



A Critical Analysis of Exclusionary Clauses in Medical Contracts

By

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Declaration of Candidate

This research has not been previously accepted for any degree and is not being currently considered for any other degree at any other university.

I declare that this Dissertation contains my own work except where specifically acknowledged.

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Signed _____

Date December 2013



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Abstract

Exclusionary clauses in South Africa have thus far been interpreted narrowly by the South African Courts. It has been accepted that where a patient enters into a medical contract/agreement with a hospital that includes a clause excluding the hospital and its employees from any form of liability whether negligently or not, the patient has no form of recourse against the hospital for any damages caused except that caused by gross negligence; the hospital will be absolved of any form of liability. The term *caveat subscriptor* applies – “let the signer be aware” that he/she is bound by the agreement signed by him/her whether or not it was read and understood. The leading case in South Africa dealing with exclusionary clauses in medical contracts is *Afrox Healthcare Limited v Strydom*. Since that decision the Consumer Protection Act has come into existence. My research question involves determining the impact an exclusionary clause would have, when analysed in terms of the provisions of the Consumer Protection Act with particular reference to its applicability and enforcement in medical/hospital contracts. The *Afrox* case has in itself been a controversial decision, with many legal writers of the opinion that the principles laid down by the case need to be overturned as the judgement is not in line with public policy. It is argued that with the Consumer Protection Act in place, it can be assumed that exclusionary clauses in medical/hospital will no longer be valid. The Act is a step in the right direction towards patient/consumer protection and awareness.



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CHAPTER 1

INTRODUCTION

*“Exemption clauses that exclude liability for bodily harm in hotels and other public places have the effect, generally, of denying a claimant judicial redress, and would not pass Constitutional muster”*¹ Heaton–Nicholls J

The South African Common law system accepts the concept of freedom of contract, in that parties to a contract are free to decide on the terms, conditions and content of their contract to the exclusion of all others.² The concept of freedom of contract is well established in our Constitution,³ which enshrines the rights of all South Africans, and seeks to permeate democratic values of equality, dignity and freedom⁴ in all spheres and aspects, including contractual law.

Exemption clauses generally exclude liability of one of the parties in the contract, and while being unfair in theory, have thus far been accepted by the courts as clauses that are “entrenched” in our law.⁵ Despite such clauses being against public policy, creating unequal bargaining positions and generally being unreasonable by their very nature, they have thus far been established as part of the standard terms included in a contract. Our courts have been very reluctant to invalidate an exemption clause, and they are generally regarded as acceptable.⁶ In the majority of the instances the consumer is affected the most, as their rights are sufficiently curtailed by the exclusionary clause.⁷ They have no right of recourse against the other party, as in all other respects the contract is deemed to be valid and enforceable.

In the health care sector, whether private or public, exemption clauses are commonly used in admission forms and contracts, to exclude all liability including gross negligence of the health care practitioner, staff and employees of the health care establishment. The Supreme Court of Appeal⁸ has accepted that the Common law recognises a hospital’s liability can be excluded by way of an exemption clause for medical malpractice that results in death or physical injury, but the exclusionary clause may not extend to gross negligence.

Up until 2011 in South Africa, there existed no comprehensive body of laws which protected consumers against unfair terms and conditions like exclusionary clauses.⁹ While there were various industry specific legislation, it appeared as though this was still insufficient to protect

¹ *Naidoo v Birchwood Hotel* 2012 (6) SA 170 (GSJ) paras 52 and 54 at 182E-F and 182I

² AJ Kerr *The Principles of the Law of Contract* 5 ed (1998) 121

³ The Constitution of South Africa Act No 108 of 1996

⁴ Act 108 of 1996 (note 3 above) Section 7(1)

⁵ *Durban’s Water Wonderland (Pty) Ltd v Botha* 1999 (1) SA 982 (SCA); *Afrox Healthcare Limited v Strydom* 2002 (6) SA 21 (SCA)

⁶ *Durban’s Water Wonderland (Pty) Ltd v Botha* (note 5 above)

⁷ S Cohen and M Costa “Exemption Clauses” 2007 *The Professional Accountant* 4

⁸ *Afrox Healthcare Limited v Strydom* (note 5 above)

⁹ T Woker “Why the Need for Consumer Protection Legislation? A look at some of the reasons behind the promulgation of the National Credit Act and the Consumer Protection Act” 2010 *Obiter* 217

consumers in industries not specifically legislated.¹⁰ The Common law was applied to protect those industries, but even with the application of the Common law, contracts that fulfilled all legal requirements were valid and enforceable, and these included contracts that contained unfair and unjust conditions against the consumer. In such instances, the contracts never achieved the Common law objective of the “meeting of the minds”, with many consumers not understanding the contractual terms or not reading the fine print which almost always favoured the party that drafted the agreement.¹¹ The *caveat subscriptor* principle was regarded as “settled law” in that a person who signed the contract assented to the contents of the document.¹² It has been argued, and correctly so, that the *caveat subscriptor* principle is not only outdated for current society, but is appropriate for agreements and transactions concluded in “village markets” where people were aware of the manufacturer and were given sufficient time to examine such elementary products and services.¹³ In today’s fast paced society, even educated consumers may incur difficulties in interpreting contracts and legal clauses, and thus there exists a need to protect consumers.¹⁴

This position has changed considerably by the coming into existence of the Consumer Protection Act.¹⁵ The Act came into operation on the 1st April 2011 and applies to every transaction in the Republic unless exempted by the provisions of Section 5 of the Act. The definitions, which will be discussed in detail in the chapters to follow are wide enough to include service providers in the health care sector including health care professionals. The Act thus seeks to be a single comprehensive framework for consumer protection in the Republic.¹⁶ Thus far, it has been accepted that when a patient enters into a medical contract/agreement with a hospital that includes a clause excluding the hospital and its employees from any form of liability whether negligently or not, the patient has no form of recourse against the hospital for any damages caused, except damages caused by gross negligence; the hospital will be absolved of any form of liability. This position is however about to change, when evaluating exemption clauses against the Consumer Protection Act. In terms of the Act, the patient has a right to fair, just and reasonable conditions.¹⁷ Exemption of liability for gross negligence is strictly prohibited and unenforceable.¹⁸ The severity of the Consumer Protection Act is evident from the fact that many academic writers suggested that health care providers and establishments should be reviewing their current medical malpractice insurance in an effort to ensure that they have sufficient cover for liability.¹⁹

¹⁰ T Woker (note 9 above) 218

¹¹ T Woker (note 9 above) 227

¹² *Freddy Hirsch Group (Pty) Ltd v Chickenland (Pty) Ltd* 2010 (1) SA 8 (GSJ)

¹³ T Woker (note 9 above) 230

¹⁴ T Woker (note 9 above) 230

¹⁵ Consumer Protection Act No 68 of 2008

¹⁶ P Van den Heever “Impact of the Consumer Protection Act in the Health Care Context” (2012) 3 *De Rebus* 22, 22

¹⁷ Act 68 of 2008 (note 15 above) Section 48

¹⁸ Act 68 of 2008 (note 15 above) Section 51(3)

¹⁹ M Letzler “The Law of Contract, The Consumer Protection Act and Medical Malpractice Law” (2012) *De Rebus* 22, 27; MN Slabbert and MS Pepper “The Consumer Protection Act: No Fault liability of Health Care Providers” (2011) 101(11) *SAMJ* 800, 801

However the problem with gross negligence, is that the Act²⁰ does not define what gross negligence is, and in the medical context this could lead to grounds for litigious conflict especially since there is no distinction made in the Act as to what constitutes ordinary negligence and what constitutes gross negligence.²¹ It is submitted that this would now be the responsibility of the superior courts in the land to develop the distinction in more detail.

Strict liability law is not an alien concept, and is in fact enforced in countries like the United States as far back as the 1960's, Australia and the United Kingdom as far back as the 1980's.²²

It is intended to discuss the future existence of exemption clauses in the context of the Consumer Protection Act. This involves determining the impact an exclusionary clause would have, when analysed in terms of the provisions of the Consumer Protection Act.²³ It will be argued that with the Consumer Protection Act in place, it can be assumed that exclusionary clauses will no longer be valid in hospital contracts, and it would be impractical for them to be still applicable in certain respects. However application in theory, and application in practice are two very different concepts, and while the Act is forward-thinking its practicality in a South African context is questionable. Do we have the resources, the staff capacity and the ability to give effect to the statutory requirements? In some instances, it can be argued that we are not fully equipped to give effect practically to the sections of the Act.

The purpose of this dissertation is to:

1. Analyse exclusionary clauses in medical contracts;
2. Discuss in detail the leading cases dealing with exclusionary clauses;
3. Review foreign jurisdiction with regard to exclusionary clauses;
4. Discuss the Consumer Protection Act in so far as the provisions of the Act have a direct effect on the validity of exclusionary clauses;
5. Critique exclusionary clauses against all of the above, and provide a comprehensive discussion and opinion on the way forward;
6. Present a conclusion on whether the Consumer Protection Act effectively protects patients and proposals for reform.

The next chapter will be discussing the contractual and delictual relationship between the hospital/doctor and the patient. The chapter will be looking at how the contract comes into existence, and the applicable formalities.

²⁰ Act 68 of 2008 (note 15 above)

²¹ P Van den Heever (note 16 above) 24

²² MN Slabbert, B Maister, M Botes, and MS Pepper "The Application of the Consumer Protection Act in the South African Health Care Context: Concerns and Recommendations"(2011) *CILSA* 168, 182

²³ MN Slabbert, B Maister, M Botes, and MS Pepper (note 22 above) 182

CHAPTER 2

THE CONTRACTUAL/DELICTUAL RELATIONSHIP BETWEEN THE DOCTOR/HOSPITAL AND THE PATIENT DEFINED AND EXPLAINED

2.1 INTRODUCTION

A contract is formed when two or more parties have the same intention, comply with the legal requirements and agree to enter into an agreement with each other.²⁴ The person making the offer (offeror) usually puts forward a proposal, and with the acceptance of the offer by the offeree the agreement comes into existence.²⁵ Until the offer has been accepted no agreement/contract can come into existence and the acceptance cannot simply be an acceptance in the “mind of the offeree” but must be communicated to the offeror.²⁶ The contract establishes the manner and grounds upon which such contract is based upon.²⁷ In the health care context, it is necessary to determine the basis of the doctor/health care practitioner (for the purposes of this thesis the use of the words doctor/health care practitioner shall refer to the same person) patient relationship, as well as the hospital-patient relationship. In both instances the patient is “contracting” with different entities, and as far as offer and acceptance is applicable, it is important to understand which party makes the offer and which party accepts the offer.

2.2 THE NATURE OF THE RELATIONSHIP BETWEEN THE DOCTOR AND THE PATIENT – HOW DOES THE PATIENT ENTER INTO THE CONTRACT WITH THE DOCTOR (PRIVATE HEALTH SECTOR)?

A patient who consults a doctor in private practice enters into a contract with the doctor.²⁸ As a general rule a doctor in private practice does not have an obligation to treat each and every person that requests his service. There exists no legal duty for the doctor to accept a person as his/her patient.²⁹ It is submitted that the patient makes the offer by requesting the services of the doctor, and the doctor chooses to either accept this offer or not to treat the patient. The freedom to accept or reject a person as a patient is qualified in three respects, firstly a doctor may not refuse to attend to a person where such refusal is unconstitutional³⁰ or where a person requires emergency medical treatment or assistance, or lastly once a doctor has agreed to accept the offer to treat the patient, the doctor may not unilaterally abandon the patient, if such abandonment is harmful to the patient.³¹ It is submitted that in accepting the offer to treat the patient, the doctor would have to advise the patient before of all terms and conditions of the “contract”. Should the contract include a clause which excludes gross

²⁴ AJ Kerr (note 2 above) 41

²⁵ RH Christie *The Law of Contract* 4 ed (2001) 32

²⁶ RH Christie (note 25 above) 76

²⁷ P Carstens & D Pearmain *Foundational Principles of South African Medical Law* 1 ed (2007) 308

²⁸ MA Dada & DJ McQuoid-Mason eds *Introduction to Medico-Legal Practice* 1 ed (2001) 5

²⁹ SA Strauss *Doctor, Patient and the Law* 3 ed (1991) 3

³⁰ DJ McQuoid-Mason & MA Dada *A-Z of Medical Law* 1 ed (2011) 166

³¹ SA Strauss (note 29 above) 3

negligence of the doctor, is the patient entitled to accept the contract as is, or insist on the removal of that condition? This will be discussed in more detail in the chapters to follow.

2.3 THE CONTRACTUAL RELATIONSHIP BETWEEN THE HOSPITAL AND THE PATIENT (PUBLIC AND PRIVATE HEALTH SECTOR)

A patient who presents himself for treatment at a hospital enters into a contractual relationship with the hospital authority. Even though the hospital may be held liable for the negligence of its employees through vicarious liability, the employees may also be liable in their personal capacity.³² It is submitted that the hospital-patient contract is not one that always fulfils the requirement that there is a “meeting of the minds” – in many instances the patient has no other option but to enter into the contract with the hospital as the patient requires the services of the hospital’s health care practitioner. The contractual terms and conditions may not be in their favour or even to their advantage, and in the past patients were bound to such contracts. It is submitted that the contracts generally included exclusionary clauses, which excluded gross negligence of the health care practitioners, and this was regarded as acceptable by the courts.³³

With that said though, it is necessary to distinguish between a hospital in the public health sector and one in the private health sector. A hospital in the private health sector would cater largely for those individuals who are on a medical aid scheme or those individuals who are able to pay cash for their treatment at the hospital. On the other hand, a hospital in the public sector differentiates between the patients treated by applying the “means test” to determine whether free health treatment would be offered to the patient or whether the patient would have to be charged a nominal fee. Carstens and Pearmain³⁴ are of the opinion that the contractual relationship between the hospital in the public health sector and the patient is far more complex than the above explanation suggests. The complexity of the relationship arises from the Constitutional obligation of the State towards the progressive realisation of the right afforded by Section 27(1) of the Constitution³⁵ in terms of which everyone is afforded the right of access to health care services. While both the public health care providers and the private health care providers have to ensure that the right of access to health services is within their budgetary constraints to ensure realisation of the right, it is submitted that the obligation is a heavier one for the public health care sector. This is because the majority of South Africans attend a public health care facility, and in this way rely on its services for health care. A report published in June 2011 presented a bleak picture of at least 84% of South Africans living without medical aid, which in turn meant that of the 48 million South

³² MA Dada & DJ McQuoid-Mason (note 28 above) 5

³³ *Durban’s Water Wonderland (Pty) Ltd v Botha* (note 5 above); *Afrox Healthcare Limited v Strydom* (note 5 above)

³⁴ P Carstens & D Pearmain (note 27 above) 379

³⁵ Act 108 of 1996 (note 3 above) Section 27(1)

Africans, only 3.5 million have medical aid.³⁶ This bleak picture is nothing short of a health crisis.

Carstens and Pearmain³⁷ argue that to suggest a contractual relationship between a patient and a public health care provider exists, would amount to a purchase and sale agreement, which would in turn affect the legal and social responsibilities of the parties. A contract of this nature would however depend on the intention of the parties concerned, as not every contract amounts to a commercial transaction. In *Administrator, Natal v Edouard*³⁸ the respondents requested a tubal ligation when their third child was born. The tubal ligation was not done and the respondent gave birth to her fourth child a year later. The respondents sued for damages on the basis of breach of contract. The court accepted that the consent form signed by the parties amounted to an agreement between them. Not only was there verbal consent, but there was also written consent which confirmed the intention of the respondents.³⁹

Each province in South Africa currently has its own provincial legislation that governs the right of access of its users to health care services, though none of them specifically make mention of the existence of any contracts between health care providers and the patients.⁴⁰ Section 12(c) of the Eastern Cape Provincial Act⁴¹ provides that health care users are entitled to access to health care services within the budgetary limits provided.⁴² Carstens and Pearmain state that the provisions of the Act do not emphasise a contractual relationship, because the terms and conditions of access to the health services are in terms of the Regulations to the Act.⁴³ Similarly an objective of the KwaZulu-Natal Health Act⁴⁴ is to give effect to the progressive realisation of the right of access in the Constitution,⁴⁵ and even provides that the health care user has a right of access to available primary health care services.⁴⁶ The Gauteng District Health Services Act⁴⁷ provides for primary health care services to be dealt with by the municipalities.⁴⁸ The Act does not make mention of contractual obligations between the health care providers and the state.

2.4 NATURE OF THE CONTRACT (PUBLIC AND PRIVATE SECTORS)

The doctor-patient contract is regarded as an “implied contract” in terms of which the doctor accepts and agrees to diagnose the patient’s complaint and treat the patient in accordance

³⁶ Z Mtshiya “84% of South Africans have No Medical Aid Cover - 29/06/11” Available at <http://www.bhfglobal.com/84-south-africans-have-no-medical-aid-cover-290611> (Accessed 26 October 2013)

³⁷ P Carstens & D Pearmain (note 27 above) 382

³⁸ *Administrator, Natal v Edouard* 1990 (2) All SA 374 (A)

³⁹ *Administrator, Natal v Edouard* (note 38 above) page 376

⁴⁰ P Carstens & D Pearmain (note 27 above) 396

⁴¹ Eastern Cape Provincial Act No 10 of 1999

⁴² P Carstens & D Pearmain (note 27 above) 396

⁴³ P Carstens & D Pearmain (note 27 above) 396-397

⁴⁴ KwaZulu Natal Health Act No 4 of 2000

⁴⁵ Act 4 of 2000 (note 44 above) Section 2(a)

⁴⁶ Act 4 of 2000 (note 44 above) Section 29(2)

⁴⁷ The Gauteng District Health Services Act No 8 of 2000

⁴⁸ P Carstens & D Pearmain (note 27 above) 401

with generally acceptable medical procedure.⁴⁹ Where a doctor agrees to examine a person this does not necessarily mean that a contractual obligation immediately comes into existence and the doctor has undertaken to treat the patient. The doctor may decide to refer the patient to a specialist or another professional colleague.⁵⁰ With a hospital-patient relationship the patient presents himself for treatment and the hospital accepts the patient, only if the patient has been referred to the hospital by a clinic or a practitioner. The patient would be bound by the terms and conditions of any contract that he/she signs with the hospital authority. It is submitted that, should a patient read the contract and not agree with the terms and conditions, then at that stage they have the opportunity to refuse to present themselves for treatment. In practice though it seems that many patients sign the contract without reading the terms and conditions, due to the urgency of the circumstances. A doctor, whether in private practice, or employed by a hospital would never guarantee that he/she would cure a patient completely of his/her illness, unless he/she specifically says so.⁵¹ It is submitted that the reason for not guaranteeing the patient that he/she would be definitely cured, is because this confirmation may result in the doctor opening the floodgates of litigation for himself/herself and his/her practice. A doctor would always act in the best interests of the patient, and while the doctor's objective would be to cure the patient, should the doctor guarantee a cure and fail to deliver, he/she could be liable for damages, for failure to fulfil what has been provided.

2.5 CONTRACTUAL FORMALITIES IN THE HOSPITAL/PATIENT RELATIONSHIP (PUBLIC AND PRIVATE)

In the event of a contractual agreement between the hospital and the patient being established, the following general contractual formalities between a health care provider and the patient would apply:⁵²

- All the essential terms of the contract must be agreed upon. We have already discussed the concept of offer and acceptance between the hospital and the patient.
- The parties must be legally able to enter in the contract (18 years and above), and in the event of him/her being under the legal age, a parent or guardian must consent on their behalf.⁵³

⁴⁹ K Moodley *Medical Ethics, Law and Human Rights – A South African Perspective* 1 ed (2011) 113 – 114 ; MA Dada & DJ McQuoid-Mason (note 28 above) 5

⁵⁰ MA Dada & DJ McQuoid-Mason (note 28 above) 5

⁵¹ MA Dada & DJ McQuoid-Mason (note 28 above) 5

⁵² R Bregman "Contracts – A Legal Guide" Available at

<http://www.roylaw.co.za/home/article/contractsalegalguide/pageid/your-rights> (Accessed 1 July 2013)

⁵³ This requirement should be read with Section 129 of the Childrens Act No 38 of 2005 which provides in Section 129(2) and (3) that a child may consent to his/her own medical treatment of his/her own surgical operation if the child is over the age of 12, and if the child is of sufficient maturity and has the mental capacity to understand the benefits, risks, social and other implications of the treatment or operation. An additional requirement for the surgical operation is that the child must be duly assisted by a parent or guardian. The parent, guardian or care-giver of the child is expected to consent to the medical treatment if the child is under the age of 12 years, or over the age of 12 years but is of insufficient maturity or is unable to understand the benefits, risks or social implications of the treatment (Section 129 of Act 38 of 2005). Only a parent or guardian may consent to a surgical operation on the child if he/she is under the age of 12 years, or is over the age of 12 years but of

- The terms of the contract must be legal.
- The patient must have legal capacity to enter into the contract (not be mentally incapable).

Apart from the written formalities of the contract, Carstens and Pearmain⁵⁴ have submitted a number of tacit or implied terms which can be inferred from the hospital/patient contract even though it may not be specifically stated in the contract:

- Every term in the contract must be clear and precise.
- The hospital is expected to take all reasonable steps to ensure that its employees are properly qualified and trained to deal with the patients.
- The patient should be treated with a reasonable degree of professional skill, and the standard of care used should satisfy both legal and ethical requirements.
- All decisions taken by the health care authorities in respect of the patient must be lawful, reasonable and fair, and should always be taken after the patient has consented to the procedure.
- The patient's consent should be obtained prior to the treatment.
- Should the treatment be of an experimental nature, the patient must be clearly informed of this and should be given time to decide whether he/she wants to continue with the treatment or not.
- The health records of the patient should be kept confidential
- Unless expressly stated, the health care authority does not guarantee to cure the patient
- The health care authorities shall always act in the best interests of the patient
- The health care authority cannot abandon the patient, and in the event of not being able to treat the patient, must refer the patient to an alternate health care provider who can assist the patient. A patient would be abandoned if a health care provider ceases all treatment whilst in the midst of assisting the patient, and fails to refer the patient to another health care practitioner to continue with the treatment.⁵⁵

In the absence of a formal contract between the parties, the "relationship" between the parties would arise primarily from legislation, namely the Constitution⁵⁶ which provides that everyone has a right of access to health care services.⁵⁷

2.6 THE DELICTUAL RELATIONSHIP BETWEEN THE HOSPITAL AND THE PATIENT (PUBLIC AND PRIVATE)

The law of delict falls under the category of private law and is also known as the law of obligations.⁵⁸ A delict is defined as the act of a person which causes harm to another person

insufficient maturity to understand the benefits, risks or social implications of the operation (Section 129 (5) of Act 38 of 2005).

⁵⁴ P Carstens & D Pearmain (note 27 above) 362-365

⁵⁵ DJ McQuoid-Mason "Medical Ethics and the Payment of Fees before Treatment" (2011) *SAMJ* 101(11)

⁵⁶ Act 108 of 1996 (note 3 above)

⁵⁷ Act 108 of 1996 (note 3 above) Section 27(1)(a)

⁵⁸ J Neethling, JM Potgieter, PJ Visser *The Law of Delict* 5 ed (2006) 3

in a wrongful and culpable manner. For a person to rely on the law of delict, five requirements have to be fulfilled in order to prove liability, these are: an act, wrongfulness, fault, harm and causation. There is a distinction between an action based on the law of contract and that based on the law of delict.⁵⁹ The remedy for a breach of contract would be either enforcement, fulfilment or execution of a contract, while the remedy for a claim for damages would be damages for the harm caused.⁶⁰ Similarly a loss in delict is calculated differently from a loss in contract – in contract the loss is calculated by looking at what the position of the plaintiff would have been, but for the breach of contract whereas, in delict the loss is calculated by looking at the position of the plaintiff but for the wrongdoing.⁶¹ Contract law only deals with pecuniary loss, whereas the law of delict deals with both pecuniary and non-pecuniary loss.

A brief description of each element follows:

- 2.6.1 Act – An act is caused by the conduct of a human being which can either be a voluntary act or an omission.⁶² In *Stoffberg v Elliot*⁶³ the court noted that a person who agrees to be admitted to a hospital does not submit himself/herself to any treatment referred by the doctor. Consent is still a necessity, and failure to obtain the consent of the person could result in the unlawful assault of his/her body.
- 2.6.2 Wrongfulness – The act must have resulted in a harmful consequence.⁶⁴
- 2.6.3 Fault – There must be an element of fault proven, which can either be in the form of intention or negligence.⁶⁵ For the purposes of hospital liability, negligence rather than intention is more likely to be proven. This is because it would be difficult to prove that the harm was caused by the intentional conduct of the health care provider. However in applying that the harm could be caused by the negligent conduct of the health care provider, it implies an expectation of a standard of care. The test used is the reasonable person test, as noted in *Kruger v Coetzee*,⁶⁶ in terms of which a two-pronged test was formulated to determine whether liability arises, as follows:
1. Would a reasonable person in the position of the defendant have foreseen the possibility of the harm occurring? and
 2. Would the reasonable person have taken steps to prevent the harm from occurring?

In the event of both of the above questions being answered in the affirmative, the defendant's conduct would be regarded as negligent.

⁵⁹ J Neethling, JM Potgieter, PJ Visser (note 58 above) 6

⁶⁰ J Neethling, JM Potgieter, PJ Visser (note 58 above) 6

⁶¹ P Carstens & D Pearmain (note 27 above) 523-524

⁶² J Neethling, JM Potgieter, PJ Visser (note 58 above) 23

⁶³ *Stoffberg v Elliot* 1923 CPD 148

⁶⁴ J Neethling, JM Potgieter, PJ Visser (note 58 above) 31

⁶⁵ J Neethling, JM Potgieter, PJ Visser (note 58 above) 10

⁶⁶ *Kruger v Coetzee* 1966 (2) SA 428 (A) 430

2.6.4 Causation – There must be a causal link between the conduct and the harm that occurred, and there must be no *novus actus interveniens* which resulted in a break in the chain of events leading to the harm.⁶⁷

In the medical law context, Carstens and Pearmain⁶⁸ are of the opinion that claims in delict are largely based on the imbalance of power between the health care provider and the patient. The patient is described as being in a much more vulnerable position than the health care provider for the following reasons⁶⁹:

1. The health care provider boasts a far more extensive knowledge of the medical procedures in comparison to the patient, and as a result the patient is less likely to challenge the opinion of the health care provider.
2. The success or failure of the patient's treatment is largely dependent on the level of skill and expertise of the health care provider, which the patient is unable to challenge or determine at any stage of treatment.
3. Services by the health care provider are sometimes rendered when the patient is already sick, weak or sometimes even unconscious, making it difficult if not impossible for the patient to refuse or debate the treatment.

It is submitted that the above opinion is correct. The patient will always be in a vulnerable position in comparison to the doctor due to his/her lack of knowledge, skill and understanding of the medical concepts and procedures. In addition, the patient is expected to sign an admission form with legal terms and concepts at a time when he/she may not be in "right frame of mind" to do so, and many would sign the form not knowing the legal ramifications of his/her signature.⁷⁰

2.7 THE HOSPITAL'S GENERAL DUTIES TO ITS PATIENTS

A hospital's duties towards its patients can be derived from the general rights derived from Chapter 2 of the Bill of Rights of the Constitution of South Africa.⁷¹ These include the following: -

- Section 9: The right to equality – which means that every patient admitted to a hospital should be treated equally;
- Section 10: The right to dignity and to have such dignity respected and protected – every patient should be treated with dignity and respect;
- Section 12 (2): The right to bodily and psychological integrity, which includes the right :
 - a) To make decisions concerning reproduction;
 - b) To security in and control over his/her body; and

⁶⁷ J Neethling, JM Potgieter, PJ Visser (note 58 above) 159

⁶⁸ P Carstens & D Pearmain (note 27 above) 489

⁶⁹ P Carstens & D Pearmain (note 27 above) 489

⁷⁰ *Afrox Healthcare Limited v Strydom* (note 5 above)

⁷¹ Act 108 of 1996 (note 3 above)

c) Not to be subjected to medical or scientific experiments without their informed consent.

Similarly the National Health Act⁷² protects patients by stating in Section 18(1) that every patient has the right to lay a complaint against a health care establishment.

The Department of Health introduced the National Patients' Rights Charter⁷³ to ensure that there was a realisation to the right of access to health care as granted by Section 27 of the Constitution of South Africa,⁷⁴ and in doing so brought about certain responsibilities that hospital/doctors (whether in private or public health) owed to their patients. The Charter does not specifically mention that both the private and public health care providers are bound by it, but this can be implied from the Constitution⁷⁵ and the National Health Act,⁷⁶ which applies equally to all individuals.

The Charter provides as follows:

Every patient has the right to:⁷⁷

- A healthy and safe environment;
- Access to safe healthcare;
- Emergency care in life-threatening situations;
- Confidentiality and privacy;
- Be treated with courtesy and consideration by all staff;
- Be informed about his/her illness/condition and treatment, so as to be in a position to give informed consent;
- Exercise choice in healthcare services;
- Participate in decision-making that affects his/her health;
- Be referred for a second opinion;
- Continuity of care;
- Complain about health services;
- Be treated by a named healthcare provider;
- Refuse treatment or information about his/her illness.

It is the responsibility of both the private practitioner, and the state doctor to adhere to the above general duties owing to their patients.

2.8 THE PATIENT'S DUTIES

Patients have a responsibility to ensure that they are available for treatment/consultation by either the doctor or the hospital. In the event of a patient not presenting himself/herself for

⁷² The National Health Act No. 61 of 2003

⁷³ Department of Health – Patient Rights Charter Available at <http://www.justice.gov.za/vc/docs/policy/Patient%20Rights%20Charter.pdf> (Accessed 13 July 2013)

⁷⁴ Act 108 of 1996 (note 3 above)

⁷⁵ Act 108 of 1996 (note 3 above)

⁷⁶ Act 61 of 2003 (note 72 above)

⁷⁷ Department of Health (note 73 above)

treatment/consult, he/she could be held liable for lost fees.⁷⁸ It is submitted that “lost fees” result due to the doctor having allocated a specific appointment time for the client. By not presenting himself/herself for the treatment and not informing the doctor in advance of his/her failure to attend the booked treatment/consultation, the patient may become responsible for the treatment/consultation fee (or a portion of the fee) that the doctor would have charged, had the patient made himself/herself available for treatment. The writer submits that the health care provider should, ethically, be applying lost fees with caution, and after establishing the reason for the no show by the patient.

In addition, the patient also has a number of responsibilities as set out in the National Patients’ Rights Charter as follows:

Every patient or client has the responsibility to:⁷⁹

- Advise the health care providers of his/her wishes with regard to his/her death;
- Comply with the prescribed treatment or rehabilitation procedures;
- Enquire about the related costs of treatment and/or rehabilitation and to arrange for payment;
- Take care of health records in his/ her possession;
- Take care of his/her health;
- Care for and protect the environment;
- Respect the rights of other patients and health providers;
- Utilise the health care system properly and not abuse it;
- Know his/her local health services and what they offer;
- Provide health care providers with the relevant and accurate information for diagnostic, treatment, rehabilitation or counselling purposes.

2.9 THE DUTY TO TREAT, COMPLETE TREATMENT AND DUTY OF CARE

Doctors do not have a legal duty to treat each and every person who enter their practice.⁸⁰ Legally, there is no liability for an omission to act unless there is a duty to act, or public policy regards the failure to act as unlawful.⁸¹ The same however does not apply to doctors who are employed by a hospital, as state doctors are often bound by their contracts of employment and may not refuse to treat any patient, unless such refusal is based on a conscientious objection.⁸² Our Constitution⁸³ recognises in Section 15 (1) that every person has the freedom of conscience, religion, thought, belief and opinion, and in the event of a state doctor refusing to treat a patient on these grounds, it may be regarded as acceptable. It is submitted that this would also depend on the availability of other doctors and in the event of there being no other doctor on duty at the time, the state doctor may be compelled to attend to the patient. Also important in respect of the duty to treat is the context of emergency

⁷⁸ MA Dada & DJ McQuoid-Mason (note 28 above) 6

⁷⁹ Department of Health (note 73 above)

⁸⁰ Department of Health (note 73 above)

⁸¹ K Moodley (note 49 above) 114

⁸² K Moodley (note 49 above) 114

⁸³ Act 108 of 1996 (note 3 above)

situations, in terms of which both private and state doctors have both a legal and an ethical obligation to attend to the patient.⁸⁴ Both Section 27(3) of the Constitution⁸⁵ and Section 5 of the National Health Act⁸⁶ provide that no person may be refused emergency treatment. An “emergency” has been described in the *Soobramoney*⁸⁷ case as a “dramatic, sudden situation or event which is of passing nature in terms of time and not a chronic terminal illness.”

Once a doctor has accepted a person as his/her patient, and has agreed to diagnose and treat the patient, the doctor has a legal obligation to ensure that he/she continue with the treatment until it has been completed unless the following occur:⁸⁸

1. The doctor has referred the patient to another practitioner or specialist;
2. The doctor has given the patient sufficient instructions for treatment;
3. The patient has been cured;
4. The patient refuses any further treatment, and legally is capable of withdrawing his/her consent;
5. The doctor has decided to discontinue practice and has advised the patient of his/her intention to stop practising, and may even refer the patient to another practitioner to continue with the treatment.

When a doctor accepts a person as his/her patient, and when such patient agrees to be treated at a hospital there is a duty of care owed to the patient.

2.10 CONCLUSION

In the private health care sector, a patient makes an offer to enter into a contract with a doctor, when he/she consults a doctor with the view to be treated by that doctor. The doctor can choose to accept the person as his/her patient. However on acceptance of the patient, the doctor has a dual legal and ethical duty not to abandon the patient. A patient who presents himself/herself for medical treatment at a hospital (whether public or private) enters into a contractual relationship with the hospital. A patient who has suffered harm can choose to claim in either contract or delict. The remedy for contractual breach would be to either enforce, fulfil or execute the contract. The remedy for a delictual breach would be to claim in damages for the harm caused. A patient has an ethical duty responsibility towards the health care provider. The next chapter will be focusing on exclusionary clauses; how they are defined and interpreted in our law.

⁸⁴ Act 61 of 2003 (note 72 above) Section 5; Act 108 of 1996 (note 3 above) Section 27(3) ; Section 5.1.13 and Section 5.7.1 of the Health Professions Council of South Africa – Guidelines for Good Practices in the Health Care Professions (Booklet Number 1) Available at http://www.hpcsa.co.za/downloads/conduct_ethics/rules/generic_ethical_rules/booklet_1_guidelines_good_prac.pdf (Accessed 25 November 2013)

⁸⁵ Act 108 of 1996 (note 3 above)

⁸⁶ Act 61 of 2003 (note 72 above)

⁸⁷ *Soobramoney v Minister of Health KwaZulu Natal* 1998 (1) SA 765 (CC) paras 21 at 774E

⁸⁸ MA Dada & DJ McQuoid-Mason (note 28 above) 7; K Moodley (note 49 above) 114 - 115

CHAPTER 3

DEFINING EXCLUSIONARY CLAUSES AND THE LEGAL AND ETHICAL EFFECT OF SUCH CLAUSES

3.1 INTRODUCTION

An exclusionary clause is a clause that “excludes, alters or limits the liability of one of the parties” which normally follow in a contract.⁸⁹ Most standard contracts have exclusionary clauses, which are also referred to as “exemption clauses,”⁹⁰ “exception clauses,”⁹¹ “disclaimers,”⁹² “indemnity clauses”⁹³ and “exculpatory clauses.”⁹⁴ Generally, an exclusionary clause results in the exclusion of liability for the party in whose favour the contract is drafted. Against the backdrop of the health care sector, an exclusionary clause is mainly used in a contract between the doctor and the patient, or the hospital and the patient in terms of which the doctor/hospital seek to protect either the doctor personally or the staff/agents of the hospital from any personal liability arising from negligence of the doctor, or staff of the hospital or its agents, which could cause the patient harm, serious bodily injury or even death.⁹⁵

The South African courts tend to only exclude liability for harm, if the product or service was defective, and will interpret the exemption clause in favour of the person who had been harmed if it appears that the clause itself is unclear or ambiguous.⁹⁶ In *Naidoo v Birchwood Hotel*⁹⁷ the plaintiff suffered serious bodily injuries when a steel gate fell on top of him while at the defendant’s premises. The defendant sought to escape liability by relying on a disclaimer at the hotel premises. The court held that in terms of public policy, enforcing the exemption clause would amount to a decision that was “unfair and unjust.”⁹⁸ The court further held that one could not blindly rely on the notion of freedom of contract, as this does not supercede the right of all individuals to have access to the courts. Historically though, courts have held in favour of exclusionary clauses on the basis that the person signing the contract accepts all conditions in the contract that has been signed.⁹⁹

⁸⁹ PN Stoop “The Current Status of the Enforceability of Contractual Exemption Clauses for the Exclusion of Liability in the South African Law of Contract” (2008) 20 *SA Merc Law LJ* 496, 496

⁹⁰ PN Stoop (note 89 above) 496

⁹¹ PN Stoop (note 89 above) 496

⁹² PN Stoop (note 89 above) 496

⁹³ M Letzler (note 19 above) 22

⁹⁴ M Letzler (note 19 above) 22

⁹⁵ PN Stoop (note 89 above) 496

⁹⁶ MA Dada & DJ McQuoid-Mason (note 28 above) 96

⁹⁷ *Naidoo v Birchwood Hotel* (note 1 above) paras 53 at 182G-I

⁹⁸ *Naidoo v Birchwood Hotel* (note 1 above) paras 53 at 182G-I

⁹⁹ *Durban’s Water Wonderland v Botha and Another* (note 5 above); *Afrox Healthcare Limited v Strydom* (note 5 above)

3.2 THE LAW OF CONTRACT AND EXCLUSIONARY CLAUSES

The law of contract has historically accepted that when a person signs a contract he is bound by the ordinary meaning and effect of the words in that contract.¹⁰⁰ This allows for freedom of contract and would apply whether they have in fact read the contract and understood it, or not. Otherwise known as the *caveat subscriptor* rule, the basis of the principle stems from the doctrine of quasi-mutual assent.¹⁰¹ The question is basically whether the other party can be reasonably entitled to assume that the signatory read the contract, was aware of its terms, and consented to being bound by it.¹⁰² In *George v Fairmead (Pty) Ltd*¹⁰³ the court held that when a party signs a contract, his/her signature means that he/she has assented to the conditions of the contract, and in this case the hotel guest was held to be bound by the hotel register clause which he had not read. Most standard contracts contain an exclusionary clause which, while introducing both parties to the exclusion of liability, will usually be in favour of one of the parties to the contract. Theoretically, consensus and the freedom to contract is vital for the contracting parties in the contract, but often these principles are not applied in practice.¹⁰⁴ When the “harmed” party institutes an action on the basis of the contract, the onus of proof lies on the plaintiff to prove the terms of the contract which could prove more difficult for the plaintiff. Christie is of the opinion that when the *caveat subscriptor* rule is invoked, there is no true consensus between the parties, but rather a quasi-mutual assent.¹⁰⁵ It is submitted that such opinion is correct. A meeting of the minds would imply that both parties to the contract have agreed with each other and on every term of the contract. *Caveat Subscriptor* literally means “let the signer beware” – why would this be a necessity if all the terms are transparent and known to the parties of the contract?

In examining the enforceability of exclusionary clauses in contracts, consensus, public policy and the interpretation of the contract are important components which the courts assess in determining the validity of the contract.¹⁰⁶

3.2.1 Consensus

Consensus refers to a subjective agreement between the parties in a contract.¹⁰⁷ Consensus relates to two aspects – (1) both parties must be aware of their intention to be bound by the contract, and (2) both parties must be aware of the obligations created by the contract.¹⁰⁸ A lack of consensus could result in the contract being declared null and void. When a

¹⁰⁰ *Burger v Central SAR* 1903 TS 571 page 578

¹⁰¹ RH Christie (note 25 above) 200

¹⁰² RH Christie (note 25 above) 200

¹⁰³ *George v Fairmead (Pty) Ltd* 1958 (2) SA 465 (A) page 472

¹⁰⁴ PN Stoop (note 89 above) 497

¹⁰⁵ RH Christie (note 25 above) 203

¹⁰⁶ RH Christie (note 25 above) 203

¹⁰⁷ Farlex – The Free Dictionary Available at <http://www.thefreedictionary.com/consensus> (Accessed 15 July 2013)

¹⁰⁸ D Bhana, E Bonthuys, M Nortje *Students Guide to the Law of Contract* 2 ed (2009) 24

contracting party signs a contract he/she is often “plagued” by the *caveat subscriptor* rule in that he/she is bound by the terms of the contract irrespective of whether he/she read it or not.¹⁰⁹ There are certain instances when the *caveat subscriptor* rule is relaxed. These include: where the document is complex and public policy would have expected the contract to be explained to the client,¹¹⁰ or where the headings in the contract are misleading, or where one party is illiterate. The lack of consensus could pertain to a specific clause in the agreement, or alternatively to the entire agreement. Consensus obtained through “improper” means either by misrepresentation, duress or undue influence could result in the entire contract being rescinded.¹¹¹

3.2.2 Public Policy

An exclusionary clause can be regarded as null and void if it is held to be contrary to public policy by the courts. Public policy is constantly evolving and is never static,¹¹² but the core of it remains steadfast and based on the principles and values enshrined in the Bill of Rights of our Constitution.¹¹³ Exemption clauses that are struck down because they are contrary to public policy, include those which exclude any liability for fraud, or any form of intentional conduct that results in a breach.¹¹⁴ Exemption clauses can also be interpreted narrowly, in terms of which the court would determine the liability applicable in the absence of the exemption clause. The least amount of blameworthiness would then be applied.¹¹⁵ In *Drifters Adventure Tours CC v Hircock*¹¹⁶ the respondent was injured in an accident that resulted from the negligent conduct of the appellant’s employee. The appellant sought to escape vicarious liability on the grounds of the exemption clause that was signed by the respondent. The court held that, the exemption clause which formed the core of the case, was ambiguous in its meaning, and the clause did not, from its meaning, exclude liability for negligent driving on the public roads. The court reinforced the *contra proferentum* rule, in terms of which the language of an exclusionary clause is of importance. If the language is clear and unambiguous, it is applicable, however if it is ambiguous it is construed against the *proferens*.¹¹⁷ The appeal was dismissed.

3.3 THE LAW OF DELICT AND EXCLUSIONARY CLAUSES

A patient who consults a doctor or a hospital for treatment does not only enter into a contractual relationship with the entity, but a reciprocal duty of care arises by the

¹⁰⁹ *George v Fairmead* (note 103 above) page 472 - 473

¹¹⁰ *Davids en Andere v ABSA Bank Bpk* 2005 (3) SA 361 (C) paras 24 at 371F-H

¹¹¹ PN Stoop (note 89 above) 501

¹¹² *Stembridge v Stembridge* 1998 2 All SA 4 (D) page 15

¹¹³ Act 108 of 1996 (note 3 above) Chapter 2

¹¹⁴ PN Stoop (note 89 above) 502

¹¹⁵ RH Christie (note 25 above) 214 - 215

¹¹⁶ *Drifters Adventure Tours CC v Hircock* 2007 (2) SA 83 (SCA)

¹¹⁷ *Drifters Adventure Tours CC v Hircock* (note 116 above) paras 13 at 88G-H

doctor/hospital to the patient.¹¹⁸ In terms of the Declaration of Geneva¹¹⁹ a doctor pledges his/her life to the service of humanity, and declares that the health of the patient would be his/her first consideration. Further, in terms of the Hippocratic Oath¹²⁰ every doctor, on admission to the medical profession, takes an oath to always make decisions which would be to the benefit of the patient and act in the best interests of the patient. These Declarations and Oaths stress the importance of the duty and standard of care which doctors owe to their patients. However, when doctors act in a negligent or careless manner, this may not only result in a breach of contract but there may also be liability in delict due to the damages or harm caused to the patient.¹²¹ In this instance the patient would have a choice whether to claim in contract or delict, or alternatively or cumulatively. This is referred to as a concurrence of actions.¹²²

The three most important delictual actions are the *actio Legis Aquiliae*, the *actio iniuriarum* and the action for pain and suffering as follows:¹²³

Actio Legis Aquiliae: The *actio legis aquilae* action can be instituted to claim damages for financial loss caused by culpable conduct. The right to claim from the wrongdoer can be transferred to another person, enabling him to recover the amount from the wrongdoer.¹²⁴

Actio iniuriarum: The *actio iniuriarum* is used to claim for the impairment of one's personality rights. The purpose of this action is to compensate for the intentional injury to one's bodily and mental integrity and reputation. Because this action is bound to the person of the injured party, it cannot be ceded to another.¹²⁵

Action for pain and suffering: Where the impairment of a person's personality was caused by negligent conduct, this action may be instituted for the recovery of satisfaction for pain and suffering. As the amount of satisfaction is for the personal benefit of the injured party, the action cannot be ceded to a third party.¹²⁶

The *Actio Legis Aquiliae* and the *actio iniuriarum* concur where an injury to personality (eg insult) also causes patrimonial loss which results in medical and hospital expenses. The plaintiff patient would then institute an action based on the *actio iniuriarum* for satisfaction and the *actio Legis Aquiliae* for the actual cost of the expenses.¹²⁷

¹¹⁸ H Lerm "Exclusionary Clauses in Medical Contract Revisited" 2011 (74) *THRHR* 47, 56

¹¹⁹ Declaration of Geneva (1948) Adopted by the General Assembly of the World Medical Association at Geneva, Switzerland 1948. (Revised 06 June 2002). Available at <http://www.cirp.org/library/ethics/geneva/> (Accessed online 31 July 2013)

¹²⁰ The Hippocratic Oath Available at <http://nktiuro.tripod.com/hippocra.htm> (Accessed online 31 July 2013)

¹²¹ H Lerm (note 118 above) 56; T Naude and G Lubbe "Exemption Clauses – A Rethink occasioned by *Afrox Healthcare Limited v Strydom*" (2005) *SALJ* 441, 456

¹²² J Neethling, JM Potgieter, PJ Visser (note 58 above) 238

¹²³ J Neethling, JM Potgieter, PJ Visser (note 58 above) 238 - 242

¹²⁴ J Neethling, JM Potgieter, PJ Visser *Neethlings Law of Personality* 1 ed (2005) 65-68

¹²⁵ J Neethling, JM Potgieter, PJ Visser (note 58 above) 11 - 14

¹²⁶ J Neethling, JM Potgieter, PJ Visser (note 58 above) 15

¹²⁷ J Neethling, JM Potgieter, PJ Visser (note 124 above) 67-68

The *actio Legis Aquiliae* and the action for pain and suffering concur where, in addition to the pain and suffering, patrimonial damages arise such as medical expenses.¹²⁸

The *actio iniuriarum* and the action for pain and suffering concur in that both may be used for wrongful and intentional infringement of physical or mental integrity. Neethling and Potgieter cite Van Der Merwe and Olivier, who are of the opinion that the two actions cannot concur, and use the example of an assault to explain that in an assault, the *actio iniuriarum* offers full compensation as it already incorporates an action for pain and suffering. This view however is not accepted by Neethling and Potgieter.¹²⁹

The above delictual actions can also be concurrently applied with contract law, as detailed below.

The *actio Legis Aquiliae* and contractual action concur if there is a breach of contract and simultaneously the delictual action *damnum iniuria datum* applies, which is applied where there is a “wrongful culpable causing of patrimonial damage”.¹³⁰ The wronged party or plaintiff can then choose to claim either in contract or in delict or in the alternative. Neethling and Potgieter emphasise that these remedies will only be applicable where there is a breach of contract, which wrongfully and culpably “infringes a legally recognised interest which must be independent from the contractual breach”.¹³¹ The elements of either action must be satisfied.

The *actio iniuriarum* and contractual action concur in instances where there is a breach of contract which also constitutes an *iniuria*.¹³² It is submitted that an example of this would occur where a doctor carries out a procedure without obtaining an informed consent from the patient, for example a sterilization performed without the valid consent, but goes ahead with it, resulting in both a breach of contract, as well as injury to the patients physical and mental integrity.

The action for pain and suffering and contractual action concur where there is a breach of contract and a wrongful culpable infringement of the physical mental integrity of the plaintiff.¹³³ The example given by Neethling and Potgieter is where a surgeon contractually performs an operation, which negligently affects the health of the patient. The patient has a contractual claim for the damages, as well as an action for pain and suffering.¹³⁴

The above remedies which would otherwise apply in everyday medical law matters, are restricted when parties include an exclusionary clause in the contract signed. The extent to

¹²⁸ J Neethling, JM Potgieter, PJ Visser (note 58 above) 238

¹²⁹ J Neethling, JM Potgieter, PJ Visser (note 58 above) 238

¹³⁰ JC Van der Walt and JR Midgley *Principles of Delict* 3 ed (2005) 57-59

¹³¹ JC Van der Walt and JR Midgley (note 130 above) 57-59

¹³² J Neethling, JM Potgieter, PJ Visser (note 124 above) 67-68

¹³³ J Neethling, JM Potgieter, PJ Visser (note 58 above) 239

¹³⁴ J Neethling, JM Potgieter, PJ Visser (note 124 above) 67-68

which the remedy is restricted is dependent on the wording of the clause itself which the courts have held need to be clear and unambiguous.¹³⁵

3.4 TYPES OF EXCLUSIONARY CLAUSES IN MEDICAL CONTRACTS

In Roman Dutch Law, any term which excluded liability of an essential obligation in a contract, was regarded as null and void, as it would amount to undue enrichment to the party in whose favour it had been drafted.¹³⁶ In principle, it is submitted, where an exclusionary clause undermines the very essence of the contract, it should be seen as unenforceable. The importance of an exclusionary clause and its validity lies in the wording of the clause itself. The more ambiguous and complicated the meaning, the less likely it would be acceptable by our courts.¹³⁷ When analysing different types of exclusionary clauses, the difference applies by interpreting the extent of liability being excluded in the clause.¹³⁸ Some clauses exclude all liability, others limit the possibilities to which the exclusion will apply.¹³⁹ As this thesis focuses on exclusionary clauses that apply in medical contracts, the writer will begin by focusing on the few South African medical law cases dealing with exclusionary clauses. While there are a reasonable number of cases dealing generally with exclusionary clauses, the writer has streamlined the analysis of the types of exclusionary clauses by focusing on those in medical cases only.

In the *Burger v Medi-Clinic Limited*¹⁴⁰ case the exclusionary clause reads as follows:

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 by 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 their former 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.

It is submitted that the clause specifically excludes any liability which could possibly include not only negligent acts, but gross negligent acts as well. Further, the hospital is protected against both loss and damages arising out of any cause whatsoever, which reiterates that the liability excluded extends over a wide spectrum of possibilities. It is further submitted that such clauses should be regarded as *prima facie* unlawful and unenforceable, as they are in complete contravention of the Constitution and its values of equality, dignity and freedom of contract. It also appears in contravention of the ethical principles and standard of care expected of a health care professional.

¹³⁵ *First National Bank of SA Ltd v Rosenblum and Another* 2001 (4) SA 189 (SCA) 35 paras 6 and 7 at 195G/H-H, 195I-196A and 196B-B/C

¹³⁶ T Naude and G Lubbe (note 121 above) 450

¹³⁷ *Drifters Adventure Tours CC v Hircock* (note 116 above) paras 9 at 87E-G; *Durban's Water Wonderland (Pty) Ltd v Botha* (note 5 above) page 10

¹³⁸ D Yates *Exclusion Clauses in Contracts* 2 ed (1982) 33

¹³⁹ D Yates (note 138 above) 33

¹⁴⁰ *Burger v Medi-Clinic* Unreported Judgement Witwaterstrand Local Division (1999)

In the *Strydom v Afrox*¹⁴¹ case the exclusionary clause reads as follows:

I absolve the hospital from 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 or 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 the patient whatever the causes may be excluding only wilful default on the part of the hospital, its employees or agents.

I hereby indemnify the hospital against any claim, award judgment, cost and expenses which may be made or awarded suffered by the hospital resulting from or connected with the treatment of the patient.¹⁴²

It is submitted that the above clause, similarly exempts liability in respect of a wide range of medical problems. Not only does it specify that the damages excluded are for any loss, it further provides that such loss could be caused by both direct or indirect injury. The only type of conduct which would not fall within the ambit of the exclusionary clause is an intentional omission by the hospital or its employees. It is submitted that to prove that the doctors intentionally caused harm/damage to the patient would be a difficult task. A clause of this nature has been worded to include in effect every possible type of damage or loss, and would also include gross negligence (but not if such gross negligence was done intentionally). It is submitted that for a hospital to extend the definition of an exclusionary clause to this extent is grossly repugnant. It goes against the very ethos of the medical fraternity's oath to act in the best interests of the patient and to place the patient's needs before its own needs. The clause would clearly be unacceptable if a court was asked to determine its validity, and with the Consumer Protection Act¹⁴³ now being in existence. The use of the clause also stresses the reason why statutory laws, which protect the rights of consumers, was needed in South Africa. While many argued that there are currently laws protecting consumers, this clause emphasises that the current laws were not providing sufficient protection to those who require it the most – the lay person.

3.5 ETHICAL CONSIDERATIONS

Ethics has been defined as a sub-discipline of philosophy.¹⁴⁴ Medical ethics involves applying moral principles in medical practice.¹⁴⁵ Moral principles emanate from oaths, pledges, declarations and codes.¹⁴⁶ The Hippocratic Oath has been described as the most well-known ethics document in the medical sphere.¹⁴⁷ Most general ethical principles are based on the principles of Beauchamp and Childress in their book titled "Principles of

¹⁴¹ *Strydom v Afrox Healthcare Limited* 2001 JOL 8434 (T)

¹⁴² *Strydom v Afrox Healthcare Limited* (note 141 above) page 6

¹⁴³ Act 68 of 2008 (note 15 above)

¹⁴⁴ K Moodley (note 49 above) 10

¹⁴⁵ Wikipedia – Medical Ethics Available at http://en.wikipedia.org/wiki/Medical_ethics (Accessed 4 October 2013)

¹⁴⁶ DJ McQuoid-Mason and MA Dada (note 30 above) 184

¹⁴⁷ K Moodley (note 49 above) 7

Biomedical Ethics”.¹⁴⁸ These four principles are patient autonomy, beneficence, non-maleficence and justice.¹⁴⁹

With regard to exclusionary clauses, the question to be posed is whether it would be regarded as ethical to include an exclusionary clause in a medical contract. Carstens and Kok¹⁵⁰ are of the opinion that the use of exclusionary clauses will be regarded as unethical. Their reasoning is that an exclusionary clause is meant to protect the hospital/doctor from any liability, should any harm be caused to the patient. However, in terms of the ethical codes a doctor is meant to act in the best interest of the patient incorporating a certain degree and standard of care. The disclaimer results in the patient “consenting” to the possibility of harm being imposed by a medical practitioner, who is meant to be imposing no harm or the least amount of harm to the patient.¹⁵¹ While ethical principles generally have no legal enforceability, it can be argued that when the Courts invalidate an exclusionary clause in a medical contract on the basis of public policy, this helps to promote the moral principles by giving legal effect to them.¹⁵²

Historically decisions in medical ethics were based on the principle of paternalism (a “time-honoured” tradition), in terms of which the doctor took a paternal role in relation to his/her patient and controlled the patient in every aspect of decision making.¹⁵³ However in recent times, there has been a move towards patient autonomy and establishing a more “open” relationship resulting in a patient being an active participating party in decision-making, especially regarding his/her health. Giesen notes that there is a need for courts to be more critical of decisions taken by physicians. Not every decision made by a physician which is considered to be standard practice by the physician, is necessarily legally justifiable.¹⁵⁴ It is submitted that patient autonomy and active decision-making seems to have resulted in an equal status in the doctor-patient relationship, which might be considered to be a contributing factor to the arrival and emergence of exclusionary clauses in hospital/doctor contracts, in an effort by the hospital/health care practitioner to protect himself/herself.

3.6 EXCLUSIONARY CLAUSES IN FOREIGN JURISDICTIONS

Section 39(1) (b) and (c) of the Constitution¹⁵⁵ provides that courts, when interpreting the Bill of Rights must consider international law and may consider foreign law. Further the Consumer Protection Act¹⁵⁶ permits a court to consider foreign law and international law,¹⁵⁷ which the writer submits is a necessity to develop our Common law. It is intended to consider the situation in the United Kingdom, the European Union, the United States of America

¹⁴⁸ Wikipedia (note 145 above)

¹⁴⁹ Wikipedia (note 145 above)

¹⁵⁰ P Carstens and A Kok “An Assessment of the Use of Disclaimers by South African Hospitals in view of Constitutional demands, foreign law and medic-legal considerations” (2003) 18(2) *SA Public Law* 430, 450

¹⁵¹ P Carstens and A Kok (note 150 above) 450

¹⁵² P Carstens and A Kok (note 150 above) 450

¹⁵³ D Giesen *International Medical Malpractice Law* 1 ed (1988) 695

¹⁵⁴ D Giesen (note 153 above) 685

¹⁵⁵ Act 108 of 1996 (note 3 above)

¹⁵⁶ Act 68 of 2008 (note 15 above)

¹⁵⁷ Act 68 of 2008 (note 15 above) Section 2(2)

(USA) and India to discuss and compare how their legal systems define and apply exclusionary clauses in comparison to South Africa.

3.6.1 United Kingdom

The United Kingdom accepts the doctrine of freedom of contract, and hence exclusionary clauses are not regarded as invalid generally.¹⁵⁸ Courts do not like to interfere where the terms and conditions of the contract have been negotiated and accepted by the parties to the contract. This position would apply where the parties have an equal bargaining position, and are on the same standing.¹⁵⁹ The same does not apply where the parties are considered to have an unequal bargaining position, an example of which is the hospital-patient relationship. It is submitted that both parties are not equal in such situations as the hospital is the only party to the contract with bargaining power. Further, where a party is given certain legal rights to protect them against damages, exclusionary clauses result in a reduction of the rights afforded, and most standard contracts between parties of an unequal bargaining position result in a “take it or leave it” situation.¹⁶⁰ The patient is usually in a vulnerable position, and hence cannot dictate or argue the terms of the contract with the hospital – as they are ultimately bound by it. In an effort to curb the problems associated with such clauses, the courts attempted to restrict the use of exclusionary clauses, but with time this did not prove to be sufficient to reduce the inapplicability.¹⁶¹ Parliament intervened and the Unfair Contract Terms Act¹⁶² came into existence which dealt specifically with exclusionary clauses, followed by the Unfair Terms in Consumer Contracts Regulations.¹⁶³

The Act¹⁶⁴ specifically deals with exclusionary clauses, and not general unfair contract terms as the name suggests.¹⁶⁵ Section 2 of the Act strictly prohibits exclusionary clauses which restrict or exclude liability for death or personal injury arising from negligence. This provision is absolute and not subject to the requirement of reasonableness.¹⁶⁶ The Act does provide for exclusion or restriction of liability for other types of losses, but only if it is regarded reasonable to do so.¹⁶⁷ The test for reasonableness is dealt with in terms of Section 11 of the Act. While the Act does not specifically define what bargaining power is, it has been suggested by Atiyah¹⁶⁸ that the court may look at the relevant market and the ability of the parties to understand the clause.

At Common law, the court would consider whether the exclusionary clause is incorporated into the contract, or alternatively, whether the clause itself covers the liability the party is

¹⁵⁸ N Lucas *Law of Contract* 2 ed (1998) 80

¹⁵⁹ N Lucas (note 158 above) 80

¹⁶⁰ PS Atiyah & SA Smith *Atiyah's Introduction to the Law of Contract* 6 ed (2005) 150

¹⁶¹ N Lucas (note 158 above) 81

¹⁶² Unfair Contract Terms Act 1977

¹⁶³ Unfair Terms in Consumer Contracts Regulations 1999

¹⁶⁴ Act 1977 (note 162 above)

¹⁶⁵ PS Atiyah & SA Smith (note 160 above) 314

¹⁶⁶ Act 1977 (note 162 above) Section 2.1

¹⁶⁷ Act 1977 (note 162 above) Section 2.2

¹⁶⁸ PS Atiyah & SA Smith (note 160 above) 315

trying to escape.¹⁶⁹ An exclusionary clause would be incorporated into the agreement by way of a signature (which indicates that both parties have read and understood the terms and conditions), or by way of a notice to either party in a contract, or in the course of dealing (where it can be shown that there had been sufficient discussions surrounding the clause).¹⁷⁰ Where an exclusionary clause has not been incorporated into a contract, the court will consider how the clause has been constructed and whether the wording of the clause specifically covers the damages.¹⁷¹ Where an ambiguous clause is read against the interests of the person seeking to rely on it, this is referred to as the *contra proferentem* rule.¹⁷² If there is any confusion or ambiguity regarding the clause itself, then the clause is interpreted in favour of the consumer.¹⁷³ The *contra proferentem* rule is also applied in South African law. South African courts also do not accept exclusionary clauses that are ambiguous or unclear. However the difference between the UK courts, and the South African courts is that in the UK, the courts did not accept unconscionable clauses, which our courts have accepted.

3.6.2 European Union

In Europe, exclusionary clauses that exclude death or bodily injury are generally regarded as unenforceable.¹⁷⁴ The EC Directive on Unfair Contract Terms in Consumer Contracts of 1993 recognises that liability in respect of injury or death is grey-listed throughout the European Union.¹⁷⁵ South Africa's Consumer Protection Act includes a general clause which prohibits unfair, unreasonable or unjust terms,¹⁷⁶ and a separate list of outright prohibited clauses in Section 51. The problem with the prohibited clauses, as per Naude¹⁷⁷ is that it is an exhaustive list. With the European countries, much of their consumer protection legislation refers to "grey lists" which are non-exhaustive lists of unfair consumer terms. This, he says, provides for optimal consumer protection, and are also found in the laws of Germany, Austria, Netherlands, Portugal, Brazil, Japan and Thailand.¹⁷⁸ It is submitted that such grey lists could be beneficial in South Africa. With the Consumer Protection Act having an exhaustive list, it implies that there is a specific list of clauses which are prohibited, and nothing further may be included to the list. Contrary to an exhaustive list, a non-exhaustive list gives the authority and power to the courts to primarily decide whether a clause is so unfair, unjust or unreasonable that it warrants being included in the grey list. This would also help to develop our statutory laws and increase the protection of consumers. An important point brought into consideration by Naude is that developing countries with insufficient

¹⁶⁹ N Lucas (note 158) 81

¹⁷⁰ N Lucas (note 158) 81

¹⁷¹ N Lucas (note 158) 87

¹⁷² N Lucas (note 158) 81

¹⁷³ R Lawson *Exclusion Clauses and Unfair Contract Terms* 10 ed (2011) 47

¹⁷⁴ T Naude "Proposals For Amendment Of Consumer Protection Bill" Available at www.pmg.org.za/files/docs/080826proftjakiesub.doc (Accessed 31 August 2013) 511

¹⁷⁵ T Naude (note 174 above) 511

¹⁷⁶ Act 68 of 2008 (note 15 above) Section 48

¹⁷⁷ T Naude (note 174 above) 511

¹⁷⁸ T Naude (note 174 above) 511

knowledge of consumer protection laws may not want to immediately increase long non-exhaustive lists like the European countries.

3.6.3 United States of America

In the United States of America exclusionary clauses are generally invalid in hospital contracts, as the courts apply the Common law where there is an infringement of public interests.¹⁷⁹ The policies and medical practices are generally based on ethics and governed by regulations, and anything contrary to that would be regarded as invalid.¹⁸⁰ The leading case is *Tunkl v Regents of University of California*,¹⁸¹ where Tunkl sought to recover damages for negligent injuries allegedly incurred by him while at the defendant hospital. The defendant sought to rely on an exclusionary clause signed by Tunkl on his admission to the hospital. The relevant clause that was signed by him 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 liability for the negligent or wrongful acts or omission of its employees, if the hospital has used due care in selecting its employees.¹⁸²

The reasoning of the Appeal Court in *Tunkl's* case is important for the following points:¹⁸³

1. The court held that hospital-patient relationship was of such a nature that it involved the public interest, as opposed to only private entities. The reason for such interest is due to the importance of health care services to the public, who rely on it.
2. The patient relied on the health care practitioners for certain services, which services are to be applied with due diligence and a standard of care. For a hospital to exempt its staff, employees or any doctors from incurring liability, derogates from the principle of the standard of care which is afforded by every doctor to his/her patient.
3. The insistence that a patient signs a waiver prior to treatment results in an unequal bargaining position in favour of the hospital. It also amounts to an immediate superior advantage over the patient.
4. The patient, at that late stage, is forced to accept the admission pre-requisite as he/she is unable to bargain or find an alternative hospital. The admission room cannot be seen as a bargaining table for parties to a contract.

¹⁷⁹ M Letzler (note 19 above) 22

¹⁸⁰ M Letzler (note 19 above) 23

¹⁸¹ SCOCAL, *Tunkl v Regents of University of California*, (1963) 60 Cal.2d 92 Available at <http://scocal.stanford.edu/opinion/tunkl-v-regents-university-california-27188-21> (Accessed August 31 2013)

¹⁸² *Tunkl v Regents of University of California* (note 181 above)

¹⁸³ *Tunkl v Regents of University of California* (note 181 above)

It is submitted that the above reasoning of the Court is indicative of the type of reasoning that is required by South African Courts when defining and applying the validity of exclusionary clauses. The *Tunkl* case heard in 1963 shows the progressive thinking of the judiciary at that time in California. While each state has its own judicial authority, the USA generally regards exclusionary clauses as invalid in hospital contracts.¹⁸⁴ The courts base their decisions on the Common law, rather than on statutory guidelines.¹⁸⁵ At the core of the medical profession in the USA, are the principles of the standard of care which all health care professionals are expected to exercise when consulting with their patients. This affects the public interest, and any deviation in professional conduct is deemed unacceptable and unenforceable.¹⁸⁶

The court in the *Tunkl* case did not rule in favour of a blanket provision, which makes all exclusionary clauses null and void. Instead it distinguished between private contracts, and those contracts which affect the public interest. In contracts that affect the public interest, there are certain obligations which arise. Further, because of the nature of the parties, and the manner in which the contract is signed (no bargaining, or debate and in a take it or leave it situation), the Court was able to accept the unequal bargaining position. It is further submitted that it is vital for the Court to understand the position of the patient at the time of “accepting” the clause and signature. The state of mind of the patient and inability to find alternative care at such a late stage, which added to the patient’s high stress levels at the time before presenting himself for treatment all are indicative of the weaknesses of the patient.

Another important American case heard by the Michigan Court of Appeal is *Cudnick v William Beaumont Hospital*.¹⁸⁷ Mr Cudnick received post-operative treatment at the defendant hospital after undergoing surgery for prostate cancer. Four years later he complained of a back pain, which was diagnosed as being a result of the post-operative treatment. He sued the hospital for medical malpractice, but died shortly thereafter. The Trial Court held in favour of the defendant, validating the exclusionary clause which was signed by the deceased on admission to the hospital. On Appeal, the court reversed the decision.¹⁸⁸

The relevant part of the document signed by the plaintiff on admission which related to the exclusionary clause read as follows:

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 or assigns hereafter can, shall, or may have arising out of my participation in the radiation therapy treatment regimen.¹⁸⁹

It is submitted that the clause not only excludes the patient himself/herself from instituting action for harm caused to him/her, but extends to prevent any person duly representing the

¹⁸⁴ M Letzler (note 19 above) 23

¹⁸⁵ M Letzler (note 19 above) 23

¹⁸⁶ M Letzler (note 19 above) 23

¹⁸⁷ *Cudnick v William Beaumont Hospital* (1994) Available at http://www.leagle.com/decision/1994585207MichApp378_1535 (Accessed 2 October 2013)

¹⁸⁸ *Cudnick v William Beaumont Hospital* (note 187 above)

¹⁸⁹ *Cudnick v William Beaumont Hospital* (note 187 above)

patient (should the patient himself/herself be unable to institute the action) from instituting any form of action. It is interesting to note the extent of the exclusion of liability, and the extent it goes to exclude the patient or his/her duly authorised agent from claiming. Usually an exclusionary clause does exclude all types of claims, but does not go so far so as to even exclude the party who may claim in the event of the plaintiff personally being unable to do so. It is submitted that such a clause shall not be regarded as legally binding in South Africa. It has been held that one cannot forego the autonomous claim of a dependant.¹⁹⁰

The Court had to decide in the *Cudnick* case on the validity of the exclusionary clause. The court in deciding the clause was invalid, based its decision on other decisions like the *Tunkl* case, where the basis of the invalidity was determined by the public interest of the clause.¹⁹¹ The court once again held that an exclusionary clause which is signed by a patient prior to treatment is invalid, as it is against public policy. The writer submits that the court's decision follows precedent and, while not invalidating exclusionary clauses as a whole, it indicates that the circumstances under which a patient is expected to accept the clause determines whether the clause is contrary to public policy or not.

3.6.4 India

We now turn our attention to consumer protection laws in India. India's Consumer Protection Act¹⁹² was passed in 1986, with amendments to the Act passed in 1993 and 2002. The Act defines a consumer as a person receiving a service for which he/she has paid for, or partly paid for, or has contracted himself or herself to defer payment to some later stage.¹⁹³ Service is defined as a service available to users, for which a consideration is payable.¹⁹⁴ The Indian Courts have accepted that medical services, for which consideration is payable are to be included in the Act.

In the leading case of *Shanta*¹⁹⁵ the court held that all medical practitioners and hospitals which provided a paid service were bound by the Act.¹⁹⁶ However the Act specifically did not apply to those hospitals and medical practitioners who offered their services to patients free of charge.¹⁹⁷ The writer submits that India is unique in its approach, as those hospitals or medical practitioners who render services free of charge to their patients, and who are not bound by the Consumer Protection Act¹⁹⁸ may still be liable in terms of the Indian Contract Act.¹⁹⁹ The Indian Contract Act provides that a contract comes into existence where parties

¹⁹⁰ *Jameson's Minors v Central South African Railways* 1908 TS 575

¹⁹¹ *Cudnick v William Beaumont Hospital* (note 187 above)

¹⁹² Consumer Protection Act No. 68 of 1986

¹⁹³ Act 68 of 1986 (note 192 above) Section 2(1)(d)(ii)

¹⁹⁴ Act 68 of 1986 (note 192 above) Section 2(1)(o)

¹⁹⁵ *Indian Medical Association v VP Shanta and Others* 1995 SCC (6) 651 Available at <http://indiankanoon.org/doc/723973/> (Accessed 19 October 2013)

¹⁹⁶ Act 68 of 1986 (note 192 above)

¹⁹⁷ *Indian Medical Association v VP Shanta and Others* (note 195 above) page 16

¹⁹⁸ Act 68 of 1986 (note 192 above)

¹⁹⁹ Indian Contract Act No 9 of 1872 Available at <http://www.gujhealth.gov.in/images/pdf/legis/indian-contract-act1872.pdf> (Accessed 19 October 2013)

who have legal capacity freely give their consent to contract with each other for a lawful objective.²⁰⁰ The Act provides that consent will not be regarded as being given freely, if there is any undue influence by either party to the contract.²⁰¹ It is submitted that the definition of undue influence provided for in the Act is of particular importance. The parties to a contract would be considered to have consented under undue influence if either party has the ability to dominate the will of the other party.²⁰² It is submitted that this would apply where parties held unequal bargaining power, as in the hospital/doctor patient relationship. The court, in terms of the Act is given the power to set aside such a contract.²⁰³ The Act also recognises that contracts which are contrary to public policy may be held to be unlawful, and while the Act does not define public policy, the Indian Courts have gone to great lengths to substantiate the meaning.²⁰⁴

It is submitted that India's current consumer protection and contractual laws are able to ensure maximum protection of consumers. An exclusionary clause would generally be unlawful or not applicable by virtue of the unequal bargaining advantage the hospital would have over the patient. The *contra proferentem* rule is also applied in India, in terms of which exclusionary clauses are interpreted strictly.²⁰⁵ The writer was unable to find specific judicial precedent dealing with exclusionary clauses in the health care sector. However it is submitted that for an exclusionary clause to be legal and binding in India, it would have to pass judicial scrutiny in terms of the Indian Contract Act or the Indian Consumer Protection Act, dependent on which is applicable.

3.7 CONCLUSION

An exclusionary clause results in an exclusion of liability for the party in whose favour the contract is drafted. Our courts have thus far upheld exclusionary clauses which is evident from judicial decisions and reveal the niche that the clause has made for itself in our law.

Contractual freedom is widely recognised as a principle affording individuals the right to enter into lawful contracts freely. Consensus between the parties and the considerations of public policy also play a pivotal role in determining the validity of the contract.

Apart from the contractual duties arising in the doctor/hospital-patient relationship, there also exists a reciprocal duty of care by the doctor/hospital to the patient. These duties are historically derived from the Hippocratic Oath and the Declaration of Geneva. Both declarations emphasise the ethical duties which a doctor or hospital is expected to afford to his/her patient.

²⁰⁰ Act 9 of 1872 (note 199 above) Section 10 and 12

²⁰¹ Act 9 of 1872 (note 199 above) Section 14(2)

²⁰² Act 9 of 1872 (note 199 above) Section 16(1) – (3)

²⁰³ Act 9 of 1872 (note 199 above) Section 19

²⁰⁴ *Central Inland Water Transport Corporation Case AIR (1986) page 1571 at 1612*

²⁰⁵ N Shyama "Standard Form Contracts – A comprehensive Analysis" Available at http://www.legalservicesindia.com/article/print.php?art_id=1161 (Accessed 19 October 2013)

The legal systems of the United Kingdom, the European Union, United States of America and India all do not accept certain exclusionary clauses, especially when dealing with the medical profession. This is so in cases where the rights of individuals are curbed by the exclusionary clause to such an extent that it adversely affects their right to judicial redress. All three countries and the European Union recognise the unequal bargaining power between the doctor/hospital and the patient, and the vulnerability of the patient when faced with the requirement to sign an admission form containing an exclusionary clause.

The next chapter deals with the principles of the leading cases in South Africa, and how they have thus far dealt with the interpretation of exclusionary clauses.

CHAPTER 4

THE PRINCIPLES REGARDING EXCLUSIONARY CLAUSES IN SOUTH AFRICA

4.1 INTRODUCTION

The rulings of South African courts up until the enactment of the Consumer Protection Act have been very traditional in their interpretation of exclusionary clauses. Exclusionary clauses have been held to be valid and enforceable in law, especially where the contracting parties entered into an agreement of their own free will. There are not many medical law cases dealing with the validity of exclusionary clauses, and the discussion that follows in this chapter will be based on the principles of public policy, unequal bargaining power, misrepresentation, *stare decises* and good faith derived from the leading cases in South Africa regarding exclusionary clauses generally.

4.2 PUBLIC POLICY

The notion of public policy is an important one when determining the validity of exclusionary clauses and their enforceability in contracts. The courts have declared that clauses, including exclusionary clauses, which are contrary to public policy will be declared null and void and unenforceable.²⁰⁶ However, at the outset it is important to determine what public policy actually entails. The Constitutional Court has stated that when deciphering the validity of a contractual term, public policy cannot be avoided, and has defined public policy as follows:²⁰⁷

Public policy represents the legal convictions of the community; it represents those values that are held most dear by the society. Determining public policy was once fraught with difficulties. That is no longer the case. Since the advent of our Constitutional democracy, public policy is now deeply rooted in our Constitution and the values that underlie it. Indeed, the founding provisions of our Constitution make it plain: our Constitutional democracy is founded on, among other values, the values of human dignity, the achievement of equality and the advancement of human rights and freedoms, and the rule of law.

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.

From the above, it is clear that public policy is entrenched in our Constitution and the values enshrined in it. The writer submits that public policy is also determined by what society would consider acceptable or not. However, the courts have held that exclusionary clauses are in keeping with public policy.

In *Strydom v Afrox Healthcare Limited*²⁰⁸ the plaintiff alleged that due to the negligent conduct of the staff of the defendant he suffered damages. On being admitted to the hospital

²⁰⁶ *Afrox Healthcare Limited v Strydom* (note 5 above) in paras 9 where the court held that if a contract is so contrary to public policy it would be regarded as unenforceable. However the court also held that the power of the court to invalidate contracts should be exercised sparingly.

²⁰⁷ *Barkhuizen v Napier* 2007 (5) SA 323 (CC) paras 28 -29 at 333E-F; 333G-334A

²⁰⁸ *Strydom v Afrox Healthcare Limited* (note 141 above)

the plaintiff signed a disclaimer clause, which he alleged he was not aware of at the time. He had thought his signature was an acceptance of his liability for payment of his account. The plaintiff thus argued that the disclaimer was *contra bonos mores* alternatively against public policy. The court *a quo* as per Mavundla AJ held that the disclaimer was in fact *contra bonos mores* and thus unenforceable.²⁰⁹ The judgement has been described as courageous.²¹⁰ The court held that our Common law does not recognise clauses that are contrary to public policy, and the disclaimer was held to be unenforceable for that reason.

On Appeal however,²¹¹ the Court emphasised that its power to strike down an exclusionary clause based on public policy must be exercised sparingly.²¹² While the court accepted that a contractual clause that is contrary to public policy is unenforceable, disclaimer clauses are valid and are to be interpreted restrictively.²¹³ The court accepted that an indemnity clause which excluded gross negligence could be contrary to public policy, but held that in this matter the respondent only alleged negligence, not gross negligence. This traditional approach towards interpreting exclusionary clauses has become the precedent in South Africa. Public policy is never static, it is deemed to be constantly evolving in accordance with the interests of the community, and so too should our courts be interpreting exclusionary clauses in accordance with the ideals of public policy.

In *Naidoo v Birchwood Hotel*²¹⁴ the court held that any contractual term that deprived a party of “judicial redress” is *prima facie* contrary to public policy. Further it held that an exclusionary clause which excluded liability for bodily harm caused to the plaintiff at the defendant’s property, resulted in denying the plaintiff the right of access to the courts. The court held that to allow such an exclusionary clause to be enforceable would be contrary to the notions of fairness and justice, and subsequently held that the clause was unenforceable.²¹⁵

In *Johannesburg Country Club v Stott and Another*²¹⁶ the court had to decide whether an exemption clause indemnified the club from claims from its members for any loss of, damage to, or any personal injury or harm caused to any member, their child or guest while at the club’s premises or grounds. The majority judgement by Harms JA held that to permit such exclusion would be against public policy because it runs counter to the high value that the Common law and the Constitution place on the sanctity of life.²¹⁷ In a dissenting judgment, Marais JA held that he was not of the opinion that exclusionary clauses were unconstitutional by the reason that the conduct in question led to the death of the individual.²¹⁸

²⁰⁹ *Strydom v Afrox Healthcare Limited* (note 141 above) page 18

²¹⁰ P Carstens and A Kok (note 150 above) 434

²¹¹ *Afrox Healthcare Limited v Strydom* (note 5 above)

²¹² *Afrox Healthcare Limited v Strydom* (note 5 above) paras 9-10 at 34D-D/E, G and H-I

²¹³ *Afrox Healthcare Limited v Strydom* (note 5 above) paras 9-10 at 34D-D/E, G and H-I

²¹⁴ *Naidoo v Birchwood Hotel* (note 1 above) paras 52 at 182E-F

²¹⁵ *Naidoo v Birchwood Hotel* (note 1 above) paras 54 at 182I-183B

²¹⁶ *Johannesburg Country Club v Stott and Another* 2004 (5) SA 511 (SCA)

²¹⁷ *Johannesburg Country Club v Stott and Another* (note 216 above) paras 12 at 518G-H/I

²¹⁸ *Johannesburg Country Club v Stott and Another* (note 216 above)

In *Barkhuizen v Napier*²¹⁹ the Constitutional Court had to determine whether the time-limitation clause was contrary to public policy. Ngcobo JA took into consideration that public policy tolerated time-limitation clauses, subject to the considerations of reasonableness and fairness.²²⁰ Also, the Constitution recognised that the right to seek judicial redress could be limited in circumstances where it was sanctioned by a law of general application and the limitation was reasonable and justifiable.²²¹ Ultimately the test for reasonableness was whether the contract contained a time-limitation clause that afforded a contracting party an adequate and fair opportunity to seek judicial redress, and have disputes arising from the contract resolved by a court of law. The court held that the clause was not contrary to public policy.²²² The principle of the case is that generally a clause which limits a party's ability to seek redress from the court would be regarded as contrary to public policy. It is submitted that similarly the very nature of an exclusionary clause has the same meaning. By limiting the liability of the hospital or medical practitioner, the patient is left with no grounds on which to claim, and if courts continue to adhere to this strict and traditional approach, courts are ultimately closing their doors to the public, which in any event is contrary to the spirit and purpose of our Constitution.

4.3 UNEQUAL BARGAINING POWER

Section 9 of the Constitution²²³ provides that everyone is equal before the law and every person is afforded equal protection. Similarly, Section 2 of the Promotion of Equality and Prevention of Unfair Discrimination Act²²⁴ provides that its object is to enact legislation required by Section 9 of the Constitution, and to give effect to the spirit of the Constitution, in particular the equal enjoyment of all rights and freedoms by every person and the promotion of equality. These purposes should be applied to all aspects of law, including contractual law. The bargaining power of parties in a contractual relationship is problematic because if one party is in a weaker bargaining position, the consent, even if genuine, cannot be seen as unequivocal.²²⁵ This is especially so where both parties are not of the same background. A clear example being the hospital-patient relationship.

In the *Afrox* case²²⁶ Brand JA was of the opinion that even where there is an unequal bargaining power between the parties in a contract, this does not mean that the stronger party will be in conflict with public interest.²²⁷ An unequal bargaining power is one of many factors that may be taken into consideration when determining public interest. In this case however, the court held there was nothing to show that the respondent was in a weaker bargaining

²¹⁹ *Barkhuizen v Napier* (note 207 above)

²²⁰ *Barkhuizen v Napier* (note 207 above) paras 48 at 338F-G

²²¹ *Barkhuizen v Napier* (note 207 above) paras 48 at 338F-G

²²² *Barkhuizen v Napier* (note 207 above) paras 63, 66 and 67 at 342H, 343D and 343F

²²³ Act 107 of 1996 (note 3 above)

²²⁴ Promotion of Equality and Prevention of Unfair Discrimination Act No 4 of 2000

²²⁵ JC Kanamugire "The Future of Standard Form Contracts in South Africa with Particular Reference to Recent Developments in the Law" (2013) Available at

<http://www.mcser.org/journal/index.php/mjss/article/viewFile/1521/1535> (Accessed 3 December 2013)

²²⁶ *Afrox Healthcare Limited v Strydom* (note 5 above)

²²⁷ *Afrox Healthcare Limited v Strydom* (note 5 above) paras 12 at 35C-D

position than the appellant.²²⁸ The decision of the court regarding the equal bargaining power has been widely criticized by legal writers, and it is submitted that this is rightly so. Carstens and Kok²²⁹ questioned what kind of evidence the court required from the respondent to prove the unequal bargaining power between the parties. It was clear from the facts that the respondent thought he was signing the admission document for payment, and the disclaimer was not specifically brought to his attention. Being a lay person, he was unable to understand the legality of the document, and Carstens and Kok are of the opinion that the Supreme Court interpreted disclaimers as the rule rather than the exception.²³⁰ Academic writer D Brand²³¹ describes the courts reasoning as puzzling. He argues that the judgment ignores the “self-evident” inequality of the contractual relationship. He further states that the respondent had in fact no bargaining power, as a refusal on the respondents side to sign the disclaimer would have resulted in him not having access to the health services.²³² It is submitted that this is an important consideration. The balance between the unequal bargaining position and the right of the patient to adequate health services as provided for in the Constitution, tilts in favour of the stronger party. Ultimately it is the patient who is not only in a weaker bargaining position, but also stands to lose more. The patient will never be in a position to debate the terms of the disclaimer – it is ultimately a lose-lose situation for the patient in the sense that if he chooses to refuse to adhere to the disclaimer he/she will not receive the medical treatment. But if he/she accepts the disclaimer and he/she is a victim of negligence, he/she would have contracted out of liability. It is submitted that the decision by Brand JA in no way assisted the bargaining plight of the patient, but in effect worsened the situation.

4.4 MISREPRESENTATION

Misrepresentation by either party in a contract can result in the entire contract being null and void.²³³ Christie notes²³⁴ that the innocent party does not have to prove that the representation is fraudulent or innocent, as it would be against good faith to continue with a contract knowing there was a misrepresentation. Misrepresentation can be brought about by silence. Christie highlights a number of cases where silence can amount to a misrepresentation²³⁵ such as:

- (a) where only a part of the truth has been disclosed and the non-disclosure of the remaining information is misleading;²³⁶
- (b) where there was a representation made but the facts are changed prior to signature;²³⁷ and

²²⁸ *Afrox Healthcare Limited v Strydom* (note 5 above) paras 12 at 35C-D

²²⁹ P Carstens and A Kok (note 150 above) 443

²³⁰ P Carstens and A Kok (note 150 above) 443

²³¹ D Brand “Disclaimers in Hospital Admission Contracts and Constitutional Rights” (2002) *ESR Review* : *Economic and Social Rights in South Africa*, Vol 3, Issue 2, Sep 17, 18

²³² D Brand (note 231 above) 18

²³³ P Carstens and D Pearmain (note 27 above) 314

²³⁴ RH Christie (note 25 above) 313

²³⁵ RH Christie (note 25 above) 321

²³⁶ *Marias v Edelman* 1934 CPD 212

²³⁷ *Viljoen v Hillier* 1904 TS 312 page 315-316

(c) where a party presents a contract for signature without disclosing an onerous clause in circumstances where he/she knows the signatory would not read the contract or see the clause.²³⁸ It is submitted that these instances are relevant to hospital-patient contracts, as the misrepresentation is in fact silent; in most instances the hospital authorities do not specifically point out the exemption clause and the signatory is unaware of it.

In the *Afrox*²³⁹ case, the respondent argued that he was not bound by his signature as the hospital never advised him of the existence of the disclaimer. He argued that had they advised him of the clause, he would not have signed the contract. The expectation is that the hospital owes a duty of care and professionalism towards its patients, and one would not expect the hospital to exclude liability for the negligence of its staff or agents. The court however rejected the argument. It held that the respondent's subjective expectations had no bearing on the responsibility of the hospital staff. The question was what was reasonable in the circumstances, and exclusionary clauses are "the rule" rather than the exception and can be found in most standard contracts. Consequently there is no need to differentiate between private hospitals and other service providers.²⁴⁰

Carstens and Kok describe the courts reasons as "startling".²⁴¹ They are of the opinion that it leaves open the question of whether every or any service provider can use an exemption clause without actually bringing it to the attention of the signatory. In effect it results in the plaintiff having no legal recourse against a negligent service provider. Brand²⁴² regards this aspect of the judgement as "disturbing". The court did not see the need to distinguish between private hospitals and other private service providers, but this misses the point that hospitals do not just provide any service. They provide a service which is also a Constitutional right.²⁴³

The position regarding silent misrepresentations by non-disclosure will be different when evaluated against the Consumer Protection Act.²⁴⁴ The theory and principles as defined by the courts suggest that a silent misrepresentation does result in a contract being void. However the courts' approach is in direct contrast with previous decisions (even if by the lower courts).

4.5 STARE DECISIS AND THE CONSTITUTION

In *Shabalala v Attorney-General, Transvaal, Gumede v Attorney-General, Transvaal*²⁴⁵ Cloete J noted that the arguments before him suggested that a court can depart from a previous decision on the same point in the same division, where the court has to interpret the argument in light of the Constitution. This reasoning was not accepted. A court can only depart from a previous decision in the same division where the decision was "clearly

²³⁸ *Kempson Hire (Pty) Ltd v Snyman* 1988 (4) SA 465 (T)

²³⁹ *Afrox Healthcare Limited v Strydom* (note 5 above)

²⁴⁰ *Afrox Healthcare Limited v Strydom* (note 5 above) Paras 33 – 36

²⁴¹ P Carstens and D Pearmain (note 27 above) 445

²⁴² D Brand (note 231 above) 18

²⁴³ D Brand (note 231 above)

²⁴⁴ Act 68 of 2008 (note 15 above)

²⁴⁵ *Shabalala v Attorney-General, Transvaal, Gumede v Attorney-General, Transvaal* 1995 (1) SA 608 (T)

wrong”.²⁴⁶ There is no reason to depart from the previous decision simply because the current issue must be interpreted in terms of the Constitution. While the Constitution binds all organs of state, and judicial authority is interpreted in terms of it, this does not mean that the principles of *stare decisis* will no longer apply. Section 39 of the Constitution²⁴⁷ deals with the interpretation of the Bill of Rights, and provides that a court must promote the values that underlie an open and democratic society based on human dignity, equality and freedom. When developing the Common law, the aim is to promote the spirit, purport and objects of the Bill of Rights.

In the court *a quo* in *Strydom v Afrox Healthcare Limited*²⁴⁸ Mavundla AJ noted that Section 39 of the Constitution does not blend with the principle of *stare decisis* when interpreting a disclaimer clause, and held that the disclaimer clause was unenforceable. He held that lower courts should not blindly follow higher court decisions that are not consistent with the provisions of Section 39 of the Constitution. On Appeal²⁴⁹ Brand JA referred to the Constitutional Court judgment of *Ex parte The Minister of Safety and Security: In Re: The State v Walters*²⁵⁰ where it was held that courts are obliged to follow precedent cases. The court did not focus on decisions taken prior to the Constitution being enforced. Brand JA noted that the following applies with regard to those conditions:²⁵¹

1. A High Court can deviate from the Common law ruling of another court, including the Supreme Court of Appeal where that Common law ruling is not in keeping with the spirit and purport of the Constitution.
2. A High Court which is of the opinion that a decision by the Supreme Court of Appeal based on public policy, does not in fact reflect the considerations of public policy, may deviate from the decision.
3. A court that has to interpret a pre-constitutional Common law rule which is not directly in conflict with a specific clause of the Constitution, is not dependant on public policy. If the court is of the opinion that such rule must be developed to promote the values of the constitution, shall however still be bound by the pre-constitutional decision and would have to follow it.

Carstens and Kok²⁵² note that the above decision by the court does not at all reflect Constitutional supremacy. It is suggesting that the Common law is higher than the Constitution, and is in no way developing the Common law which ought to be done as per the provisions of the Constitution. The court should in fact be developing the Common law so

²⁴⁶ *Shabalala v Attorney-General, Transvaal, Gumede v Attorney-General, Transvaal* (note 245 above) at 618D/E-F

²⁴⁷ Act 108 of 1996 (note 3 above)

²⁴⁸ *Strydom v Afrox* (note 141 above) page 10

²⁴⁹ *Afrox Healthcare Limited v Strydom* (note 5 above)

²⁵⁰ *Ex parte The Minister of Safety and Security: In Re: The State v Walters* 2002 (4) SA 613 (CC) paras 60 at 646D/E-F

²⁵¹ *Afrox Healthcare Limited v Strydom* (note 5 above) paras 27, 28 and 29 at 39B-H/I

²⁵² P Carstens and A Kok (note 150 above) 446

that it promotes the objects of the Constitution.

4.6 PRINCIPLES OF GOOD FAITH

The concept of good faith or *bona fides* is applicable to all contracts but is not an easy concept to understand.²⁵³ However it appears to be the requirement that both parties in a contract have mutual respect and understanding towards each other, with no hidden interests or agendas to pursue their own selfish needs.²⁵⁴

In the *Afrox*²⁵⁵ case the respondent contended that the exclusionary clause was in conflict with the principles of good faith or *bona fides*, and that the admission clerk had an obligation to draw his attention to it which he had not done. Mavundla AJ²⁵⁶ in finding the disclaimer unenforceable, held that the principle of good faith obliges the hospital not just to bring the disclaimer clause to the attention of the patient, but also to explain the meaning of the clause to the patient. If this is not done, the clause becomes *contra bonos mores*. This reasoning, it is submitted, is in keeping with our current law and despite the decision being taken prior to the Consumer Protection Act, it emphasises the meaning and very nature of the sections of the Act. The writer submits that it is a forward thinking judgement emphasising the need and importance of the principle of good faith and how it should be applied. On Appeal, the Supreme Court of Appeal dismissed the good faith argument, holding that good faith or *bona fides* are abstract considerations and are not binding legal rules.²⁵⁷ The court held that while the principle of good faith underlies a contract, it is not in itself sufficient reason to invalidate a contract. A court cannot operate on the basis of abstract terms, but rather only on established legal rules.²⁵⁸

4.7 THE LANGUAGE USED IN EXCLUSIONARY CLAUSES AND FREEDOM OF CONTRACT

Generally the language of an exclusionary clause has a direct effect on its meaning and applicability in a contract. The more general the exclusionary clause, the less likely the courts will accept it. On condition that all other legal requirements have been fulfilled, the courts accept that parties have the freedom to contract and decide the terms and conditions, and will be bound by the agreement should they have consented to a term, which is not in their favour.

In the *Durban's Water Wonderland* case²⁵⁹ the court held that an exemption clause that is unambiguous and express must be upheld, basing its decision on a number of previous rulings. But if there is any doubt regarding the language of the clause, then the meaning is interpreted against the party wishing to rely on it, thereby enforcing the *contra proferentum*

²⁵³ RH Christie (note 25 above) 19

²⁵⁴ RH Christie (note 25 above) 19-20

²⁵⁵ *Strydom v Afrox Healthcare Limited* (note 141 above) page 3

²⁵⁶ *Strydom v Afrox Healthcare Limited* (note 141 above) page 18

²⁵⁷ *Afrox Healthcare Limited v Strydom* (note 5 above) paras 32 at 40J-41B

²⁵⁸ *Afrox Healthcare Limited v Strydom* (note 5 above) paras 32 at 40J-41B

²⁵⁹ *Durban's Water Wonderland v Botha* (note 5 above) page 10

rule. The language of the clause itself must not be “fanciful” or “remote”. A similar ruling was followed in the *Swinburne*²⁶⁰ case. In the *Hubert Davies* case²⁶¹ the court held that the test for exclusionary clauses was firstly, whether the language was wide enough to exclude liability, and if there was no express reference to negligence, whether the court could interpret the clause as wide enough to exclude liability for negligence. In the *Rosenblum* case²⁶² the court held that the language of the clause should be read in the context of the agreement, the applicable Common law and the Constitution. All of the above decisions stress the importance of the language used in the clause, and the validity of its applicability. However it begs the question that in the event of the clause being clear and unambiguous, would it be regarded as valid and enforceable? Apart from the language used, if the very nature of the clause is repugnant, how can it still be regarded as valid and enforceable, simply by virtue of the language used?

The Appeal court held in the *Afrox* case²⁶³ that it is in the public interest that contracts are entered into freely by parties having the capacity to do so. The court rejected the argument by the respondent that a hospital contract which excluded the liability of its staff was contrary to the public interest. In the *Naidoo* case²⁶⁴ the court held that while the principle of freedom of contract was important, it did not override the right of parties to have access to the courts.²⁶⁵ This once again stresses the need of contracting parties to always have access to redress by the courts, which right cannot be easily excluded. Freedom of contract does not give contracting parties the right to enter into any agreement irrespective of the terms and conditions. The terms can still be qualified when interpreted in accordance with the Constitution.

4.8 CONCLUSION

Public policy forms an integral part of determining the validity of an exclusionary clause. It is submitted that a clause which prevents one of the contractual parties from approaching the court or seeking legal redress should be regarded as null and void.

The South African Courts have thus far turned a blind eye to the grossly unequal bargaining power between the hospital and the patient. This total disregard for the acknowledgement of the inequality has been the subject of discontent by many local academics. It is time our courts took steps to recognise the disparity, and rectify this blatant ignorance towards patients, who end up, inadvertently being the aggrieved party.

Misrepresentation by either party in a contract is a sufficient ground to declare the entire contract null and void. This applies if the misrepresentation is of such a nature that it fails to

²⁶⁰ *Swinburne v Newbee Investments (Pty) Ltd* 2010 (5) SA 296 (KZD)

²⁶¹ *Transport and Crane Hire (Pvt) Ltd v Hubert Davies & Co (Pvt) Ltd* 1991 (4) SA 150 (ZCS) page 156-157

²⁶² *First National Bank of SA Ltd v Rosenblum and Another* (note 135 above) paras 6 and 7 at 195 G/H-H, 195I-196A; 196B-B/C.

²⁶³ *Afrox Healthcare Limited v Strydom* (note 5 above) paras 23 and 24 at 38C/D-F

²⁶⁴ *Naidoo v Birchwood Hotel* (note 1 above)

²⁶⁵ *Naidoo v Birchwood Hotel* (note 1 above) paras 40 at 179C-D, paras 50 at 182B-C, paras 54 at 182I-183B

disclose a crucial clause in the agreement. A misrepresentation of a clause, even if it is by silence, would still be regarded as a misrepresentation if the clause could adversely affect either party to the contract.

Our courts have always accepted the principle of *stare decisis*, but this principle should not be blindly followed. A young democracy entails building strong judicial precedents which are symbolic of the values enshrined in the Constitution. Essentially the courts should recognise their ability to steer away from a past judicial decision, which, while made in a superior court, do not represent the foundational constitutional principles of equality, dignity and freedom.

Principles of good faith form the foundation of every contract. While it may not be a legal requirement of a contract, it nevertheless is an integral part of a contract for both parties.

The language of a contract is important, not only for basic understanding between the contractual parties, but also because our courts do not accept exclusionary clauses that are ambiguous. Despite the concept of freedom of contract, contractual parties are still bound by elements of fairness and equality.

The next chapter deals with the relevant provisions of the Consumer Protection Act.

CHAPTER 5

THE CONSUMER PROTECTION ACT

5.1 INTRODUCTION

The Consumer Protection Act²⁶⁶ came into effect on the 31 March 2011, the Regulations came into effect on the 1 April 2011. The Act does not apply retrospectively. The Act applies to every transaction occurring in South Africa,²⁶⁷ and is thought to have far reaching consequences for the medical profession.²⁶⁸ Patients may be regarded as consumers and medical practitioners as suppliers or service providers depending on the circumstances.²⁶⁹ If there is any conflict with any other piece of legislation, the Act provides that the legislation providing the greatest protection and which benefits the consumer the most, will apply.²⁷⁰ This, it is argued, is in keeping with the Common law *contra proferentem* rule, which means that if a document or contract is ambiguous then the clause of the document or contract relied upon, is interpreted contrary to the person who is relying on it.²⁷¹ It has been argued that all interactions between the patient, health care establishment and health care provider will fall within the ambit of the Act.²⁷² The validity of exclusionary clauses is questionable when considering certain sections of the Consumer Protection Act. The Act does however pose serious practical challenges to the medical profession, and in this way brings about uncertainties on interpretation as the meaning is not explained by the Regulations.

5.2 DEFINITIONS

The Act²⁷³ uses the following definitions:

“Consumer”: In respect of any particular goods or services, mean-

- a) a person to whom those particular goods or services are marketed in the ordinary course of the supplier's business;
- b) a person who has entered into a transaction with a supplier in the ordinary course of the supplier's business, unless the transaction is exempt from the application of this Act by section 5(2) or in terms of section 5(3);
- c) if the context so requires or permits, a user of those particular goods or a recipient or beneficiary of those particular services, irrespective of whether that user, recipient or

²⁶⁶ Act 68 of 2008 (note 15 above)

²⁶⁷ Act 68 of 2008 (note 15 above) Section 1

²⁶⁸ E Van Den Berg “The Consumer Protection Act: Implications for Medical Practice” (2003) 53(6) *South African Family Practice* 597, 597

²⁶⁹ E Van Den Berg (note 268 above) 597

²⁷⁰ Act 68 of 2008 (note 15 above) Section 4(3) and Section 4(4)

²⁷¹ MN Slabbert, B Maister, M Botes, and MS Pepper (note 22 above) 170

²⁷² MN Slabbert and MS Pepper (note 19 above) 800

²⁷³ Act 68 of 2008 (note 15 above) Section 1

beneficiary was a party to a transaction concerning the supply of those particular goods or services; and

d) a franchisee in terms of a franchise agreement, to the extent applicable in terms of section 5(6)(b) to (e);

Therefore, the definition of a consumer can refer to patients as well.

“Market”: When used as a verb, means to promote or supply any goods or services.

“Service”: Includes, but is not limited to any work or undertaking performed by one person for the direct or indirect benefit of another. This could refer to a consultation with a medical practitioner or a health care professional at a hospital.²⁷⁴ Services can be for the direct or indirect benefit of another, which includes²⁷⁵ giving information, advice and consultation and performing medical operations.

“Supplier”: Means a person who markets any goods or services. This could include or apply to either a health care establishment or a private practitioner.²⁷⁶

From the above it is clear that the Act applies to both health care establishments and health care practitioners whether in private practice or if they work for the State.²⁷⁷

5.3 SECTIONS OF THE ACT WHICH APPLY TO MEDICAL OR HEALTH SERVICES

5.3.1 The Right to Information in Plain and Understandable Language

Section 22 of the Act provides that the consumer has a right to information in plain and understandable language. The producer of any notice, document or visual representation is expected to present the article in plain language that must be understandable to the consumer.²⁷⁸

Plain language is to be determined by taking the following into consideration:

- a) the context, comprehensiveness and consistency of the notice, document or visual representation;
- b) the organisation, form and style of the notice, document or visual representation;
- c) the vocabulary, usage and sentence structure of the notice, document or visual representation; and

²⁷⁴ MN Slabbert, B Maister, M Botes, and MS Pepper (note 22 above) 170

²⁷⁵ H Ooosthuizen “The New Consumer Protection Act and the GP Anaesthetist” Available at <http://www.cmej.org.za/index.php/cmej/article/view/2449/2363> (Accessed 20 August 2013)

²⁷⁶ H Ooosthuizen (note 275 above)

²⁷⁷ H Ooosthuizen (note 275 above)

²⁷⁸ Act 68 of 2008 (note 15 above) Section 22(1)(b)

d) the use of any illustrations, examples, headings or other aids to reading and understanding.²⁷⁹

It is submitted that the above section may prove difficult to apply practically in public health care establishments throughout the various provinces in South Africa. There are currently 11 official languages. According to the 2011 census, isiZulu is the mother tongue of 22.7% of South Africa's population, followed by isiXhosa at 16%, Afrikaans at 13.5%, English at 9.6%, Setswana at 8% and Sesotho at 7.6%. The remaining official languages are spoken at home by less than 5% of the population each.²⁸⁰ The question that prevails, is to what extent the health care establishment is expected to ensure that they are fully equipped and employ staff who can communicate in almost every language, or more importantly at the very least in all the designated official languages of that province (eg KwaZulu Natal – English and isiZulu) to cater for the various linguistic variations. That may not only prove costly, but would also depend on the location of the health care establishment, and the cultural language variety of its patients. It would prove pointless trying to explain the terms and conditions of a contract to a person who doesn't understand the language, and this would also be in contravention of the Act.

Van den Berg²⁸¹ explains that plain language refers to a language that an ordinary person understands who has average literacy skills and minimum experience as a consumer. He then states that plain language might mean “official language,” depending on who the document was drafted for.²⁸² It is submitted that such an inference, that each document in every hospital/health care establishment be in the official languages of that province would not only be an expense, but a statistical nightmare. In a country where items as vital as textbooks cannot reach each and every school in South Africa, it is unlikely that contracts of this nature would reach health care establishments, and the question is whether government funds should in fact be utilised for this purpose when there are far more pressing issues that need attention.

5.3.2 The Consumers Right to Fair, Just and Reasonable Contract Terms

Section 48(1) (a) (ii) of the Act prohibits terms in an agreement that are “unfair, unreasonable or unjust” and Section 48(1) (c) prohibits terms that require consumers: (i) to waive any rights; (ii) assume any obligation; or (iii) waive any liability of the supplier, on terms that are unfair, unreasonable or unjust, or (iv) impose any such terms as a condition of entering into a transaction.

Section 48(2) of the Act provides that a term or condition is unfair, unreasonable or unjust if—

²⁷⁹ Act 68 of 2008 (note 15 above) Section 22(2) a - d

²⁸⁰ Statistics SA and Census 2001, 2021 Available at <http://www.southafrica.info/about/people/language.htm#.Ug-nnB8aLIU#ixzz2cFHHmcP9> (Accessed 17 August 2013)

²⁸¹ E Van den Berg (note 268 above) 597

²⁸² E Van den Berg (note 268 above) 597

- (a) it appears excessively one-sided in favour of any person other than the consumer;
- (b) the terms of the transaction or agreement are inequitable;
- (c) the consumer relied upon a false, misleading or deceptive representation, which is to the detriment of the consumer; or
- (d) the transaction or agreement was subject to a term or condition, or a notice to a consumer contemplated in section 49 (1).

It is clear from the above sections that the Act very specifically, in clear understandable language, not only prohibits clauses that are unfair and unjust, but also provides examples of what would be considered unfair, unreasonable or unjust. The definition of unfair, unjust or unreasonable contractual terms has been described as “thorny”²⁸³ especially where it relates to a “one-sided agreement”. Section 48(2) (a) is of importance as, in the *Afrox* case,²⁸⁴ the court held that the patient did not have an unequal bargaining power in relation to the hospital. It is clear from the critical analysis by legal writers that the hospital contract was in fact an unequal agreement, as the terms were excessively in favour of the hospital. It is submitted that should the case have been heard after the inception of the Consumer Protection Act, the ruling would have most probably been different.²⁸⁵

The National Health Act²⁸⁶ also requires that the patient understands the terms and conditions of the treatment options, diagnosis and risks and benefits and that the contractual terms be explained in plain language. It also provides that literacy levels of the patient should be taken into account.²⁸⁷

5.3.3 Prohibited Transactions, Agreements, Terms And Conditions

Section 51 of the Act deals with prohibited transactions, agreements, terms and conditions, and specifically prohibits a term or condition that purports to limit or exempt a supplier of goods or services from liability for any loss directly or indirectly attributable to the gross negligence of the supplier or any person acting for or controlled by the supplier.²⁸⁸

This would refer to exemption clauses which exclude gross negligence of the supplier (as in the *Afrox* case). The list of prohibited terms is specific, and the criticism here is that the drafters should have taken into consideration foreign law and the way in which they have dealt with non-exhaustive lists of this nature.²⁸⁹ A further criticism of Section 51 is that in

²⁸³ MN Slabbert, B Maister, M Botes, and MS Pepper (note 22 above) 176

²⁸⁴ *Afrox Healthcare Limited v Strydom* (note 5 above)

²⁸⁵ DJ McQuoid-Mason “Hospital Exclusion Clauses Limiting Liability for Medical Malpractice Resulting in Death or Physical or Psychological Injury: What is the effect of the Consumer Protection Act?” (2012) 5(2) *SAJBL* 65, 65-66

²⁸⁶ Act 61 of 2003 (note 72 above) Section 6(1) and 6(2)

²⁸⁷ Act 61 of 2003 (note 72 above) Section 6(2)

²⁸⁸ Act 68 of 2008 (note 15 above) Section 51(1)(c)(i)

²⁸⁹ T Naude “The Consumer’s Right to fair, reasonable and just terms under the new Consumer Protection Act in comparative Perspective” (2009) *SALJ* 505, 521

excluding gross negligence, there is an inference that “ordinary” negligence is acceptable and legally sanctioned.²⁹⁰ It also begs the question of what would be regarded as gross negligence. This is not defined in the Act, and it would be left up to the courts to decide, depending on the circumstances of each case, and whether the act in question would be regarded as constituting gross negligence.

A contractual term or condition that purports to limit the risk or liability of the supplier must be brought to the attention of the consumer in a manner that satisfies the requirements of the Act.²⁹¹ The consumer has to assent to the term or condition by initialling next to a term or condition.²⁹² In addition, the term or condition must be brought to the attention of the consumer before they enter the contract, or begin to engage in the activity, or enter or gain access to the facility; or is required or expected to offer consideration for the transaction or agreement.²⁹³

5.3.4 Notice Required For Exemption Clauses

Section 49(1) provides that certain parts of a contract must be drawn to the attention of the consumer in a manner and form that satisfies the formal requirements of subsections (3) to (5) of the Act.

It is submitted that Section 49 (1) is important, as in the *Afrox* case²⁹⁴ one of the arguments of the plaintiff was that the exclusion clause was never brought to his attention. The court followed the *caveat subscriptor* principle and held that there was in fact no obligation on the hospital to draw his attention to the clause. The defendant was liable for what he had signed and the onus was on him to ensure that he read the terms and conditions and agreed with them prior to signing the agreement.

Naude²⁹⁵ is of the opinion that the Act does not specifically state in what format the clause must be in order to be brought to the attention of the consumer. He argues that the exemption clause could not be reflected on the reverse side of the contract, as most consumers would not see it. Further the Act is not specific about the consequences of non-compliance with the section. One would need to refer to Section 52 of the Act dealing with the powers of the court. But even when examining that section, there is no “extra judicial” protection given to the consumer.²⁹⁶ Naude submits that the section should have provided that a supplier could not rely on a clause that was in contravention of Section 49 of the Act.

²⁹⁰ T Naude (note 289 above) 523

²⁹¹ Act 68 of 2008 (note 15 above) Section 49(1)

²⁹² Act 68 of 2008 (note 15 above) Section 49(2)

²⁹³ Act 68 of 2008 (note 15 above) Section 49(4)

²⁹⁴ *Strydom v Afrox Bpk* (note 141 above)

²⁹⁵ T Naude (note 289 above) 508

²⁹⁶ T Naude (note 289 above) 509

Another important observation by Naude²⁹⁷ is in respect of Section 49(2) which provides for the consumer to initial next to the clause which limits liability, which may, it is argued, work against the consumer. An exemption clause would seem to be legally applicable, if it is brought to the attention of the consumer and initialled by the consumer.²⁹⁸ However the clause may be unfair, even if it were brought to the attention of the consumer prior to signing the agreement.

It is argued by Letzler that an exclusion clause in a hospital contract would contravene this clause as it would deprive a consumer of their rights, and it would avoid a supplier's obligations or duties.²⁹⁹ Furthermore, a consumer has the right to be treated fairly and, in terms of the hospital-patient relationship, there are certain legal duties that exist between a patient and the hospital. When a patient presents himself/herself for any form of treatment at a hospital, this would amount to a contract/agreement being entered into between the parties. Hence the section would directly affect a consumer. In looking at a supplier's obligation or duty, this means that they have a legal duty to ensure that their patient is taken care of in the best possible manner.³⁰⁰

5.3.5 The Consumer's Right to Demand Quality Services

Section 54(1)(b) of the Act³⁰¹ deals with the rights of consumers to demand quality services. It is argued³⁰² that exclusionary clauses contradict the above provision as they exclude the hospital's liability, and prevent the hospital from acting "in a manner and quality that persons are generally entitled to expect."³⁰³ Patients would expect the best possible quality of treatment from their health care provider, and any departure from this would imply that they are not receiving what they are entitled to expect.

Section 51(1)(c)(i) prohibits a supplier from entering a transaction or agreement subject to any term or condition, where such term or condition limits or exempts a supplier of goods or services from liability for any loss directly or indirectly attributable to the gross negligence of the supplier or any person acting for or controlled by the supplier.

It is submitted that Section 54(1)(b)³⁰⁴ relates to Section 51(1)(c)(i)³⁰⁵ in that both sections would result in exclusionary clauses in hospital contracts being null and void. As most clauses exclude the general negligence of the hospital, this is one of the main clauses to be applied to strike down the validity of exclusionary clauses.

²⁹⁷ T Naude (note 289 above) 510

²⁹⁸ T Naude (note 289 above) 510

²⁹⁹ M Letzler (note 19 above) 23 - 24

³⁰⁰ M Letzler (note 19 above) 23 - 24

³⁰¹ Act 68 of 2008 (note 15 above)

³⁰² M Letzler (note 19 above) 24

³⁰³ Act 68 of 2008 (note 15 above) Section 54(1)(b)

³⁰⁴ Act 68 of 2008 (note 15 above)

³⁰⁵ Act 68 of 2008 (note 15 above)

5.3.6 The Power to Declare Agreements, Terms and Conditions Unfair and Unjust

Section 52 of the Act confers certain powers on the courts when adjudicating on unfair or unjust terms or conditions and further describes the factors which the court ought to take into account in deciding. These include the following:

The court must consider—

- a) the fair value of the goods or services in question;
- b) the nature of the parties to that transaction or agreement, their relationship to each other and their relative capacity, education, experience, sophistication and bargaining position;
- c) those circumstances of the transaction or agreement that existed or were reasonably foreseeable at the time that the conduct or transaction occurred or agreement was made, irrespective of whether this Act was in force at that time;
- d) the conduct of the supplier and the consumer, respectively;
- e) whether there was any negotiation between the supplier and the consumer, and if so, the extent of that negotiation;
- f) whether, as a result of conduct engaged in by the supplier, the consumer was required to do anything that was not reasonably necessary for the legitimate interests of the supplier;
- g) the extent to which any documents relating to the transaction or agreement satisfied the requirements of section 22;
- h) whether the consumer knew or ought reasonably to have known of the existence and extent of any particular provision of the agreement that is alleged to have been unfair, unreasonable or unjust, having regard to any—
 - i) custom of trade; and
 - ii) any previous dealings between the parties;
- i) the amount for which, and circumstances under which, the consumer could have acquired identical or equivalent goods or services from a different supplier; and
- j) in the case of supply of goods, whether the goods were manufactured, processed or adapted to the special order of the consumer.

If a court finds that an agreement was indeed unfair, unjust or unreasonable the Act provides for a number of options in terms of which the agreement, term or condition could be partially unenforceable,³⁰⁶ or completely void,³⁰⁷ or make any other order it considers to be just and reasonable in the circumstances.³⁰⁸

³⁰⁶ Act 68 of 2008 (note 15 above) Section 52(a)(i)(aa)

³⁰⁷ Act 68 of 2008 (note 15 above) Section 52 4(a)(i)(bb)

³⁰⁸ Act 68 of 2008 (note 15 above) Section 52(4)(b)

5.3.7 The Concept of Strict Liability

Section 61 of the Act has been described as the most controversial of all the sections in the Act. This is because the section creates the no fault or strict liability provision. The section provides that any harm³⁰⁹ caused, which includes death, or injury, or illness to any natural person, as a result of the supply of unsafe goods, or product failure, or a defect or hazard in any goods or inadequate instructions or warnings pertaining to any hazard arising from or associated with the use of any goods, then the producer, importer, distributor or retailer would be liable, irrespective of whether there was negligence on the part of any of the specified individuals.³¹⁰

The writer submits that applying the above section to the health care context has serious consequences. In effect it means that all medical transactions are bound by the provisions of the Act. Prior to the Act being in existence, consumers would have to prove either a contractual or delictual link between the harm caused and the product/service rendered.³¹¹ Delictually, all elements had to be proved including the element of fault on the part of the producer/supplier. It is argued that to prove fault on the part of the manufacturer may be difficult as the fault could not have been present at the time of manufacturing, or the consumer may have no knowledge of the production process or the consumer may not have sufficient knowledge to locate the actual manufacturer.³¹² However the introduction of the above section in the Act, now means that consumers no longer have to prove the element of fault. The only requirement on the part of the consumer is to prove that there was harm caused to them. The consumer may then choose to hold the producer, distributor, importer or retailer liable for the damages that may follow, as all of the above fall under the definition of supplier in terms of the Act.³¹³ In addition should the consumer decide to hold all of the above liable for the damages caused, each party would be held to be jointly and severally liable.³¹⁴

In applying the above provision to exclusionary clauses in medical contracts, it can be argued that the hospital or medical practitioner may not contract itself/himself/herself out of the strict liability provision. On these grounds, an exclusionary clause in a medical/hospital contract, it is submitted, is invalid. In practice this now means that should a patient admit himself/herself to a health care establishment (and assuming the patient signed an admission form which included an exclusionary clause for liability), and is injured due to the negligence of the health care practitioner for which he/she wants to claim damages, the health care establishment can no longer benefit from the exclusionary clause in terms of Section 61 of the Act.³¹⁵

³⁰⁹ Act 68 of 2008 (note 15 above) Section 61(5) a - d

³¹⁰ Act 68 of 2008 (note 15 above) Section 61(1) a - c

³¹¹ W Jacobs, PN Stoop and R Van Niekerk Fundamental consumer rights under the Consumer Protection Act 68 of 2008: A critical overview and analysis. Potchefstroom Electronic Law Journal (2010) 13(3) 382 Available at <http://scielo.org.za/pdf/pelj/v13n3/v13n3a09.pdf> (Accessed 19 October 2013)

³¹² W Jacobs, PN Stoop and R Van Niekerk (note 311 above) 382; MN Slabbert and MS Pepper (note 19 above)

³¹³ Act 68 of 2008 (note 15 above) Section 65(1)

³¹⁴ Act 68 of 2008 (note 15 above) Section 61(3)

³¹⁵ Act 68 of 2008 (note 15 above)

Kok refers to the criticism that many commentators were of the opinion that Section 61 of the Act is too wide, and would require additional costs and infrastructure to give effect to it. Eventually it would be the consumer who would be expected to bear the additional costs.³¹⁶ Kok agrees with the above criticism, but also notes that an increase in price cannot be compared to the overall benefit of a fair consumer market with good, efficient goods and services.³¹⁷ It is submitted that the opinion of Kok is questionable. While consumer protection is the core goal of the Act, if it causes an increase in the price of medical services or treatment, this would also have an adverse effect on the patient. The increase in the price should not be an exorbitant one, but should be in keeping with what the consumer can afford.

5.4 CONCLUSION

The definitions of the Consumer Protection Act are wide enough to include patients as consumers and medical practitioners as suppliers or service providers. The Act is thus applicable to all contracts between patients, health care establishments and health care providers.

The Act makes provision for contracts to be in plain and understandable language. This augurs well for patients, who previously had to sign legally binding contracts without understanding the content of the legal jargon accepted by them.

Contractual terms which are unfair, unreasonable and unjust are no longer acceptable. The courts have also been given the power to adjudicate on an unfair or unjust clause, where the interpretation of the clause is the subject of a legal dispute. This protection is advantageous to patients, who usually in the past had an unequal bargaining power in relation to the healthcare provider or establishment. Section 48 now caters for the protection of consumers against unscrupulous clauses which were previously to their detriment.

Exemption clauses which exclude gross negligence are strictly prohibited in terms of Section 51 of the Act. Should a medical/hospital contract include an exemption clause, this now needs to be drawn to the attention of the patient/consumer. Patients now have the opportunity to demand equal quality services. The expectation of a high quality of services, could imply that health care providers cannot insist on exclusionary clauses being signed, as this could potentially imply that the quality of the service would be less than the highest quality expected.

The no fault or strict liability provision found in Section 61 of the Act now means that the consumer/patient may hold any party in the supply chain as liable for damages for the harm caused without proving fault. This has far reaching effects on the medical fraternity, as the consumer does not need to prove negligence, but only that there was harm caused wrongfully, and the causal link between the defective goods and the harm. The next chapter will be focusing on the Constitutional right of access to health and exclusionary clauses.

³¹⁶ C Kok *The Effect of the Consumer Protection Act on Exemption Clauses in Standardised contracts* Unpublished Thesis (2010) 59-60

³¹⁷ C Kok (note 316 above) 60

CHAPTER 6

THE CONSTITUTIONALITY OF EXCLUSIONARY CLAUSES AND THE IMPACT OF THE CONSTITUTION ON EXCLUSIONARY CLAUSES IN MEDICAL CONTRACTS

6.1 INTRODUCTION

Section 27 of the Constitution³¹⁸ provides that everyone has the right of access to health care services. While the Constitution does not grant every person the right to health care as a direct right, everybody is given a right of access, which includes the right not to be refused emergency medical treatment.³¹⁹ This chapter will explore the right of access to health care afforded to all individuals, against the validity of exclusionary clauses. The question it seeks to answer is: If a patient refuses to sign a contract with the health care provider/health care establishment on admission, can the health care provider/establishment refuse to treat the patient and in this way deny the patient his or her Constitutional right of access to health care in circumstances where there is no limitation on the resources available to provide the services? Further, can a health care establishment refuse to treat a patient in an emergency situation, where the patient is unable to sign the contract accepting the exclusionary clause or where the family refuses to sign the contract, due to them being unable to understand the terms and conditions? These are just some of the issues that will be dealt with, keeping in mind the principles of the Constitution as well as the National Health Act.

6.2 THE RIGHT OF ACCESS v THE RIGHT TO HEALTH CARE

When interpreting the right of access to health care in a resource-deficient country like South Africa, of significant importance is the Constitutional Courts' judgement in the *Soobramoney*³²⁰ case. In this case, the appellant was in the final stages of chronic renal failure and required treatment which he sought from the Addington State Hospital in Durban. The hospital however refused to provide him with the treatment, and stated that the reason for their refusal was due to limited resources. Soobramoney then approached the High Court for an order directing that the hospital provide him with the requested dialysis treatment. The High Court refused the application. He then took it on appeal to the Constitutional Court. He based his argument, on the right to life³²¹ and the right to emergency medical treatment.³²²

The Constitutional Court held that apartheid and the high levels of poverty have had far reaching consequences on the right of access to health care. The appellants right of access to health care had to be determined in the context of the needs of others in society and the historical past of the country.³²³ A holistic approach is required when determining a person's

³¹⁸ Act 108 of 1996 (note 3 above)

³¹⁹ Act 108 of 1996 (note 3 above) Section 27(3)

³²⁰ *Soobramoney v Minister of Health, KwaZulu Natal* (note 87 above)

³²¹ Act 108 of 1996 (note 3 above) Section 11

³²² Act 108 of 1996 (note 3 above) Section 27(3)

³²³ *Soobramoney v Minister of Health, KwaZulu Natal* (note 87 above) paras 8-11

right of access to health care, as the needs of society meant that it was not possible to look at the right in terms of the needs of every specific individual.³²⁴ In the Court *a quo*³²⁵ it was held that in KwaZulu Natal, in order to determine who is granted treatment, the state hospitals relied on the Department of Health's Guidelines. In circumstances where a patient showed no prospects of success if they were to receive treatment, they were precluded from receiving treatment. The guidelines are to ensure that the maximum number of patients benefit from the resources available. On Appeal, the Constitutional Court re-inforced the importance of the Department's guidelines, and held that the guidelines were enforced to assist health care practitioners in making difficult decisions regarding treatment of their patients, as there was clearly a large number of patients requiring treatment, but not enough resources to cope with that demand.³²⁶

It is submitted that the approach of both the KwaZulu Natal court and the Constitutional Court is correct and in keeping with what would be expected, bearing in mind the financial and resource constraints currently faced by our public hospitals and healthcare departments. The 1997 health care budget by the finance minister at the time, Trevor Manuel allocated an amount of approximately R20 million to the Department of Health, to be used towards improving hospitals and overall strengthening of the current health system. The total expenditure on health was projected to be over R20 billion, which was an increase of close to 9.5% on the previous year's budget of R17.5 billion.³²⁷ While the amount does seem to be exorbitant, it must be kept in mind that the budget for the 1997/1998 year is to cover various health crisis, including building infrastructure, aiding with the prevention, awareness and treatment of HIV/AIDS and TB, upgrading facilities, etc. While South Africans are afforded the right of access to health care, this right may be limited in terms of Section 36 of the Constitution, the limitations clause.

Carstens and Pearmain³²⁸ note that the right of access is not a direct right to health services. They submit that the implication is that both the private and public health sectors are bound by the Constitutional right, and that people of all races and cultures will have equal access.³²⁹ There are no specific onerous obligations placed on the state to ensure that that Constitutional right is adhered to as opposed to the private sector. Should a person be denied access to a private health establishment, which is not legally justifiable, the private health establishment may be found guilty of unfair discrimination.³³⁰ It is submitted that Carstens and Pearmain's submissions on the right of access are in line with the purport and spirit of the Constitution promoting equality, freedom and justice. The Constitution binds all individuals and entities in South Africa and this would apply equally to both the private and public health care sectors. The next question is if a private health care establishment refuses to admit a patient, who refuses to accept an exemption clause, will this be unconstitutional? It is submitted that to

³²⁴ *Soobramoney v Minister of Health, KwaZulu Natal* (note 87 above) paras 22

³²⁵ *Soobramoney v Minister of Health, KwaZulu Natal* 1998 (1) SA 430 (D)

³²⁶ *Soobramoney v Minister of Health, KwaZulu Natal* (note 87 above) paras 24 and 25 at 774H-775C/D

³²⁷ The 1997/1998 Health and Budget Available at <http://www.healthlink.org.za/pphc/Phila/budg2.htm> (Accessed 25 November 2013)

³²⁸ P Carstens and D Pearmain (note 27 above) 41

³²⁹ P Carstens and D Pearmain (note 27 above) 44

³³⁰ P Carstens and D Pearmain (note 27 above) 44

answer the question depends on whether the refusal is legally justifiable in terms of the Constitution or not. An exemption clause that excludes the gross liability of the health practitioners, would not be legally justifiable, and would be in violation of the Constitution. The health care establishment cannot rely on such refusal to deny access of a health service to a patient. It is submitted that of extreme importance is the right to equality, justice and most important the right of the patient to have access to health services with no discrimination on unlawful grounds.

6.3 THE RIGHT TO EMERGENCY MEDICAL TREATMENT

In the *Soobramoney* case³³¹ the Constitutional Court held that emergency medical treatment does not refer to “ongoing” treatment of a chronic illness. The right is to ensure that no person is deprived of emergency medical treatment by way of bureaucratic requirements. An emergency refers to a “sudden catastrophe” which requires immediate medical attention, and no person may be turned away from a hospital that is able to provide the necessary required treatment.³³² Madlala J defined the concept of emergency medical treatment as referring to suddenness or unexpectedness.³³³ The right to receive emergency medical treatment is reiterated in the National Health Act³³⁴ which provides that a health care provider, health worker or health care establishment may not refuse a person emergency medical treatment. The KwaZulu Natal Health Act³³⁵ refers to emergency medical services rather than emergency medical treatment. It provides that a person is entitled to receive emergency medical services for a life threatening condition at a public health care establishment or a private health care establishment.³³⁶ Any person who turns away a health user requiring an emergency service, is guilty of an offence.³³⁷ Carstens notes that KwaZulu Natal is the only province that criminalises the act of turning away a person requiring emergency medical treatment.³³⁸ It is described as an extreme measure because the National Health Act does not criminalise conduct, and it also infers that no matter how busy a health care establishment is, no matter how under staffed they are, or how limited their resources are, they can, under no circumstances refuse to attend to a health care user in an emergency situation.

It is submitted that this is quite a severe regulation to be enforced. It would apply to both the private and public health care establishments, and results in a harsher punishment for non-compliance than even the National Health Act. It is submitted that in applying this to exclusionary clauses, it would imply that irrespective of whether the health care user himself or the family of the health care user refuses to sign an exclusionary clause with the health care establishment, that health care establishment cannot refuse to admit the health care user to the health establishment if it is an emergency situation.

³³¹ *Soobramoney v Minister of Health, KwaZulu Natal* (note 87 above) paras 20 at 774C-D/E

³³² *Soobramoney v Minister of Health, KwaZulu Natal* (note 87 above) paras 20 at 774C-D/E

³³³ *Soobramoney v Minister of Health, KwaZulu Natal* (note 87 above) paras 38

³³⁴ Act 61 of 2003 (note 72 above) Section 5

³³⁵ Act 4 of 2000 (note 44 above) Section 29(1)

³³⁶ Act 4 of 2000 (note 44 above) Section 29(1)

³³⁷ Act 4 of 2000 (note 44 above) Section 29(3)

³³⁸ P Carstens and D Pearmain (note 27 above) 328

6.4 CONCLUSION

An individual's right of access to health care has to be determined holistically taking into account a number of factors, including:³³⁹

- Financial and resource constraints;
- The budget of both the provincial hospitals and the Department of Health;
- The competing interest of patients in need of treatment; and
- The manner in which the health care establishment recognises and distinguishes between patients who are in most need of treatment, and those who can be added to a waiting list.

The National Health Act³⁴⁰ and the Constitution³⁴¹ recognise the right of all individuals to emergency medical treatment. Our courts have also gone to the extent of defining what an emergency is, and what type of treatment would be regarded as an emergency. In the context of emergency medical treatment, the acceptance of an exclusionary clause by a patient would not be regarded as a requirement in order to receive emergency medical treatment.

The next chapter will note the conclusions and recommendations in light of what has been discussed thus far.

³³⁹ *Soobramoney v Minister of Health, KwaZulu Natal* (note 87 above) paras 22 at 774F, paras 24 and 25 at 774H-775C/D

³⁴⁰ Act 61 of 2003 (note 72 above) Section 5

³⁴¹ Act 108 of 1996 (note 3 above) Section 27(3)

CHAPTER 7

CONCLUSIONS AND RECOMMENDATIONS

In the introduction of this dissertation, the purposes outlined for this dissertation was to seek clarity on the following pertinent legal issues: -

1. Analyse exclusionary clauses in medical contracts;
2. Discuss in detail the leading cases dealing with exclusionary clauses;
3. Review foreign jurisdiction with regard to exclusionary clauses;
4. Discuss the Consumer Protection Act in so far as the provisions of the Act have a direct effect on the validity of exclusionary clauses;
5. Critique exclusionary clauses against all of the above, and provide a comprehensive discussion and opinion on the way forward;
6. Present a conclusion on whether the Consumer Protection Act effectively protects patients and proposals for reform.

In concluding it is intended to note recommendations in respect of each issue listed above.

The South African health sector consists of both a private and public component. Despite the difference between the volume of patients attended to, the budgetary constraints of each and the general manner in which both sectors are managed, ultimately the private and public health sector provide a service to patients, which in turn is subject to legal and ethical considerations.

It would seem that the ethical responsibilities of the health care provider to his/her patient becomes blurred when such ethical responsibilities become overshadowed by the legal obligations of the health care provider to protect his/her own interests. Exclusionary clauses have over the years managed to establish an existence in all standard contracts, including medical contracts and admission forms. The very nature of such clauses shield the health care provider from liability, arising from harm to the patient, and also results in the patient contracting out of liability, and losing his/her accessibility to the courts.

However what must be kept in mind is that a medical contract needs to be distinguished from a standard commercial contract. While the parties in a commercial contract will in all likelihood have equal bargaining power, in medical contracts the same does not apply. In the leading case of *Afrox*, Brand JA was of the opinion that there was not any difference between the party's bargaining power. It is respectfully submitted that the court erred in its judgement. It failed to consider the unequal footing of the parties, the circumstances under which the patient signed the form, the lack of understanding that the patient had of the form in terms of the clauses and conditions which he was signing, and the overall legal ramifications that its decision had not only on that individual patient, but on patients generally.

Ethically, exclusionary clauses cannot be regarded as acceptable, as they corrode the very responsibility of the doctor – to act in the best interests of the patient at all times.

The legal position of exclusionary clauses in countries like the United Kingdom, USA and India have managed to reach consensus on the non-acceptance of such clauses in medical contracts. While the UK accepts the concept of freedom of contract, it also distinguishes between those contracts which affect the public interest, and those of a commercial nature. The law recognises that added obligations and protections need to be enforced when dealing with contracts which affect the public interest, especially their right to health services which is considered a basic right.

Similarly the USA generally regards exclusionary clauses as invalid in medical contracts. The courts have accepted the unequal bargaining position, the reliance and need of the patient on the access to medical services and treatment, and the vulnerable position patients are placed in, when having to decide on the acceptance of the clause as opposed to the non-acceptance of the clause and non-treatment which they desperately require.

Our courts should follow the same reasoning. The writer is of the view that exclusionary clauses should not be completely removed from all contracts and a blanket provision applied. A distinction is required to be drawn between standard commercial contracts, and those contracts which affect the rights of a patient to access to medical services. Our Constitution affords individuals the right of access to health services, and in the event of such services not being provided to the satisfaction of patients, such individuals should have the right to redress for any harm that occurred.

The writer chose India as the third country to analyse, as India and South Africa are both faced with similar health challenges. Both countries face the difficult task of providing and maximising access to health care to large numbers of poor people, without them having their right of redress undermined. India's consumer protection laws date back as far as 1986. Interestingly enough, consumer protection laws only apply to those services where consideration is payable.

Medical practitioners and hospitals who offer free services, do not go unaccounted for and are still bound in terms of the Indian Contract Act. The writer submits that the importance of the Act lies in its evaluation of consent by the patient. Consent given by undue influence is not regarded as freely and voluntarily. Further the Act specifically recognises unequal bargaining powers, and will set aside such contracts as null and void.

While the concept of public policy is a consideration in most legal systems, it is respectfully submitted it is one which our courts seem to have difficulty in applying in practice. Public policy should form an integral part in nullifying exclusionary clauses.

The Constitution now provides a guide in promoting values. The Consumer Protection Act in South Africa brings with it the hope for change, and long earned protection specifically aimed at those who need it most – the public. In applying it to medical contracts, there is an extra protection afforded to patients. The provisions are in place theoretically to nullify some

exclusionary clauses, but what is left to be seen is whether our courts can interpret the provisions to protect patients from exclusionary clauses.

The following recommendations are submitted:

1. All health care establishments should follow the requirement of the Consumer Protection Act and ensure that patients have a clear and precise understanding of the form they are signing when being admitted to a health care establishment.
2. An exclusionary clause in a medical contract should fall into the category of “unfair, unjust and unreasonable”, and declared null and void in contracts that affect the public interest, more specifically access to health services. Our courts should be guided by the precedents of the UK, USA and India’s laws which recognise that those contracts in the public interest demand special protection.
3. Our courts need to develop the concept of public policy further using the values in the Constitution. It is often emphasised in judgements that public policy is never static and is dependent on what the legal convictions of the community are – it is now time to assess the constitutional values and determine whether our public policy is in line with it.
4. An unfair or unjust clause is a clause which allows dominance by one party over the other. The hospital/doctor contracts include such clauses which, it is submitted should be held as null and void.
5. Exclusionary clauses which exclude gross negligence are strictly prohibited in terms of the Consumer Protection Act – as they were under the Common law.
6. The courts need to take into account the state of mind of the patients, when considering the enforceability of exclusionary clauses. Consent by parties to a contract should be given freely and voluntarily and not under any form of duress, desperation or undue influence.
7. There should be an ongoing debate/discussion in the public arena including state departments regarding access to health care and the factors which restrict and frustrate a patients efforts to gain access to health care. This is necessary since it affects the lives of all the country’s citizens, and access to health care is essential and fundamental.
8. While we have the Consumer Protection Act in place, it is important to bear in mind that even though a patient may be aware of the provisions of the Act which protect him/her, very few patients may be in a financial position to challenge the public or private health care sector, should the patient find himself/herself in an instance where a hospital contract contains an exclusionary clause, and the patients wishes to litigate due to the harm caused to him/her.

South African courts have the power and ability to ensure that patients should never be restricted from seeking the assistance of the courts. They have the ability to ensure that both the public and the private health sectors no longer apply unfair exclusionary clauses in their admission forms and medical contracts. Exclusionary clauses that exclude liability for bodily injury or death should be outlawed. It is not necessary for every exclusionary clause in every standard contract to be declared null and void, however those exclusionary clauses which are used in the health care sector, whether public or private require extra scrutiny and analysis. There should be judicial authority in place to confirm that such clauses are unenforceable in the health care sector. The writer submits that in instances where the parties to a contract have equal bargaining power, exclusionary clauses should still apply, if both parties to contract freely consent to such inclusion of the exclusionary clause. The Consumer Protection Act is not flawless, however it does serve as an initial step towards recognising patient protection. South Africa as one of the developing economies of Africa, fulfils an important role in leading other developing nations in Africa towards developing and recognising patients' rights in the health care sector. The statutory laws are in place, but it remains to be seen how these laws will be applied in practice - only time will tell!

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