is a matter of practical necessity for some members of the public. Defendant hospital holds itself out as willing to perform medical services to members of the public."*

Secondly, the court looked at the unequal bargaining position, especially the patient, occupied in the contractual relationship between the patient and the hospital. The court consequently found:

*"Defendant hospital certainly possesses an advantage in bargaining strength against any member of the public who seeks its services. (FN6). Defendant hospital presented plaintiff's decedent with the standardized contract of exculpation, without any provision for some other type of protection against negligence. Finally, it is readily apparent that plaintiff's decedent placed himself under the control of defendant hospital, subject to the risk of carelessness by the hospital or its agents."*

The court further rejected the hospitals contention that the provision of medical care should be considered a "private affair". The court took a contrary view in declaring: *"The courts have long recognized that the provision of medical care involves issues of public interest. Lewis v State Bd of Dentistry; 277 Mich. 334, 343, 269 N.W. 194 (1936); People v Cramer 247 Mich. 127, 134, 225 N.W. 595 (1929)."*

Relying on the above, the court consequently found that the exculpatory agreement in this case was contrary to public policy and further: *"The exculpatory agreement constitutes a contract of adhesion. (FN7) and is unenforceable. Tunkl supra at 102, 32 Cal.Rptr 33, 383 P.2d 441."*<sup>153</sup>

#### 14.4.1.3 Legal Opinion

The effects of the inclusion of exclusionary clauses or waivers in hospital contracts, alternatively other healthcare providers attempting to relieve themselves from liability for damages flowing from their negligence, are, by and large, settled in the United States of America. Waivers of liability and other attempts at exculpating hospitals/healthcare providers from liability are treated with disfavour by the courts. The rationale for this approach, by both the American legal writers and the courts, stems from the thinking that public interests dictate the performance of such duties in accordance with pre-defined professional and ethical standards, which cannot be compromised.<sup>154</sup>

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<sup>153</sup> *Cudnik v William Beaumont Hospital* 207 Mich. App 378, 525 N.W. 2d 891 (1995).

<sup>154</sup> For legal writings see Flamm "Healthcare provider as defendant" A chapter published in *Legal Medicine American College of Legal Medicine* (1991) 127; Furrow et al *Health Law* (1995) 256 Annotation "Validity and Construction of Contract exempting hospital or doctor from liability for negligence to patient" 6 *ALR* 3d 704 at 705; Kelner and Kelner "Waivers of Liability in Personal Injury" *New York Law Journal* October (1992) 3; American Jurisprudence 57A *AM Jur* 2d 121; Reynolds Comments "Torts - Negligence - Exculpatory Clause" *Kentucky Law Journal* Vol. 58 (1970) 583 at 584; But it is especially, the writers Stetler and Moritz *Doctor Patient and The Law* (1962) 388 who write: *"Generally, a physician cannot avoid liability for negligence, by having a patient sign in advance or a contract containing an exculpatory clause. The obligation of a physician to possess and exercise reasonable care in treating a patient is imposed by law. The physician who undertakes the treatment of a patient cannot therefore avoid that obligation by contract."* See further Winston-Smith "Antecedent grounds of liability in the practise of surgery" *The Rocky Mountain Law Review* Vol. 49 No 2 (1986). For case law see *Tunkl v Regents of the University of California* 80 Cal 2d 92, 32 Cal, RPTR 37, 383 P2d 441; *Belshaw v Feinstein* 258 Cal, App 2d 711 65 Cal RPTR 788 (1968); *Leidy v Deseret Enterprises Inc* 252 Pa. Super 162 A. 2d 164 (1977); *Olson v Molzen* 558 S.W. 2d 429 (1997) 429 at 432 (1977); *Emory University v Porubiansky* 248 Ca 391, 282 S.E. 2d 903

In addition, the thinking includes that, as the hospital/other healthcare providers and the patient do not stand upon equal footing, the weaker party, usually the patient would be in a disadvantageous position when entering into the agreement.<sup>155</sup> For that reason, these types of agreements are regarded as unenforceable, by both the writers and the courts.

Besides the fore stated rationale, public policy is often used as a rationale for denouncing these types of clauses, despite these clauses being correctly worded and understood by the patient. The reason there-for stems from the fact that the patient needs to be protected against the deviation from minimum levels of performance, or what is also expressed as, bad medicine.<sup>156</sup>

Public policy and public interests often overlap and are often used in conjunction with each other, in influencing the American courts in pronouncing on the validity of these types of clauses.<sup>157</sup> The American courts have, however, over and over, denounced waivers or

(Supreme Court of Georgia 1981); *Tatham v Hoke* 469 F. Supp 934 (W.D.N.C.) (1979); *Meiman v Rehabilitation Centre* 444 S.W. 2d 78 (KY); *Cudnik v William Beaumont Hospital* 207 Mich. App 378, 525 N.W. 2d 891 (1995).

<sup>155</sup> For legal writings see Flamm "Healthcare provider as defendant" A chapter published in *Legal Medicine American College of Legal Medicine* (1991) 127; Furrow et al *Health Law* (1995) 256 Annotation "Validity and Construction of Contract exempting hospital or doctor from liability for negligence to patient" 6 *ALR* 3d 704 at 705; Kelner and Kelner "Waivers of Liability in Personal Injury" *New York Law Journal* October (1992) 3; American Jurisprudence 57A *AM Jur* 2d 121; Reynolds Comments "Torts - Negligence - Exculpatory Clause" *Kentucky Law Journal* Vol. 58 (1970) 583 at 584; See also Ginsburg et al "Contractual Revisions to Medical Malpractice Liability Law and Contemporary Problems" Vol. 49 No 2 (1986) who pronounces "*Medical care is a necessity of life over which the superior bargaining power of the provider should not prevail .....*" See further Prosser *Law of Torts* (1971) 48 at 442. For case law see *Tunkl v Regents of the University of California* 80 Cal 2d 92, 32 Cal, RPTR 37, 383 P24 441; *Olson v Molzen* 558 S.W. 2d 429 (1997) 429 at 432 (1977); *Tatham v Hoke* 469 F. Supp 934 (W.D.N.C.) (1979); *Meiman v Rehabilitation Centre* 444 S.W. 2d 78 (KY); *Cudnik v William Beaumont Hospital* 207 Mich. App 378, 525 N.W. 2d 891 (1995).

<sup>156</sup> For legal writings see Winston-Smith "Antecedent grounds of liability in the practise of surgery" *The Rocky Mountain Law Review* Vol. 14 June (1942) No 4 288 at 288-291; Ginsburg, Kahn, Thornhill and Gambardella "Contractual Revisions to Medical Malpractice Liability Law and Contemporary Problems" Vol. 49 No 2 (1986). For case law see *Tunkl v Regents of the University of California* 80 Cal 2d 92, 32 Cal, RPTR 37, 383 P24 441; *Leidy v Deseret Enterprises Inc* 252 Pa. Super 162 A. 2d 164 (1977); *Olson v Molzen* 558 S.W. 2d 429 (1997) 429 at 432 (1977); *Emory University v Porubiansky* 248 Ca 391, 282 S.E. 2d 903 (Supreme Court of Georgia 1981); *Tatham v Hoke* 469 F. Supp 934 (W.D.N.C.) (1979); *Meiman v Rehabilitation Centre* 444 S.W. 2d 78 (KY) (1968); *Ash v New York University Dental Centre* 184 A.D. 2d 366, 584 N.Y.S. 2d 308 (1980); *Cudnik v William Beaumont Hospital* 207 Mich. App 378, 525 N.W. 2d 891 (1995).

<sup>157</sup> Winston-Smith "Antecedent grounds of liability in the practise of surgery" *The Rocky Mountain Law Review* Vol. 14 June (1942) No 4 288 at 288-291; Ginsburg, Kahn, Thornhill and Gambardella "Contractual Revisions to Medical Malpractice Liability Law and Contemporary Problems" Vol. 49 No 2 (1986). For case law see *Tunkl v Regents of the University of California* 80 Cal 2d 92, 32 Cal, RPTR 37, 383 P24 441; *Leidy v Deseret Enterprises Inc* 252 Pa. Super 162 A. 2d 164 (1977); *Olson v Molzen* 558 S.W. 2d 429 (1997) 429 at 432 (1977); *Emory University v Porubiansky* 248 Ca 391, 282 S.E. 2d 903 (Supreme Court of Georgia 1981); *Tatham v Hoke* 469 F. Supp 934 (W.D.N.C.) (1979); *Meiman v Rehabilitation Centre* 444 S.W. 2d 78 (KY) (1968); *Ash v New York University Dental Centre* 184 A.D. 2d 366, 584 N.Y.S. 2d 308 (1980); *Cudnik v William Beaumont Hospital* 207 Mich. App 378, 525 N.W. 2d 891 (1995).

exculpatory clauses in hospital contracts as invalid and unenforceable, due to them being contrary to public policy. The Supreme Court of California, as long ago as 1963, in the case of *Tunkl v Regents of the University of California*,<sup>158</sup> designed a test to determine when an exculpatory agreement violates public policy. The criteria formulated include:

- "(1) *the agreement concerns an endeavour of a type generally thought suitable for public regulation;*
- (2) *The party seeking exculpation is engaged in performing a service of great importance to the public, which is often a matter of practical necessity for some members of the public;*
- (3) *such party holds itself out as willing to perform this service for any member of the public who seeks it, or at least for any member of the public coming within certain established standards;*
- (4) *the party seeking the exculpation possesses a decisive advantage of bargaining strength against any member of the public who seeks the services;*
- (5) *in exercising a superior bargaining power, the party confronts the public with a standardized adhesion contract of exculpation and makes no provision whereby those receiving services may pay additional reasonable fees and obtain protection against negligence; and*
- (6) *The person or members of the public seeking such services must be placed under the control of the furnisher of the services, subject to the risk of carelessness on the part of the furnisher, its employees, or its agents."*

In this case, the court emphasized the fact that, as the treatment of patients was governed by the *California Health and Safety Code* and therefore, subject to public regulation, the hospital-patient contract clearly fell within the category of agreements affecting the public interests. Public interests, on the other hand, according to the court, dictated that, as the public was in special need of medical care, the duty of care was part of the social fabric. The court also considered the unequal bargaining position of the patient in relation to the hospital and found that the hospital exercised a decisive advantage in bargaining, with the patient being given no room for debate regarding the terms of the contract. The court, consequently, held that to immunize the hospital from negligence would be abhorrent to medical ethics and contrary to the regulations, therefore in conflict with public interests. Moreover, the court held that such agreements were contrary to public policy and unenforceable.

The principles of the *Tunkl case* have, since, been followed in the different states of the United States of America, on numerous occasions. In one of the first cases, in the matter of *Belshaw v Feinstein*,<sup>159</sup> the court, in following the principles enunciated in the *Tunkl case*

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<sup>158</sup> 60 Cal. 2d 92, 32 Cal RPTR, 37, 383 P 2d 441 (1963).

<sup>159</sup> 258 CAL. App 2d 711, 65 CAL RPTR 788 (1968).

and applying the criteria laid down by the court, held that; as the agreement defined the regulations governing the hospital-patient relationship, the terms of the agreement clearly involved public interest, in that the parties were, in the first place, in an unequal bargaining position, with the hospital being in a stronger position, and secondly, in conflict with public regulations, the hospital being obliged to deliver much needed standard of care and skill to patients. Consequently, the court held that the agreement was void.

In a subsequent case, in the matter of *Leidy v Deseret Enterprises Inc*,<sup>160</sup> the court considered whether a clause purporting to release the Spa from liability for injuries resulting from its negligence was unconscionable. The court attached significant weight to the sensitivity displayed by the courts, to public interest, in considering contracts that involved health and safety. The court also considered the aims of statutory provisions, in the protection of human life and the practice of safe medicine, and, stated acts having a tendency to be injurious to public good, as they were inimical to the public interest. Therefore, where public policy required the observance of a statute, it could not be waived. Because the legislature recognized that a physical therapist was, in a sense, part of the medical profession, the duties of the therapist were akin to that of a doctor, namely; to do, *inter alia*, no wrong to the patient. The exculpatory clause was consequently ruled to be unconscionable and contrary to public policy.

In the case of *Olson v Molzen*,<sup>161</sup> the court, in determining whether exculpatory contracts were invalid, formulated the following factors, namely:

- "(1) whether the transaction concerns business of a type suitable for public regulation and performing service of importance to the public;
- (2) Whether a party invoking exculpation, possesses decisive advantage of bargaining strength and, in exercising superior bargaining power whether the public, as a result of the transaction, is placed under the control of the party seeking exculpation of which the inferior party agrees to the risk of carelessness."

The court recognized that public policy favoured the utmost freedom to contract, even where it was against liability for negligence. But, asserted the court, notwithstanding the doctrine of freedom to contract, there were certain contracts, which due to public interest, did not fall into the category which favoured the protection of the doctrine of freedom of contract. It was, especially, in contracts involving professional people, subject to licensure

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<sup>160</sup> 252 PA Super 162, 381 A.2d 164 (1977).

<sup>161</sup> 558 S.W. 2d 429 (Tenn.S.Ct 1977).

by the State, that such protection would not befall the party relying upon an exclusionary clause. The court also drew a distinction between ordinary business transactions and that of professional persons, who, as a result of their status, acquired greater responsibility than that of an ordinary person. Any exclusion, under these circumstances, avoiding liability was obnoxious. Relying, as well, on the inequality of bargaining power between the parties, the court, with reference to the work of Prosser, *The Law of Torts* (1971) 68, at 442 and *Williston on Contracts* (1972) Para 179, held that; where one party was at such obvious disadvantage in bargaining power, but nonetheless because he/she entered into the agreement effect must be given thereto, that would be to put the weaker party at the mercy of the other's negligence. The court, consequently, concluded that a professional person should not be permitted to hide behind the protective shield of an exculpatory contract and thus, procure a license to commit negligence in professional practice.

Subsequent to this case, the Supreme Court of Georgia, in the case of *Emory University v Porubiansky*,<sup>162</sup> also considered whether an exculpatory clause in a dental contract was invalid as against public policy. The court firstly, looked at the American court's general approach in recognizing the doctrine of freedom of contract. The court, consequently, repeated the general approach by the courts, namely, the courts must exercise extreme caution in declaring a contract void as against public policy and should do so only in cases free from doubt and where an injury to the public interest clearly appears. The court also recognized that, in certain instances, statutory prohibitions placed clear restrictions on exemption clauses indemnifying a party from liability arising from his/her own negligence. The court, consequently, looked at the physician-patient relationship and found that the relationship was founded upon public consideration. The court also found that the practise of dentistry was a regulated profession, licensed by the State. The regulations, in turn, laid down minimum standards which had to be observed and exercised. This, the court regarded as a public duty. The court quoted, with approval, the principle adopted in the Tunkl case, namely:

*"A professional person should not be permitted to retreat behind the protective shield of an exculpatory clause and insist that he or she is not then answerable for his or her own negligence. We do not approve the procurement of a license to commit negligence in professional practice..... "*

Consequently the court concluded:

*"We find that it is against the public policy of this state to allow one who procures a license to practise dentistry*

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<sup>162</sup> 248 GA 391, 282 S.E. 2d 903 (Supreme Court of Georgia 1981).

*to relieve himself by contract of the duty to exercise reasonable care .....*"

In the case of *Tatham v Hoke*<sup>163</sup> the court, concerning a medical contract involving an abortion, resulting in subsequent hospitalisation and surgical treatment, considered the validity of an exclusionary clause, exonerating a physician from professional liability arising from his negligence, causing the injuries. The court, with reference to legal writings, identified factors which courts ought to consider before exculpatory contracts were declared unenforceable. The included situations were:

- "(a) significantly regulated by public authority;*
- (b) holds himself out to the public as willing to perform the sort of services subject to such regulation;*
- (c) purports to be capable of performing those services in conformity with the standard of care established in the community;*
- (d) provides the services in an atmosphere suggestive of unequal bargaining power; and*
- (e) subjects the patient to precisely the sort of risk made the subject of the exculpatory agreement."*

The court, consequently, held that the medical services provided by the defendant to the public were of public interest. The court also looked at the effect of the licensing requirements, including and established care which medical doctors owed their patients and the public at large. The court held that any breach of such an obligation was contrary to public policy. Moreover, the agreement entered into was unenforceable.

The Kentucky Court of Appeals, in the case of *Meiman v Rehabilitation Centre*,<sup>164</sup> also considered the validity of exculpatory clauses in medical contracts. More particular, the court looked at the standard form contract of a rehabilitation centre, including an exemption clause.

The court acknowledged that, generally, a party may contract against his responsibility, but this may be done neither where neither a public duty was owed, nor where such agreement affected the public interest. The court considered the exculpatory agreement, sought to be enforced, between the dental clinic and patient and found that the service rendered implicated State interest in the health and welfare of its citizens. The court also considered the special relationship between doctor and patient. The court, consequently, held that, in

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<sup>163</sup> 469 F. Supp 934 (W.D.N.C.) (1979).

<sup>164</sup> 444 S.W. 2d 81 (KY. 1969).

such instances, it was in public interest that medical care was provided in a safe and professional manner. The court also considered the licensing effect, which licensure imposed upon physicians and other health care professionals and concluded that it prevented any untoward consequences to the public, flowing from the conduct of the physician. The court held that minimum standards of professional care had to be observed. Consequently, the court, with reference to standards to be maintained at clinics, held:

*"There cannot, however, be any justification for a policy which sanctions an agreement which negates the minimal standards of professional care which have been carefully forged by State regulations and imposed by law."*

The court also weighed up the principle of freedom of contract and the welfare of people. Consequently the court, in choosing the latter, stated:

*"That freedom of contract may be said to be affected by the denial of the right to make such agreements, is met by the answer that the restriction is but a salutary one, which organized society exacts for the surer protection of its members. While it is true that the individual may be the one, who, directly, is interested in the making of such a contract, indirectly, the state, being concerned for the welfare of all its members, is interested in the maintenance of the rule of liability and in its enforcement by the courts. Johnson v Fargo, 184 N.Y. 379, 77 N.E. 388."*

The court also drew a clear distinction between ordinary commercial agreements and agreements governed by professional relationships, when considering whether agreements were contrary to public policy, when it held:

*"The public policy considerations here are buttressed by the independent obligations owed by defendants to plaintiff arising from the physician-patient relationship between them. This relationship imposes upon the health care provider greater responsibilities that required in the ordinary commercial market place. In the context of that professional relationship "a provision avoiding liability is peculiarly obnoxious." (15 Williston on Contracts (3rd ed. 1972) section 1751)"*

The court, in motivating the denouncement of these types of clauses, held: *"..... thus even aside from the deleterious effect which a decision upholding such an agreement could have on the public at large, the individual responsibility bestowed upon defendants by the physician-patient relationship, in the context of the disadvantageous position from which plaintiff necessarily entered into the agreement, militates strongly against its propriety."*

The court consequently laid down the following golden rule, that in some instances such an agreement may be valid, but that, in no event, can such an exculpatory agreement be upheld where, either:

*"(1) the interest of the public requires the performance of such duties; or*

- (2) *Because the parties do not stand upon a footing of equality, the weaker party is compelled to submit to the stipulation."*

The court concluded that the exculpatory contract relied upon was invalid as being against public policy.

More recently in the case of *Ash v New York University Dental Centre*,<sup>165</sup> the court was again confronted in dealing with the invalidity of a dental agreement, between the dental patient and the dental centre. The court commenced its assessment of the validity of these types of agreements by stating that; these types of agreements have long been frowned upon and required close judicial scrutiny. The court laid down the general approach by the courts, when it stated:

*"Because exculpation provisions are not favoured by the law, they are strictly construed against the party relying on them and must be unambiguously expressed in unmistakable language that is clear and explicit in communicating the intention to absolve from negligence the party seeking to be insulated from liability. (Gross v Sweet, supra; Ciofalo v Vic Tanny Gyms, 10 N.Y. 2d 294, 220 N.Y.S. 2d 962, 177 N.E. 2d 925; Boll v Sharp and Dohme, 281 App. Div. 568, 121 N.Y.S. 2d 20, aff'd., 307 N.Y. 646, 120 N.E. 2d 836)"*

Referring to the influence of public policy in respect of exculpatory clauses the court stated: *"..... it has been held that even an agreement that clearly and unambiguously attempts to exempt a party only from liability for ordinary negligence will not be enforced by the courts of this State, if it is found to violate public policy either by way of conflicting with an overriding public interest or because it constitutes an abuse of a special relationship between the parties, or both. (See Ciofalo v Vic Tanney Gyms, 10 N.Y. 2d 294, 220 N.Y.S. 2d 962, 177 N.E. 2d 925)"*

The validity and enforceability of an exculpatory agreement, executed by a patient before receiving radiation therapy, at a hospital in the State of Michigan, also received the attention of the Court of Appeals of Michigan, in the case of *Cudnik v William Beaumont Hospital*.<sup>166</sup>

The court, firstly, gave recognition to the doctrine of freedom and sanctity of contract when it stated: *"As a general proposition, parties are free to enter into any contract at their will, provided that the particular contract does not violate the law or contravene public policy. Feldman v Stein Building and Lumber Co 6 Mich. App 180, 184, 148 N.W. 2d 544 (1967); Michigan Ass'n. of Psychotherapy Clinics v Blue Cross and Blue Shield of Michigan 101 Mich. App. 559, 573, 301 N.W. 2d 33 (1980)."*

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<sup>165</sup> 164 AD 2d 346, 564 N.Y.S. 2d 308 (1990).

<sup>166</sup> 207 Mich. App. 378, 525 N.W. 2d 891 (1995).

The court recognised, however, that there were instances wherein courts would rule against the validity of these types of clauses, namely, where they were deemed to be contrary to public policy.

The court, however, laid down a prerequisite, which ought to be met before such a clause, generally, would be recognized by the courts, namely: *"There is a corollary rule that an exculpatory clause that seeks to absolve a party from liability for its own negligence must be clear and unambiguous. American Empire Ins. Co v Koenig Fuel and Supply Co 113 Mich.App. 496, 499, 317 N.W. 2d 335 (1982)."*

The Court of Appeal, however, turned to public interest in deciding the validity and enforceability of exclusionary clauses in medical/hospital contracts. Relying upon the influence of other jurisdictions, the court stated:

*"The overwhelming majority of other jurisdictions that have addressed this question have held that such agreements are invalid and unenforceable because medical treatment involves a particular sensitive area of public interest. (FN4) Tunkl v Regents of the University of California 60 Cal.2d 92, 32 Cal.Rptr 33, 383 P.2d 441 (1963); Ash v New York University Dental Centre 164 A.D. 2d 366, 564 N.Y.S. 2d 308 (1990); Smith v Hospital Authority of Walker, Dade and Catoosa Cos. 160 Ga. App. 387, 287 S.E. 2d 99 (1981); Meiman v Rehabilitation Centre, Inc 444 S.W. 2d 78 (Ky.App.1969). Today we join in the view of these jurisdictions."*

The court relied upon the list of factors enunciated in the *Tunkl case* and identified the following factors akin to the *Tunkl case* affecting public interest, namely:

Turning to public regulation the court held: *"The performance of medical services is of great importance to the public, and is a matter of practical necessity for some members of the public. Defendant hospital holds itself out as willing to perform medical services to members of the public."*

The court also looked at the unequal bargaining power between the patient and the hospital and consequently found:

*"Defendant hospital certainly possesses an advantage in bargaining strength against any member of the public who seeks its services. (FN6). Defendant hospital presented plaintiff's decedent with the standardized contract of exculpation, without any provision for some other type of protection against negligence. Finally, it is readily apparent that plaintiff's decedent placed himself under the control of defendant hospital, subject to the risk of carelessness by the hospital or its agents."*

The court further rejected the hospitals contention that the provision of medical care should be considered a "private affair". The court took a contrary view in declaring: *"The courts*

*have long recognized that the provision of medical care involves issues of public interest. Lewis v State Bd of Dentistry; 277 Mich. 334, 343, 269 N.W. 194 (1936); People v Cramer 247 Mich. 127, 134, 225 N.W. 595 (1929)."*

The court consequently found that the exculpatory agreement, in this case, was contrary to public policy.

#### 14.5 **Adjudication of exclusionary clauses in hospital contracts in present context**

The South African courts' approach to the adjudication of exclusionary clauses in hospital contracts is embraced in the Supreme Court of Appeal judgement of *Afrox Healthcare Bpk v Strydom*.<sup>167</sup> The Supreme Court of Appeal, per Brand JA, as previously discussed, decided the case on a number of grounds, including, the common law and constitutional law. For the present purpose, in embarking on a critical discussion of the dictum, it will be useful to repeat briefly how the court went about assessing whether such a clause is invalid and unenforceable, as advanced by the respondent.

Insofar as the common law is concerned, in assessing whether such a clause is invalid and unenforceable, owing to the clause being contrary to public policy, the court looked at public interest. Whilst the court accepted that, as a general rule, a contractual provision which is unfair on the basis that it is in conflict with the public interest, is legally unenforceable, the court, with reference to a number of cases,<sup>168</sup> nonetheless, cautioned that the power bestowed on the courts to declare contracts contrary to public policy should be exercised sparingly and only in the clearest of cases. The court also emphasized the reason for such an approach lies in the fact that public policy, generally, favours the utmost freedom of contract. The court, in assessing the general use of exclusionary clauses or indemnity clauses in the South African Law of Contract, stated that these types of clauses are valid and enforceable and adds that these types of clauses have become the rule, rather than the exception, in standard contracts. The court, however, did acknowledge that there may be specific exclusionary clauses (without naming any) which may be declared against public interest and therefore unenforceable. The court, consequently, dealt with the three grounds upon which the respondent based his arguments to show that an exclusionary clause, in hospital contracts, is in conflict with public interests. The court, firstly,

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<sup>167</sup> 2002 (6) SA 29 (A).

<sup>168</sup> *Sasfin (Pty) Ltd v Beukes* 1989 (1) SA 1 (A); *Botha (now Griesel) and another v Finanscredit (Pty) Ltd* 1989 (3) SA 773 (A); *Brunner v Corfil Brothers Investment (Pty) Ltd en Andere* 1999 (3) SA 789 (SCA) at 420ff; *De Beer v Keyser and Others* 2002 (1) SA 827 (SCA) at 837C-E; *Brisley v Drotzky* 2002 (4) SA (1).

considered the uneven bargaining position between the hospital and patient. The court found, as a general rule, that even where, on the face of an agreement, it appears that an unequal bargaining position exists between the parties, with the strongest party, been advantaged, it does not necessarily justify a conclusion that the agreement is in conflict with the public interests. But the court does acknowledge that unequal bargaining power is indeed a factor which, together with other factors, can, in certain instances, play a role in considerations of the public interest. But, the court held that no evidence to that effect was led by the respondent in the court a quo.

Turning to the second ground of the respondent's objection, namely, that the hospital and its staff had a duty to provide medical treatment in a professional and careful manner and could, therefore, not indemnify the hospital and its staff from liability for damages arising from negligence, including gross negligence. In this regard, the court held that although there is academic support <sup>169</sup> that the indemnification of a hospital against gross negligence of its nursing staff would be in conflict with the public interest, Brandt JA nonetheless held that in the absence of such allegation in the pleadings, the court could not, *mero motu*, make such a finding. The court, relying on case law, <sup>170</sup> then found that the clause in the contract, providing for indemnification, should be interpreted so as to exclude gross negligence. Also at common law, the court considered good faith as an alternative basis of the respondent's case. The court rejected the argument, advanced on behalf of the respondent, in relying on good faith, reasonableness, fairness and justice. The court concluded that abstract terms such as good faith, reasonableness, fairness and justice should not be used by our courts as an independent or 'free-floating' foundation for the setting aside of contractual provisions. <sup>171</sup> The court also held that, although these abstract considerations represent the foundation of legal rules, but they are not, in themselves rules of law.

The court further dealt with the general defences of misrepresentation and mistake. The court noted the evidence of the respondent, which included, that he signed the admission document without reading it and that the respondent's attention was not drawn to the exclusionary clause. The court also found, as a fact, that the respondent was not aware of the contents of the exclusionary clause contained in clause 2.2 when he entered into the

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<sup>169</sup> Strauss *Doctor, Patient and the Law* (1991) 305.

<sup>170</sup> *Wells v South African Alumenite Company* 1927 (AD) 65.

<sup>171</sup> The court referred as authority for this view to the decision in *Brisley v Drotsky* 2002 (4) SA 1 (SCA).

agreement. On the evidence that the respondent conceded that he had full opportunity to read the document, Brandt JA subsequently found that, in these circumstances, the fact that the respondent signed the document without reading it; it does not mean, as a rule, that he is not bound by its contents.<sup>172</sup>

The respondent also relied on the exception to the *caveat subscriptor* rule in that the admissions clerk had a duty to inform him of the contents of clause 2.2 and, the clerk's failure to do so, rendered the exemption clause invalid and inoperative. The respondent conceded, however, that as a general principle, there is no legal duty upon a contracting party to inform the other contracting party of the contents of their agreement. The respondent also contended that a primary duty of the hospital was to supply medical and professional services in a professional manner, it is for that reason that he did not expect that the applicant would try to indemnify itself against the negligence of its own nursing personnel. Although the court found that there were exceptions to the *caveat subscriptor* rule, Brandt JA, nonetheless, found the subjective expectations, of the respondent, concerning what ought to be incorporated into the contract between himself and the applicant, played no role in the question of whether there was a duty, on the admission clerk, to point out the exemption clause in 2.2 to him. What is of relevance here, stated Brandt JA, is whether such an exemption clause, contained in clause 2.2, could reasonably be expected or, if it was objectively speaking, unexpected.

Brandt JA's reply to this was that the indemnity clause contained in clause 2.2, as is the case with many other forms of indemnity clauses, are presently the rule, rather than the exception in standard contracts, these days. For that reason, the court consequently held there was no reason, in principle, to distinguish between private hospitals and suppliers of other services. For that reason, the court held, that, objectively speaking, it cannot be said that the provision of clause 2.2 was unexpected. There was, therefore, no duty, said Brandt JA, upon the admissions clerk to bring the clause to the attention of the respondent.

Now that consideration was given to the court's approach to the common law in deciding the validity of indemnity clauses in hospital contracts, the court's approach to constitutional principles will also be looked at.

To the ground advanced by the respondent that, as the appellant was a provider of medical services, it would generally be impermissible for providers of medical services to add an

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<sup>172</sup> Brandt JA in this regard relied on the case of *Burger v Central South African Railways* in which it was held that a person who signs an agreement without reading it does so at his own risk and is consequently bound thereby as though he were aware of its provisions and expressly consented thereto.

exclusionary clause in a standard contract, Brandt JA noted that the respondent did not rely on the fact that clause 2.2 directly violates the constitutional values entrenched in section 27(1) (a) of the Constitution. The court held that, even if it was accepted that section 27(1) (a) is horizontally applicable in terms of section 8(2) of the Constitution, and therefore, binding on private hospitals, nevertheless, clause 2.2 does not prohibit the access of any person to the hospital. For that reason, the court rejected the argument that clause 2.2 was in conflict with the spirit, purport and object of section 27(1) (a) and therefore contrary to the public interest.

Brandt JA also found that, as clause 2.2 was enforceable prior to the Constitution coming into effect on 4 February 1997, it was still applicable, and as the Constitution has no retrospective power. In this regard, the court considered that the agreement between the parties arose on 15 August 1995, prior to the Constitution coming into being. The court found, therefore, that transactions which were valid when the Constitution commenced are, therefore, not rendered invalid retrospectively. Brandt JA also found there was no matching provision in the interim Constitution.

Turning to whether the hospital had complied with the provisions of Section 27(1)(a) of the Constitution, namely, the right to adequate healthcare, Brandt JA held that the exclusionary clause, contained in clause 2.2, did not stand in the way of patients accessing medical services. Concerning adequate healthcare, Brand JA found that the hospital placed reliance on legally acceptable conditions in providing medical services. The court also found that clause 2.2 was not in conflict with the values embodied in section 27(1) (a) and, therefore, not in conflict with public policy. Besides, the court found that the nursing staff was already bound by their own professional code and they were subject to the statutory authority of their professional body, who could discipline them. Brandt JA also found that negligent acts by the appellant's nursing staff would not be in the interests of the appellant's reputation and competitiveness as a private hospital

The court also found that section 27(1) (a) was not the only constitutional value applicable to this case. Consequently, the court quoted the Supreme Court of Appeal's <sup>173</sup> attitude when approaching these types of cases, namely:

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

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<sup>173</sup> *Brisley v Drotsky* 2002 (4) SA 1 (SCA).

dignity.”

Moreover, Brandt JA, in turn, emphasized that the constitutional nature of contractual freedom embedded the principle of *pacta sunt servanda*. For that reason the court added, contracts freely entered into, by voluntary<sup>174</sup> and competent parties, must in public interest, be enforced. For that reason, the court consequently rejected the argument, by the respondent, that the indemnity clause in the hospital contract was contrary to the public interests. Turning to section 39 of the Constitution, the court rejected the idea that section 39 of the Constitution enjoins every court to develop common law or customary law. In this regard, the court also rejected the broadening of the *stare decisis* rule by invoking section 39(2) of the *Bill of Rights*. Brand JA, in this regard, relied heavily on the thinking of Kriegler JA, in the case of *Ex parte Minister of Safety and Security and Others and in S v Walters and another*,<sup>175</sup> where stated:

*“The Constitution enjoins all courts to interpret legislation and to develop the common law in accordance with the spirit, purport and objects to the Bill of Rights. In doing so, courts are bound to accept the authority and the binding force of application decisions of higher tribunals.”*<sup>176</sup>

The court consequently held:

*“High Courts are obliged to follow legal interpretations of the SCA, whether they relate to constitutional issues or to other issues, and remain so obliged unless and until the SCA, itself decides otherwise or this Court does so in respect of a constitutional issue.”*

Brand JA; consequently, found that a High Court was not empowered by section 39(2) to depart from the decisions of the Supreme Court of Appeal, whether they are pre- or post-constitutional.

But, stated Brand JA, section 39(2) of the *Constitution* must be read in conjunction with section 173. The latter section dealt with the inherent competence of the High Court, together with the Supreme Court of Appeal and the Constitutional Court, to develop the common law. But, despite the competence of the courts to develop the common law, the *stare decisis* held sway before the introduction of the Constitution. But, according to Brand JA, the *stare decisis* rule had not been set aside by the *Constitution* and was still relevant today. The rationale for the retention of the *stare decisis* rule was said, by Brand JA, to lie

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<sup>174</sup> SA *Sentrale Ko-op Graan Maatskappy Bpk v Shifren en Andere* 1964 (4) SA 761 (A).

<sup>175</sup> 2002 (4) SA 613 (CC).

<sup>176</sup> *Ex parte Minister of Safety and Security and Others: In re S v Walters* 2002 (4) SA 613 (CC).

in the fact that, to deviate from the decisions of the Supreme Court of Appeal would lead to a lack of uniformity and certainty.

Consequently, the court having considered the common law and constitutional court principles and values, held that the respondent was bound to the terms of the clause as if he had read it and expressly agreed to it. The appeal consequently succeeded with costs.

#### 14.6 Proposed adjudication of exclusionary clauses in hospital contracts

It is submitted, with the greatest respect, that the decision of the Supreme Court of Appeal in the case of *Afrox* was, for the reasons set out hereunder, wrongly decided. The approach adopted by Brandt JA, in delivering the judgment on behalf of the court, leads one to believe that the Supreme Court of Appeal was reluctant to depart from the antiquated views of the contexts in which the law of contract operates and embrace a new ethos based on fairness, reasonableness and justice and, in so doing, promote the values enshrined in the new constitutional order. Consequently, the discourse surrounding the criticism of this judgement will take place on three frontiers, including medical ethics, the common law and constitutional law.

The doctor/hospital-patient relationship has, historically, governed the behaviour of the parties *inter partes* and continues to do so today. The doctor/hospital-patient relationship has also been central to the practise of medicine and continues to be the position today. One feature of the said relationship is the promotion and maintenance of medical standards in which, *inter partes*, the interests of the patient are advanced. What arises from this relationship is also an obligation and commitment not to deviate from the standard of conduct. This means, they are not to harm the patient in any way. The nature of the relationship between the doctor/hospital-patient has also been shaped by a strong commitment to long-standing principles of medical ethics, in which conscience and the intuitive sense of goodness, public conscience, responsibility, the Hippocratic Oath, the sanctity of life and bodily integrity, play a major role.

The relationship is also said to be founded upon trust and respect and which, together with normative ethics, greatly influence the said relationship. Normative ethics, on the other hand, entail the responsibility of medical practitioners and hospitals to comply with standards of conduct, including moral principles, rules, rights and virtues.<sup>177</sup> Normative

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<sup>177</sup> Several writers internationally, (including South Africa) have written extensively about the influence of the doctor/hospital-patient relationship. See Michael A Jones - *Medical Negligence* (1998) 18. Mason and McCall Smith *Law and Medical Ethics* (1991) 14-17 who believe that in the doctor/patient relationship, medical ethics play an important role in that: "*trust and respect continue to influence the relationship.*" See further Ficarra

ethics, in the form of codes/regulations, are also viewed as a protective measure of human rights, namely, to do the patient no harm and to act, always, in the best interests of the patient.<sup>178</sup>

What have also emerged, especially during the modern era, are the renewed interests in the fiduciary nature of the doctor-patient relationship. In this relationship, the doctor/hospital has an obligation to their patients to act with utmost good faith and not to allow their

"Ethics in Legal Medicine" A Chapter dedicated to Sanbar, Gibofsky, Finestone and Leglang *Legal Medicine* (1995) 147ff who states that as medicine operates in an ethical climate *"it is essential that ethical principles be applied to the physician-patient interaction."* See also Skegg *Law, Ethics and Medicine* (1988) 8. Beauchamp and Childress *Principles of Bio-Medical Ethics* (2001) 1-7, 27 hold the view that normative ethics have enjoyed a remarkable degree of continuity from the days of Hippocrates until the 20th century. According to the writers, normative ethics include the responsibility of medical practitioners to comply with *".... standards of conduct, including moral principles, rules, rights and virtues."* A violation of these norms *"..... Without having a morally good and sufficient reason"* constitutes immoral or improper conduct. The writers state that in addition thereto, health professionals and scientists are also given moral direction which comes through *"the public policy process, which includes regulations and guidelines promulgated by government agencies, the aim of which is to govern a particular area of conduct"* which includes *"abstaining from causing harm to others."* The latter thinking, it is submitted, corresponds with the position in South Africa today. The regulations published in the *Government Gazette on the 1st February 1980 No 2948 No 6832* regulate the reasonable degree of care and skill which has to be maintained by private hospitals in maintaining a license held by the licensure. One of the relevant regulations 25(23) requires that: *"All services and measures generally necessary for adequate care and safety of patients are maintained and observed."* Veatch *Medical Ethics* (1997) 21 views the codes regulating the conduct of medical practitioners as a "social contract" between the practitioners and the patients in which the practitioners pledge to *" ..... act to benefit their patients....."* For the nature and scope of ethics see Strauss SA "Ethics in the Treatment of Mental Patients: Some Aspects" in Van Wyk C and Van Oosten H (Eds) *Nihil Obstat: Feesbundel vir WJ Hosten/Essays in Honour of WJ Hosten* (1996) 181. Steyn The Law of Malpractice Liability in Clinical Psychiatry *Unpublished LLM Dissertation Unisa* (2003) 67-68 defines ethics as *"the science of rules of moral conduct which should be followed because they are good in themselves."* According to Steyn (1943) 67 *"ethical considerations can never be excluded from the administration of Justice, which is the end and purpose of all civil law."* With reference to the functions of the Health Professions Council of South Africa Steyn (2003) 68 Strauss opines that *"ethical rules certainly do have a significant degree of enforceability."* Steyn (2003) 68 correctly, it is submitted, points out that the set of standards of practice born from ethics and law are *"reinforcing and enriching"*. See also the very informative writings of Carstens and Pearmain *Foundational Principles of South African Medical Law* (2007) 458ff.

<sup>178</sup> Skegg (188) 8 endorse the idea when he states: *"The conduct of doctors is circumscribed by public conscience."* Mason and McCall Smith (1991) 7 attach great value to public conscience and warn that *"the practice of medicine cannot be conducted solely on the basis of the individual conscience; the conduct of doctors is circumscribed by the public conscience ....."* *"It is against this ethical background that the validity of exclusionary clauses in hospital contracts will be investigated as means to determine ultimately whether the exclusion of negligence in hospital contracts favours public attitudes. Put differently, whether regulating the relationship with the patient in this way, does not constitute an improper derogation from an area of legitimate public concern. See also Carstens and Kok "An Assessment of the use of disclaimers by South African hospitals in view of constitutional demands, foreign law and medico-legal considerations", (2003) 18 SAPR/PL 449-451 who, with South Africa's acquired status as a constitutional state, view the role of normative medical ethics in the form of codes/instruments as "a protective measure of human rights" in that "to do no harm" and "to act in the best interest of the patient". In this regard with reference to disclaimers against medical negligence in hospital contracts which forms the core of the research of this thesis. Carstens and Kok (2000) 450 persuasively argue: *"..... disclaimers against medical negligence in hospital contracts would amount to an unreasonable/unfair/unethical acceptance on the part of a patient to contract to the possibility of harm (in the form of personal injury/death resulting from medical malpractice) by an attending medical practitioner (albeit in the hospital setting) who is ethically bound not to harm."**

personal interests to conflict with their professional duty.<sup>179</sup> Instead of embracing the principles enunciated hereinbefore, which have been part of the medical profession, worldwide, for many centuries, the Supreme Court of Appeal, embracing the doctrine of freedom of contract, chose to accentuate the application of exclusion clauses, in, especially, hospital contracts, which seek to protect the medical practitioner/hospital against mishaps occurring in connection with the conduct of the practitioner, the hospital's nursing staff or doctors employed by the hospitals. Accentuating the latter, it is respectfully submitted, is to ignore societal dictates which demand that, in executing his/her profession, the medical practitioner/hospital ought not be allowed to relax the degree of care and skill expected of him/her as a practitioner, alternatively, if it is a hospital, despite the patient consenting thereto. In allowing this, it is submitted, the court ignored the long-standing principles of medical ethics, in which public conscience and the doctor/hospital's responsibility towards the patient play a major role.<sup>180</sup>

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<sup>179</sup> What has also emerged in more modern times is a reviewed interest in the fiduciary nature of the doctor-patient relationship in which the said relationship is one of trust and confidence and in which doctors have an obligation to their patients to act with utmost good faith and loyalty and not to allow their personal interests to conflict with their professional duty. See Picard and Robertson (1996) 4 who emphasize the fiduciary nature of the relationship. The Canadian Courts in particular have also emphasized the fiduciary nature of the relationship. In the case of *Norberg v Wynrib* 1992 72 D.L.R. (4th) 448 See McLachlin J deciding on a damages claim arising from sexual exploitation by the doctor and the patient expresses himself as follows: "*The relationship of physician and patient can be conceptualized in a variety of ways. It can be viewed as a creature of contract, with the physician's failure to fulfill his or her obligations giving rise to an action for breach of contract. It undoubtedly gives rise to a duty of care, the breach of which constitutes the tort of negligence. But perhaps the most fundamental characteristic of the doctor-patient relationship is its fiduciary nature. I think it is readily apparent that the doctor-patient relationship shares the peculiar hallmark of the fiduciary relationship - trust, the trust of a person with inferior power that another person who has assumed superior power and responsibility will exercise that power for his or her good and only for his or her good and in his or her best interests. Recognizing the fiduciary nature of the doctor-patient relationship provides the law with an analytic model by which physicians can be held to the high standards of dealing with their patients which the trust accorded them requires.*" Academic writers have expressed strong views in favour of the fiduciary aspects of medical practice and in particular its usefulness in providing "a dynamic tool for reshaping the doctor-patient relationship as means to finding a proper balance in the discourse between patient and doctor." See Chapman (1984) 140 who describes the fiduciary relationship between the doctor and patient as "..... One in which the patient's interests are placed first and foremost in the time-honoured traditions of service, duty and honour." See also Picard and Robertson (1996) 4.

<sup>180</sup> The principles founded in medical ethics is said to be influenced by societal dictates in which public conscience is foundational. Skegg (188) 8 endorse the idea when he states: "*The conduct of doctors is circumscribed by public conscience.*" Mason and McCall Smith (1991) 7 attach great value to public conscience and warn that "*the practice of medicine cannot be conducted solely on the basis of the individual conscience; the conduct of doctors is circumscribed by the public conscience .....*" "*It is against this ethical background that the validity of exclusionary clauses in hospital contracts will be investigated as means to determine ultimately whether the exclusion of negligence in hospital contracts favours public attitudes. Put differently, whether regulating the relationship with the patient in this way, does not constitute an improper derogation from an area of legitimate public concern. The responsibility required of the medical practitioner/hospital takes centre stage in medical ethics. Hans The Imperative of Responsibility (1984) 6, 90-95 regards responsibility as the centre of the ethical stage which is borne out by the cliché "he is responsible, because he did it." The significance thereof according to Hans, is the doer must answer for his deed and is thus responsible for its consequences. So strong is his belief in the intrinsic value of responsibility that he argues: "... responsibility is as unconditional and irrevocable as any posited*

It is further submitted that, as the doctor/hospital stand in a trust position in relation to the patient, in which the doctor/hospital, through his/her/its expert knowledge, dominates the relationship and in which the patient is dependant upon the doctor/hospital's judgement and conduct, societal dictates demand that, in executing his/her/its professional duties, the doctor/hospital ought not be allowed to relax the degree of care and skill expected of him/her/it. It has been said, on many occasions, and needs to be said, over and over again, to allow the relaxing of standards of skill and care would be tantamount to giving the patient the authority to licence the medical practitioner/hospital to deviate from recognized norms and ethics.

Put differently, the court ignored the modern day approach wherein significant value is attached to social and moral values, as well as the constitutionally acquired values founded upon fairness, reasonableness and equity.

It is respectfully submitted that, should the patient be allowed to abandon a potential claim for damages, flowing from the negligent conduct of a doctor or hospital, this will result in the medical practitioner/hospital being given a license to practise negligently. Should this be allowed, the doctor and/or nursing staff of the hospital may, easily, abuse such abandonment of rights by getting the patients to sign exclusionary clauses. To allow such practise, it is submitted further, will result in recognition being given to the breach of the position of trust, which the doctor/hospital occupies, arising from his/her/its expert knowledge.

After all, as was previously stated, members of the public have, throughout decades, expected to be treated in a professional manner and in accordance with the degree of care and skill set for members of that profession. Once the court acknowledges that the health care professionals are ethically obliged, by their professional rules, to take due and proper care and to exercise their professions with diligence, it is unfortunate and regrettable that Brandt JA rejected the argument that clause 2.2 would promote negligent and unprofessional conduct, on the part of the nursing staff, as being built on a *non sequitur*,

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*by nature can be ..... "See also Van Niekerk "Ethics for Medicine and Medicine for Ethics" SAFR J. Philos 2002 21 (1) 35. It is widely felt that the Hippocratic Oath remains a precursor of modern ethical codes. See Teff - Reasonable Care (1994) 72 who regards the Oath as "a powerful symbol of the doctor's responsibility." The author advocates that its future existence lies in the maintenance of high ethical standards and a sense of obligation to serve the best interests of the patients. See also Giesen Acta Juridica (1988) 114. See further Sanbar et al Legal Medicine (1999) 6 who views the Hippocratic Oath as the "touchstone of modern medical ethics." For a comprehensive discussion see also Mason and McCall-Smith (1991) 439-446; Carstens and Kok (2003) 450.*

firstly, because the nursing staff are still bound to observe their professional code of conduct and secondly, because action against an employee of the applicant for negligent acts would adversely impact on its reputation and competitiveness, does not take into account the practical realities of the situation.<sup>181</sup>

It is also submitted that, by allowing the standard of conduct of professional people to be compromised, is tantamount to placing professional people on the same footing as any other provider of services who operates in the commercial terrain. This position, it is respectfully submitted, should never be tolerated, for it would place, for example, a tradesman on the same matrix as a professional person.<sup>182</sup> What needs to be emphasized as well, is the fact that an admission form, in which the patient seeks to obtain medical care and the hospital and its staff/doctor undertakes to treat the patient with due diligence,

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<sup>181</sup> Pearmain (2004) 705 when criticizing Brandt JA's approach states: *"Real life, it is submitted, is far more complicated than this. Brandt JA has seized only upon those factual elements within a larger factual matrix, which suit his particular viewpoint irrespective of how they impact on reality upon the other elements of the matrix to produce a result which Brandt JA could not anticipate without more in-depth knowledge of the business of health service delivery than he apparently has."*

<sup>182</sup> Pearmain (2004) 702 correctly calls into question the position when he states: *"Members of the public expect to be treated in a professional manner and up to a certain standard when they seek out the services of a registered professional because if they did not, they might as well go to Joe Public for those same services. What would be the reason for seeking out professional help if it meant that the professional in question was not bound to follow certain ethical rules and standards of practice associated with his profession?"*

The writer continues at 709 when she states: *"It is submitted with respect to the Supreme Court of Appeal that entering a hospital for medical treatment and enlisting the services of a plumber to address a household plumbing problem are two extremely different activities on the basis of risk. One cannot thus say that all suppliers of services are the same and that what is good for one is good for all. The nature of the service they render directly affects the nature and extent of the personal risk to the customer represented by that service. The South African courts have distinguished between different levels of risk even within the healthcare environment for instance with regard to the mode of delivery of a medicine - intravenously or per mouth. The effect of this judgement of the Supreme Court of Appeal is that every single private hospital in South African will include such a clause in its admission documentation with the result that, even assuming a patient did have some degree of bargaining power, the chances patients ever having recourse in South Africa against a private hospital for the negligent acts of its employees are now - negligible."* And further at 710: *"The court's failure to recognize the importance of the fact that private hospitals can be distinguished from other suppliers on the basis that the former provide services which are the subject of a constitutional right - a right moreover which seeks to ensure access to those services is also regrettable. The court chose to take a very narrow view of the issue of access holding that the clause did not interfere with access to healthcare services in that it did not have the effect of barring anyone from obtaining healthcare services. It is submitted with respect that this view of access is overly simplistic given the nature of the services one is dealing with. Healthcare services are generally required to promote, maintain or improve the health of a patient. When the courts consider claims in delict on the basis of medical negligence they do not adopt an approach which says that if the patient would in any event have ended up in his final state if there had been no medical intervention then one cannot hold a health professional liable for his negligence in preventing this from happening. In other words the law expects a health professional to act in such a way as to improve the patient's situation. Admittedly the improvement is not guaranteed but that is not the point. The point is that the health professional must act in the way in which any other reasonable health professional in the position of the health professional would act."*

is not a simple commercial contract or transaction.<sup>183</sup>

A further aspect that is troublesome and regrettable in the judgement is the manner in which the court handled the conduct of the nurses, to justify the validity of clause 2.2, in the admission form. The court, per Brandt JA, in this regard, found that, firstly, the appellant's nursing personnel are already bound by their professional code and they are already subject to the statutory authority of their professional body. Secondly, negligent acts by the appellant's nursing staff would not be in the interests of the appellant's reputation and competitiveness as a private hospital. Thirdly, the respondent's argument comes down, in effect, to that fact that the appellant's nursing staff, due to the existence of clause 2.2, will be purposefully (or otherwise intentionally) negligently - something which by definition amounts to self contradiction. The effect of the reasoning behind the decision in this regard, does not, with respect, make sense. The question, in the first instance, can be begged, namely, why seek professional help if it means that, despite professional standards been set and ethical rules being put in place for centuries, this can simply be ignored. Take for example where the conduct of nurses result in their standards of practise falling below the norm, resulting in patients suffering loss, yet, the patient cannot institute action against them.<sup>184</sup> This surely is an absurdity. This reasoning it is submitted is contrary to the approach taken by many of the courts since 1957, when the principle of vicarious liability, arising from the negligent conduct of health professionals, was first introduced.<sup>185</sup> In the Afrox case, other professional staff employed by a private hospital,

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<sup>183</sup> Naude and Lubbe (2005) 122 SALJ 444 at 460-463 persuasively argue: "*What is at stake here is not the patient's patrimonial interest (unlike an ordinary commercial contract), but, the patient's bodily inviolability*". And further: "*To allow such an agreement to be put on the same footing as a commercial agreement whilst there is an imbalance between the interests of the parties, would be to allow an improper, unconscionable advantage been gained over the patient.*" For other authorities see Jan Hendrik Esser who cares? Reflections on business in Healthcare *Unpublished LLM Thesis University of Stellenbosch* (2001) 72 who writes that a patient in seeking healthcare services looks for virtues like compassion, integrity and trustworthiness. See also Van den Heever "Exemption of Liability of Private Hospitals in South Africa" *De Rebus* (April 2003) 47; Jansen and Smith "Hospital Disclaimers" *Afrox Healthcare v Strydom 2003 Journal for Juridical Science* (2003) 28 (2) 214 at 218; Hawthorne "Closing of the open norms in the Law of Contract" (2004) 67 (2) *THRHR* 294, 299; See further the instructive argument presented by Carstens and Pearmain (2007) 458ff.

<sup>184</sup> It is especially Pearmain (2004) 702-703 who correctly points out the flaw in the courts argument when she points out: "*If a nurse's professional indemnity cover takes into account the vicarious liability of her employer and is lower than would have been in case had she been self-employed, then this judgement of the Supreme Court of Appeal may effectively have left patients who are the victims of negligence of nurses without recourse to compensation. A disciplinary hearing by a professional council even assuming any sanction is imposed, is cold comfort to a patient that has lost the ability to work or to function in society or that has experienced considerable pain and suffering and become liable for extra medical expenses as a result of professional negligence. It is submitted with respect that the confidence of the Supreme Court of Appeal that the existence of professional bodies to discipline professionals who do not practice their professions according to acceptable standards is a sufficient deterrent of professional negligence and adequately reduces the attendant risks to patients is naive to say the least.*" See also Carstens and Pearman (2007) 462ff.

<sup>185</sup> In a number of cases the courts refused to accept the view that the delicts of health professionals who are

operate as an autonomous body, over which the hospital itself or its management has no control. <sup>186</sup> In any event, by the time a nurse, or nursing staff member, is disciplined, it is too late, as the harm is done and the patient is left to suffer the harm. <sup>187</sup>

The second frontier upon which the judgement of the Supreme Court of Appeal in the *Afrox* case may be criticised is at common law. It is generally accepted at common law, that the doctrine of freedom of contract, in which contracting parties are free to negotiate the terms of their contracts and with whom they wish to contract, as well as the sanctity of contract, in which agreements, once entered into, should be held sacred and enforced by the courts, have universally dominated the contractual sphere. <sup>188</sup> The doctrine of freedom of contract

employed by a hospital should not attract vicarious liability for their employer. See *Esterhuizen v Administrator, Transvaal* 1957 (3) SA 710 (T) and *Dube v Administrator, Transvaal* fn 78 supra. See also the discussion of this subject in *Mtetwa v Minister of Health* 1989 (3) SA 600 (D) and the discussion there of *Lower Umfolosi District War Memorial Hospital v Lowe* 1937 NPD 31 and *St Augustine's Hospital (Pty) Ltd v Le Breton* 1975 (2) SA 530 (D); See also the persuasive argument of Carstens and Pearmain (2007) 460ff.

<sup>186</sup> It is for that reason that Pearmain (2004) 706 is forced to remark: *"This judgement almost gives the impression that nurses and other professional staff employed by a private hospital operate fairly independently, almost as contractors, of their employer and that the hospital itself has no authority to supervise them nor does it have any responsibility to control them in the same way that other employers control their employees. The impression is created that the fact that these employees are professionals and therefore subject to the disciplinary powers of their professional body somehow reduces the weight of the public policy considerations that the employer should be held vicariously liable....."* The writer cautions: *"With regard to the former argument, it is submitted that the frequency with which nurses are disciplined by the South African nursing council and even the relatively lower frequency with which they are found guilty and struck off the roll or their names removed from the register, is such that it gives the lie to this argument. Furthermore, an employer who is not vicariously liable for the negligence of its employees may be less concerned about taking preventive action to preclude professional negligence - even if it takes action to discipline the nurse as an employee after the event. Once a nurse is subject to a disciplinary proceeding, by her professional body it is too late."*

<sup>187</sup> It is Pearmain (2004) 707 who points out: *"..... that the argument of the Supreme Court of Appeal that there is adequate protection for the patient against the risks of professional negligence of the applicant's employees because the applicant had a reputation and a competitive edge to maintain is based on a fallacy."* See also Carstens and Pearmain (2007) 460ff.

<sup>188</sup> Aronstam (1979) 13-14; Atiyah (1995) 9-10. The South African legal position is best illustrated by Hahlo "Unfair Contract Terms in Civil Law Systems" Vol. 98 *SA Law Journal* (1981) 70: *"Provided a man is not a minor or a lunatic and his consent is not vitiated by fraud, mistake or duress his contractual undertakings will be enforced to the letter. If thought inexperience, carelessness or weakness of character, he has allowed himself to be overreached it is just too bad for him, and it can only be hoped that he will learn from his experience. The courts will not release him from the contract or make a better bargain for him. Darwinian survival of the fittest, the law of nature, is also the law of the market place."* The ingredients of the doctrine of freedom of contract comprising unlimited freedom to contract and sanctity of contract were highlighted by the courts quite frequently none better than, the much better quoted English decision of *Printing and Numerical Registering Company v Sampson* (1875) L.R. 19 Eq. 582 in which Sir George Jessel MR stated: *"If there is one thing which more than another public policy requires it is that men of full age and competent understanding shall have the utmost liberty of contracting, and that their contracts when entered into freely and voluntarily shall be held sacred and shall be enforced by Courts of Justice. Therefore you have this paramount public policy to consider, that you are not lightly to interfere with this freedom of contract."* The American courts were particularly alive to individualism, private rights free from restrictions and a minimum of legal interference with private rights. This was expressed in very clear and precise terms in the case of *Lochner v State of New York* (1898) 45 US 198 in which Mr Justice Peckham stated: *"There*

and the sanctity of contract has its roots deeply embedded in the classical law of contract and, especially since the advent of standard term contracts, shown little regard for the bargaining strength of the parties concerned, notwithstanding the inequality that a weaker party may face in the contractual relationship.<sup>189</sup> The classical law approach also ignores the unfair and unconscionable result some contractual agreements may bring with them. One of the reasons advanced by the courts is this, to give judges, *carte blanche*, discretion to ignore contractual principles which they regard as unfair and unreasonable, would be in conflict with the rules of practice. They, according to the Supreme Court of Appeal,<sup>190</sup> would be in conflict with the principle of *pacta sunt servanda* and the pronouncements of the enforcement of contractual provisions will ultimately be determined by the presiding judge, who has to determine whether the circumstances of the case are fair and reasonable, or not. The further argument is advanced that the criteria would no longer be the principles of law, but the judge him/herself.

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*is no reasonable ground for interfering with the liberty of person or right of free contract, by determining the hours of labour, in the occupation of a baker. There is no contention that bakers as a class are not equal in intelligence and capacity to match other trades or manual occupations, not that they are not able to assert their rights and care for themselves without the protecting arm of the State, interfering with their independence of contract and of action."* The judicial ethics of freedom of contract also made its way into the South African courts so much so, that Kotze JP in the case of *Osry v Hirsch, Loubser and Co Ltd* 1922 CPD 531, remarked: "*The spirit of modern jurisprudence is in favour of the liberty of contract, and there is practical wisdom in the observations of De Villiers CJ, in Henderson v Hamilton, 1903 2d SC 513 at 519.*" And further remarking: "*All modern commercial dealings proceed upon the assumptions that binding contracts will be enforced by law.*"

<sup>189</sup> It is especially, the writer's Kahn (1980) 70 who fully embraces the sanctity of contract with reference to the famous dictum of Jessel in *Printing and Numerical Registering Co v Sampson* (1875) LR EQ 462 or 445 in which he stated: "..... if there is one thing which more than another public policy requires it is that men of full age and competent understanding shall have the utmost liberty of contracting, and that their contracts when entered into freely and voluntarily shall be held sacred."

And Hahlo (1981) 70 following the English law advocates: *Provided a man is not a minor or a lunatic and this contract is not vitiated by fraud, mistake or duress, his contractual undertakings will be enforced to the letter. If, through inexperience, carelessness or weakness of character, he has allowed himself to be overreached, it is just too bad for him, and it can only be hoped that he will learn from his experience. The courts will not release him from the contract to make a better bargain for him. Darwinian survival of the fittest, the law of nature, is also the law of the market place.*" Christie (2001) 17 also defend the so-called hands-off approach in stating: "*the whole basis of the law of contract is that the law will enforce their agreement. Intervention by the courts appears to be unreasonable, a form of paternalism inconsistent with the parties' freedom of contract.*" The South African courts have also over a century supported the idea of contractual freedom and the sanctity of the enforcement of contracts. This commenced as far back as 1902 in the case of *Eastwood v Shepstone* 1902 TS 294 at 302, continuing with the case of *Wells v South African Alumenite Company* 1927 AD 69 who adopted the principle enunciated in *Printing and Numerical Registering Company v Sampson* (1875) LR EQ 462 and more recently *Olsen v Standaloft* 1982 (2) SA 668 ZS; *Otorian Properties (Pty) Ltd v Maroun* 1973 (3) SA 779 (AD); *Tamarillo (Pty) Ltd v B.N. Aithken (Pty) Ltd* 1982 (1) SA 398 (AD); *Sasfin (Pty) Ltd v Beukes* 1989 (1) SA 1 (AD) and most recently in the cases of *Brisley v Drotzky* 2002 (4) SA 1 (SCA) and *Afrox Healthcare Bpk v Strydom* 2002 (6) SA 21 SCA.

<sup>190</sup> *Afrox Healthcare Bpk v Strydom* 2002 (6) SA 27 (SCA).

The effect of the classical law approach amounted to this; once a contract is freely and voluntarily entered into, it should be held sacred, and should be enforced by the courts; notwithstanding its results. As a general rule it has been accepted, by the legal writers and the courts, that a person who signs a contractual document thereby signifies his assent to the contents of the document. Once a person has signed a contractual document, but it has subsequently turned out that the terms of the contract are not to his/her liking, he/she cannot complain, as he/she has no one to blame but him/herself. The legal effect thereof is that; once a contracting party signs the document, unaware that it contains terms not acceptable to him/her, he/she will, in general, not be permitted to rely on his/her mistake to escape liability. This has come to be known as the *caveat subscriptor* rule. But, despite the *caveat subscriptor* rule, which strengthened the doctrine of freedom of contract and the sanctity of contract, the legal writers and courts do recognise that there are circumstances when a contracting party, despite his/her signing the document, he/she will not be bound to the terms. In those instances, special defences, including the ignorance and handicap of the signatory to whom the contents of the document have been inadequately and inaccurately explained; where a trap has been set for the signatory; where, despite the signatory appending his/her signature to the document without reading the document, the document contained a term or terms which the reasonable man would not expect to find therein.

The other defences to the *caveat subscriptor* rule, recognised by the legal writers and the courts, include, contracts contaminated by fraud, misrepresentation, mistake, illegality, duress and undue influence. Other exceptions to the *caveat subscriptor* rule include; where the contract or provisions of the contract threatens health, the moral welfare or the safety of the public, as well as contracts that are illegal or against public policy.

With the advent of consumer organisations, pressure was been brought to bear, on businesses, to respect the rights of consumers, as a means to curb forms of exploitation. It is especially the standardized contracts which have often come under criticism by legal writers, the courts and consumer organisations, especially in countries such as England and the United States of America. In South Africa, the legal writers have been quite vocal, often calling for law reform. But, the South African courts, until now, have adopted a rather conservative approach. It appears that one of the primary criticisms of standardized contracts is that, in reality, equality rarely exists in standardized agreements.

Other attempts made to curb the unrestricted freedom of contract were to introduce and recognise doctrines, *inter alia*, good faith, public policy, unconscionable-ness and reasonableness.

The recognition of the principle of good faith, has received very mixed reactions in the South African jurisdiction. Whereas the legal writers, generally, viewed and continue to do so today, that the principle of good faith or fairness is a means of curtailing unlimited freedom of contract and the concept of *pactum sunt servanda*, the South African courts have clearly shown a mixed reaction towards recognizing the principle.<sup>191</sup>

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<sup>191</sup> Many motivational reasons have been advanced by the different academic writers. In this regard Van Aswegen (1994) 448 at 456 argue that freedom of contract and *pacta sunt servanda* brought with it inequalities which necessitated the introduction of mechanisms such as fairness, justice and good faith in contract to counter substantial injustices in the law of contract. Lotz (1979) 11-12 promotes the utilization of *bona fides* or good faith as a mechanism to advance "honesty in contract and the prohibition of unreasonable promotion of one's own interests". Support for this view is found in the writings of Fletcher (1997) 1 at 2. Christie (2003) 19-20 believes good faith as a mechanism will go a long way to create and enforce moral and ethical values in contract especially, where courts are confronted with "the unfair enforcement of a contract". Support for this view is espoused by Zimmerman (1996) 256. The writer also calls for legislative intervention whereby courts will openly be obliged to perform their duty of policing unfair contract terms. See further Van Aswegen (1994) 458 who finds for the courts to be given an equitable discretion to declare invalid or modify a contract or contractual clause which does not conform to the standard of good faith. The courts as early as 1881 in *Judd v Fourie* (1881) 2 EDC 41 (76) expressed the view that good faith is required in all contracts. The Appellate Division as far back as 1923 in the case of *Neugebauer and Co v Herman* 1923 AD 564 also endorsed the principle that *boni fides* is required from both parties to a contract of sale. It was especially, with the interpretation of contracts where the contracts were ambiguous and capable of more than one construction that the courts adopted a practice to consider good faith as means to seek an answer. This position was recognized in *Trustee, Estate Cresswell and Durbach v Coetzee* 1916 (AD) 14, *Rand Rietfontein Estates Ltd v Cohen* 1937 (AD) 317 in which use was made of equitable construction. The South African courts, including the Appellate Division (as it was then) recognized the principle that all contracts are *bonae fidei*. See *Meskin NO v Anglo American Corporation of SA Ltd and Another* 1968 (4) SA 793 (W); *Savage and Lovemore Mining (Pty) Ltd v International Shipping Co (Pty) Ltd* 1987 (2) SA 149; *Paddock Motors (Pty) Ltd v Igesund* 1976 (3) SA 16 (A); *Tuckers Land and Development Corporation (Pty) Ltd v Hovis* 1980 (1) SA 645 (A). In the latter case the court specifically states the requirement of *bona fides* underlies our law of contract. The curtain was however, drawn on the recognition of *bona fides* as a criterion in contract law and more in particular, that *bona fides* had developed to fulfil the function of the *exceptio doli*. The court continues to make it clear an equitable discretion with our courts, is no part of our law. See however, the Jansen JA minority decision. But the recognition of good faith as a norm in the South African law of contract flared up in a number of cases *inter alia* the minority judgement of Olivier JA in *Eerste Nasionale Bank van Suidelike Afrika Bpk v Saayman NO* 1997 (4) SA 302 (A). The learned Judge argues that there is a close connection between the doctrine of *bona fides* and that of public policy, public interest and suggests that *bona fides* becomes a open norm or free floating defence. Van Zyl in the case of *Janse van Rensburg v Grieve Trust CC* 2000 (1) SA 315 (C) pleaded for the development of good faith as a norm to control unconscionable and unfair contracts. A similar approach was taken by Ntsebeza AJ in *Miller and Another NNO v Donnecker* 2001 (1) SA 928 (C) when following the minority judgement of Olivier JA in *Eerste Nasionale Bank van Suidelike Afrika Bpk v Saayman NO* 1997 (4) SA 302 (SCA). The re-introduction was also pleaded for by Davis J in *Mort NO v Henry Shields-Cheat* 2001 (1) SA 404 (C). Subsequently, the Supreme Court of Appeals when confronted with a golden opportunity to bring about law reform in the South African law of contract, squandered the opportunity in the cases of *Brisley v Drotsky* 2002 (4) SA 1 (SCA); *Afrox Healthcare Bpk v Strydom* 2002 (6) SA 27 (A). Instead of infusing the law of contract with equitable principles founded upon constitutional values, the court continued to entrench the doctrines of freedom of contract and the *pactum sunt servanda*. The majority of the court (Harms, Streicher and Brand JJA) subsequently refused to follow the Cape Provincial Division judgements of *Miller and Another NNO v Donnecker* 2001 (1) SA 928 (C) (in which Ntsebeza AJ followed the minority decision of Olivier JA in *Eerste Nasionale Bank van Suidelike Afrika Bpk v Saayman NO* 1997 (4) SA 302 (SCA) wherein the learned Judge found that the principle of *bona fides* is very much part of the modern law of contract in South Africa, it being part and parcel of the moral and ethical values of justice, equity, and decency), as well as *Janse van Rensburg v Grieve Trust CC* 2000 (1) SA 315 (C) (wherein Van Zyl J found justification for an application of good faith in the fact that such an interpretation was consonant with the spirit and values contained in the Bill of Rights); and the *Mort*

It is respectfully submitted that Brandt JA, besides stating that good faith is not a free floating value, was not sensitive enough to public dictates, which have, over a significant period of time, called for fair dealings in contract, especially where a degree of bargaining unfairness is present in concluding agreements.<sup>192</sup> Although Brandt JA held that good faith, *inter alia*, represents the foundation and *raison d'être* for the present legal rules and can also lead to the formulation and alteration of rules of law, the learned Judge makes no attempt to develop good faith as a safety valve to ensure a minimum level of fairness in contracting, which, I submit, is manifestly in keeping with the constitutional values of human dignity, equity and freedom.

It is further submitted that; the acknowledgement and development of good faith, to ensure a minimum level of fairness in contracting, by the Supreme Court of Appeal, would have gone a long way towards embracing the historical justification for recognizing good faith in contract and which has, as its roots, ethics and fairness in law. The historical justification for recognizing good faith is said to have stemmed from the need to protect the public welfare against unfair contracts or contractual terms and from unreasonable hardship. The

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*NO v Henry Shields-Chiat* 2001 (4) SA 464 (C) case (in which Davis J supported the reasoning of Van Zyl J in *Janse van Rensburg v Grieve Trust (supra)*) that in performing their constitutional mandate the courts could use the concept *boni mores* to infuse our law of contract with the concept of 'good faith'. The Supreme Court of Appeal did not support Olivier JA's view in the *Saayman NO* case (referred to above) namely, that *boni fides* ought to be given a more prominent place in the South African Law of Contract. To do so, according to the Supreme Court of Appeal, would be too far reaching. Hence, the court stated the judgement by a single judge, must be approached with great circumspection as Oliver's reasoning is based on shaky grounds. The court agreed with the writer, Hutchison, who is of the view that good faith was not "*an independent, free-floating basis for setting aside or not enforcing contractual principles*". The Constitutional Court in a more recent case of *Barkhuizen v Napier* 2007 (5) SA 323 (CC) 66 acknowledged that "*good faith is not unknown in our common law of contract*" and that "*it underlies contractual relations in our law*". But warns the court it is not the only value or principle that underlies the law of contracts. The court also states that "*the concepts of justice, reasonableness and fairness constitute good faith*". But it is especially, Sachs J in a minority judgement who advocates a new ethos in assessing standard form contracts. He cautions that courts should be sensitive to economic power in public affairs affecting the general public. Sachs J stresses the legal convictions of the community which seeks fair dealings in business-consumer relationships. Moreover, he finds support for his contention in the preamble to the new *Consumer Protection Bill* published by the Department of Trade and Industry for public comment in March 2006. In this regard the preamble reads:

*"The people of South Africa recognize-*

*That is necessary to develop and employ innovative means to-*

- (a) *fulfill the rights of historically disadvantaged persons and to promote their full participation as consumers;*
- (b) *protect the interests of all consumers, ensure accessible, transparent and efficient redress for consumers who are subjected to abuse or exploitation in the marketplace; and*
- (c) *give effect to the internationally recognised customer rights."*

<sup>192</sup> In this regard Sachs J calls for the fair dealings in contract and in so doing to "*ensure the basic equity in the daily dealings of the ordinary people*". The legal convictions of the community according to Sachs J regard reasonableness and fair dealings in contract as intrinsic to 'appropriate business/consumer relationships in our contemporary society'.

Supreme Court of Appeal, it is respectfully submitted, failed to have regard to the public welfare when it ignored good faith including reasonableness, justice and equity.<sup>193</sup>

Brandt JA, relying on the common law principles, stated that a contractual provision which is unfair, on the basis that it is in conflict with the public interest, is unenforceable.<sup>194</sup> This, it is respectfully submitted, is in line with the South African common law position that agreements contrary to law, morality or public policy are unenforceable, or void.<sup>195</sup>

It is generally accepted that public policy, as a doctrine, places a limitation on contractual freedom or contractual autonomy, as well as the enforcement of contractual agreements once entered into, i.e. the doctrine of *pacta sunt servanda*.<sup>196</sup>

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<sup>193</sup> The unfairness and unreasonableness of exclusionary or exemption clauses in medical contracts are highlighted by Carstens and Kok (2005) 78 *SAPR/PL* 450; Veatch (1983) 2-7; Beauchamp and Childress (1994) 3; Mason and McCall-Smith (1991) 4. But it is the legal writer Tladi (2002) 17 *SAPR/PL* 473; 477 who comes out strongly against exclusionary clauses in hospital contracts when he writes that these types of clauses deserve to be dismissed as their acceptance would acknowledge the "dismissal of the principles of reasonableness, justice, equity and good faith in contract law."

<sup>194</sup> This principle was accepted and applied in *Sasfin (Pty) Ltd v Beukes and Botha (now Griesel) and Another v Finanscredit (Pty) Ltd*. Brandt JA quoted with approval then the dictum of Smalberger JA in the state case where he stated: "The power to declare contracts contrary to public policy should, however, be exercised sparingly and only in the clearest of cases, lest uncertainty as to the validity of contracts result from an arbitrary and indiscriminate use of the power. One must be careful not to conclude that a contract is contrary to public policy merely because its terms (or some of them) offend one's individual sense of propriety and fairness. In the words of Lord Atkin in *Fendor v St John-Mildmay* 1938 AC 1 (HL) at 12..... 'the doctrine should only be invoked in clear cases in which the harm to the public is substantially incontestable, and does not depend upon the idiosyncratic inferences of a few judicial minds .....' In grappling with this often difficult problem it must be borne in mind that public policy generally favours the utmost freedom of contract, and requires that commercial transactions should not be unduly trammelled by restrictions on that freedom." Brandt JA also pointed out that these cautionary words were emphasized more recently in *Brummer v Gorfil Brothers Investments (Pty) Ltd en Andere; De Beer v Keyser and Others; Brisley v Drotsky*. He said that concerning exclusionary or indemnity clauses in South African law the position are that such clauses although valid and enforceable must be restrictively interpreted. He observed that these types of clauses have become the rule rather than the exception in standard contracts and that the limits of such clauses are apparently determined largely by business considerations such as savings in insurance premiums, competitiveness and the possibility of scaring off prospective clients.

<sup>195</sup> See Wessels (1951) Par 483-480ff; Van der Merwe et al (2003) 176-178; Joubert (1987) 132-151; De Wet and Van Wyk *Kontraktereg and Handelsreg* 5ed Volume 1 (1978) 89-92; Kerr (1998) 177-183; Christie *Bill of Rights Compendium* (2002) 3H-9-3H-12; 3H-20-3H-21; Hutchinson et al (1991) 431; Joubert et al *LAWSA* Volume 5 Part 1 (1994); 214-216; Kahn (1988) 32; Christie (2001) 398ff; Hawthorne "The End of bona fides" (2003) 15 *SA Merc LJ* 277; Jordaan "The Constitution's impact on the law of contract in perspective" 2004 *De Jure* 59ff; Hopkins "Standard form contracts and the evolving idea of private law justice: A case of democratic capitalist justice versus natural justice" *TSAR* 2003-1 159; Hawthorne "Closing of the open norms in the law of contract" 2004 67 (2) *THRHR* 295 ff; Hawthorne "The principle of equality in the law of contract" 1995 (58) *THRHR* 173; Van Aswegen "The future of South African contract law" 1994 (59) *THRHR* 453.

<sup>196</sup> See Wessels (1951) Par 463-480ff; See also Jordaan (2004) *De Jure* 59-60; Christie *Bill of Rights Compendium* (2002) 3H-20; Van der Merwe et al (2003) 15; See also Kahn (1988) 32. The author expresses the view that: "Our common law has in a sense encroached on the freedom and sanctity of contract by its condemnation of contracts against public policy." See further Hutchinson et al (1991) 431 who identifies that need for the exception to the general rule of freedom of contract in the form of public policy as "the necessity for doing simple justice between man and man." Joubert *LAWSA* Volume 5 Part 2 (1994) 215.

The rationale for the existence of public policy is said to lie in the broader concept of paternalism, in which the courts protect the weaker party to the contract and determine what is, or not, a matter of public interest and when it is established that a contract, or provision of a contract, offends against public interest, then it ought to be struck down or declared invalid. But, the South African approach, as with the other jurisdictions, including England and the United States of America, has been to adopt a cautious approach when declaring a contract or a term in a contract contrary to public policy and, therefore, unenforceable. It has often been stated that such a discretion should be exercised sparingly and only in the clearest of cases.<sup>197</sup>

The court, in the *Afrox* case, consequently held that the yardstick used in measuring whether exclusionary clauses are unenforceable as against public policy, is exactly the same as measuring contractual provisions which are, as a result of public policy, unenforceable. The question always remains whether the enforcement of the particular exclusionary clause or other contractual provision would, as a result of extreme unfairness, or as a result of other policy convictions, be contrary to the interests of the community.

The Supreme Court of Appeal, after considering the three grounds relied upon by the respondent to prove that the disclaimer offended public policy, namely:

- (1) The unequal bargaining position between the parties;
- (2) The nature and extent of the acts of the hospital staff against which the appellant was indemnified;
- (3) The fact that the appellant is the provider of healthcare services;

rejected all of these grounds.

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<sup>197</sup> See Hawthorne 2004 67 (2) *THRHR* 299; See also Christie *Bill of Rights Compendium* (2002) 3H-10; Hutchinson et al (1991) 431. Joubert *LAWSA* Volume 5 Part 1 (1994) 215. The author endorses the principle that the power to declare a contract contrary to public policy should be exercised sparingly " ..... only when the impropriety of the contract and the element of public harm are manifest." Jordaan 2004 *De Jure* 61 identifies the criterion to prove that a contractual provision is *contra* public policy namely when "substantially incontestable harm to the interests of the public will be caused". See further Pretorius 2004 69(2) *THRHR* 298-299. Smalberger JA similarly in the case of *Sasfin (Pty) Ltd v Beukes* 1989 (1) SA 1 (A) declared in the most quoted dictum that: "No court should therefore shrink from the duty of declaring a contract contrary to public policy when the occasion so demands. The powers to declare contracts contrary to public policy should, however, be exercised sparingly and only in the clearest of cases lest uncertainty as to the validity of contracts result from an arbitrary and indiscriminate use of the power. One must be careful not to conclude that a contract is contrary to public policy merely because its terms (or some of them) offend one's individual sense of propriety and fairness." The court then quotes with approval the words of Lord Atkin in *Fender v St John-Mildmay* 1938 AC 1 (HL) at 12: "The doctrine should only be invoked in clear cases in which the public is substantial incontestable and does not depend upon the idiosyncratic inference of a few judicial minds."

As to the unequal bargaining power, the court held that on its own, it is not enough to conclude that the impugned clause offends public policy. The court consequently held that unequal bargaining power is a factor to be considered, with all other factors, in deciding whether public policy was offended. But, the court held that, in this case, the respondent provided no evidence whatsoever that indicated a weaker bargaining position.

As to the second ground, it was argued, on behalf of the respondent, that the disclaimer excluded even gross negligence and that this is against public policy. The court, however, rejected this argument, *inter alia*, because the respondent relied on negligence, *per se*, in his pleadings and not on gross negligence.

The court also held that contractual autonomy, as encapsulated in the common law maxim of *pacta sunt servanda*, forms part of the value of freedom and is thus protected in the Constitution.

Although the court correctly laid down the test used to measure whether exclusionary clauses are unenforceable as against public policy, namely, to determine whether the enforcement of the particular exclusionary clause would, as a result of extreme unfairness, or as a result of other policy convictions, be contrary to the interests of the community the criteria needs to be developed. But, despite the court laying down the correct test, the Supreme Court of Appeal paid lip service to the principles of fairness and public interests, when Brand JA pronounced that exclusionary clauses in hospital contracts, excluding the hospital and/or its staff from liability arising from negligence, are not unfair nor, do they violate public interests. The court's approach in this regard should, with respect, be criticised.

It is, respectfully, submitted that the practise of medicine and all its associated protocols, practises, ethical codes and standards, is affected with public interests. The duty, which the doctor/hospital owes to his/her/its patient, to apply the defined standards of care and skill in accordance with the average qualification or standard in the class of profession to whom they belong, alternatively, standards set for the hospital, is a product of tort law but also a creature of public policy, designed to maintain that practise to a minimum level of performance. It is, therefore, submitted that it will be offensive to public policy to permit these safeguards to be destroyed by a medical practise designed by contract law, under what is known as, contract waivers. Foundational to this principle is the value that a doctor/hospital's duty of care is an inalienable duty. The obligation of the doctor/hospital to maintain and exercise reasonable care in treating a patient, imposed by law cannot,

therefore, be avoided by contract. The rationale for the recognition of the principle, it is respectfully submitted, is founded on the fact that medical care is a necessity of life, in which the patient's welfare is of paramount importance and from which a relational duty arises, to treat the patient with the utmost diligence and care, which duty is inalienable. Healthcare providers have, therefore, a non-negotiable duty of public service, in respect of which the prevailing standards of care ought not to be violated. It is, further, submitted that exclusionary clauses in medical contracts have no place in the practise of medicine and any private agreements which compromise, or reduce the health providers statutory or ethical duties ought to be struck down, as they impact on public interest <sup>198</sup> and any attempt by a

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<sup>198</sup> It is submitted that the regulations published in the *Government Gazette* on the 1st February 1980 No 29449 No 6832 which regulates the reasonable degree of care and skill which is conditional to private hospitals obtaining and maintaining their licenses to operate is clearly a public regulation. One of the relevant regulations 25(23) requires that: "All services and measures generally necessary for adequate care and safety of patients are maintained and observed." Any contract aimed at exculpating the performance of a service which is of great importance to the public would therefore affect public interest. Medical ethics have and continue to play a very influencing role in public interests matters. It is submitted that any conduct which negatively affects ethical practices or codes impacts on public interests. It is especially, the writings of Carstens and Kok (2005) 78 *SAPR/PL* 430 who put a premium on medico-legal considerations in assessing the validity of disclaimers in hospital contracts. Referring to the *Hippocratic Oath*, the *Declaration of Geneva*, the *International Code of Medical Ethics and the Declaration of Helsinki* as well as domestic *Medical Codes*, the writers persuasively argue that medical ethics have its roots in the highest order that cannot be compromised. For that reason healthcare providers including hospitals are first and foremost required 'to do no harm' and to act in the best interests of the patient. See also Roth "Medicine's Ethical Responsibility in Veatch (ed) *Cross Cultural Perspectives in Medical Ethics* (1983) 150 wherein the writer opines at 153 that "medical ethics have, over years, acquired a rather philosophical character ..... it has its roots in a societal concept of summum bonum, which interesting modifications such as that expressed in the repeated maxum primun non nocere" which means medical ethics have its roots in the highest order which cannot be compromises. Beauchamp and Childress of *Biomedical Ethics* (1994) 3. Turning to societal moral dictates the writers Carstens and Kok argue that: " ..... disclaimers against medical negligence in hospital contracts would amount to an unreasonable/unethical acceptance on the part of a patient to contract to the possibility of harm in the form of personal injury/death resulting from medical malpractice by an attending medical practitioner (albeit in the hospital setting) who is ethically bound not to do harm." By ignoring medical ethics and the accompanying standards of care is contradictory it is submitted to the very values of Afrox Healthcare website: (<http://www.afroxhealth.co.za/>) is a document entitled "Core Values". It reads:

Core values

*Organizational values are principles or qualities considered worthwhile by an organization. At Afrox Healthcare there is a fundamental commitment to these values throughout the entire organization - merely posting them on a bulletin board and paying them lip service is not tolerated! `Living" these values in our day-to-day business activities provides us with the foundation of what is important to us - namely, providing world-class patient care.*

Accountability

*We ensure employees know what they are responsible for and are empowered to deliver.*

Collaboration

*We maximise that visible problems can be solved and that informed people make better decisions.*

Stretch

*We continuously push the boundaries of performance.*

Quality

*Afrox Healthcare quest is to maintain world-class quality standards at all its hospital facilities - to the benefit of its patients, employees, supporting medical practitioners and funders. A world-class quality management process. We believe that our unique process of managing quality standards in our hospitals matches and probably exceeds the best to be found anywhere in the world today.*

See also the writings of Carstens and Pearmain (2007) 465.

doctor/hospital/other healthcare provider to use written contracts to reduce liability for negligence, in whatever form, ought to be struck down as they are deemed to be contrary to public policy.

It is further, respectfully, submitted that the regulation which governs the licensing of private hospitals and calls for the maintenance of a standard of care and skill in treating a patient, is grounded on public policy. It, forbids acts which has the tendency to be injurious to the public good. Where public policy requires the observance of a statute or regulation, no court should fail in its duty to denounce an attempt to waive a hospital/doctor/or other health carer's liability for negligence as invalid and unenforceable and against public policy. In this regard, a professional person should not be permitted to retreat behind a protective shield of an exculpatory clause and insist that he/she/it is not answerable for his/her/its own negligence.

It is further submitted that the Supreme Court of Appeal, in the *Afrox case*, failed in its constitutional obligation to develop the common law, including the principles of the law of contract.

It is submitted that, instead of taking a principled approach, using objective criteria, such as fairness, reasonableness and conscionable-ness in contract, to ensure standards of fairness and reasonableness are achieved, especially, when dealing with standard form contracts, the Supreme Court of Appeal chose to entrench the traditional approach, by denouncing fairness and reasonableness as a yardstick to measure the validity of standard form clauses.

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<sup>199</sup> Brand JA quotes with approval the much highlighted dictum of Smalberger JA in *Sasfin (Pty) Ltd v Beukes* 1989 (1) SA 1 (A) in which the Supreme Court of Appeal held: *"No court should therefore shrink from the duty of declaring a contract contrary to public policy when the occasion so demands. The powers to declare contracts contrary to public policy should, however, be exercised sparingly and only in the clearest of cases lest uncertainty as to the validity of contracts result from an arbitrary and indiscriminate use of the power. One must be careful not to conclude that a contract is contrary to public policy merely because its terms (or some of them) offend one's individual sense of propriety and fairness."* The court then quotes with approval the words of Lord Atkin in *Fender v St John-Mildway* 1938 AC 1 (HL) at 12: *"The doctrine should only be invoked in clear cases in which the public is substantially incontestable and does not depend upon the idiosyncratic inferences of a few judicial minds."* Insofar as judicial thinking is concerned Stratford CJ in *Jajbhay v Cassim* 1839 AD 537 at 544 spoke of "public policy should properly take into account the doing of simple justice between man and man." In a more recent judgement of the Supreme Court of Appeal Cachalia AJA writing for the unanimous court also relied upon this feeling of fairness and justice in contract when he stated: *"..... There can be no doubt that the tendency of the clause (in the present matter) is to deprive the respondent of his right to approach the court for redress from his parlous financial position. To deprive or restrict anyone's right to seek redress in court, as the case cited above make clear, is offence to one's sense of justice and is inimical to the public interest."* More recently the Constitutional Court in the case of *Barkhuisen v Napier* 2007 (5) SA 323 (CC) 66 per Ngcobo J delivering the majority judgement emphasized that the enforcement of an unreasonable or unfair time limitation clause will be contrary to public policy. The court also stressed that *"notions of fairness, justice and equity and reasonableness cannot be*

The suggested approach is very much in line with some of the judicial thinking,<sup>200</sup> which has spanned over a long period, backed by scholarly opinion amongst academic writers,<sup>201</sup> as well as the South African Law Commission.<sup>202</sup> In this regard, courts should not enforce

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*separated from public policy.*" The court also accepts that public policy takes into account the necessity to do simple justice between themselves.

<sup>200</sup> *Lorimar Productions Inc and Others v Sterling Clothing Manufactures (Pty) Ltd; Lorimar Productions Inc and Others v OK Hyperama Ltd and Others; Lorimar Productions Inc and Others v Dallas Restaurant* 1981 (3) A 1129 (T) at 1152-3; and *Schultz v Butt* 1986 (3) SA 667 (A) at 679B-E quoted with approval in *Barkhuizen v Napier* 2007 (5) SA 323 (CC) 66.

<sup>201</sup> There has been a united effort amongst writers in South Africa to advocate for the courts to refuse on public policy to enforce contracts, or contractual terms that are unfair or unconscionable. See Woolfrey "Consumer Protection - a new jurisprudence in South Africa" (1989-1990) 11 *Obiter* 109 at 119-20. See generally Aronstam (1979) 14; McQuoid-Mason "Consumer law: the need for reform" (1989) 52 *THRHR* 32; Lewis (2003) 120 *SALJ* 330; Bhana and Pieterse (2005) 122 *SALJ* 865 and articles quoted therein. Contractual fairness, equity and reasonableness based on social, ethical and moral values have been foundational to some academic writers denouncing the validity of exclusionary clauses or the so-called "contracting out of liability" clauses. See Gordon, Turner, Price (1953) 153ff, who as long ago as 1953 persuasively argue with reference to the so-called "contracting out" of liability cases that: "*any attempt by a practitioner to contract out of liability for malpractice may be considered at least probable, that the courts would declare such a contract void as against public policy, leaving the patient's right to sue for damages unimpaired.*" And further: "*Society cannot allow a medical practitioner to take such an advantage of his patient in regard to whom he stands in a position of such power.*" The writers Strauss and Strydom (1967) 317ff in a similar view and relying upon societal dictates as well as the trust position the medical practitioner occupies in relation to the patient convincingly argue that a medical practitioner ought not compromise his/her expert knowledge and relax the degree of care and skill even where the patient consents thereto. To allow this, so it is argued by the learned authors would be tantamount to giving the practitioner a license to operate negligently which is contrary to medical norms and ethics. This conduct is considered, according to the learned writers, to be against public policy and so-called *bona mores*. It is especially, the writings of Carstens and Kok (2005) 78 *SAPR/PL* 430 which put a premium on medico-legal considerations in assessing the validity of disclaimers in hospital contracts. Referring to the *Hippocratic Oath*, the *Declaration of Geneva*, the *international Code of Medical Ethics and the Declaration of Helsinki* as well as domestic *Medical Codes*, the writers persuasively argue that medical ethics have its roots in the highest order that cannot be compromised. For that reason healthcare providers including hospitals are first and foremost required 'to do no harm' and to act in the best interests of the patient. See also Roth (1989) 150 which the writer opines at 153 that "*medical ethics have, over years, acquired a rather philosophical character ..... it has its roots in a societal concept of summum bonum, with interesting modifications such as that expressed in the repeated maxim primum non nocere*" which means medical ethics have its roots in the highest order which cannot be compromised. Beauchamp and Childress *Principles of Biomedical Ethics* (1994) 3. Turning to societal moral dictates the writers Carstens and Kok (2005) *SAPR/PL* 430 argue that: "*..... disclaimers against medical negligence in hospital contracts would amount to an unreasonable/unfair/unethical acceptance on the part of a patient to contract to the possibility of harm in the form of personal injury/death resulting from medical malpractice by an attending medical practitioner (albeit in the hospital setting) who is ethically bound not to do harm.*" But, it is the legal writer Tladi (2002) 17 *SAPR/PL* 473, 477 who comes out strongly against exclusionary clauses in hospital contracts when he writes that these types of clauses deserve to be dismissed as their acceptance would acknowledge the "*dismissal of the principles of reasonableness, justice, equity and good faith in contract law.*"

<sup>202</sup> The South African Law Commission in their investigation into standard form contracts "unreasonable stipulations in contracts and the rectification of contracts" Project 47 (April 1998) at Para 1.44 stated that: "*Public policy ..... is more sensitive to justice, fairness and equity than ever before.*" The Commission added that - "*With the rise of the movement towards consumer protection in the early seventies, it became the generally accepted view in most Western countries that neither specific legislation dealing with certain types of contract nor the traditional techniques of control through 'interpretation' of contractual terms were sufficient, and that legislative action was*

a clause if it would result in unfairness, or would be unreasonable, as this represents the general sense of justice of the community, the *boni mores*, manifested in public opinion.

The court, in the *Afrox case*, also, regrettably, chose to entrench the principle of freedom of contract, when Brand JA cautioned against relaxing the doctrine *pacta sunt servanda*.<sup>203</sup> It is submitted that this approach by the Supreme Court of Appeal, in this regard, is totally (out of step with the approach adopted by the courts and academic writings in, especially, recent decades. Whereas the pure doctrine of freedom of contract was not, particularly, interested in the consensual approach to contract and the equality in the bargaining power between contracting parties, especially, when standard form contracts have been used, modern day thinking, under the mast of consumer orientations, have placed a greater emphasis on restoring a truly consensual approach and have highlighted that the premise from which classical law theorists have argued, namely, that both parties to a contract are bargaining from equal strength, is incorrect. The ethos of pure freedom of contract has, thus, been questioned and criticized, especially by the academic writers, the courts, as well as consumer organisations. The ethos of pure freedom of contract has, on numerous occasions, been called into question, against the backdrop of the advent and influence of standardized contracts.

In so far as the consensual aspect in contract is concerned, it is one of the fundamental requirements in any contractual agreement, that the parties reach consensus in respect of the terms of the agreement. Several South African legal writers have held that an exemption clause may fail for lack of consensus, if there is no consensus. The clause will therefore be invalid where one of the parties has abused the other party's circumstances to such proportions that consensus has, in effect, been improperly obtained.<sup>204</sup> It is especially where the parties stand in an unequal bargaining position, that consensus is not always possible. What happens often, in those situations, is that the weaker contracting party has no chance in making contributions in orchestrating the parties reaching agreement. Instead the weaker contracting party is often exploited in entering into the contract on a "*take-it-or-leave-it*" basis.

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*required to deal with contractual unconscionability on a more general level. Such laws have been enacted in Denmark, Sweden, Norway, France, and the Federal Republic of Germany, the Netherlands, and Australia as well. They are all based on the principle of good faith in the execution of contracts."*

<sup>203</sup> The court cautions against relaxing the doctrine *pacta sunt servanda*, Brand JA stated: "*In grappling with this often difficult problem it must be borne in mind that public policy generally favours the utmost freedom of contract and requires that commercial transactions should not be unduly cancelled by restrictions on that freedom.*" (Para 9).

<sup>204</sup> Van der Merwe et al *Contract - General Principles* (2003) 275.

Brand J in the *Afrox case* found that, despite the respondent signing the admission document without reading it, and thus, no true consensus coming into being, as the patient was not familiar with the contents of the exclusionary clause contained in clause 2.2, it did not matter as the patient had a full opportunity to read the document. It does therefore not lead as a rule, that he is not bound by the contents of the contract entered into... It is respectfully submitted that, once again, the Supreme Court of Appeal ignored the consensual requirement. In any event, it is difficult to see how a patient, who is admitted to hospital for a serious illness, trauma or even elective surgery, would be in a position to reach consensus with the hospital authorities.

The same holds sway for family members, who often have to sign on their behalf. Often they are traumatized and highly stressed, resulting in them signing anything, without really considering the consequences.<sup>205</sup> It is further submitted that when the hospital and patient

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<sup>205</sup> Van den Heever *De Rebus* (April 2003) 47-48 opines that any patient who is admitted to hospital for serious illness, trauma or even for elective surgery (the cause of which often results in the patient believing that he or she has no choice but to undergo the requisite treatment) is not in an equal bargaining position with the hospital, as he or she will often be incapable of negotiating the terms of his or her admission under these circumstances. The same hold thus for family members (signing on behalf of a patient) who, under such stressful and traumatic circumstances, are more concerned about their loved ones receiving the assistance they need than worrying about the fine print. See also Jansen and Smith (2003) *Journal for juridical science* (28) 2 210, 218. The importance of the parties reaching true consensus especially in a position where power imbalances between the parties are present is highlighted by Ngcobo J in *Barkhuizen v Napier*. Sachs J in the minority judgement in *Barkhuizen v Napier* is particularly critical of standard form contracts which is drafted in advance and presented to the consumer on a take-it-or-leave-it basis stifling the opportunity for arm's length negotiations. They often contain onerous terms (such as exemption clauses excluding the supplier of services from liability) often couched in obscure legalize and incorporation as that of the 'fine print' of the contract in the commercial world we live in. Sachs J points out that it would be impractical for ordinary people in their daily commercial activities to enlist the advice of a lawyer. Most consumers therefore simply sign or accept the contract without knowing the full implications of their act. Contracting parties conclude the contract on the basis of a printed document which process often results an imposition of will rather than mutual consent to an agreement. See also Collins *The Law of Contract* (1997) 2-3. A further issue arising from these types of contracts in a commercial sense which further serves as criticism to the *Afrox* dictum, is the fact that a large proportion of the South African population is seldom, if ever, exposed to commercial contracts. This factor, occupied with language difficulties, implies that many South Africans would not expect to encounter such a clause (let alone understand the implications thereof). See Naude and Lubbe (2005) 122 *SALJ* 444 at 460-463 quoting the authority Jan Hendrik Esser who cares? Reflections on business in Healthcare Unpublished LLM Thesis, University of Stellenbosch (2001) 72 who writes that a patient in seeking healthcare services looks for virtues like compassion, integrity and trust worthiness. See also Van den Heever *De Rebus* (April 2003) 47; Jansen and Smith (2003) *Journal for Juridical Science* (2003) 28 (2) 214 at 218; Hawthorne (2004) 67 (2) *THRHR* 294, 299. Sachs J in a minority judgement in the *Barkhuizen matter* with regard to the consensual aspect in contracts remarked: "*The potential unreasonableness in the eyes of the community, leading to a possible finding of violation of public policy, lies in holding a person to one-sided terms of a bargain to which he or she apparently did not actually agree, in respect of which there is nothing to indicate that his or her attention was drawn and the legal import of which a reasonable person in his or her position could not be expected to be aware.*" In this regard Naude and Lubbe (2005) 122 *SALJ* 444 suggest the parties could therefore not modify the consequences of a contract in a manner opposed to the naturalia of the contract itself. The naturalia of the contract is founded in the duty to take care which arises from the relationship between the medical caregiver and the patient. The legal writers persuasively argue to allow a medical service provider to exempt the degree of

enter into the agreement that the hospital will treat the patient, with the necessary care and skill, that serves as the naturalia of the contract itself. It has, correctly, been pointed out, by our legal writers, that to allow a hospital to exempt the degree of skill expected of it, which is part of the primary or essential obligation undertaken by it, would be counter to the very essence of why the contract was concluded between the parties.<sup>206</sup> It is, respectfully, submitted it just does not make sense.

But, it is especially the inequality of bargaining power in standardized contracts which has had to endure the greatest criticism. The main arguments advanced include, firstly, the argument that both parties to a contract, are bargaining from positions of equal strength, is incorrect, especially when dealing with standardized contracts. In reality, so it is argued by the legal writers and the courts alike, equality in the relationship between two contracting parties rarely exists. Often the weaker contracting party is exploited by the stronger party.<sup>207</sup>

In a medical context, involving contracts entered into between the hospital/other healthcare providers and patients, certain types of clauses, especially exculpatory clauses, also known as indemnity clauses, alias exemption clauses, alias waivers, in which the hospital/other healthcare providers seek to relieve themselves from liability for negligence, have been criticized. The main reason advanced is that the parties do not stand upon equal footing, the weaker party, usually the patient, would be in a disadvantageous position when entering into the contract with the hospital/other healthcare providers. It is particularly in the United States of America, that academic writer's and the courts alike have treated these types of clauses as unenforceable, being contrary to public policy.<sup>208</sup> It is regrettable

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skill expected of him/her/it and which is part of the primary or essential obligation undertaken by him/her/it, would be contrary to the essence of the basic contractual purpose of the parties to such a contract.

<sup>206</sup> In this regard Naude and Lubbe (2005) 122 *SALJ* 444 suggest the parties could therefore not modify the consequences of a contract in a manner opposed to the naturalia of the contract itself. The naturalia of the contract is founded in the duty to take care which arises from the relationship between the medical caregiver and the patient. The legal writers persuasively argue to allow a medical service provider to exempt the degree of skill expected of him/her/it and which is part of the primary or essential obligation undertaken by him/her/it, would be contrary to the essence of the basic contractual purpose of the parties to such a contract.

<sup>207</sup> The writers Aronstam (1979) 14 and Hawthorne (2003) 277 identify social and economical inequalities as factors influencing the domination and exploitation; With regards to the courts approach during the classical period Atiyah (1995) 8-9 presents the position as follows: "..... during the classical period the court of freedom of contract took no account of social and economic pressures which in many circumstances might virtually force a person to enter into a contract." The writer also expresses the view that "classical law of contract paid little attention to inequalities between the contracting parties." One of the factors which have influenced the change in mindset to curb the domination and exploitation is that of morality. The effect of the change is described by Atiyah (1995) as "The moral principle that one should abide by one's agreements and fulfil one's promises is being increasingly met by another moral principle, namely that one should not take advantage of an unfair contract which one has persuaded another party to make under economic or social pressure."

<sup>208</sup> Flamm "Healthcare provider as defendant ", a chapter published in *Legal Medicine American College of Legal*

that the Supreme Court of Appeal in the *Afrox* case chose to ignore the principles adopted in other countries, including the United States of America.

Although the court considered the uneven bargaining position between the hospital and patient, the court, as previously discussed, found, as a general rule, that even where on the face of an agreement it appeared that an unequal bargaining position existed between the parties with the strongest party been advantaged, it did not necessarily justify a conclusion that the agreement was in conflict with the public interests. But the court does acknowledge that unequal bargaining power is, indeed, a factor which, together with other factors, can, in certain instances, play a role in considerations of the public interest. But the court held that no evidence to that effect was led by the respondent in the court a quo.

It is, respectfully, submitted that the court conveniently chose to find that, as no evidence had been led as regards the bargaining position of the hospital, as opposed to the patient, the court could not find that the patient was in a disadvantageous position. It is known by all and ought to be known to the courts that a patient, in a hospital contract, is in a

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*Medicine* (1991) 127; Furrow et al (1995) 256 Annotation "Validity and Construction of correcting the exempting of hospital or doctor from liability for negligence to patient" 6 *ALR* 3d 704 at 705; Kelner and Kelner "Waivers of Liability in Personal Injury" *New York Law Journal* October (1992) 3; American Jurisprudence 57A *AM Jur* 2d 121; Reynolds "Torts - Negligence - Exculpatory Clause" *Kentucky Law Journal* Vol. 58 (1970) 583 at 584. The writers Ginsburg et al "Contractual provisions to medical malpractice liability law and contemporary problems" Vol. 49 No 2 (1986) highlights certain overlapping rationales which influence the American courts in pronouncing on the validity of these type of clauses *inter alia*: "..... *The disparity of bargaining power between provider and patient is too extreme to give any normative weight to the results of bargaining: .....*" In the leading case of *Tunkl v Regents of the University of California* 60 Cal 2d 92, 32 Cal, RPTR 37, 383 P. 2d 441 the Supreme Court of California included in the test to determine when an exculpatory agreement violates public policy *inter alia* the criteria: "..... *in exercising a superior bargaining power, the party confronts the public with a standardized adhesion contract of exculpation and makes no provision whereby those receiving services may pay additional reasonable fees and obtain protection against negligence; and the person or members of the public seeking such services must be placed under the control of the furnisher of the services, subject to the risk of carelessness on the part of the furnisher, its employees, or its agents.*" In a succeeding case of *Belshaw v Feinstein* 258 Cal. App 2d 711, 65 Cal RPTR 788 (1968) the court with reference to the *Tunkl* case also held: "*Since the service involved is one which each member of the public, presently or potentially, may find essential to him, he faces, despite his economic inability to do so, the prospect of a compulsory assumption of the risk of another's negligence. Public policy does not favour 'agreements' which shift the risk of negligence from the actor to the victim, where the latter is not in an equal bargaining position.*" In a more recent judgement in the case of *Cudnik v William Beaumont Hospital* 206 Mich App 378, 525 N.W. 2d 891 (1995) the Appeal Court of Michigan looked at the unequal bargaining position especially, the patient, occupied in the contractual relationship between the patient and the hospital. The court consequently found: "*Defendant hospital certainly possesses an advantage in bargaining strength against any member of the public who seeks its services. (FN6) Defendant hospital presented plaintiff's decedent with the standardized contract of exculpation, without any provision for some other type of protection against negligence. Finally, it is readily apparent that plaintiff's decedent placed himself under the control of defendant hospital, subject to the risk of carelessness by the hospital or its agents.*" The court further rejected the hospitals contention that the provision of medical care should be considered a 'private affair'. The court took a contrary view in declaring: "*The courts have long recognized that the provision of medical care involves issues of public interest. Lewis v Stated Bd of Dentistry: 277 Mich 334, 343 N.W.194 (1936); People v Cramer 247 Mich 127, 134, 225 N.W. 595 (1929).*"

disadvantageous position. Several South African legal writers have, over the years, argued that, in so far as the effect of exclusionary clauses in hospital contracts are concerned, as a patient is in a disadvantageous position, when entering into agreements, with the hospitals, containing exclusionary clauses, from a public policy view point, therefore, the validity of exemption clauses is an undesirable feature.<sup>209</sup>

It is also unfortunate and regrettable that the court saw fit not to distinguish between suppliers of healthcare services and the typical commercial contracts, when this was, with respect, clearly indicated.<sup>210</sup>

Another common law ground relied on in opposing the validity of exemption clauses in contracts, is that an exemption clause is seen as constituting a *pactum de non petendo in*

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<sup>209</sup> See in this regard the traditional writings of Strauss (1991) 305; Claassen and Verschoor (1992) 103. The more modern writers have also expressed strong views against exemption clauses in broad terms where the parties to the contract stand in an unequal bargaining position. Van der Merwe (2003) 274 writes: "*Exemption clauses have become the object of suspicion, in as much as they are said to enable contractants who are in a strong bargaining position to exploit the weaker co-contractants.*" The writers Bhana and Pieterse (2005) 822 SALJ 865 at 888 are especially critical of the Supreme Court of Appeal's abstract approach in determining both the existence and effect of the unequal bargaining power between contracting parties. In this regard the writers correctly argue that the court failed to take proper account of the normative considerations of good faith, fairness and equality that were in play in the circumstances. The writers also convincingly argue where the contracting parties stand in an unequal bargaining position, the weaker party cannot contract out of his fundamental rights as set out in the Bill of Rights. The legal writer Tladi (2002) 17 SAPR/PL 473, 477 also expresses very strong views that "*freedom of contract, when abused by the stronger party to achieve unreasonable and unjust contracts, undermines the values of equality and dignity that are supposed to permeate our constitutional dispensation.*" And further: "*When people go to hospitals in need of medical care, they are not in a position to negotiate their contract. It seems unconscionable to use this inability to bargain to exclude all liability, save intention, as the clause in question purports. The Court confidently assumes that the use of scope of indemnity clauses can be curbed by business considerations (at 8). This laissez-faire attitude ignores the reality that most hospitals (if not all) have such indemnity clauses in their admissions forms. The result of this is that a patient cannot decide to hop on to another hospital if he or she is dissatisfied with the contractual arrangement. One of the reasons for the need to 'constitutionalise' the common law is to protect the weak and the exploited. The clause complained of exploits the lack of bargaining power of patients to escape a duty of care owed under the common law.*"

<sup>210</sup> Naude and Lubbe "Exemption Clauses - A Rethink occasioned by Afrox Healthcare Bpk v Strydom" (2005) 122 SALJ 444 at 460-463 quoting the authority Jan Hendrik Esser who cares? Reflections on business in Healthcare Unpublished LLM Thesis, University of Stellenbosch (2001) 72 who writes that a patient in seeking healthcare desperately looks for virtues like compassion, integrity and trust worthiness. The legal writers Naude and Lubbe rightfully support the idea that an agreement to obtain medical care is not a simple commercial contract or transaction. What is at stake here is not the patient's patrimonial interest (unlike an ordinary commercial contract), but, the patient's bodily inviolability. It is, persuasively argued by the writer that to allow such an agreement to be put on the same footing as a commercial agreement whilst there is an imbalance between the interests of the parties, would be to allow an improper, unconscionable advantage been gained over the patient.

For similar views see also Van den Heever *De Rebus* (April 2003) 47; Jansen and Smith (2003) *Journal for Juridical Science* (2003) 28 (2) 214 at 218; Hawthorne (2004) 67 (2) *THRHR* 294, 299. It is this distinction between medical health service and ordinary commercial contracts for Pearmain (2004) 709 to remark that "..... entering a hospital for medical treatment and enlisting the services of a plumber to address a household plumbing problem are two extremely different activities on the basis of risk. One cannot thus say that all suppliers of services are the same and that what is good for one is good for all. The nature of the service they render directly affects the nature and extent of the personal risk to the customer represented by that service."

*anticipando*, whereby the parties envisage the commission of an unlawful act. In such an event, the aggrieved party agrees not to institute an action which he/she would otherwise have enjoyed. <sup>211</sup>

The third frontier, upon which Brandt JA's, much criticised, dictum may, with respect, be attacked, is along constitutional lines. The court's failure to recognize certain constitutional principles is disturbing and also regrettable.

After all, since the *Constitution of the Republic of South Africa* <sup>212</sup> is the supreme law of the Republic, all law, be that the common law; be that the statutory law is subordinate to the Constitution. <sup>213</sup>

The Constitution is also said to affect, not only the relationship between the State and other government structures and its citizens, but also private relationships between business enterprises and their clients. It includes the relationship between hospitals and patients.

Insofar as the relationship between the Constitution and the Law of Contract is concerned, the same values, that underlie the Bill of Rights and which affect the spheres of law in general, also affect the law of contract. As was stated before, the Constitution permeates all law in South Africa, including the common law that regulates the enforcement of contracts. Whereas the freedom of contract, and its corollary of *pacta sunt servanda*, in the pre- constitutional dispensation played a significant role, in the new constitutional order, although the courts leave space for the doctrine to operate, the courts, at the same time, are able to decline to enforce contractual terms that are in conflict with the constitutional

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<sup>211</sup> It is especially Van den Heever *De Rebus* (2003) 47-48 who holds the view that "*It is difficult to accept that the exemption which the hospital enjoys could be indusive to the maintenance or promotion of acceptable medical standards.*" Cronje-Retief *The Legal Liability of Hospitals Unpublished LLD Thesis University of the Free State* (1997) 474 and Van den Heever submit that for reasons of public policy and the fact that hospitals should take responsibility for sub-standard negligent provision of services, organizational failures and systemic defects, an exemption clause in that regard would be a *pactum de non petendo*.

<sup>212</sup> Act No 108 of 1996.

<sup>213</sup> Currie and De Waal *The Bill of Rights* 5ed (2005) 708 note that "*the Constitution, in turn, shapes the ordinary law and must inform the way legislation is drafted by the legislators and interpreted by the courts and the way the courts develop the common law.*" They also state that "*any law or conduct that is not in accordance with the Constitution, either for procedural or substantive reasons, will therefore not have the force of law.*" See also the *Executive Council of the Western Cape Legislature v President of the Republic of South Africa* 1995 (4) SA 877 (CC) Para 62.

values, even though the parties may have consented to them.<sup>214</sup> Factors such as unfairness and unreasonableness have begun to play a significant role with the courts.<sup>215</sup> For that reason, it is respectfully submitted, that Brandt JA, when assessing the validity of exclusionary clauses in hospital contracts, should have given greater weight to communal values as opposed to the personal autonomy of hospitals, influenced by the doctrine of *pacta sunt servanda*. The principle of *pacta sunt servanda*, it is respectfully submitted, is subject to constitutional control and the principle cannot trump over, *inter alia*, the values of equality and dignity. Also, the fact that a patient stands in an unequal bargaining position to that of a medical practitioner/hospital causes the contractual liberty of a contracting party to be scrutinized against the values that animate the *Constitution*. To this end, it is submitted, that freedom of contract, when abused by the stronger party, resulting in unreasonable and unjust contracts, as is the case of exclusionary clauses in hospital contracts, undermines the values of equality and dignity and ought to be found to be inconsistent with the values enshrined in the Constitution and the Bill of Rights. This, it is respectfully submitted, Brandt JA, chose to ignore.

What is, further, regrettable is the fact that Brandt JA downplayed the importance of the right to healthcare services. Instead, Brandt JA placed private hospitals, the suppliers of healthcare services, on the same footing as suppliers of other services. In so doing, the learned Judge ignored the fact that the hospital provided services which are the subject of a constitutional right, a right, moreover, which seeks to ensure access to those services.<sup>216</sup> Instead of placing a premium on access healthcare services and the accompanying

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<sup>214</sup> *Barkhuizen v Napier* 2007 (5) SA 323 (CC) 66. The Constitutional Court per Ngcobo J delivering the majority judgement, stated: "I do not understand the Supreme Court of Appeal as suggesting that the principle of contract *pacta sunt servanda* is a sacred cow that should trump all other considerations." The court continues: "All law, including the common law of contract, is now subject to constitutional control. The validity of all law depends on their consistency with the provisions of the Constitution and the values that underlie our Constitution. The application of the principle *pacta sunt servanda* is, therefore, subject to constitutional control."

<sup>215</sup> The court in the *Barkhuizen* case also held: "While it is necessary to recognize the doctrine of *pacta sunt servanda*, courts should be able to decline the enforcement of a time limitation clause it would result in unfairness or would be unreasonable." See also the comment of Sachs J in a minority judgement who confirms that the jurisprudential pedestal, on which the maxim *pacta sunt servanda* had once occupied, has been singularly narrowed in the great majority of democratic societies.

<sup>216</sup> Section 27 of the Bill of Rights provide:  
*"Healthcare, food, water and social security*  
 27(1) *Everyone has the right to have access to-*  
 (a) *Healthcare services, including reproductive healthcare:*  
 .....  
 (b) *The State must take reasonable legislative and other measures, within its available resources, to achieve the progressive realization of each of these rights.*  
 (3) *No one may be refused emergency medical treatment."*

guarantee given to the right to access healthcare services, as provided for by section 27 of the *Constitution*, the court chose to take a very narrow view of the issue of access, finding that the exclusion clause did not interfere with access to healthcare services, in that it did not have the effect of barring anyone from obtaining healthcare services. What is also important is that; besides the patient having access to the healthcare services, the nature of the services include that the hospital and its staff are ethically obliged, by professional rules or codes and by virtue of statutory regulations, to take due and proper care and act with diligence.<sup>217</sup> In turn, the general public have the expectation that when they are treated by a medical practitioner and/or hospital or staff, that they be treated in a professional manner and with professional standards which will not cause them harm. The ethical conduct and the professional standards they are obliged to uphold in treating patients, or when conducting surgery, in furthering access to healthcare services, cannot, it is submitted, be compromised in any way, nor can they, it is further submitted, validly be excluded, in contract form. The doctor or nurses cannot escape their responsibility after the patient had signed a contract that contained an indemnity clause, which is generally couched, as such, to exclude a medical practitioner and/or hospital from liability arising from their own negligence. This was clearly the position in *Afrox*.<sup>218</sup>

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<sup>217</sup> In so far as statutory controls are concerned, the regulations published in the *Government Gazette* on the 1st February 1980 No 2948 No 6832 control the reasonable degree of care and skill which has to be maintained by private hospitals in securing a license granted to them. Regulations 25(23) of the regulations so published requires that "*all services which are reasonably, generally and necessary for adequate care and safety of patients, are maintained and observed.*" Besides the regulations controlling the professional standards of private hospitals, the conduct of nurses and the setting of professional standards for nurses as reflected in the *Nursing Act, 1978* (Act No 50 of 1978). Section 29(1) (c) of the Act makes provision for the removal from the register of registered nurses and midwives following on a disciplinary inquiry by the South African Nurses Control.

<sup>218</sup> See in this regard Pearmain (2004) 710-711. The writer suggests that an attempt to compromise the standard of conduct defeating the object of the Constitutional right to access to healthcare is contrary to public policy or to the legal convictions of the community as expressed in the *boni mores*. The writer emphasizes this aspect, especially, where the contracting parties is also in an unequal bargaining position. The writer goes on to state: "*It is extremely difficult to see why the broader community, as opposed to the business community with which the Supreme Court of appeal seemed primarily concerned in this case, would prefer the right to freedom of contract to the right of access to effective and properly delivered healthcare services. It is submitted that the Supreme Court of Appeal demonstrates not only in this case but also in others such as Carmichele a surprising and unfortunate reluctance to take opportunities to align the more traditional common law principles with the Constitution and that within this court, judicial inertia is the order of the day.*" Brand D in `Disclaimers in Hospital Admission Contracts and Constitutional Health Right: *Afrox Healthcare v Strydom* ESR Review Vol. 3 No 2 September 2002 published by the Socio-Economic Rights Project, University of the Western Cape also gave great consideration to Brand JA's recognition of the exemption of healthcare services and critically states: "*The Court's judgement puzzles. The Court's finding that there was equality of bargaining power ignores the self-evident inequality inherent in the contractual relationship. It is submitted that the nature of the service at stake created an unequal bargaining position. One cannot do without healthcare services, which are a fundamental constitutional right. Since all private and public hospitals in South Africa use indemnity clauses, it is clear that the respondent had no bargaining power regarding the indemnity clause - if he objected to it he had nowhere else to go and would not have gained access to healthcare services. The Court's reasoning on the clash between the indemnity clause and constitutional values is equally suspect. The Court concluded that, in the absence of the threat of action for damages, disciplinary*

It has also been persuasively argued that such a right to access to healthcare services cannot be waived or limited, such right being inalienable.<sup>219</sup> It is submitted, with respect, that to accept otherwise, is to contradict the long established principles of the common law, as well as the *Constitution*.

Although Brandt JA acknowledged the important role which public interest (often used inter-changeably with public policy) plays to denounce the validity of a contractual provision,<sup>220</sup> it is respectfully submitted that, once again, the Supreme Court of Appeal showed its reluctance to unshackle the ethos of contractual freedom and the sanctity of contracting, and to place greater impetus on other values which influence public policy. The values, it is suggested, include fairness, dignity and equality.<sup>221</sup>

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*action by professional bodies and concern for a hospital's reputation ensure that hospitals avoid negligent conduct. The Court's reasoning ignores the fact that the respondent litigated precisely because of negligence that incurred despite these 'sanctions' and that caused the respondent damage, for which he cannot now be compensated."* The writer continues: *"In addition, the case seemed significant because it concerned the indirect horizontal application of a socio-economic right. It allowed the Court an opportunity to demonstrate its regard for constitutional values. However, the judgement raises doubt as to the extent to which the Court considers these values. This observation is most evident in the consideration of whether the indemnity clause offends public policy. This consideration comes down to a balancing of the individual interests of the contracting parties and the general, constitutional interests of the public. The Court opted for the protection of the individual (commercial) interests while ignoring almost completely the fact that the service the parties bargained about was a constitutional right. With regard to the scope of the limits engendered by an indemnity clause, the Court held that those limits should be defined by business considerations such as saving in insurance premiums and competitiveness. The Court missed an opportunity: it again insulated that common law, from constitutional infusion."*

<sup>219</sup> Insofar as inalienable rights are concerned Hopkins (2001) 122 at 137 persuasively argues that contracts whose enforcement would entail the violation of a right in the Bill of Rights are unenforceable because they are contrary to public policy. Enforcement of such a contract (waiver) so it is further argued by Hopkins would mean in effect, the limitation of a contracting party's constitutional right. The writer further suggests that this can only be done if the reason for the limitation is reasonable and proportionate to the benefit obtained. It is suggested that the right to the access to healthcare, falls into this category of rights which cannot be limited, for such right is inalienable.

<sup>220</sup> Brand JA quoted the well-known case of *Sasfin (Pty) Ltd v Beukes* 1989 (1) SA 1(9) dictum of Smalberger JA in the former where he stated:  
*"The power to declare contracts contrary to public policy should, however, be exercised sparingly and only in the clearest of cases, lest uncertainty as to the validity of contracts result from an arbitrary and indiscriminate use of the power. One must be careful not to conclude that a contract is contrary to public policy merely because its terms (or some of them) offend one's individual sense of propriety and fairness. In the words of Lord Atkin in Fender v St John-Mildmay 1938 AC 1 (HL) at 12 ..... 'the doctrine should only be invoked in clear cases in which the harm to the public is substantially incontestable, and does not depend upon the idiosyncratic inferences of a few judicial minds .....' In grappling with this often difficult problem it must be borne in mind that public policy generally favours the utmost freedom of contract, and requires that commercial transactions should not be unduly trammelled by restrictions on that freedom."*

<sup>221</sup> It is especially, the court's approach in the Afrox case that has elicited strong criticism in its use of public policy standards. In this regard Naude and Lubbe (2005) 441 at 443 advances the view that as regard the public policy standard, the court fell back on the elementary principle, virtually elevated into a constitutional value, namely that *"public interest requires the enforcement of contracts freely and earnestly entered into."* What the authors do

It is respectfully submitted, that the Supreme Court of Appeal in the *Afrox case* also failed to include, in its considerations in determining the effect of public policy on exclusionary clauses in hospital contracts, the unequal bargaining position of the parties, unjust and unreasonable results in contract, as well as good faith in contractual dealings.<sup>222</sup>

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advocate however, are broader policy considerations *inter alia* the maintenance of a standard of care and medical ethics. The writers Jansen and Smith (2003) 210 at 217 is also critical of Brand JA in not considering foreign law when considering whether exclusionary clauses in hospital contracts were invalid or not. In this regard the writers suggest that had the court considered foreign law, they would surely, have followed England, America and Germany in pronouncing that such clauses are contrary to public policy. Tladi (2002) 17 *SAPR/PL* 473 is particularly critical of the Supreme Court of Appeal in the *Afrox* case for relying on freedom of contract for its conclusion. The court noted that freedom is one of the values underlying the Constitution. Relying on the *Brisley v Drotzky* case, the court decided that the freedom of contract is in fact a constitutional value as it forms part of freedom. The writer in this regard, suggests that freedom of contract may promote constitutional values in some cases, but not in all. In instances where there is an unequal bargaining power between contracting parties this can lead to 'obscene excesses'. It is for that reason that *Tladi* suggest at 477 that freedom as a constitutional value has to be balanced with other values underlying the Constitution, namely "*fairness, dignity and equality*". The writer suggests that public policy dictates that considerations of unequal bargaining power of the parties, unjust or unreasonable clauses, contracts contrary to good faith ought to be considered when deciding contractual provisions or contracts to be unenforceable.

<sup>222</sup> Support for the development of the open norms of the South African common law to include bona fides, public policy and *boni mores* in accordance with the Constitutional mandate, is also promoted by Hawthorne (2003) 15 *SA Merc LJ* 271 at 277. The writers Carstens and Kok (2002) also convincingly argues that the Supreme Court of Appeal made too much of contractual autonomy which is not explicitly recognised in the *Bill of Rights*. Moreover, the writers suggest that contractual autonomy must yield to enhancing access to professional healthcare services. Hopkins "Standard-form contracts and the evolving idea of private law justice: A case of democratic capitalist justice versus natural justice" *TSAR* 243-1 150 at 157 also persuasively argue that although public policy is a very useful and resourceful body of doctrine, all law in South Africa (including the common law), must promote the value that underlie the Bill of Rights. The values suggested by Hopkins, include, openness, dignity, equality and freedom. But, cautions the writer, whereas the common law once valued sanctity of contract as epitomizing contractual justice, it is no longer the case. Sanctity of contract must now also be constitutionally scrutinized against the values that animate the Constitution. The Bill of Rights according to Hopkins is a guarantee to all South Africans that their fundamental rights will be protected against infringement. An area of concern, raised by the writer, are contracts, often entered into, between contracting parties where there is a huge disparity in their bargaining power, for example, in standard-form contracts. Such contracts ought to receive different treatment from the courts, especially, in those where there is no radical difference in bargaining power. A solution suggested by Hopkins is that as public policy is already entrenched in our common law and in particularly the law of contract wherein contracts contrary to public policy are declared unenforceable, the Bill of Rights should itself provide for an exceptionally reliable statement of seriously considered public opinion. This solution according to Hopkins is compatible with the rationale behind Section 39(2) of the Bill of Rights - that the common law be developed so as to be made compliant with the values that underlie the Constitution. To this end, it is argued that any standard-form contract that contains a clause that conflicts with the provisions of the *Bill of Rights* is *prima facie* unenforceable, unless, good cause is shown by the contracting party relying on the clause. Hopkins also persuasively argues that the enquiry by the judges in adjudicating these matters ought no longer to be restricted to judicial precedent, contractual capacity and the legality of the transaction. Instead, they will have to grapple with issues such as fairness and reasonableness as well. See also Christie "The Law of Contract and the Bill of Rights" *Bill of Rights Compendium* (1997) 3H-7. In a groundbreaking decision in the case of *Archaize v Napier* 2007 (5) SA 323 (CC) 66 the Constitutional Court per Gobo J who gave the majority judgment, emphasizes the importance of public policy when he stated: "*Public policy represents the legal convictions of the community; it represents those values that are held most dear by the society.*" The court goes on to state: "*Determining the content of public policy was once fraught with difficulties. It is no longer the case. Since the advent of our constitutional democracy, public policy is now deeply rooted in our Constitution and the values which underlie it.*" The court added: "*..... The founding provisions of our Constitution make it plain: our constitutional democracy*

Although it was not specifically pleaded in the *Afrox case*, the court also ignored one of the rights enshrined in the *Bill of Rights* that reflects the foundational values that underlie our constitutional order and also constitute public policy, such as the right of access to court in terms of s34 of the *Constitution*.<sup>223</sup> It is a guaranteed right, founded upon the emphasized values in the new South African constitutional order;<sup>224</sup> it has as a pedestal constitutionalism, bolstered by the entrenched rule of law. The rule of law, in turn, in terms of section 34 of the Constitution, gives expression to a foundational value, namely, guaranteeing to everyone the right to seek the assistance of a court and further, guaranteeing orderly and fair resolutions of disputes by courts or independent and impartial tribunals.<sup>225</sup>

Exclusionary clauses, by their very nature, it is respectfully submitted, run counter to the foundational value in guaranteeing to everyone the right to seek the assistance of the courts, in that, exemption clauses prevent a potential plaintiff from suing a potential

*is founded on, among other values, the values of human dignity, the achievement of equality and the advancement of human rights and freedoms, and the rule of law. And the Bill of rights, as the Constitution proclaims, "Is a cornerstone" of the democracy; "it enshrines the rights of all people in our country and affirms the democratic (founding) values of human dignity, equality and freedom."* The court consequently considered the role of public policy when it stated: *"What public policy is and whether a term in a contract is contrary to public policy must now be determined by reference to the values that underlie our constitutional democracy as given expression by the provisions of the Bill of Rights. Thus a term in a contract that is inimical to the values enshrined in our Constitution is contrary to public policy and is, therefore, unenforceable."* The court also suggested: *"The proper approach to the constitutional challenges to contractual terms is to determine whether the term challenged is contrary to public policy as evidenced by the constitutional values, in particular, those found in the Bill of Rights. This approach leaves space for the doctrine of pacta sunt servanda to operate, but at the same time allows courts to decline to enforce contractual terms that are in conflict with the constitutional values even though the parties may have consented to them."*

<sup>223</sup> To this end the authors Currie and De Waal the *Bill of Rights Handbook* (2005) 704 states that *"a fundamental principle of the rule of law is anyone may challenge the legality of any law or conduct."* The authors also emphasize the fact that the purpose of Section 34 has as its grounding the higher value of the rule of law in that *"..... It promotes the peaceful institutional resolution of disputes and to prevent the violence and arbitrariness that results from people taking matters in their own hands"* and further *"..... By insisting on the resolution of legal disputes by fair, independent and impartial institutions [it] prohibit the resort to self-help"*. What this Section does according to Currie and De Waal is to provide *"access, independence, impartiality and fairness."*

<sup>224</sup> In *Archaize v Napier* op cit the Constitutional Court emphasized the right of access to the courts when it stated: *"This is fundamental to the stability of an orderly society. It is indeed vital to a society that, like ours, is founded on the rule of law. Section 34 gives expression to the foundational value by guaranteeing to everyone the right to seek the assistance of a court."* (Para 31). And further at Para 33: *"Section 34 therefore not only reflects the foundational values that underlie our constitutional order, it also constitutes public policy."* The court consequently laid down the following test in Para 36: *"The proper approach to this matter is, therefore, to determine whether clause 5.2.5 is inimical to the values that underlie our constitutional democracy, as given expression to in section 34 and thus contrary to public policy."*

<sup>225</sup> Section 34 of the Constitution Act 108 of 1996 under the heading 'Access to Courts', provides: *"Everyone has the right to have any dispute that can be resolved by the application of law decided in a fair public hearing before a court or, where appropriate, another independent and impartial tribunal or forum."*

defendant, in a court of law, or in any other tribunal, or forum. To enforce an exemption clause in a contract has the effect that the doors of the courts are, effectively, closed to an injured party.<sup>226</sup>

Although the Constitutional Court has not been asked to pronounce on the validity of hospital contracts containing exemption clauses, in which the patient indemnifies or exonerates a hospital from liability, notwithstanding the negligence of the hospital's staff, it is respectfully submitted that, if the court was to be confronted with this legal question, the

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<sup>226</sup> The legal writer Hopkins in a most recent publication "Exemption clauses in contracts" *De Rebus* June 2007 22 at 24 suggests that if one were to take the proposition seriously that the Bill of Rights is an accurate statement of public policy "..... then it follows that contracts which violates provisions of the Bill of Rights (if enforced) without good reason should be deemed unconstitutional and therefore in violation of public policy with the result that they should be unenforceable." The author is critical of the approach adopted by the Supreme Court of Appeal in the cases of *Afrox Healthcare Bpk v Strydom supra* and *Johannesburg Country Club v Stott* 2004 (5) SA 511 (SCA) which involved exemption clauses. The writer suggests that in these cases the question of exemption clauses were not adequately tested against the constitution. He also holds the view that the legal team for the patient in *Afrox* case selected the wrong right when challenging the unconstitutionality of the contractual provisions. Whereas in *Afrox*, the writer reasons, the exemption clause could never have resulted in the limitation of the right to access to health, in the *Stott* case, he argues, the SCA wrongly implicated the right to life clause. For that reason the writer argues "It is crucial to determine, upfront, exactly what right is limited if the contract is upheld". In other words, one has to ask the right questions: What right will be limited if the contract is allowed to stand? The answer lies in the nature and scope of exemption clauses - "Exemption clauses according to Hopkins page 29 "prevent a potential plaintiff from suing a potential defendant in a court of law or in any other tribunal or forum." They are devices which limit the right to access to court as provided for in terms of Section 34 of the Constitution. For courts to enforce exemption clauses in a contract, effectively closes the doors of the courts to injured parties. This Hopkins adds, is contrary to the provisions of Section 34 of the Constitution. The second part of the enquiry is whether or not the limitation of the constitutional right should nevertheless be allowed to stand because it is reasonable and justifiable? For a right to be limited in the particular circumstances s36 of the Constitution needs to be invoked that a person's constitutional rights may be limited where it is 'reasonable and justifiable' to do so in a free and open democracy based on human dignity, equality and freedom. (s36) Although exemption clauses in contracts will always amount to a limitation of the Constitutional right contained in section 34, it does not according to Hopkins at page 25 mean that all exemption clauses are unconstitutional and therefore in violation of public policy. The answer lies in whether the limitation of a constitutional right can be justified? Here Hopkins at page 29 correctly draws a distinction between exemption clauses prevalent in some industries which are justified and others which can quite simply never be justified. Hopkins also suggests that the basis for deciding the validity of exemption clauses could no longer be decided under the traditional sanctity of contract, but, will always be a constitutional call. It will therefore be up to the party seeking to exclude itself from liability to justify to the court why, in that particular case, there is a reasonable and justifiable basis for having the exemption clause in the contract. More recently the Constitutional Court considered section 34 as a constitutional value. In *Barkhuizen v Napier* Ngcobo J delivering the majority judgement emphasized the value of Section 34 of the Constitution which "not only reflects the foundational values that underlie our constitutional order, it also constitute public policy". The court consequently considered the common law position of an aggrieved person's right to seek the assistance of a court of law and whether the time-bar clause 5.2.5 was contrary to public policy and unenforceable? As to the nature of the clause, the court stated: "What is also apparent from the clause is that it does not deny the applicant the right to seek judicial redress; it simply requires him to seek judicial redress within the period it prescribes failing which the respondent is released from liability. It is in this sense that the clause limits the right to seek judicial redress." The court also weighed up the principle of freedom of contract and the need to ensure access to the courts and concluded: "In approaching this question, a court will bear in mind the need to recognize freedom of contract but the court will not let blind reliance on the principle of freedom of contract override the need to ensure that contracting parties must have access to courts." (Para 55).

court would rule that such clauses or contracts fall into the category of contracts which violate provisions of the Bill of Rights, more especially section 34, without any good reason. It is further submitted, that the court would declare such an agreement to be unconstitutional and therefore in violation of public policy and unenforceable.

What also emerged from the *Afrox case*, it is respectfully submitted, is the lack of initiative and insight shown by Brandt AJ to adapt the common law to reflect the changing social, moral and economic fabric of our society, in developing the law of contract, especially, the impact which exclusionary clauses always had on society and the unjust and unreasonable results they often brought with them. More especially, the wrongs that exemption clauses in hospital contracts, bring with them, often results in the suffering of the patients.<sup>227</sup>

In this regard Brandt JA, it is respectfully submitted, disappointingly, ignored the aide at the Supreme Court of Appeal's disposal, namely section 39 of the *Constitution*. Section 39, it is submitted, has been designed as an aide, where necessary, to develop the common law, in our new constitutional order, to reflect the spirit, purport and objects of the Bill of Rights. By using section 39, judges have the opportunity to develop the common law, where no law exists, or law reform is necessary, i.e. where the competing rights conflict with the values in the *Constitution*.<sup>228</sup> Despite the reluctance shown by certain judges to develop

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<sup>227</sup> Hopkins (2007) 25 unlike Brandt JA in the *Afrox case* persuasively argue that no matter how highly we value the sanctity of contract rule, the freedom to contract can never serve as a justification for enforcing a private agreement that has the purpose and effect of unreasonably limiting the other party's constitutional rights especially, a potential litigant's right of access to court contained in S34 of the *Constitution*.

<sup>228</sup> Judges have shown reluctance however, to use these aides though available to them. It is especially the writer De Vos "Pious wishes or directly enforceable human rights? Social and economic rights in South Africa's 1996 Constitution" *South African Journal on Human Rights* (1999) who equate the roll which judges choose to take in the new Constitutional Order akin to the pre Constitutional Period. In this regard De Vos holds the view that it seemed the same road which some of the Constitutional Court judges had also walked. He uses several dicta of the Constitutional Court to support his view namely: In *S v Zuma* 1995 (4) BCLR 401 (SA) (CC) Kentridge AJ, while admitting that general language does not have a single 'objective' meaning, nevertheless warns that the main task of the judiciary should remain the interpretation of a written instrument and that a less rigorous approach may entail the danger that the Constitution may be taken to mean whatever one wishes it to mean (at 412F-G); Also in *S v Makwanyane* 1995 (6) SA 665 (CC) where Kriegler J remarks: "*In answering the question the methods to be used are essentially legal, not moral or philosophical. The incumbents are Judges, not sages; their discipline is the law, not ethics or philosophy and certainly not politics*" (at 747F-748A). For an extensive discussion on the jurisprudence of the Constitutional Court, see Alfred Cockrell 'Rainbow Jurisprudence' (1996) 12 *SAJH* R 1-38. Cockrell argues that the judges of the Constitutional Court had by and large failed to go beyond the formulation of formal reasons for their decisions and had not engaged in the moral and political reasoning required when making the difficult decisions about matters of political morality. But, notwithstanding some of the judges' hesitancy to move with the times, some of the judges changed their mindset. It was Kentridge AJ in *Du Plessis v De Klerk supra* who quoted with approval the Canadian dictum in *R v Saliture* (1992) 8 CRR 2d 173 (1991) 3 SCR 654 wherein it was stated: "*Judges can and should adapt the common law to reflect the changing social, moral and economic fabric of the country. Judges should not be quick to perpetuate rules whose social foundations have long since disappeared. Nonetheless there are significant constraints on the*

the common law, nonetheless, certain judges, especially in the Constitutional Court, made use of section 39 of the *Constitution* by making use of recognized international and foreign law authorities.<sup>229</sup> It is respectfully submitted that, had Brandt JA relied upon international

*power of the judiciary to change the law. In a constitutional democracy such as ours it is our legislature and not the courts which have the major responsibility for law reform. The judiciary should confine to show incremental changes which are necessary to keep the common law in step with the dynamic and evolving fabric of our society."*

<sup>229</sup> Chapter 2 of the Bill of Rights provides as follows:

*"Interpretation of Bill of Rights"*

39. (1) When interpreting the Bill of Rights, a court, tribunal or forum:
- (a) must promote the values that underlie an open and democratic society based on human dignity, equality and freedom;
  - (b) must consider international law; and
  - (c) may consider foreign law.
- (2) When interpreting any legislation, and when developing the common law or customary law, every court, tribunal or forum must promote the spirit, purport and objects of the Bill of Rights ....."

When interpreting the Bill of Rights, a court, tribunal or forum must therefore consider international law. See Blake "The world's law in one country: the South African Constitutional Court's use of public international law" 1998 SALJ 668; Botha "International law in the Constitutional Court" 1995 SAYIL 668 as quoted in Christie *Bill of Rights Compendium* (2002) 1A-21. According to the learned author the rule is peremptory, but, except where international agreements and international law are law in South Africa, a court is not obliged to apply international law, it must merely consider it. The learned author relies on ss231, 232 and 233 of the Constitution which indicate that the Constitution "..... is the primary source of the protection of human rights in South Africa, in principle, international agreements become part of South African law only after they have been enacted as Acts of parliament and customary international law is law in the Republic unless it is inconsistent with the Constitution or an Act of parliament. See *LS v AT 2001 2 BCLR 152 (CC)*, *2001 1 SA 1171 (CCO par [27])*."

A number of the High Courts in South Africa have considered and recognized international and foreign law authorities which they expressed to be useful and instructive in incorporating in their judgements. Some of the cases include but are not restricted to the following: See *S v Scholtz* 1997 (1) BCLR 103 (NMS); *S v Mathebula and Another* 1997 (1) BCLR 123 (W); *Fraser v Children's Court, Pretoria North and Others* 1997 (2) BCLR 153 (CC); *Chinamora v Angwa Furnishers (Pty) Limited and Another (Attorney-General intervening)* 1997 (2) BCLR 189 (ZS); *Du Preez v Attorney-General of the Eastern Cape* 1997 (3) BCLR 329 (E); *Fose v Minister of Safety and Security* 1997 (7) BCLR 851 (CC); *Coetzee and Others v Attorney-General, Kwazulu Natal and Others* 1997 (9) BCLR 989 (C); *S v K* 1997 (9) BCLR 1283 (C); *S v Coetzee and Others* 1997 (4) BCLR 437 (CC); *Du Preez and Another v Truth and Reconciliation Commission* 1997 (4) BCLR 531 (A); *Elliott v Commissioner of Police and Another* 1997 (5) BCLR 670 (ZS); *President of the Republic of South Africa and Another v Hugo* 1997 (6) BCLR 708 (CC); *S v Naidoo and Another* 1998 (1) BCLR 376 (E); *S v J* 1998 (4) BCLR 424 (SCA); *National Coalition for Gay and Lesbian Equality and Others v Minister of Justice and Others* 1998 (6) BCLR 726 (W); *New National Party of South Africa v Government of RSA and Others* 1999 (4) BCLR 457 (C); *National Media Ltd and Others v Bogoshi* 1999 (1) BCLR 1 (SCA). In the case of *Carmichele v Minister of Safety and Security* 2001 (4) SA 938 at 954ff the Constitutional Court relied heavily on foreign law to develop the common law in particular in the field of delictual liability by extending the general duty of care in accordance with spirit, purport and objects of the Bill of Rights as intended in Section 39(2) of the Constitution. In this case the court found the prosecution and the police had a duty imposed on them not to perform any act infringing on the dignity, equality and freedom of citizens but rather to provide appropriate protection to everyone through and structures designed to afford such protection. Where such rights are infringed, the court held there is no ground for immunity of public officials from delictual causes by the public. This case is filled with foreign law cases ranging from Canadian Law, English Law and American Law and the European Court of Human Rights. The said cases pioneered the Constitutional Court in developing the common law. In the first instance the court supported the dictum of Tacobucl J in the Canadian decision of *R v Saliture* (1992) 8 CRR (2d) 173 (1991) 2 GCR 654 quoted with approval in *Du Plessis v De Klerk* 1996 (3) SA 850 (CC) 1996 (5) BCLR 658 at paras [15] - [24] wherein the iudex discussed the role judges should

law and/or foreign law, the following contractual jurisprudence in South Africa would have emerged. From a common law perspective, the court would have followed the United States of America's authorities to keep the common law in step with the dynamic and evolving fabric of our society. Moreover, the court would have relied on the following factors in denouncing exclusionary clauses or exculpatory clauses, otherwise known as waivers in which the hospital/other healthcare providers relieve themselves from liability for negligence, as unenforceable as against public policy.

Firstly, that although all exclusionary clauses or exculpatory clauses are not, *per se*, invalid and therefore, unenforceable, where they are found to involve public interest, they will not be held to be valid. The following factors, in turn, influence public interest. The medical profession and medical practise affect public interests. The existence of the medical profession and medical practises are governed by public regulations that involve health, safety and welfare, as well as ethical codes which, in turn, set certain standards of conduct or behaviour, which are expected of hospitals and other healthcare professionals, which they need to show towards their patients in discharging their duties. These standards of conduct or behaviour manifest themselves in standards of care and diligence, which hospitals and other healthcare providers have to uphold. The hospital and/or other healthcare providers' standards of care and diligence are derived from its/his/her statutes or ethical duties. As the prevailing standards affect public safety, health and welfare, any attempt to violate prevailing standards will impact on the public interests. For that reason, it is said that hospitals and/or other healthcare providers have a non-negotiable duty of public service. Private agreements, in the form of exculpatory clauses which aim to reduce a hospital or other healthcare provider's statutory or ethical duties, should, therefore, not be tolerated. Any attempt by a healthcare provider, including hospitals, to use written contracts to limit or reduce liability for negligence, have been struck down by the American courts, as contrary to public policy as it affects the public interest. The American courts have also, on numerous occasions, held that, as the services of, especially, hospitals to members of the public, constitute a crucial necessity, the hospital and its staff's duty of care is, therefore, part of the social fabric and any compromise of such a duty affects the

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play in adopting the common law. In this regard the iudex held: *"Judges can and should adapt the common law to reflect the changing social, moral and economic fabric of the country. Judges should not be quick to perpetuate rules whose social foundation has long since disappeared. Nonetheless there are significant constraints on the power of the Judiciary to change the law. In a constitutional democracy such as ours it is the Legislature and not the courts which have the major responsibility for law reform. The Judiciary should confine itself to those incremental changes which are necessary to keep the common law in step with the dynamic and evolving fabric of our society."* The court also relied on International Law considered consistent with the rights enshrined in our Constitution aimed at the wellbeing of the South African population. The court consequently looked at the provisions of the *European Convention on Human Rights (Convention)*.

public interests.

Another factor which weighs heavily against acknowledging the validity of exclusionary clauses in hospital contracts, in the United States of America, is that of the unequal bargaining position between that of the hospital and patient.

Between public interest and the unequal bargaining position of the patient, the American courts have designed a test to determine whether exculpatory clauses in hospital agreements are valid. Consequently, the court considers the following factors when pronouncing on exculpatory clauses namely:

- "(1) whether the transaction concerns business of a type suitable for public regulation and performing service of importance in the public;"<sup>230</sup>
- (2) Whether a party invoking exculpation, possessive decisive advantage of bargaining strength and, in exercising superior bargaining power whether the public, as a right of the transaction, is placed under the control of the party seeking exculpation of which the inferior party agrees to the risk of harm or carelessness." <sup>231</sup>

The American courts have continuously held that a hospital and/or another healthcare provider and the patient stand in an unequal bargaining position, because the hospital and/or other healthcare provider are of crucial importance to the general public. It is respectfully submitted that, had the Supreme Court of Appeal, in the *Afrox case*, followed the American common law, the court may, very well, have followed the leading case of *Tunkle v Regents of University of California*.

Besides foreign law, the Supreme Court of Appeal in the *Afrox case* also chose to ignore international law, when it was otherwise indicated. The court could so easily have relied upon English legislation and the legislation enacted in South American countries, as well as European countries, in an attempt to develop the much needed contractual jurisprudence in South Africa.<sup>232</sup>

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<sup>230</sup> *Olson v Molzen* 558 California S.W. 2d 429 (Tenn.S.Ct.1977).

<sup>231</sup> The Kentucky Court of Appeal in the case of *Meiman v Rehabilitation Centre* 444 S.W. 2d 881 (KY 1969) describes public policy considerations as follows: "*The public policy considerations here are buttressed by the independent obligations owed by defendants to plaintiff arising from the physician-patient relationship between them. This relationship imposes upon the healthcare provider greater responsibilities that that required in the ordinary commercial market place. In the context of that professional relationship "a provision avoiding liability is peculiarly obnoxious."* (15 *Williston on Contracts* (3eds ed 1972) section 1751)"

<sup>232</sup> In so far as international legislation is concerned it is especially the *Unfair Contract Terms Act* 1977 and Art 3 of the *European Council Directive on Unfair Terms in Consumer Contracts Council Directive* 93/13/EEC OJL 095/29 (5 April 1993) which provides: "*A contractual term which has not been individually negotiated shall be regarded as unfair if, contrary to the requirement of good faith, it causes a significant imbalance in the parties' rights and obligations arising under the contract, to the detriment of the consumer.*" Sachs J in the minority judgement in *Barkhuizen v Napier* also refer to the development in South American countries when he states: "*It appears that a number of South American countries have also enacted legislation since 1990 providing for*

Such an attempt, it is respectfully submitted, would have helped to curb the uncertainty, which the South African courts have brought about, when pronouncing on standard form contracts. In this regard, specific emphasis is placed on the controversial dictum of Brandt JA in the Afrox case. What has emerged, from the research undertaken in this thesis, is that there are contracts, in South Africa, which are, in their entirety, alternatively partially, unfair, unreasonable, unconscionable or oppressive. This may arise when agreements are executed, including the intention of exemption or exculpatory clauses in contracts or when their terms are enforced.

Although the South African courts have, on occasions, tried to control agreements contrary to law, morality or public policy, often denouncing certain contracts or contractual terms to be unenforceable or void, our courts, it is respectfully submitted, have not done enough to deal with contracts which are unfair, unreasonable, unconscionable or oppressive. This has caused academic opinion, over the years, to call for reform in contract law. The majority of these writers have united in their efforts in calling for the courts to ensure that they refuse, on grounds of public policy, to enforce contracts, or contractual terms, which were unfair or unconscionable.<sup>233</sup> Because of the South African courts' reluctance, or inability, in not

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*consumer protection against unfair contracts similar to legislation existing in so-called first world countries. According to the SALRC these statutes were heavily influenced by the Mexican Consumer Protection Law of 1974 and the Brazilian Consumer Protection Code of 1990, as well as Spanish and French consumer protection law.*" In illustrating the value section 39(1) of the *Constitution* brings when guidance is sought from international practices, Sachs J puts the position as follows: "*In considering the standards of contractual behaviour required by public policy in South Africa, attention should be paid to the manner in which standard form contracts are being dealt with in other open and democratic societies.*" The idea of limiting and in some cases to take away entirely, the right to rely on exemption clauses in certain situations, was given a boost in South Africa in 1988. During this year, the South African Law Commission under Chairpersonship of Mr Justice Olivier and influenced greatly by legislative interventions in Scandinavian countries such as Denmark, Sweden, Norway as well as the European countries such as France, the Federal Republic of Germany, the Netherlands, England and Australia, decided upon legislative intervention for South Africa, by proposing statutory control under the *Unfair Contractual Terms Bill*. South African Commission - Report on Unreasonable Stipulations in Contracts and the Rectification of Contracts Project 47 April 1982. By proposing the introduction of the *Unfair Contractual Terms Bill* it heralded in a new ethos in exercising statutory control where contracts and contractual terms are unjust or unconscionable and to denounce such contracts or contractual terms so as to avoid the injustices which would otherwise ensue. The Commission received a broad spectrum of representations, which varied from objections to broadening of the courts' authority; to support for the courts to be given the power to strike down unconscionable clauses in contract; to upholding freedom of contract; to social control over private volition in public interests. Ultimately, the Commission adopted the fairness criteria as applied in the foretasted foreign countries by concluding: "*Despite various critics lodging various objections to the fairness criteria to be included in the proposed legislation the Commission nevertheless recommends that unreasonableness, unconscionability or oppressiveness be the yardstick to be applied in determining fairness in contracts.*"

<sup>233</sup> This has caused Sachs J in his minority judgement in *Barkhuizen v Napier* with reference to the writings of Aronstam *Consumer Protection, Freedom of Contract and The Law* (1979); Woolfrey "Consumer Protection - A New Jurisprudence in South Africa (1989-1990)" *Obiter* 103 at 119-20; McQuoid-Mason "Consumer law: the need for reform" (1989) 52 *THRHR* 32; Lewis *Fairness in South African Contract Law* (2003) 120 *SALJ* 330; Bhana and Pieterse "Towards a Reconciliation of Contract Law and Constitutional Values: Brisley and Afrox Revisited" (2005) 122 *SALJ* 865 and articles quoted therein to remark: "*It must be granted that it would be self-referential and inconclusive to take the views of academics as to what the legal convictions of the community are,*

always satisfactorily dealing with contracts or contract terms which are unfair, unreasonable or oppressive,<sup>234</sup> strong calls have gone out, amongst certain academic writers, that comprehensive legislation be introduced to curb the, often, unscrupulous exploitation of weaker contracting parties at the hands of corporations and monopolies.<sup>235</sup> Although the receiving of other practises, including legislative provisions, from different jurisdictions ought to be executed with care and, often, circumspection because of the different social and economic development and experiences, it does not follow that comparative research must be ignored.

Nor does it follow that the law reformer, in a specific jurisdiction, seeking reform, should not have regard to tested models and ideas and adapt them to the local environment.<sup>236</sup> It is respectfully submitted that, despite the different social and economic development of the

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*as evidence of what actually constitutes these convictions. Nevertheless, taken with the other indices mentioned in this part of the judgement, I believe that the near-unanimity of scholarly opinion on the need for fairness in contracts, at the very least reinforces the approach that I am developing, and is manifestly in keeping with the constitutional values of human dignity, equality and freedom."*

<sup>234</sup> Kotz "Controlling unfair contract terms: Options for legislative reform" *SALJ* (1986) 405 at 407 expresses the view that although the courts have adopted a number of techniques including rules of interpretation to invalidate a term in a standard-form contract which is found to be abusive, no attempt has been made by any of the courts to strike down a contract as a whole. Nor have the courts prepared to say openly that they were striking down the contractual provision on the sole ground that it was unfair in all the circumstances or was harsh or unconscionable. That remains the position today. The only court that has mooted this to be the correct approach is Sachs J in the minority judgment of *Archaize v Napier*.

<sup>235</sup> One of the first calls for the regulation of unfair, unreasonable, unconscionable or oppressive contracts as well as the uncontrolled use of exemption clauses in all types of contracts came from Delpont "Exemption clauses: The English Solution" *De Rebus* (Dec 1979) 641. Influenced by legislative reforms in countries including Germany, Denmark, Sweden, Norway, France, Australia and England, those in favour of legislative reform have advocated that specific legislation directed at specific abuses in specific types of contract is to be preferred over the existing order which breed ambiguity and uncertainty and triggered wasteful litigation. The other main motivational feature for advocating legislative reform include the following: Despite the principle of freedom of contract been widely recognised, internationally, social control mechanisms, especially in the form of legislation, have been introduced over decades to address the ills of specific types of contract and certain kinds of unfair contractual provisions. See also Kotz "Controlling Unfair Contract terms: Options for legislative reform" *The South African Law Journal* (1986) 405, 406ff; South African Law Commission - Report on unreasonable stipulation in contracts and the rectification of contracts Project 41 1998 17.

<sup>236</sup> Van Loggerenberg "Unfair Exclusion Clauses in Contracts: A Plea for Law Reform" (1987) 7 after analyzing the legislative reform in countries such as England, Germany, the United States of America and Holland, concludes that as our legal system is closely related to some of the legal systems, our legal philosophy in South Africa ought to resemble that of the other jurisdictions, namely, *"unfair contractual terms can only be controlled effectively by adopting reasonableness as a general criterion of control with bona fide as its under carriage."* Delpont (1979) 641 at 642-643 relying heavily on the English law reform with their promulgation of the *Unfair Contract Terms Act 1977* states: *"the English solution is not wholly without its difficulties, nevertheless it does offer certain answers to a rather complicated problem."* He does venture to suggest that some of the provisions of the English legislation may serve as a basis for drafting similar legislation in South Africa.

different jurisdictions, there is commonality in the philosophy amongst consumers in the different jurisdictions, namely, to limit the unfair practises which have been adopted by big business enterprises and often monopolies, to the detriment of the consumers.<sup>237</sup> But, consumer protection is not restricted to the commercial practises proper, but includes, it is submitted, the relationship between healthcare providers, including hospitals, and their patients, in which legislative intervention is desperately sought.<sup>238</sup>

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<sup>237</sup> To this end strong calls have also been made for the enactment of legislation for the protection of consumers and to regulate the inclusion of particular types of terms in contracts. See in this regard the writings of Hahlo "Unfair Contract Terms in Civil Law Systems" (1981) 98 *South African Law Journal* 70; Van der Merwe et al (2003) 216; Christie (1996) 15-17; Steyn (2004) 16 *Merc LJ* 106 at 112; Carstens and Kok (2003) 18 SAPR/PL 430 at 455; Van den Heever; *De Rebus* April 2003 47 at 48; Strauss (1994) 305; Aronstam "Unconscionable Contracts" The South African Solution?" (1979) 2 at 42; Fletcher "The Rule of Good Faith in the South African Law" (1997) *Responsa Meridiana* 1 at 12-13; Van der Walt "Aangepaste Voorstelle vir 'n stelsel van voorkomende beheer oor kontrakteervryheid in die Suid-Afrikaanse Reg" 1993 (56) *THRHR* 65 at 66; Van Aswegen "The Future of South African Contract Law" (1994) 67 *THRHR* 458-459; Hawthorne "The Principle of Equality in the Law of Contract" 1995 (58) *THRHR* 157 176. But the most significant attempt to protect and promote consumerism came from the South African Law Reform Commission in 1998 when the commission relying on other foreign jurisdictions stated that "*public policy ..... is more sensitive to justice, fairness and equity than ever before. The commission added that: "With the rise of the movement towards consumer protection in the early seventies, it became the generally accepted view in most Western countries that neither specific legislation dealing with certain types of contract nor the traditional techniques of control through 'interpretation' of contractual terms were sufficient, and that legislative action was required to deal with contractual unconscionability on a more general level. Such laws have been enacted in Denmark, Sweden, Norway, France, and the Federal Republic of Germany, the Netherlands, and Australia as well. They are all based on the principle of good faith in the execution of contracts."* See also SALRC "Unreasonable Stipulations in Contracts and the Rectification of Contracts" *Project 47* (April 1998) at Para 1.44 quoted by Sachs J in *Barkhuizen v Napier* 2007 this moves Sachs J Para 184 to remark: "*Given the scale of injustice in our past, it is not surprising that the theme of consumer protection has not roomed as large in this country as it has in other parts of the industrialized world. What is also significant is that even the South African courts, more especially, the Constitutional Court in the case of Du Plessis v De Klerk and Another* 1986 (3) SA 850 (CC) 1996 (5) BCLR 658 Para 61 quotes with approval the Canadian case of *R v Saliture* in which the court remarked "*Judges can and should adapt the common law to reflect the changing social, moral and economic fabric of the country. Judges should not be quick to perpetuate rules whose social foundation has long since disappeared. Nonetheless there are significant constraints on the power of the judiciary to change the law..... In a constitutional democracy such as ours it is the legislature and not the courts which have the major responsibility for law reform..... The judiciary should confine itself to those incremental changes which are necessary to keep the common law in step with the dynamic and evolving fabric of our society."*

<sup>238</sup> Strauss (1991) at 305 as long ago as sixteen years ago suggested that the legislative should step in to protect patients against the unfairness and oppressiveness that arise from exemption clauses in hospital contracts. The stance adopted by Strauss has in more recent times been supported by various South African legal writers. See in this regard Naude and Lubbe (2005) 462; Carstens and Kok (2003) 455. It is Cronje-Retief (1997) 440-441 who comes out strongly against the use of exemption clauses in hospital contracts when she writes: "*..... big institutions, corporations or other groups with unrestricted financial resources and adequate insurance exempt themselves from liability of such contracts, are effectively contra bonos mores, against public policy and/or public interest and should be declared invalid by our courts.*" Support for Cronje-Retief's contention is found in Van den Heever *De Rebus* (April 2003) 47-48 in which it is stated: "*Hospitals should take responsibility for sub-standard negligent provision of services, organizational failure and systemic defects ..... The present untenable position in which a victor of a medical accident finds himself should in the public interest and with due regard to considerations of public policy be appropriately addressed either by the court, legislature or the hospitals themselves.*"

I am, respectfully, of the view that legal reform is urgently required in the law of contract in South Africa and the introduction of legal entrenchment is much preferred. Our courts, it is submitted, are loathe to create new and equitable rules and to find just solutions to problems experienced in respect of fairness, unreasonableness, unconscionability and oppressiveness. This is clearly; it is submitted, illustrated in the Supreme Court of Appeal in the cases of *Brisley v Drotsky*,<sup>239</sup> *De Beer v Keyser and Others*,<sup>240</sup> and *Afrox Healthcare Bpk v Strydom*.<sup>241</sup>

In the abovementioned cases, the Supreme Court over-emphasized contractual autonomy, at the expense of reasonableness and equity. This clearly ignored the values one may derive from the Constitution. The courts, it is submitted, in relying upon the Constitution, have a general jurisdiction not to enforce unfair contracts or contractual provisions. This is strengthened by societal calls for consumer protection and the recognition of business and medical ethics.

#### 14.7 Summary and Conclusions

It is evident from the scope of this chapter that exclusion clauses, or, as they are otherwise known, exculpatory clauses or waivers, have found their way into hospital contracts and other contracts between healthcare providers and patients. For that reason, exclusionary, or exculpatory, or indemnity clauses have, for many years, especially in the jurisdiction of the United States of America and South Africa, been widely included in admission forms, used by hospitals and other healthcare providers.

It is also evident from this chapter that much controversy surrounds the circumstances under which a contract, containing an exculpatory clause, is signed and the legal effect thereof. What is called into question is the aim of the hospital and healthcare provider in including an exclusionary or exculpatory clause, in such a contract. The aim, as seen from this thesis, is to escape liability, which often has a far-reaching effects on the plaintiff, more specifically, denying him the opportunity of suing the hospital or healthcare provider for the personal injury and/or damages which the patient suffered as a result of the former's negligence.

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<sup>239</sup> 2002 (4) SA 1 (SCA).

<sup>240</sup> 2002 (1) SA 829 (SCA).

<sup>241</sup> 2002 (6) SA 27 (SCA).

The position with regard to the legitimacy of exclusionary clauses in medical contracts is well settled in the United States of America. Most legal writers are against them and most courts in the United States of America have struck down, or severely limited, attempts by hospitals and other healthcare providers, to use written clauses containing exclusionary, to exclude or to reduce their liability for negligence.

The courts', as well as the legal writers,' reasoning have ranged from, these types of contract are offensive to public policy; they violate public interests etc. The rationale is founded in the protection of the patient against the practise of medicine where, minimum levels of performance are being compromised. The hospital's/other healthcare provider's duty of care, so it is found, is inalienable, for, to hold otherwise, would result in the hospital/other healthcare provider being given a license to practise negligently, which in turn, will result in the standards not being upheld.

From the scope of this chapter, it is also evident that a strong argument is that; as the patient does not stand upon equal footing with the hospital/other healthcare provider, the patient is regarded as the weaker party, who is in a disadvantageous position, when entering into the contract with the hospital/other healthcare provider. This impacted heavily, in the United States of America, on the legitimacy of exclusionary clauses.

From the content of this paragraph, it appears that the position in England is also fairly settled. Although there are no legal writings on hand, nor has there been judicial pronouncement on the legitimacy of exclusion clauses in the medical contracts, it has been argued that the health system in England does not encourage the creation of private hospitals, where these types of agreements are promoted. Besides, even if a clause was to be inserted in a hospital/other healthcare provider contract with a patient, excluding liability for personal injury and damages arising from the hospital/healthcare provider's negligent conduct, English legislative measures in the form of the Unfair Contract Terms Act, 1977, protect the patient, in that, the clause will be pronounced unenforceable. In this regard, the Act places a prohibition on the exclusion or restriction of liability for death or personal injury, resulting from negligence, ensuring that a claim for damages under these circumstances remains an inalienable right.

But, despite certainty being reached, in the jurisdictions of the United States of America and the United Kingdom, with regard to the legitimacy of exclusion clauses, it is evident, from the scope of this chapter that the South African legal system is in a marshland of uncertainty. It is also evident, from the scope of this chapter that no other dictum has

received the magnitude of criticism than that of Brandt JA, in the case of *Afrox Healthcare Bpk v Strydom*.

It is, respectfully, submitted that, given the consumer welfarism drive and the international movement away from the traditional ethos of contractual freedom and sanctity of contract, (including the strong views recently expressed by the South African legal writers and academics) to a more value laden approach, including standards of fairness, reasonableness and equity, the approach adopted by Brandt JA is out of step with such movement.

From the scope of this chapter, it is also evident, that the *Afrox* case was wrongly decided. The discourse surrounding the criticism of this dictum was staged on three frontiers, in this chapter. The three frontiers include, medical ethics founded on the doctor/hospital and patient relationship, the common law and constitutional law.

It is evident, from the discourse in this chapter that medical ethics in the doctor/hospital-patient relationship have, for many centuries, played a significant role. This continues to be the position in modern medical practise. It was seen from the discourse, that the core feature of the relationship is founded in the promotion and maintenance of medical standards, in which, *inter partes*, the interests of the patient are advanced. This places an obligation on the hospital/healthcare provider not to deviate from the standard of conduct expected of him/it or its staff. To this end, medical ethics, in which conscience and the intuitive sense of goodness, public conscience and responsibility towards the patient, play a major role should be respected and promoted. Akin to that is the trust position the doctor/hospital/other healthcare provider occupies in relation to the patient. Instead of embracing the principles enunciated hereinbefore ,which have been part of the medical profession, worldwide, for many centuries, the Supreme Court of Appeal, embracing the doctrine of freedom of contract, chose to accentuate the application of exclusion clauses in, especially, hospital contracts, which seek to protect the medical practitioner/hospital against mishaps occurring, in connection with the conduct of the practitioner, the hospital's nursing staff or doctors employed by the hospitals. Accentuating the latter, it is respectfully submitted, is to ignore societal dictates which demand that, in executing his/her profession, the medical practitioner/hospital ought not be allowed to relax the degree of care and skill expected of him/her as a practitioner, alternatively, if it is a hospital, despite the patient consenting thereto. In allowing this, it is submitted, the court ignores the long standing principles of medical ethics, in which public conscience and the doctor/hospital's responsibility towards the patient play a major role.

It is also submitted that; allowing the standard of conduct of professional people to be compromised, is tantamount to placing professional people on the same footing as any other provider of services, who operate in the commercial terrain. This position, it is respectfully submitted, should never be tolerated, for it would place, for example, a tradesman on the same matrix as a professional person. What needs to be emphasized, as well, is the fact that an admission form, in which the patient seeks to obtain medical care and the hospital and its staff/doctor undertakes to treat the patient with due diligence, is not a simple commercial contract or transaction.

It is also evident, from the discourse in this chapter, that, at common law, the court placed too much emphasis on the doctrine of freedom of contract and the sanctity of contract. The doctrine of freedom of contract and the sanctity of contract had its roots deeply embedded in the classical law of contract and, especially since the advent of standard term contracts, has shown little regard for the bargaining strength of the parties concerned, notwithstanding the inequality that a weaker party may face in the contractual relationship. The classical law approach also ignores the unfair and unconscionable result some contractual agreements may bring with them. One of the reasons, advanced by the courts, is this, to give a judge the, *carte blanche*, discretion to ignore contractual principles which they regard as unfair and unreasonable, would be in conflict with the rules of practice. They, according to the Supreme Court of Appeal, would be in conflict with the principle of *pacta sunt servanda* and the pronouncement of the enforcement of contractual provisions will, ultimately, be determined by the presiding judge, who has to determine whether the circumstances of the case are fair and reasonable, or not. The further argument is advanced that the criteria would no longer be the principles of law, but the judge him/herself.

It is further submitted that the court wrongly ignored the principle of good faith when deciding the validity of exclusionary clauses in the hospital contract.

It is, respectfully, submitted that Brandt JA, besides stating that good faith is not a free-floating value, was not sensitive enough to public dictates which have, over a significant period of time, called for fair dealings in contracts, especially where a degree of bargaining unfairness is present in concluding agreements. Although Brandt JA held that good faith, *inter alia*, represent the foundation and *raison d'être* for the present legal rules and can also lead to the formulation and alteration of rules of law, the learned Judge makes no attempt to developing good faith as a safety valve, to ensure a minimum level of fairness in contracting, which, I submit, is manifestly in keeping with the constitutional value of human dignity, equity and freedom. It is, further, submitted that the acknowledgement and

development of good faith to ensure a minimum level of fairness in contracting, by the Supreme Court of Appeal, would have gone a long way towards embracing the historical justification for recognizing good faith in contract and which has, as its roots, ethics and fairness in law. The historical justification for recognizing good faith is said to have stemmed from the need to protect the public welfare against unfair contracts or contractual terms from unreasonable hardship. The Supreme Court of Appeal, it is respectfully submitted, failed to have regard to the public welfare, when ignoring good faith including reasonableness, justice and equity.

Although the court acknowledged that contractual provisions which are unfair, on the basis that they are in conflict with public interests, the court, regrettably, did not regard the exclusionary clause in the hospital contract as being one in conflict with public interests. In this regard, it is respectfully submitted, the Supreme Court of Appeal paid lip service to the principles of fairness and public interests. Moreover, as the practise of medicine and all its associated protocols, practises, ethical codes and standards, is affected with public interests, it is difficult to comprehend how Brandt JA would allow the duty of care, which ought to be regarded as an inalienable duty, to be compromised. It is further submitted that exclusionary clauses in medical contracts have no place in the practise of medicine and any private agreement which compromises or reduces the health providers statutory or ethical duties ought to be struck down, as they impact on public interests and any attempt by a doctor/hospital/other healthcare provider to use written contracts to reduce liability for negligence, in whatever form, ought to be struck down as they are deemed to be contrary to public policy.

It is further, respectfully, submitted that the regulation which governs the licensing of private hospitals and which calls for the maintenance of a standard of care and skill in treating a patient, is grounded on public policy. One of the aims of the regulation is that it forbids acts which have the tendency to be injurious to the public good. Where public policy requires the observance of a statute or regulation, no court should fail in its duty to denounce an attempt to waive a hospital/doctor/or other health carer's liability for negligence, as invalid and unenforceable and against public policy. In this regard, a professional person should not be permitted to retreat behind a protective shield of an exculpatory clause and insist that he/she/it is not answerable for his/her/its own negligence.

It is further submitted that the Supreme Court of Appeal, in the *Afrox case*, failed in its constitutional obligation to develop the common law, including the principles of the law of contract.

It is submitted that, instead of taking a principled approach, using objective criteria such as fairness, reasonableness and conscionableness in contract, to ensure standards of fairness and reasonableness are achieved, especially when dealing with standard form contracts, the Supreme Court of Appeal chose to entrench the traditional approach, by denouncing fairness and reasonableness as a yardstick to measure the validity of standard form clauses. The suggested thinking, it is respectfully submitted, is that courts should not enforce a clause if it would result in unfairness or would be unreasonable.

By clinging to the ethos of freedom of contract, the Supreme Court of Appeal, in the *Afrox* case, ignored, it is respectfully submitted, the lack of consensus which often arises when contracting parties enter into standard form contracts. It is especially where the parties stand in an unequal bargaining position that consensus is not always possible. The weaker of the contracting parties often has no chance of making any input in reaching agreement. Instead, the weaker contracting party is often exploited in entering into the contract on a “take-it-or-leave-it” basis. Brandt JA, in the *Afrox* case, found that, despite the respondent signing the admission document without reading it and thus, no true consensus coming into being, as the patient was not familiar with the contents of the exclusionary clause contained in clause 2.2, it did not matter, as the patient had a full opportunity to read the document. It does therefore not lead as a rule, that he is not bound by the contents. It is respectfully submitted that once again the Supreme Court of Appeal ignored the consensual requirement.

The Supreme Court of Appeal, in the *Afrox* case, also failed along constitutional lines to recognise some values that underlie the *Bill of Rights*. For that reason, it is respectfully submitted, Brandt JA, when assessing the validity of exclusionary clauses in hospital contracts, should have given greater weight to communal values, including fairness and reasonableness, as opposed to the personal autonomy of hospitals, which is greatly influenced by the doctrine of *pacta sunt servanda*. Unlike the historical past, the principle of *pacta sunt servanda* is no longer placed on a pedestal, but is, very much, subject to constitutional control and contractual liberty now has to be scrutinized against the values that animate the *Constitution*.

From a constitutional angle, Brandt JA also, with respect, downplayed the importance of the right to healthcare services. Instead, private hospitals were placed on the same footing as suppliers of other services by the court, ignoring, it is submitted, that private hospitals supply healthcare services, which are guaranteed by the *Constitution*. The court, it is

respectfully submitted, took a very narrow view in finding that exclusionary clauses in hospital contracts do not interfere with access to health care services. To exclude healthcare services by way of exclusionary clauses, it is submitted, is to ignore normative ethics and statutory regulations designed to protect expected professional standards of medical practise and, more especially, the duty of care and skill which ought to be exercised in the interests of the patients.

Although it may not have been specifically pleaded in the *Afrox case*, the court was also silent on suggesting that section 34 of the *Constitution*, which guarantees a potential litigant a right of access to court, could be used as a measure to invalidate exclusionary clauses in hospital contracts. It is, respectfully, submitted that section 34, which gives expression to one of the foundational values, namely, guaranteeing to everyone the right to seek the assistance of a court ought, albeit obiter, to have been considered. Exclusionary clauses, by their very nature, it is submitted, run counter to this foundational value in guaranteeing to everyone the right to seek the assistance of the courts.

Exemption clauses, by their very nature prevent a potential plaintiff from suing a potential defendant in a court of law. To enforce an exemption clause in a hospital contract, it is submitted, has the effect that the doors of the courts are effectively closed to an injured party. Although the Constitutional Court has, thus far, not pronounced on the validity of hospital contracts, containing exemption clauses in which the patient indemnifies or exonerates a hospital or its staff from liability, notwithstanding the negligence of the hospital staff, judging by the attitude adopted by the court in the case of *Barkhuizen v Napier*, it is respectfully submitted that the court may, very well, use section 34 to invalidate such clauses in hospital contracts.

From a constitutional view-point, what disappoints, with respect, as well, is the Supreme Court of Appeal's lack of initiative and insight in making use of section 39 of the Constitution in developing the South African common law in our new Constitutional Order, to reflect the spirit, purport and objects of the *Bill of Rights*. Section 39, it is submitted, has been incorporated in the *South African Constitution* and designed to assist with the development of the common law, by making use of foreign law and/or international law. Where no law exists or law reform is necessary, i.e. where the competing rights conflict with the values in the Constitution. In the *Afrox case*, it is respectfully submitted, the competing rights i.e. freedom of contract and the sanctity of contract clearly conflicted with the values of the Constitution i.e. the right to equality and dignity, as well as aspects such as fairness and reasonableness. But, despite this glaring conflict between competing

rights with the values of contracts in the Constitution, Brandt JA, with respect, ignored this challenge by ignoring recognized international and foreign law authorities.

Had Brandt JA relied upon international law and/or foreign law, the following contractual jurisprudence in South Africa may, very well, have emerged. From a common law perspective, the court, it is submitted, would have followed the United States of America authorities to keep the common law in step with the dynamic and evolving fabric of our society. The following factors, it is submitted, would have prompted the court to develop the common law, namely, the medical profession and medical practise affects public interests. As the medical profession and medical practices are governed by public regulations, which involve health, safety and welfare, as well as ethical codes which, in turn, set certain standards of conduct or behaviour in motion, hospitals and other healthcare provisions are expected to maintain such standards instead of compromising or limiting them by way of exclusion. This clearly violates public interests and should not be tolerated.

The unequal bargaining position between the hospital/other healthcare provider and patient is also a factor which holds sway, in the United States of America, in denouncing exclusionary clauses in hospital contracts. It is, respectfully, submitted that had the Supreme Court of Appeal, in the Afrox case, followed the American common law, the court may, very well, have followed the leading case of *Tunkl v Regents of University of California*, in denouncing such a clause in hospital contracts.

On the other hand, the Supreme Court of Appeal, with respect, also chose to ignore international law, when it was otherwise indicated. Moreover, the court had, at its disposal, the benefit of legislation passed in countries such as the United Kingdom, European countries such as France, Spain, Italy and South American countries such as Brazil, from which the courts have, at times developed aides to limit or curb certain contracts or contractual terms, deemed to be unenforceable or void, for example, the *contra proferentum* rule, much can be learnt from other jurisdictions on how they control contractual provisions or contracts which are unfair, unreasonable or oppressive. Because the courts have not always been willing to invalidate contracts or contractual terms that are unfair or unconscionable, strong calls have been made by, especially, the South African academic writers, that comprehensive legislation be introduced in South Africa to curb the, often, unscrupulous exploitation of weaker contracting parties.

Judging from the experiences of the other jurisdictions, and given the different social and economic development of the different jurisdictions, nonetheless, there is commonality, in

the different jurisdictions, to limit unfair practises. Strong feelings of consumerism and the concern that, especially the weaker contracting parties should not be exploited by the stronger parties have driven people to advocate for legal reform.

It is clear that unless the South African courts are prepared to depart from the antiquated views, which the courts have expressed and maintained over decades, accentuating the traditional ethos of contractual freedom and sanctity of contract, to a more value-laden approach, including standards of fairness, reasonableness and equity, the introduction of legislation is greatly preferred. Legislative measures, it is respectfully submitted, will go a long way in bringing consistency in the South African courts' approach in controlling contracts or contractual provisions tainted with unfairness. It is, especially, in hospital/other healthcare provision contracts, containing exclusionary clauses, that legislation will provide a much needed regulatory framework in controlling the relationship between private individuals, who occupy a weaker position and entities, such as hospitals, who exploit their position of strength by excluding their obligation to provide healthcare services, at predefined standards, in using exemption clauses.

#### 14.8 **Conclusions and Recommendations concerning exclusionary clauses in medical contracts.**

The legal position regarding exclusionary clauses in the law of contract is presently far from ideal in South African law. The challenge presented is not so much that the concept of a contract as a binding agreement between two parties is, in itself, problematic;<sup>242</sup> it is, however, the antiquated approach of the South African courts to this area of law that is called into question. Although it is, unquestionably, so that exclusionary clauses have, and will continue to play, a significant role in contracts entered into in the commercial world, provided of course, consideration is given to the principles which are highlighted hereinafter. What has emerged, from the research undertaken with this thesis, is that the courts, when dealing with contractual issues, have not kept pace with sociological and commercial developments within South African society. Nor have the courts paid due regard to the shift in balance of power, brought about by major commercial enterprises. It is especially in medical contracts, and more specifically, hospital contracts, that the courts have ignored the fact that a patient stands in a weaker position to that of a hospital and its staff. In including an exclusionary clause in the admission form, the hospital, in effect, exploits the weaker position the patient occupies, to his/her detriment. This, in turn, leads to unfair, often, harsh results. Another area of concern is that the courts view this type of agreement on the same level as a general commercial contract, whereas, in reality,

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<sup>242</sup> Pearmain (2004) 1386.

it is otherwise indicated. An agreement regulating the providing of health care services can never be compared with, for example, the supply of goods etc. Worst of all, when analyzing the courts' approach hitherto, there is still an almost complete failure to incorporate constitutional principles and values into the law of contract.<sup>243</sup> In areas such as health care services, where the circumstances and the nature of the item of trade, in and of themselves, make it quite obvious that there is an unacceptable imbalance of power, that should be rectified in order to avoid injustices. But, it is the Supreme Court of Appeal, in the *Afrox* case, that remarked that it cannot see the difference between providers of health care services and any other service provider. What has also emerged, from the research undertaken, is the South African courts' passionate clinging to the age-old doctrines of freedom of contract and the sanctity of contract. The South African courts, throughout many decades, were loathed to part with this philosophy. The consequence is that South African law of contract appears to remain trapped within a judicial mindset that would be at home in the Victorian era<sup>244</sup>.

The areas of concern within the South African law of contract have not gone unnoticed. The South African Law Reform Commission, in a working paper<sup>245</sup> entitled 'Unreasonable stipulations in contracts and rectification of contracts,' highlighted the philosophy of consumer welfarism and its rise in the early seventies. Since then it became the generally acceptable view, in most first world countries, that legislative action was required to deal with contractual unconscionable-ness. The Commission noted that South African proponents of granting such power of review to the courts, support legislation that will introduce the doctrine of unconscionable-ness and the concomitant review power of the courts<sup>246</sup>. What is seriously needed in South Africa is a paradigm shift, in which the courts could play a more active role in ensuring that contracting parties, who do not

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<sup>243</sup> See especially the approach of the Supreme Court of Appeal in *Afrox Healthcare v Strydom* 2002 (6) SA 21 (SCA); See however the new course of direction taken by the Constitutional Court in *Barkhuizen v Napier* 2007 95 SA 323 (CC).

<sup>244</sup> See the writing of Pearmain 92004) 1387 who quotes the writings of Matlala D "The Law of Contract: When the Supreme Court of Appeal Fails to Act, Senior Lecturer, University of Venda <http://wwwserver.law.wits.ac.za/workshop03/WWLSMatlala.doc> points out that, in the case of the law of contract, the courts are still happy to follow a statement made by Chief Justice Innes a century ago in *Burger v Central South Africa Railways* 1903 TS 571 to the effect that it is as sound principle of law that a man, when he signs a contract is taken to be bound by the ordinary meaning and effect of the words which appear over his signature' even which he does not understand (*Mathole v Mothe* 1951 (1) SA 256 (T) or that a signatory who cannot read or write any language is held bound by a document written in English which she did not understand and which was apparently misrepresented to her (*Khan v Naidoo* 1989 (3) SA 724 (N)).

<sup>245</sup> Discussion Paper 65 (project no 47) (1998).

<sup>246</sup> Pearmain (2004) 1387. Support for this view can also be found amongst a host of South African legal writers *inter alia* Carstens and Pearmain (2007) 288; Carstens and Kok (2003) 430; Jansen and Smith (2003) 210; Bhana and Pieterse (2005) 865.

occupy an equal bargaining power, would be protected against prejudice by those in a stronger bargaining position. There are many things the courts could do to ensure that the law of contract reflects and upholds the principles and values of the Constitution<sup>247</sup>. From the discourse in this thesis, various themes were identified which also permeate other fields of law, *inter alia*, public interest, *bona fides* or good faith, public policy, reasonableness and fairness. There can be no doubt that these themes have a clearly recognized mandate, in terms of the Constitution, to develop the common law<sup>248</sup>. The Constitution, it is submitted, is the supreme law of the Republic and any law or conduct inconsistent with it, is invalid. In this regard, one does not have to look further than section 8 of the Constitution and its provision that the Bill of Rights applies to all law, including, the law of contract. Another enabling provision in the Constitution is that of Section 2 of the Constitution, which provides that any conduct inconsistent with the Constitution is invalid. In this regard, it can be argued that, to deprive a person from gaining access to a court of law or tribunal to have a dispute adjudicated upon would be inconsistent with the Constitution and therefore invalid. The South African courts have, for many decades, also adjudicated upon the validity of certain contracts or contractual provisions, including exclusionary clauses in contract, by looking purely at the stereotype principles in the law of contract. Artificial conceptual boundaries were created and enforced by the courts. The traditional principles in the law of contract and the conceptual boundaries have, as their aim that commercial transactions ought not to be unduly trammelled with. This often resulted in no simple justice between man and man and no fair dealings in contract being attained. As stated previously, no attempt has previously been made, where foundational principles of contract law, medical law and ethics, the law of delict and statutory law in the context of the Constitution are integrated, say, in finding an answer to the assessment of the validity of exclusionary clauses in medical contracts. An integrated approach, especially under the value-driven Constitution may very well have yielded another result than that achieved in the *Afrox case*.

#### **14.8.1 Recommendations to the key issues surrounding exclusionary clauses in medical contracts.**

Since the judiciary has, unquestionably, failed consumers in the context of contracts for private health service delivery, notwithstanding the fact that exclusionary clauses in

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<sup>247</sup> See the dictum of *Ncqobo J*, in *Barkhuizen v Napier* 2007 95 SA 323 (CC), as well as, the minority judgment of Sachs J in the same case.

<sup>248</sup> See the view of Ackerman and Goldstone JJ in *Carmichele v Minister of Safety and Security and Another Centre for Applied Legal Studies interviewing* 2001(7) SA 938 (CC)

medical contracts, generally viewed, are unreasonable, unfair and unconscionable. When courts continue to enforce unreasonable clauses, even when they are so unreasonable, or applied unreasonably, as to be unconscionable, notwithstanding the adoption of the Constitution, it gets to this point that one can, unreservedly, conclude that exemption clauses operate against the public interest in many cases, especially in medical contracts, so much so, that there is a need for statutory regulation. It is submitted that in the absence of legislation to maintain fairness and equity in contracts, individuals, especially, the weak, the foolish, the illiterate and thoughtless, from imposition and oppression are likely to continue to be exploited and disrespected. Such continued practice will run counter to the constitutional ideals. The introduction of statutory regulation to protect consumers will not be without precedent. Post constitutionally, various pieces of legislation have found their way into the statute books, which promote the idea of consumer welfarism. Moreover, the *Housing Consumer Protection Measures Act*<sup>249</sup> aims to protect the interests of the Housing consumer. In this regard section 13 provides inter alia:

“.....

(2) *The agreement between a home builder and a housing consumer for the construction or sale of a home shall be deemed to include warranties enforceable by the housing consumer against the home builder in any court, that-*

(a) *the home, depending on whether it has been constructed or is to be constructed-*

(i) *is or shall be constructed in a workmanlike manner;*

(ii) *is or shall be fit for habitation; and*

(iii) *is or shall be constructed in accordance with-*

(aa) *the NHBRC Technical Requirements to the extent applicable to the home at the date of enrolment of the home with the Council; and*

(bb) *the terms, plans and specifications of the agreement concluded with the housing consumer as contemplated in subsection (1);*

.....”

From the said legislation it can, clearly, be deduced that housing, like health care services, is subject to a constitutional right<sup>250</sup>. It is submitted that, in recognizing the need for

<sup>249</sup> Act No 95 of 1998.

<sup>250</sup> Section 26 of the Constitution stipulates that everyone must have access to adequate housing and that the state must take reasonable legislative and other measures, within its available resources, to achieve the

statutory protection in housing, arguably, there should be no bar to the introduction of similar legislative regulations, with regard to health care services, to protect the consumer, the health care recipient, against unfair or unconstitutional practices by the providers of such services.

In so far as legislative regulations concerning health services is concerned, section 47 of the National Health Act<sup>251</sup> provides -

- “(1) All health establishments must comply with the quality requirements and standards prescribed by the Minister after consultation with the National Health Council.*
- (2) The quality requirements and standards contemplated in subsection (1) may relate to human resources, health technology, equipment, hygiene, premises, and the delivery of health services, business practises, safety and the manner in which users are accommodated and treated.*
- (3) The Office of Standards Compliance and the Inspectorate for Health Establishments must monitor and enforce compliance with the quality requirements and standards contemplated in subsection (1).”*

Similarly, regulations governing the licensing and maintaining reasonable degree of care and skill in order to promote the welfare and safety of patients in private hospitals are set out in the publication of the Government Gazette on the 1<sup>st</sup> February 1980<sup>252</sup>. The relevant regulation is 25(23), which provide: *“All services and measures generally necessary for adequate care and safety of patients are maintained and observed.”* It is submitted that the above legislative provisions and regulations will provide sufficient powers, to the Minister of Health, to ensure that exculpatory or exclusionary clauses, in private hospitals contracts, are largely harmless to patients, if they are permitted at all.<sup>253</sup>

It is also submitted that the *Consumer Affairs (Unfair Business Practises) Act* 254 could also afford a measure of assistance. In terms of this Act, “business practice” includes –

- (a) any agreement, accord, arrangement, understanding or undertaking, whether legally enforceable or not, between two or more persons;*
- (b) any scheme, practice or method of trading, including any method of marketing or distribution;*
- (c) any advertising, type of advertising or any other manner of soliciting business;*
- (d) any act or omission on the part of any person, whether acting independently or in*

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<sup>251</sup> progressive realization of this right.  
Act 61 of 2003.

<sup>252</sup> See Government Gazette No 2948, R6832.

<sup>253</sup> See the persuasive argument of Pearmain (2004) 1385 which need to be supported.

*concert with any other person;*

- (e) *any situation arising out of the activities of any person or class or group of persons, but does not include a practice regulated by competition law*

*And*

*‘Unfair business practice’ means any business practice which, directly or indirectly, has or is likely to have the effect of-*

- (a) harming the relations between businesses and consumers;*
- (b) unreasonably prejudicing any consumer;*
- (c) deceiving any consumer; or*
- (d) unfairly affecting any consumer.*

*.....”*

It is evident from the provisions of the Act that the *Consumer Affairs Act* provides mechanisms for the investigation of unfair business practises and their prohibition<sup>254</sup>. Regard being had to the introduction of this legislation, which reveals the modern approach of consumerism and considerations such as unreasonableness, good faith and fairness in contract.

More recently, under the auspices of the Department of Trade and Industry, the said Department published, for public comment, in the Government Gazette 2862 GN R489, on the 15<sup>th</sup> March 2006, a draft bill, namely the Consumer Protection Bill. In this regard the preamble provides.

*“The people of South Africa recognise-*

*That is necessary to develop and employ innovative means to-*

- (a) fulfil the rights of historically disadvantaged persons and to promote their full participation as consumers;*
- (b) protect the interests of all consumers, ensure accessible, transparent and efficient redress for consumers who are subjected to abuse or exploitation in the marketplace; and*
- (c) give effect to the internationally recognised consumer rights.”*

Section 3(1) goes on to provide that-

*“The purpose of the Act is to promote and advance the social and economical welfare of consumers in South Africa by-*

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

<sup>254</sup>

Act 71 of 1988.

*responsible.”*

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

- “(a) the fact, nature and effect of that provision are drawn to the attention of the consumer before the consumer enters into the agreement;*
- (b) the provisions is in plain language; and*
- (c) if the provision is in a written agreement, the consumer has signed or initialled that provision indicating acceptance of it.”*

This proposed legislation, it is submitted, needs to be supported. It is the first attempt, since the discussion paper 65 (project No 47) (1998) and proposed *Unfair Contractual Terms Bill* (1998) to control exclusionary clauses. It is evident, from the proposed legislation, that exclusionary clauses, *per se*, are outlawed, unless, the supplier can show that the effect of the provision is drawn to the attention of the consumer, the provision must be in plain language and the consumer must have signified his/her acceptance. There is, therefore, a clear shift in onus away from the consumer, toward the supplier of goods or services.

#### **14.9 In Conclusion**

The law, as it relates to exclusionary clauses, is a very complex and voluminous topic, which encompasses various fields of law, especially, when one is to consider exculpatory or exclusionary clauses in medical contracts. During the climbing of this mountain and the course the research of this thesis took, it became evident that, as exclusionary clauses in medical contracts affects public interests; it is a worthy subject of study, research and discourse. When embarking on this course, it was important to find a factual solution to the question of whether exclusionary clauses in medical contracts ought to be declared invalid and what kind of mechanism should be put in place to control the abuse of these types of clauses, where attempts are made to exclude liability for negligence, even professional liability. Finding practical solutions averts unrealistic answers in the abstract, far removed from the real world. It is when one contextualises the law relating to exclusionary clauses in contract, for instance, in the area of medical contracts, that one realises how important it is to find a balance between competing sets of values, namely, freedom of contract which emphasizes the need for stability, certainty, and

predictability. But, it is equally important to realize that these values are not absolute and there comes a point where they face a serious challenge, especially, where these types of clauses are abused, to the detriment of the consumer. Exclusionary clauses in contracts are an internationally recognised practice. It was, therefore, necessary to do an analytical study of the principles of the law of contract as they are applied, in the different jurisdictions chosen for the research undertaken in this thesis. From the discourse in this thesis, it is evident that, while exclusionary clauses in the commercial world aide the free flow of transactions, nonetheless, in certain types of contracts, including exclusionary clauses in medical contracts, restrictions ought to be placed on the freedom to contract, as these types of contractual provisions affect public policy. A distinction ought, therefore, to be drawn between ordinary commercial contracts and medical contracts. Considerations of public policy, of which the law expressly takes cognisance, as is clear from the examination, in this thesis, of international, constitutional, delictual, medical law and ethics, contractual and statutory law, play a role in assessing the validity of exclusionary clauses in medical contracts. Just as there is tension, within International Law, with regard to, for example, trade rights as opposed to International Human Rights, so, in exclusionary clauses, there is tension between curbing these type of clauses from a humanitarian point of view, to the need for free and unrestricted trade. One of the significant factors influencing the validity/invalidity of these types of clauses in medical contracts is that of medical ethics, that, quite possibly, has no other parallel in any other area of human activity. Since the time of Hippocrates emphasis has been placed on medical ethics, which determines the standards of care and skill to be observed by health care providers. In turn, the patient not only has an expectation to be treated in that way, the patient has an inalienable right to such standards of care. Medical ethics, it is submitted, influence the *boni mores* or public policy.

Exclusionary clauses in medical contracts is an area of many legal interfaces, such as the interface between the law of contract and medical law and ethics, or that between constitutional law and the law of contract, or between foreign and international law and constitutional law. The Constitution underpins them all. The five areas of law that were chosen for the research undertaken with this thesis are considered, not only in terms of their own content, but, also, in terms of their interaction with one another. A study of same makes the concept of a legal system, within the different jurisdictions, more meaningful. It is especially the role which the Constitution plays, in South Africa, which gives one a greater understanding of the principles and values, expressed in the Constitution and how they impact on the use of exclusionary clauses in the law of contract. What also emerged during the research undertaken in this thesis is the fact that



the law is capable of refinement, growth and development. Herein lies hope for the positive change and growth and the possibility of remedying the flaws, often hardship, which exclusionary clauses brought with them. The time for change is now!