



UNIVERSITY OF KWAZULU-NATAL

**A CRITICAL ANALYSIS OF THE USE OF EXEMPTION CLAUSES WITH
PARTICULAR REFERENCE TO RISKY ACTIVITIES**

By

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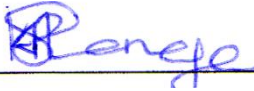
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DECLARATION

I, **Khethiwe Shange**, hereby declare that unless indicated to the contrary in this dissertation, the content of this dissertation represents my own unaided work, and this dissertation has not been previously submitted for academic examination at any other university.

Signed:  Date: 16 March 2018

ABSTRACT

Exemption clauses are regarded as part and parcel of most contracts, and are used by suppliers to ensure the efficient running of their business. It is common for suppliers of risky activities to include exemption clauses in their contracts. Therefore, it is submitted that if suppliers of risky activities are not allowed to use exemption clauses, many businesses will close down because they will not be able to afford insurance, and those that do decide to carry on will pass the cost of doing business on to consumers. In determining the enforceability and effectiveness of exemption clauses relating to risky activities, this dissertation will examine the common law position in relation to the treatment of exemption clauses. In terms of the common law of contract, the court will most likely uphold an exemption clause in favour of the principles of freedom of contract and *pacta sunt servanda*. This is to ensure commercial and legal certainty in contracts entered into between two parties. However, since the introduction of the Constitution of the Republic of South Africa, 1996, the courts will have regard to whether the term or contract is contrary to public policy and the values that underlie our constitutional democracy. This dissertation will further discuss the rights of consumers and the duties of suppliers in terms of the Consumer Protection Act 68 of 2008 (CPA). The CPA has brought about greater regulation of unfair contract terms. It not only prohibits the use of unfair, unreasonable and unjust terms, but also requires a supplier of a risky facility to draw the consumer's attention to a term that seeks to limit the supplier's liability. Furthermore, the CPA provides for greater protection of consumer rights, and among other things, the CPA aims to ensure fairness in contracts concluded between supplier and consumer.

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CHAPTER ONE: INTRODUCTION

1.1 General introduction

Suppliers sometimes provide services to consumers which may be regarded as rather dangerous. Hence, risky activities are activities in which consumers voluntarily participate and which expose them to some form of danger.¹ These include activities such as amusement park rides, bungee jumping, deep-sea diving, and even children jumping on a trampoline.² If something goes wrong and consumers are injured, the question arises as to who is liable for the damages that the consumer has suffered. In the past, service providers could rely on exemption clauses to avoid liability. An exemption clause is a clause that seeks to limit or restrict one of the contracting parties' liabilities in respect of loss, damages, death, injuries, and negligence.³ Such clauses are generally broadly worded; for example, they will include words such as: "howsoever caused", "from whatever cause arising" and "for whatever reason".⁴ A decided case which illustrates this is *Durban's Water Wonderland v Botha*,⁵ where the supplier of an amusement park activity was held not liable as the wording of the exemption clause excluded any liability based on negligence related to the design or manufacture of the ride. In this case the plaintiff and her child were injured as a result of being thrown from a malfunctioning jet ride.

There are two common law principles that need to be considered when discussing exemption clauses. These are *pacta sunt servanda* and freedom of contract. *Pacta sunt servanda* means that all duties and obligations that arise in terms of the agreement must be honoured.⁶ In addition, freedom of contract means that parties can freely enter into a contract without interference from third parties⁷. It is also generally accepted that a party who has signed a

¹ Mckay "White adventure tourism on the Ash River, South Africa" (2014) 20(1) *Journal for Physical, Health education, recreation and dance* 53.

² Moyer "Think again before letting your kid on a trampoline" (2017).
www.slate.com/article/life/the_kids/2017/07/children (Accessed: 18 September 2017).

³ Stoop "The current status of enforceability of contractual exemption clauses for exclusion of liability in South African contract law" (2008) 20 *SA Merc LJ* 496.

⁴ Marx and Govindjee "Revisiting the interpretation of exemption clauses: *Drifter Adventures Tours cc v Hircock* 2007(2) SA 831 (SCA)" (2007) 28(3) *Obiter* 625.

⁵ 1999 (1) SA 982 (SCA).

⁶ Mupangavanhu "Fairness a slippery concept: the common law of contract and the Consumer Protection Act 68 of 2008" (2015) 48(1) *De Jure* 120; Hutchison(ed) and Pretorius (ed), Du Plessis Eiselen (ed) *Contract law of South Africa* 2ed (2012) 21-24.

⁷ Hutchison et al *Contract law of South Africa* 21–24.

contract is bound by the exemption clause even if he has not read the contract or understood its importance.⁸ This is based on the rule of *caveat subscriptor*. In terms of the *caveat subscriptor* rule it is generally accepted that once a person signs a written contract, it is not easy for that person to get out of that contract or to argue that some of the terms in that contract do not apply to the agreement. However, this rule is not absolute, as a person can argue that the exemption clause is not applicable if they can prove that they made a *iustus error* (mistake),⁹ or that the contract contains an unusual term which no reasonable person would expect to find in that type of contract or that the person has deviated from previous negotiations.¹⁰

The common law position pertaining to the use of exemption clauses in the law of contract has been amended by the Consumer Protection Act (CPA).¹¹ The CPA was enacted because the system of consumer law in South Africa was out-dated, fragmented,¹² and the law was based on principles which were contrary to the democratic system that was introduced when the new democratic government came into power in 1994.¹³ Ever since the introduction of the CPA, emphasis has shifted from freedom of contract to the fact that the contracts with consumers should be fair. Certain aspects of the common law relating to rights of consumers have been incorporated into the CPA, and certain business practices that were unregulated are now regulated by CPA.¹⁴

The CPA contains a number of provisions that are used to control the use of exemption clauses; for instance, the CPA provides a distinction between a so-called “black list” and a “grey list” of terms.¹⁵ The so-called black list of terms refers to those terms that a service provider cannot use in a contract; for instance, a service provider may not contract out of liability for gross negligence. Suppliers are, however, still entitled to contract out of liability for ordinary acts of negligence.¹⁶ The grey list of terms refers to terms that are allowed to be included in a contract, but suppliers must draw the consumer’s attention to those terms and

⁸ Van Eeden E *Consumer Protection Law in South Africa* (2013) Lexis Nexis Durban 69.

⁹ Tait and Newman “Exemption provisions and the Consumer Protection Act 68 of 2008: some preliminary comments (2014) 35(3) *Obiter* 630.

¹⁰ *Ibid.*

¹¹ Act 68 of 2008.

¹² 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” (201) 31 (2) *Obiter* 6.

¹³ *Ibid.*

¹⁴ Stoop “Background to the regulation of fairness in consumer contracts (2015) 27 *SA Merc LJ* 191.

¹⁵ Naude “The consumer’s ‘right to fair reasonable and just terms’ under the new Consumer Protection Act in comparative perspective” (2009) 126 *SALJ* 131.

¹⁶ Tait and Newman (2014) *Obiter* 639.

explain the nature of the activity to the consumer.¹⁷ For instance, when a consumer intends to engage in bungee jumping, the supplier must explain to the consumer that there are serious risks involved.

1.2 Purpose statement

The purpose of this study is to analyse critically the enforceability and effectiveness of exemption clauses when suppliers provide services which involve activities which are regarded as being dangerous and which expose consumers to more risks than normal. In some situations, suppliers may not contract out of liability at all, whereas in other situations they may contract out of liability provided they comply with certain requirements as specified in the CPA. It is critically important for suppliers to understand how far they are entitled to go when it comes to including exemption clauses in their contracts, and that the old common law approach of simply including an exemption clause in the fine print of their contracts is no longer sufficient to contract out of liability, especially when dangerous activities, which expose consumers to more risk than usual, are involved. For the purpose of this dissertation, such activities are referred to as risky activities.

1.3 Statement of problem

Exemption clauses are commonly used by service providers to escape liability for death or damages that may result from injuries sustained by the consumers.¹⁸ Such clauses have become the norm in places where consumers are supposed to relax and have fun with their families.¹⁹ Clauses of this type may have significant implications for the rights of consumers; and consumers will often enter into contracts without being aware of such clauses or without being aware of what these clauses actually mean.²⁰ They discover that there is an exemption clause only when something goes wrong. When they try to hold the supplier responsible for the damages that they have suffered, they discover that the exemption clause exempts the supplier from liability.²¹ In many instances, this then means that the consumer must bear full responsibility for the damages that they have suffered even in circumstances where the

¹⁷ Ibid.

¹⁸ Stoop “The current status of the enforceability of contractual exemption clauses for the exclusion of liability in South African law of contract” (2008) 20 (4) *SA Merc LJ* 496.

¹⁹ Mupangavanhu “Exemption clauses and the Consumer Protection Act, 2008: An assessment of *Naidoo v Birchwood Hotel* 2012 6 SA 170 (GSJ)” (2014) 17(3) *PELJ* 1182.

²⁰ *Afrox Healthcare Bpk v Strydom* 2002 (6) SA 21 (SCA).

²¹ Ibid.

supplier has been negligent. In the case of *Afrox Healthcare Bpk v Strydom*,²² a hospital was able to avoid liability for harm suffered by the plaintiff as a result of the negligent conduct of a nurse who bound his bandages too tight and caused him to lose a toe. Similarly, in the case of *Durban's Water Wonderland v Botha*,²³ the amusement park was held not liable for the harm suffered by the plaintiff and her daughter, even though the cause of the accident was mechanical failure of an amusement park ride.

Over the years the use of exemption clauses have been seriously criticised because they were usually imposed on unsuspecting consumers whose rights became significantly reduced by the use of exemption clauses.²⁴ However, if the use of such exemption clauses is to be completely prohibited, this would have serious consequences for businesses and as such some might be compelled to close down.²⁵ Hence, the cost of bearing insurance may be too prohibitive for a business or the risk of facing a significant claim may be too risky for a business, thereby deterring an entrepreneur from providing certain services.²⁶ In addition, businesses that have continued to operate without the use of exemption clauses will probably bear the cost of insurance, which will invariably be passed on to consumers. This could then significantly increase the cost of certain services. Where possible the consequences that flow from risky activities such as bungee jumping, shark cage diving and even amusement parks can be shared between the consumer and supplier in order for a balance to be achieved between the rights of consumers and suppliers.²⁷

1.4 Research questions

In order to achieve the purpose of this dissertation the following questions need to be considered:

- What is the effect of the common law on agreements that are concluded between the supplier and the consumer?

²² 2002 (6) SA 21 (SCA).

²³ *Supra*, note 5.

²⁴ Stoop "Background to the regulation of fairness in consumer contracts" (2015) 27 *SAMerc LJ*, Y. Mupangavanhu (2014) 17(3) *PELJ* 1182; *Afrox Healthcare BPK v Strydom* (*Supra* 22).

²⁵ Christie and Bradfield *Law of Contract in South Africa* 7th ed (2016) 216.

²⁶ Naude "The use of black and grey lists in unfair contract terms legislation in comparative perspective" (2007) *SALJ* 132.

²⁷ Mupangavanhu (2015) 48(1) *De Jure* 117.

- What is the effect of the Constitution of the Republic of South Africa²⁸ on the use of exemption clauses?
- What is the effect of the CPA on the use of exemption clauses in risky activities?
- What consequences will suppliers face if the use of exemption clauses in risky activities is prohibited?
- What strategies can be adopted by suppliers of risky activities to minimise the risks and protect themselves from massive consumer claims?

1.5 Research objectives

- To ascertain the effect of the common law principles on agreements concluded between consumers and suppliers.
- To ascertain the effect of the Constitution of the Republic of South Africa on the use of exemption clauses.
- To ascertain the effect of the CPA on the use of exemption clauses in risky activities.
- To ascertain the consequences that will be faced by suppliers of risky activities if exemption clauses are not allowed.

1.6 Research methodology

In order to achieve the aims and objectives of this study, I will focus on consumer law and contract law. This study will draw upon case law and legal arguments by various authors in order to assess the validity of exemption clauses when used in relation to the provision of services which may involve risky activities. In order to determine the validity and enforceability of exemption clauses in these circumstances, I will draw upon various sections of the CPA. Furthermore, this study will also outline the legal position pertaining to the use of exemption clauses in Australia (New South Wales). This jurisdiction has been chosen because the Australian legal system provides for the Civil Liability Act (CLA),²⁹ which addresses some of the issues pertaining to risky activities. The Australian Act governing consumer law³⁰ also makes special allowance for the use of an exemption clause where risky

²⁸ 1996 (hereafter “the Constitution”).

²⁹ Act 22 of 2002 (NSW).

³⁰ Competition and Consumer Act 10 of 2010.

activities are involved.³¹ Therefore, in relation to this study, it is significant to outline the Australian position in respect of exemption clauses used by suppliers of risky activities.

³¹ Ibid, section 139A.

CHAPTER TWO: THE COMMON LAW DUTY OF CARE OWED TO A CONSUMER BY A SUPPLIER

2.1 Introduction

This chapter aims to discuss the legal duty of care that is owed by a supplier to a consumer. In particular, the duty of care that suppliers of risky activities owe to their consumers is considered. It is important to note that a consumer will have to prove that the supplier failed to adhere to the required standard of care before that supplier can be held liable. A supplier will not be held liable just because the consumer has suffered some form of injury. The case of *MV Shark Team v Tallman*³² illustrates this. In this case a ski-boat carrying tourists on a shark cage diving trip, capsized at sea after being hit by a big wave. As a result, Tallman drowned together with three other people. The key issue before the court was whether the death of Tallman was caused by the negligence of the skipper.³³ The Supreme Court of Appeal (SCA) found that the skipper and the company were not negligent, because the boat had capsized as a result of being hit by a big wave that was abnormally large. *Khoza v Member of the Executive Council for Health and Social Development of the Gauteng Provincial Government*³⁴ is another case which illustrates this point. In this case the plaintiff's baby was born with cerebral palsy. The High Court found that the negligence of the nursing staff was the sole cause of the cerebral palsy suffered by the child,³⁵ as the nursing staff and the hospital failed to recognise that the mother was experiencing problems from the prolonged labour and failed to conduct an emergency caesarean section.³⁶

2.2 The suppliers' duty

Suppliers owe their consumers a duty of care to ensure that their consumers do not suffer any damages when they make use of the suppliers' goods and services. If they breach their duty, consumers are entitled to hold them liable on the basis of the law of delict or they may hold them liable for breach of contract.³⁷ From this it can be said that a supplier will not be held liable for any damages suffered by a consumer unless it can be shown that there was some

³² [2016] ZASCA 46.

³³ *Ibid*, para 10.

³⁴ [2015] 2 All SA 598 (GJ).

³⁵ Para 71, 77.

³⁶ Para 71, 77.

³⁷ Mupangavanhu (2014) 17 (3) *PELJ* 1186.

form of fault involved or some form of breach of contract. In most instances, this will mean that the supplier was negligent in some way or it failed to take adequate steps to prevent foreseeable harm from occurring. For the purposes of this discussion it is most important to consider the following: When can it be said that a supplier has acted negligently, and in what circumstances will a supplier be held liable for failing to prevent harm from occurring?³⁸

2.2.1 Negligence

Negligence refers to “conduct which involves unreasonable risk of harm to another or the failure to exercise the degree of care which the circumstances demand”.³⁹ In determining whether the harm suffered by the consumer was reasonably foreseeable, the court will apply the test for negligence as set out in the case of *Kruger v Coetzee*.⁴⁰ In this case the court stated that liability arises if a *diligens paterfamilias* in the position of the supplier “would have foreseen the possibility of his conduct injuring another and would have taken steps to prevent the harm from occurring, and whether the supplier failed to take such steps”.⁴¹ However, the true test for negligence is whether the conduct complained of falls short of the standard required of a reasonable person.⁴² This is illustrated in *Naidoo v Birchwood Hotel*,⁴³ which dealt with a gate that fell on Naidoo as a result of the hotel’s failure to maintain the gate. The main issue for determination was whether Birchwood Hotel was liable for the bodily injuries sustained by Naidoo.⁴⁴ Naidoo pleaded that the hotel was negligent in that it had failed to take adequate steps to prevent the accident from occurring by not properly maintaining the gate⁴⁵ and ensuring that it was safe for public usage, and by failing to warn the public of the potential danger created by the state of repair of the gate.⁴⁶ It was emphasised that replacing the heavy gate with a lighter gate was a preventative measure that could have been taken by Birchwood Hotel to prevent the accident.⁴⁷ The court held that the

³⁸ Because of the nature of this particular discussion, it is not feasible to embark on a comprehensive discussion of the law of delict; therefore, only those aspects which are relevant are highlighted here. As exemption clauses are introduced by way of contract, the common law of contract is discussed in the next chapter.

³⁹ Nel “Risk identification and management checklist for adventure sport operators” (2017) <http://www.tourismtattler.com/articles/legal/adventure-tourism-legal-perspective-7/64420> (Accessed 18 September 2017).

⁴⁰ 1966(2) SA 428 (A). The case of *Chartaprops 16 v Silberman* (300/07) [2008] ZASCA 115 cites *Kruger v Coetzee* 1966(2) SA 428 (A), where the court endorsed that “when setting out the test for negligence what steps would be reasonable will always be dependent upon the circumstances of the particular case” (see para 13).

⁴¹ *Kruger v Coetzee* 1966 (2) SA 428 (A) at 34.

⁴² *Chartaprops 16 v Silberman* (300/07) [2008] ZASCA 115 at para 13.

⁴³ 2012 6 SA 170 (GSJ).

⁴⁴ *Naidoo v Birchwood Hotel* (Supra), para 3.

⁴⁵ *Ibid*, para 4.

⁴⁶ *Ibid*, para 4.

⁴⁷ *Ibid*, para 26.

property owners were liable to ensure that their property did not create undue hazards for the public who entered and used their premises.⁴⁸

The *Naidoo* case can be compared to the case of *Klassen v Blue Lagoon Hotel and Conference Centre*,⁴⁹ where the court declined to follow the *Naidoo* decision and found that exemption clauses should be upheld because the parties had freely and voluntarily as adults entered into the contract. In this case, *Klassen* sued *Blue Lagoon* for damages suffered when he slipped and fell in the defendant's bathroom, and as a result sustained an injury to his ankle.⁵⁰ The plaintiff contended that when he went to the toilet there were no signs placed on the floor to alert him that the floor was wet and slippery;⁵¹ nor was he warned by the receptionist that the floor was wet. The defendant disputed this claim, alleging that the plaintiff was drunk at the time he had signed into the hotel.⁵² The hotel relied on the exemption clause which read: "The hotel is not responsible for any personal injury to the guest whether such injuries or loss were sustained by the negligent or wrongful act of anyone in the employment of or acts on behalf of the defendant."⁵³ The court acknowledged that when the defendant had checked in at reception, he had completed and signed a registration card, which contained an exemption clause that excluded the hotel's liability from harm suffered by the defendant.⁵⁴ In addition, the exemption clause was mounted on the fence in such a manner that it was visible to a vehicle entering the premise. There was also a disclaimer displayed at the guard house.⁵⁵ Evidence established that the defendant had had a properly functioning system in place, and that it had taken reasonable steps and precautions to ensure that the toilet facilities were kept in a clean and dry condition and that they did not pose any danger to guests.⁵⁶

In order to determine whether the harm is reasonably foreseeable, the court takes into consideration the extent in which the occurrence of the harm should have been anticipated.⁵⁷ It looks not only at the possibility of the accident occurring, but also at the remoteness of such occurrence, the nature of the harm (serious or negligible), and whether the harm was of

⁴⁸ *Ibid*, para 24.

⁴⁹ [2015] 2 All SA 482 (ECG).

⁵⁰ *Klassen v Blue Lagoon Hotel and Conference Centre Supra*, para 1.

⁵¹ *Ibid*, para 19.

⁵² *Ibid*, para 20.

⁵³ *Ibid*, para 3.

⁵⁴ *Ibid*, 34.

⁵⁵ *Ibid*, para 35.

⁵⁶ *Ibid*, 43.

⁵⁷ *Supra*, note 36, para 11.

such a nature that a reasonable person would have taken steps to guard against the occurrence of such harm.⁵⁸ *Samuels v Vuka Marketing (Pty) Ltd and Others*⁵⁹ is an example of a case where consumers expressly agreed to participate in a risky activity. In this case the plaintiff and his wife participated in a tandem swing, known as the big swing, during which their swing plummeted down and collided with rocks at the bottom of a gorge, resulting in severe injuries to the plaintiff and the death of his wife. The rope which was used when the couple jumped had not been secured properly by the operator. The court found that the operator had been grossly negligent and found him liable for the death of the deceased as he should have foreseen the possibility that someone would die if the rope was not tied properly.

2.2.2 Preventing harm

Once it has been determined that the harm that was suffered by the consumer is reasonably foreseeable, the court will have to determine whether in the circumstances in which the harm occurred the supplier could have taken steps to prevent the harm from occurring.⁶⁰ If the harm that was suffered by the consumer was preventable, a supplier could be held liable for failing to do something when it should have been done or for doing something when it should have not been done.⁶¹ This may include:⁶²

1. Failure to post clear warning signs that sufficiently warn the consumer about the consequence of participating in the activity;
2. Failure to provide regular inspections;
3. Failure to maintain the equipment in a safe condition regularly;
4. Failure to supervise consumers while they are engaged in the activity.

An example of the kind of conduct which may result in a claim of negligence occurred in 2013, when a couple went to the South African theme park and entertainment venue, Gold Reef City. They embarked on a ride called “The Tornado”.⁶³ When the couple climbed onto the ride they noticed a number of carts had their safety bars tied to the carts with pieces of wire, so they decided to skip those carts and chose another one. When the park attendant

⁵⁸ Supra, para 11 and 48.

⁵⁹ (23237/12) [2013] ZAGPPHC 412.

⁶⁰ Van der Walt and Midgley *Principles of delict* (2016) Durban: Lexis Nexis.

⁶¹ Michon “Legal claims in amusement park accidents” (2017) <http://www.nolo.com/legal-encyclopedia/amusement-park-accidents-32457-2.html> (Accessed 17 June 2017).

⁶² Ibid.

⁶² Ibid.

⁶³ Taylor “Trauma at Gold Reef City” (2013)

<https://toritaylorswordofmouth.wordpress.com/2013/02/21/trauma-at-gold-reef-city/> (Accessed 17 June 2017).

came to lower their safety bar he began adjusting something next to their feet. The attendant pulled out a bolt, reattached the bolt, and lowered the lamp bar. About halfway into the ride the bolt fell off, along with two other bolts. Even though the couple were screaming that the bolt had fallen off, the attendant did not stop the ride. Fortunately, the ride stopped on its own and the couple was able to avoid death or injury. From these facts, it is apparent that the park attendant was aware that there were problems with the rides. If the couple had been injured, the park attendant would have been held liable for negligence for failing to take adequate steps to ensure that the ride was safe for customers.

Another example occurred at a lodge in Krugersdorp where a woman was seriously injured in a bungee jumping accident.⁶⁴ The woman leapt from an elevated point during the jump and the cord came loose and snapped. In this case the bungee jumping instructor had failed to ensure that the cord was secure enough for the jump.

A decided case that illustrates a supplier's failure to take reasonable steps to prevent the consumer from suffering injuries is the case of *Katzeff v Canal Walk Limits*,⁶⁵ where a ten-year-old girl named Andrea Katzeff was scalped when her waist-length hair was caught in the rear axle of a go-kart. The court ruled that the go-kart operator had been negligent and had breached its duty of care, as it had failed to ensure that Andrea had adequate protective clothing and equipment before she had been allowed to participate in go-karting.⁶⁶ It had also failed to have due regard to her long hair and what might happen if her hair should become entangled in an axle of the go-kart, and had failed to take adequate and reasonable steps to ensure that her hair did not become entangled in the axle of the go-kart.⁶⁷

However, where the supplier has taken all the required steps to prevent the accident from occurring or to ensure that the consumer is aware of the risks associated with participating in the activity, it cannot be said to have acted negligently and thus to have breached the duty of care. This was illustrated in the case of *P and Another v Big Sky Trading 489 cc t/a Mike's Kitchen*.⁶⁸ In this case, a restaurant provided an entertainment area for children visiting the restaurant with their parents. In the entertainment area there was a trampoline that children could jump on. A 13-year-old boy was injured while playing on the trampoline. The issue

⁶⁴ Erasmus "Women injured as bungee cords snaps (2011)" <http://www.news24.com/southafrica/news/woman-injured-as-bungee-cord-snaps-20110402> (Accessed 17 June 2017).

⁶⁵ (10293/03) [2005] ZAWCHC 58.

⁶⁶ *Ibid*, para 23.

⁶⁷ *Ibid*.

⁶⁸ (5894/2013) [2015] ZAGPPHC 379 (12 June 2015).

before the court was whether Mike's Kitchen had had a legal duty to prevent injury to the child.

The court found that all the possible precautions had been taken by Mike's Kitchen to render the trampoline safe. The trampoline had netting around it and the netting attached to the top of it was high. The testimony given by the boy showed that the area between the springs and the trampoline had been filled with soft sponge.⁶⁹ Furthermore, there were steps leading to the entrance of the netting of the trampoline with a small entrance and one had to bend down to gain entrance. Two signs were attached to the front of the netting of the trampoline. One was a height restriction sign and the other made it clear that children could use the trampoline only under adult supervision.⁷⁰ Furthermore, rules regarding the use of the playground were erected at the entrance to the playground, on the climbing frames for the small children, and on the netting of the trampoline.⁷¹ Evidence also showed that the boy had exceeded the height limit and that he had often jumped on the trampoline without parental supervision. Evidence also showed that the child had often performed risky tricks on the trampoline.⁷²

The court came to the conclusion that even if there had been an adult standing right next to the trampoline, nothing could have prevented injury to a child executing risky tricks.⁷³ He could have fallen on his neck or head at any moment and nobody standing close to the trampoline could have prevented the accident. The court concluded that it could not be stated that there was any legal duty on Mike's Kitchen to do more than what had already been done.⁷⁴ Therefore the court found that Mike's Kitchen had not acted negligently in failing to prevent the accident.

A similar case is that of *Deacon v Planet Fitness Holdings (Pty) Ltd.*⁷⁵ In this case, the plaintiff attempted to follow her son through the drop-arm barrier at the exit of the defendant's gym. As she did so, the arm closed and hit her legs, causing her to fall.⁷⁶ As a result, the plaintiff was injured, and sued the gym for damages. The gym relied on the exemption clause to avoid liability. The plaintiff argued that the gym owed her a duty of care

⁶⁹ Para 8–9.

⁷⁰ Para 10.

⁷¹ Para 11.

⁷² Para 18.

⁷³ Para 42–43.

⁷⁴ Para 43–44.

⁷⁵ 2016 (2) SA 236 (GP).

⁷⁶ *Deacon v Planet Fitness Holdings (Pty) Ltd* (Supra), para 2.

by virtue of the fact that the plaintiff attended the gym.⁷⁷ The gym breached this duty of care to the plaintiff, and was negligent while acting in the course and scope of employment.⁷⁸ In determining whether the defendant breached the duty of care, the court took into consideration that the barrier was similar to the doors of a lift or an escalator, and that people are all familiar with barriers and turnstiles in shops, at sport grounds, and on transportation, which were all designed to provide access to only one person at a time.⁷⁹ These were normal and regular features of society, and therefore there was no reason why the defendant should have warned the plaintiff about the barrier.⁸⁰

Another similar case is that of Durban's *Water Wonderland v Botha*.⁸¹ In this case, the court held that the amusement park was not liable for the injuries sustained by the plaintiff, because a person approaching the ticket office to purchase tickets could not have failed to observe the notice boldly painted on either side of the cashiers' window. The court further held that the amusement park had done everything that was necessary to bring the attention of the respondent to the notice and, the contract was concluded subject to the terms of the notice.

2.3 Concluding remarks

As stated above, suppliers of any activity, including risky activities, owe their consumers a duty of care. When suppliers breach this duty of care because they have acted negligently or because they have failed to take reasonable steps to prevent harm from occurring, they will be held liable for their conduct.⁸² However, suppliers are entitled to contract out of liability for negligence, which will now be discussed in Chapter Three. Furthermore, where a supplier has contracted out of liability for negligence, a consumer cannot avoid the limitation by simply bringing a claim in delict.⁸³ A consumer would have to prove that the exemption clause does not apply. The circumstances in which such a clause will not apply under the common law are discussed in Chapter Three, and Chapter Four focuses on the impact which the CPA has had on such clauses.

⁷⁷ Ibid, para 10.

⁷⁸ Ibid, para 11.

⁷⁹ Ibid, page 16.

⁸⁰ Ibid, page 22.

⁸¹ (Supra, note 5)

⁸² *Naidoo v Birchwood Hotel* (Supra note 43); *Samuels v Vuka Marketing (Pty) Ltd and Others* (Supra note 59).

⁸³ Supra, note 56.

CHAPTER THREE: THE COMMON LAW OF CONTRACT

3.1 Introduction

The principles of freedom of contract and sanctity of contract are based on the idea that parties to a contract have freedom of choice.⁸⁴ The parties are free to decide the content of their agreements and once they have done so, they should be free from external interference.⁸⁵ The proposition that contracts entered into freely and voluntarily should be enforced promotes legal and commercial certainty as it ensures that businesses are able to operate efficiently.⁸⁶ When a dispute regarding the enforceability and effectiveness of an exemption clause in a written contract arises, the party that seeks to enforce the contract will usually invoke the *caveat subscriptor* rule to hold the other party bound to the contract.⁸⁷ This rule means “let the signer beware”. To ensure reasonableness and fairness in contracts entered into between consumers and suppliers, the courts have endorsed the principle of public policy which in recent times has been linked to the Constitution. A case that outlines the basis of public policy and the role it plays in the law of contract in terms of the Constitution is *Barkhuizen v Napier*.⁸⁸ In this case, the court held that in establishing whether a contract is constitutional or not, the court must determine whether the terms are against the principle of public policy weighed against the Constitution and the values that underlie it.⁸⁹

This chapter aims to outline the common law in relation to contract law, with particular reference to the use of exemption clauses. In addition, it will outline the effect of the principle of *caveat subscriptor* on agreements concluded between parties. It will further outline two principles that are regarded as the cornerstone of South African law of contract. These are “freedom of contract” and “sanctity of contract”. It will further evaluate the role that public policy plays when it comes to deciding whether the courts should enforce a contract or a particular term. Lastly, this chapter will consider the wording used in exemption clauses, and whether the exemption clause that the supplier seeks to rely on covers the nature of harm suffered by the consumer.

⁸⁴ Mupangavanhu (2015) 48 (1) *De Jure*, 116.

⁸⁵ *Ibid*, 119.

⁸⁶ Christie and Bradfield (Supra, note 25) 205–206.

⁸⁷ Stoop (2008) 20(4) *SA Merc LJ* 498–501, *George v Fairmead (Pty) Ltd* 1958 (2) SA 465 (A).

⁸⁸ 2007 (5) SA 323(CC).

⁸⁹ *Barkhuizen v Napier* (Supra), para 57.

3.2 Freedom of contract and *pacta sunt servanda*

The principle of freedom of contract is regarded as the foundation of the South African law of contract and has been heavily relied upon by courts.⁹⁰ In terms of the principle, parties are, within the limits of legality, free to decide whether,⁹¹ with whom, and on what terms to contract.⁹² Once parties to the contract have exercised this freedom, the principle of *pacta sunt servanda* ensures that an agreement that is voluntarily and truly entered into should be enforced.⁹³ A major criticism of exemption clauses is that the principles of freedom of contract and *pactum sunt servanda* triumph over the right to fairness and reasonableness. This is because even an exemption clause that operates unfairly is likely to be regarded as enforceable in order to give effect to the principles of *pacta sunt servanda* and freedom of contract. As pointed out by Stoop, “any interference by the court because an agreement appears to be unreasonable would be a form of paternalism inconsistent with the parties’ freedom of contract and the historical development of our law”.⁹⁴ This point was endorsed in the case of *Brisley v Drosky*.⁹⁵ Where the court held that courts will not lightly interfere with a party’s right to freedom of contract.⁹⁶

3.3 *Caveat subscriptor*

When parties sign a contract they are taken to be indicating that they intend to enter into a valid and binding agreement.⁹⁷ They cannot later argue that the document does not signify their true intention.⁹⁸ This principle is outlined in the case of *Burger v Central South African Railway*,⁹⁹ where the court held that “it is sound principle of law that a man, when he signs a contract, is taken to be bound by the ordinary meaning and effect of the words which appear above the signature”.¹⁰⁰

Moreover, there is no duty on one contracting party to inform the other party about the *content of their agreement, and a person who signs a contract without reading it does so at*

⁹⁰ Khon “Escaping the “Shifren Shackle” through the application of public policy: An analysis of three recent cases shows Shifren is not so immutable after all” (2014) 1 *Speculum Juris* 74.

⁹¹ Mupangavanhu (2015) 48 (1) *De Jure* 119.

⁹² *Ibid.*

⁹³ Stoop (2008) 20(4) *SA Merc LJ* 509.

⁹⁴ *Ibid.*

⁹⁵ 2002 (4) SA 1 SCA.

⁹⁶ *Brisley v Drosky* (*supra*); *Barkhuizen v Napier* (*supra*, note 88), para 151.

⁹⁷ Christie and Bradfield (*Supra* note 25).

⁹⁸ *Ibid.*

⁹⁹ 1903 TS 571.

¹⁰⁰ *Burger v Central South African Railway* (*Supra*), para 578.

his/her own risk.¹⁰¹ This principle was reinforced in *Afrox Healthcare Bpk v Strydom*.¹⁰² In this case the court held that there is no duty on the admission clerk of a hospital to point out an exemption clause to a patient at the time that he is being admitted for treatment.

A party who receives a contract is regarded as being aware of the writing and the terms and conditions that relate to the contract.¹⁰³ The court in *Afrox* also noted that such exemption clauses have become the rule rather than the exception.¹⁰⁴ Therefore, the patient was bound to the contract regardless of whether or not he read the document. This principle is based on the doctrine of quasi-mutual assent or the reliance theory.¹⁰⁵ The inquiry is whether the other party is reasonably entitled to assume that by the words or conduct of the other party they intended to be bound by the contract.¹⁰⁶ The reliance theory is illustrated in the case of *Smith v Hughes*,¹⁰⁷ where the court held:

“If whatever a man’s real intention may be he so conducts himself that a reasonable man would believe that he is assenting to the terms proposed by the other party and the other party upon that belief enters into the contract with him, the man thus conducting himself would equally be bound as if he intended to agree to the other party’s terms”.¹⁰⁸

However, there is a rebuttable presumption to the principle of *caveat subscriptor*, because signing a contractual document does not necessarily mean that a party will always be bound by the contract or its terms. The party can escape liability on the basis of *iustus error* or where the other party’s reliance was not reasonable, and he was not led to believe that the other party was assenting to the terms of the contract.¹⁰⁹

Sometimes exemption clauses are contained in documents such as tickets or displayed notices in circumstances where consumers are not required to sign something. Consumers will be bound by the exemption clause if the supplier did everything that was reasonably necessary to draw the consumers’ attention to the notice.¹¹⁰ The inquiry is “whether the steps taken by the

¹⁰¹ Van Eeden *Consumer Protection Law in South Africa* (2013) Durban: Lexis Nexis.

¹⁰² *Afrox Healthcare Bpk v Strydom* (Supra note 22).

¹⁰³ *Ibid*, para 41.

¹⁰⁴ *Ibid*, para 42.

¹⁰⁵ Christie and Bradfield (Supra note 25) 206.

¹⁰⁶ *Ibid*.

¹⁰⁷ (187) LR 6 QB 597.

¹⁰⁸ *Smith v Hughes* (Supra), para 607.

¹⁰⁹ Tait and Newman (2014) 35(3) *Obiter* 630; *Mercurius Motors v Lopez* 2008 3 SA 572 (SCA); *Brink v Humphries and Jewell (Pty) Ltd* 2005 2 SA 419 (SCA); *Du Toit v Atkinson's Motors Bpk* 1985 (2) SA 893 (A); *Spindrift (Pty) Ltd v Lester Donovan (Pty) Ltd* 1986 (1) ALL SA 384.

¹¹⁰ Hutchinson..et.al “The Law of Contract in South Africa (2012)239; Durban’s *Water Wonderland (Pty) Ltd v Botha* 1999 (1) SA 982 (SCA).

supplier were reasonable as to draw the attention of a reasonable consumer to the terms of the notice so that the supplier”,¹¹¹ on the basis of the doctrine of quasi-mutual assent or reliance theory, is entitled to assume from the consumer’s conduct that he has read and assented to the terms or is prepared to be bound by the terms without reading them.¹¹²

It is a well-known fact that most consumers do not read contracts before they sign them,¹¹³ nor do they read tickets that are handed to them or large notices that are displayed on walls.¹¹⁴ However, on the basis of the reliance theory and the *caveat subscriptor* rule (in the case of a signed contract), they may well be held bound by the contract, even if the contract contains unexpected terms.¹¹⁵

3.4 Public policy and good faith

The principle of public policy has been recognised by courts as a mechanism to set aside a contract or a term in a contract.¹¹⁶ The courts have, however, emphasised that they will not exercise the power to declare contracts contrary to public policy too quickly.¹¹⁷ They will exercise such power only when it is clear that the contract is contrary to public policy in that it is clearly against the values of society.¹¹⁸ Before the introduction of the Constitution, clauses that excluded liability for negligently causing death or injury were permissible.¹¹⁹ This was endorsed in the case of *Durban’s Water Wonderland v Botha*,¹²⁰ where the court upheld an exemption clause relied on by the amusement park to avoid liability for the injury that was suffered by the plaintiff and her daughter. Similarly, in *Afrox*,¹²¹ the plaintiff sued a private hospital which also relied on an exemption clause to avoid liability. The plaintiff sought to challenge the validity of the exemption clause on the basis that it was not in the public interest, and that the admission clerk should have drawn the consumer’s attention to

¹¹¹ *Durban’s Water Wonderland Pty Ltd v Botha* 1999 1 SA 982 (SCA).

¹¹² Hutchinson..et al *The Law of Contract in South Africa* 39.

¹¹³ Christie and Bradfield (supra note 25) 213; *Durban’s Water Wonderland Pty Ltd v Botha* ((Supra note 5); Barkhuizen v Napier (Supra note 88), para 135.

¹¹⁴ Ibid.

¹¹⁵ Ibid.

¹¹⁶ Kohn “Escaping the Shifren Shackale” through the application of public policy: An analysis of three recent cases shows Shifren is not so immutable after all” (2014) 1 *Speculum Juris* 24.

¹¹⁷ *Sasfin v Beukes* 1989 (1) SA 1 (A) at 71–79.

¹¹⁸ Ibid.

¹¹⁹ *Naidoo v Birchwood Hotel* (Supra note 43), para 53–54; *Afrox Healthcare Bpk v Strydom* (Supra note 22); *Johannesburg Country Club v Stott* 2004 (5) SA 511 (SCA).

¹²⁰ 1999(1) SA 982 (SCA).

¹²¹ Supra, note 19.

the clause.¹²² The court contended that the exemption clause was not against public policy and was thus enforceable.¹²³

Since the introduction of the Constitution in 1996 the issue of how public policy should be evaluated is rooted in the Constitution and the values that underlie South Africa's constitutional democracy.¹²⁴ Furthermore, to ascertain whether the exemption clause offends public policy, the values and principles that underlie South Africa's constitutional democracy must be taken into consideration,¹²⁵ and any clause that offends any of the values enshrined in the Constitution is contrary to public policy and is therefore unenforceable.¹²⁶ This was expressed in the case of *Barkhuizen v Napier*,¹²⁷ which dealt with the constitutionality of a time-bar clause in a short-term insurance policy. In the majority decision, Ngcobo J defined public policy as follows:

“Public policy represents the legal convictions of the community; it those values that are held most dear by the society. Determining the content of public policy was once fraught with difficulties. That is no longer the case. Since the advent of our constitutional democracy, public policy is now deeply rooted in our Constitution and the values 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. And the Bill of Rights, as the Constitution proclaims, 'is a cornerstone' of that democracy; 'it enshrines the rights of all people in our country and affirms the democratic values of human dignity, equality and freedom’.”¹²⁸

The majority decision upheld the time bar clause as not being contrary to public policy but there was a strong minority decision delivered by Sachs J that is particularly relevant to this discussion. In his judgment, Sachs J discussed standard-form contracts that are placed before consumers who often sign them without reading them or understanding their true nature. This is something that frequently occurs when an issue around an exemption clause arises. He pointed out that the terms of the standard form contract tend to favour the supplier heavily and to operate in such a manner as to exclude and limit the consumer's normal contractual

¹²² Ibid, para 34–35.

¹²³ Ibid, para 9–10.

¹²⁴ Stoop (2008) 20(4) *SA Merc LJ* 502.

¹²⁵ *Brisley v Drotosky* (Supra note 95), para 91.

¹²⁶ Bhana “The law of contract and the constitution: *Barkhuizen v Napier* 2007 (5) SA 323 (CC): (2007) 124 (2) *SALJ* 271.

¹²⁷ Supra note 88.

¹²⁸ Ibid, para 28.

rights and the supplier's normal contractual obligations and liabilities.¹²⁹ Not only is the consumer unable to resist the terms of the contract,¹³⁰ but he is usually unaware of certain terms in the contract. If there is an exemption clause that excludes the supplier's liability from any harm that may be suffered by the consumer it is usually hidden away in "fine print."¹³¹ The time and task of looking through small print in endless standard-form contracts is beyond the expectations of any ordinary person who simply wishes to engage in the services of the supplier.¹³² Sachs J was of the opinion that a clause that did not afford a contracting party a fair and reasonable opportunity to approach the court for judicial redress was unfair, unjust, and contrary to public policy and the values that underlie our Constitution.¹³³

Also linked to the principle of public policy is the principle of good faith. The concept of good faith is a concept that underlies the law of contract. This suggests that when one party seeks to enforce a contract, he should act in good faith; and if he is acting in bad faith, the other person is entitled to a legal remedy. Determining the exact role of good faith in South African law of contract has not been easy, as South African courts have grappled with the issue of whether good faith can be used as a mechanism to set aside a contract. The court in the case of *Eerste Nasionale Bank van Suiderlike Afrika Bpk v Saayman NO*¹³⁴ recognised the close link between good faith and public policy and public interest.¹³⁵ The court also recognised that the concept of good faith has always been recognised as a fundamental principle that underlies the law of contract and informs the principles of fairness, reasonableness, and equity.¹³⁶ It recognises the doing of simple justice between two parties to a contract, and precludes the enforcement of a clause in a contract that goes against the principles of equity, fairness and reasonableness.¹³⁷ Many commentators felt that the concept of good faith would be developed by courts in such a way as to intervene in the unfair enforcement of a contract. Christie went so far as to state that when it comes to the enforcement of a contract, parties should be required to take into consideration the legitimate interest of the other party.¹³⁸ However, in the case of *Barkhuizen*, although the court

¹²⁹ Ibid, para 135.

¹³⁰ Ibid, para 136.

¹³¹ Ibid.

¹³² Ibid.

¹³³ *Barkhuizen v Napier* (Supra note 88), para 95.

¹³⁴ 1997 (4) SA 302 (SCA).

¹³⁵ *Eerste Nasionale Bank van Suiderlike Afrika Bpk v Saayman NO* (supra), para 14.

¹³⁶ Ibid para 10.

¹³⁷ Ibid para 33.

¹³⁸ Christie and Bradfield (Supra note 25) 213.

recognised the importance of the principle of good faith and the link between good faith and public policy, the court held that good faith is not an independent basis for setting aside contractual provisions, but is rather a basic principle which underlies the law of contract and which finds expression in the specific rules and principles of contract law. Louw argues that the *Barkhuizen* case left the door of public policy open for the development of good faith in the common law of contract.¹³⁹ It is submitted that by leaving the door open, the court created the possibility that good faith may in the future become embedded in the principle of freedom of contract, rather than being disregarded when it comes to deciding whether a contract term is unfair.

Hopes for a future revisiting of the proper role of good faith in contract law emerged in the case of *Everfresh Market Virginia v Shoprite Checkers*.¹⁴⁰ The court in *Everfresh* emphasised the central importance of the principle of good faith and the desirability of infusing the law of contract with the constitutional values, including the value of ubuntu.¹⁴¹ It is submitted that the court in *Everfresh* highlights the importance of taking into account the interests and rights of both parties when it come deciding whether a contract should be enforced, and how the principle of good faith could be used to limit the enforcement of a term or contract if enforcement would be unfair and unjust to any one of the parties. However, the court in *Everfresh* was not able to address the issue of good faith as a result of procedural issues. Therefore, the position in so far as good faith is concerned remains as stated in the *Barkhuizen* case.

It is clear that the courts will set aside a contract only if it is contrary to public policy.¹⁴² Furthermore, as stated above, courts have always stated that parties are free to enter and decide the terms of their contract, and even if the terms of the contract are alleged to be harsh and unfair to one of the contractual parties, the court will not interfere just because it appears to be unfair to one of the contractual parties.¹⁴³ This is particularly significant when it comes to the enforcement of exemption clauses. This is because, before the parties enter into an agreement with one another, they agree that the clause will form part of their agreement, and even if it operates harshly or unfairly toward one of the contractual parties, the courts are

¹³⁹ Louw “Yet another call for a greater role for good faith in the South African law of contract: Can we banish the law of the jungle, while avoiding the elephant in the room?” (2013) 16(5) *PELJ* 61.

¹⁴⁰ 2012 1 SA 256 (CC).

¹⁴¹ *Everfresh Market Virginia v Shoprite Checkers* (supra), para 22.

¹⁴² *Afrox Healthcare Bpk v Strydom* (Supra note 22); *Barkhuizen v Napier* (Supra note 88); *Brisley v Drotsky* (Supra note 95).

¹⁴³ *Brisley v Drotsky* (Supra note 95).

likely to give effect to it. With the introduction of the CPA, although suppliers are still allowed to rely on exemption clauses to protect their business, the CPA limits and prohibits exemption clauses that are unfair, unreasonable, and unjust.¹⁴⁴ This will be discussed in the next chapter.

3.5 The interpretation of exemption clauses

The general rule is that where the exemption clause is clear and unambiguous, effect must be given to it.¹⁴⁵ The court will have to consider the wording of the exemption clause, and determine whether, based on the facts of a particular case, the party should be bound to the contract. In the case of *Barnard v Protea Assurance Co Ltd t/a Protea Assurance*,¹⁴⁶ the deceased took out an insurance policy with Protea Assurance. The policy excluded the insurance company's liability from death caused by participating in "skin diving" or any other sport involving exceptional risk. At the time of his death, the deceased had been participating in a scuba diving course when he drowned. The main issue the court had to determine was whether the deceased at the time of death was skin diving. The court held that the intention of the parties had to be sought from the language of the policy.¹⁴⁷ Furthermore, the court held that the term "skin diving" used in the policy was ambiguous and unclear, as it was not clear what the words meant.¹⁴⁸ The court interpreted the term "skin diving" as requiring some type of breath-holding diving, requiring certain equipment which involved the use of a snorkel, and there had to be exceptional risk before it could be categorised as "skin diving".¹⁴⁹ The deceased had not been wearing a snorkel and therefore, the court held, he had not been skin diving. The plaintiff was therefore entitled to the benefit under the policy.

Where the exemption clause is ambiguous and unclear, the court will adopt a narrow approach. The court must first determine what type of liability exists without the exemption clause (negligence, gross negligence, strict liability).¹⁵⁰ The clause will then be applied only to the type of liability involving the least degree of blameworthiness. The court will therefore limit the exemption clause to the risks its words state.¹⁵¹ Furthermore, where there is any doubt, and the exemption clause is capable of having more than one meaning, the exemption

¹⁴⁴ The Consumer Protection Act 68 of 2008, Section 48.

¹⁴⁵ Tait M and Newman (2014) 35(3) *Obiter* 631.

¹⁴⁶ 1993(3) SA 1063 (C).

¹⁴⁷ Para 23.

¹⁴⁸ Para 26.

¹⁴⁹ Para 30.

¹⁵⁰ Christie and Bradfield (Supra note 25) 221.

¹⁵¹ *Ibid.*

clause will be interpreted to favour the consumer.¹⁵² This is known as the *contra proferentem* rule, which requires that, where the clear meaning cannot be determined, the clause will be interpreted against the supplier.¹⁵³ However, as stated above, when the wording of exemption is clear and unambiguous, effect must be given to it.¹⁵⁴ This was illustrated in Durban's *Water Wonderland v Botha (Pty) Ltd v Botha*,¹⁵⁵ where the court held that:

“If the language of the disclaimer or exemption clause is such that it exempts the *proferens* from liability in express and unambiguous terms, effect must be given to that meaning. If there is ambiguity, the language must be construed against the *proferens*... But the alternative meaning upon which reliance is placed to demonstrate the ambiguity must be one to which the language is fairly susceptible, it must not be fanciful or remote”.

In this case the court found that it was clear from the language used in the clause that any liability that was based on negligence in the design or construction of the amusement park would fall within the ambit of the clause.¹⁵⁶

The interpretation of an exemption clause also involves determining the meaning of the specific words used in the grammatical construction of the sentence,¹⁵⁷ and the fact or external objects to which the words of the exemption clause relate, in order to arrive at a sense of the exemption clause.¹⁵⁸ Over the years the courts have given appropriate consideration to the proper meaning of words and phrases such as “any loss”, “any damage”, “howsoever caused”, “from whatever cause arising” and “for whatever reason”.¹⁵⁹ Mpuangavanhu submits that such words cannot be read in isolation; they must be read and interpreted within the context within which they operate.¹⁶⁰

In the case of *Walker v Redhouse*,¹⁶¹ Redhouse went riding at a guest house where she was staying for holiday. Before the ride, Redhouse signed a document containing a clause that excluded the staff from any liability arising from riding the horses. During the ride the horse

¹⁵² Ibid.

¹⁵³ Christie and Bradfield (Supra note 25) 223.

¹⁵⁴ Mark and Govindjee “Revisiting the Interpretation of exemption clauses: *Drifters Adventure Tours cc v Hircock* 2007 2 SA 83 (SCA)” (2007) 5(2) *Obiter*, 631–632.

¹⁵⁵ 1999 (1) SA 982 (SCA).

¹⁵⁶ Para 30.

¹⁵⁷ Mark and Govindjee (2007) 5(2) *Obiter*, 631.

¹⁵⁸ Ibid.

¹⁵⁹ Ibid.

¹⁶⁰ Mpuangavanhu (2014) 17 (3) *PELJ* 1189.

¹⁶¹ [2007] 4 All SA 1217 (SCA).

bolted and Redhouse was injured.¹⁶² The main question that the court had to decide was whether or not the indemnity signed by the respondent excluded liability for injuries sustained while horse riding.¹⁶³ Redhouse argued that the words “any” qualifies loss or damages. It does not cover injuries sustained when the horse acted *contra naturam* because the provision was silent on the question of what caused the injury. The clause read as follows:¹⁶⁴

“I hereby confirm that neither Walkersons or [*sic*] Critchley Hackle, or any member of their staff shall be liable to me, my estate or dependants for any loss or damage sustained as a result of my death or injury to my person or property in the course of my horse riding about the property of Walkersons.”

In interpreting the clause, the court relied on the case of *Durban Water Wonderland*, where the court held:¹⁶⁵

“The correct approach is well established. If the language of the disclaimer or exemption clause is such that it exempts the *proferens* from liability in express and unambiguous terms, effect must be given to that meaning. If there is ambiguity, the language must be construed against the *proferens*. (See *Government of the Republic of South Africa v Fibre Spinners & Weavers (Pty) Ltd* 1978 (2) SA 794 (A) at 804C.) But the alternative meaning upon which reliance is placed to demonstrate the ambiguity must be one to which the language is fairly susceptible; it must not be ‘fanciful’ or ‘remote’”.

The court also relied on the case of *Lawrence v Kondotel Inns (Pty) Ltd*,¹⁶⁶ where the court found that the exemption clause did not exclude liability under the pauperian action where a horse had bolted and therefore acted *contra naturam*.¹⁶⁷ The exclusion clause in question stated: “All riders ride at their own risk; if any accident should occur, Kondotel or the management of this hotel will not be held responsible.” The court held that what was expected here was the usual and normal occurrence which might happen, such as a horse stumbling in a pothole, or being startled by some sudden event. The clause did not cover misconduct on the part of the horse had it, for example, turned and bitten the rider, or bolted

¹⁶² Walker v Redhouse (Supra), para 1–2.

¹⁶³ Ibid, para 3.

¹⁶⁴ Ibid, para 4.

¹⁶⁵ Walker v Redhouse (Supra note 161), para 14; *Durban Water Wonderland (Pty) limited v Botha and Another* (Supra note 5), para 45.

¹⁶⁶ 1989 (1) SA 44 (D).

¹⁶⁷ Walker v Redhouse (Supra note 161), para 15–16.

as it did.¹⁶⁸ In *Lawrence v Kondotel Inns (Pty) Ltd*,¹⁶⁹ where the court held that when a horse is ridden by a young child who cannot control it, and the child falls, is dragged, and seriously injured, the hotel is liable, because the risk of bolting was not contemplated by the parents. However, in the *Redhouse* case, the court distinguished the situation because the exemption clause in *Redhouse* was much more cogent and clearly covered the situation where the horse had acted contrary to its nature. The exemption notice clearly excluded Walker's liability for "any loss or damages sustained as a result of death or injury to [her] person or property in the course of horse riding".

3.6 Concluding remarks

From the discussion above it is apparent that exemption clauses are frequently found in contracts, especially in contracts where there may be some form of risk to consumers such as horse riding and hospital contracts. Even in circumstances where the consumers have clearly not read the contracts and are not aware of the exemption clauses, the courts will generally under the common law uphold the exemption clause.¹⁷⁰ The courts have in numerous cases said that they will strike down an exemption clause if it is contrary to public policy, but exemption clauses are regarded as part and parcel of commercial practice and so are not regarded as contrary to public policy. This was clearly seen in the *Afrox* decision. Even with the introduction of the Constitution, it appears that the court will uphold exemption clauses that are properly drawn up although it has been questioned whether an exemption clause that allows a party to contract out of liability for gross negligence is contrary to public policy.¹⁷¹

¹⁶⁸ Ibid, para 16.

¹⁶⁹ 1998(1) SA 44 D.

¹⁷⁰ *Afrox Healthcare Bpk v Strydom* (Supra note 22).

¹⁷¹ Ibid.

CHAPTER FOUR: THE CONSUMER PROTECTION ACT

4.1 Introduction

The Consumer Protection Act (CPA) was introduced in April 2011 to protect consumers in South Africa, especially vulnerable consumers from exploitation in the market place and to advance their social and economic welfare.¹⁷² More importantly, the CPA aims, among other things, to establish a legal framework for the achievement and maintenance of a consumer market that is fair, accessible, efficient, sustainable and responsible, for the benefit of consumers generally;¹⁷³ to promote fair business market practices,¹⁷⁴ and to protect consumers from unconscionable, unjust and unreasonable business practices.¹⁷⁵ It applies to transactions that are concluded in the ordinary course of business, within South Africa, as well as to the supply of goods and services.¹⁷⁶ Since its introduction, the CPA has had a profound impact on the manner in which business operates in South Africa. It aims to ensure that suppliers conduct their business in an honest, legal and ethical manner by not only prohibiting unfair, unreasonable and unjust contractual provisions, but by also requiring suppliers to draw consumers attention to the fact, nature and potential effect of an exemption clause that limits their liability for personal injury or death. This aspect of the CPA is particularly relevant to suppliers of risky services. There are a number of sections of the CPA that such suppliers need to take note of. These include the following:

- The need for plain language;¹⁷⁷
- Terms must be fair, reasonable and just;¹⁷⁸
- There must be adequate notice of risk;¹⁷⁹ and
- Suppliers are liable for damage caused by the supply of defective goods.¹⁸⁰

¹⁷² Act 68 of 2008, Section 3.

¹⁷³ Ibid, section 3(1)(a).

¹⁷⁴ Ibid, section 3(1)(c).

¹⁷⁵ Ibid, section 3(1)(d).

¹⁷⁶ Ibid, section 5(1)(a).

¹⁷⁷ Ibid, section 22.

¹⁷⁸ Ibid, section 48.

¹⁷⁹ Ibid, section 49.

¹⁸⁰ Ibid, section 61.

4.2 Plain language

The CPA requires that all notices must be displayed or produced in plain language.¹⁸¹ Plain language is defined in terms of the CPA, as “language that enables an ordinary consumer for whom a notice or document is intended, with average skills and minimal experience as a consumer, to understand the content without undue effort”.¹⁸² In order to determine whether the document is in plain language the following factors must be taken into consideration:¹⁸³

- The context, comprehensiveness and consistency of the notice, document or visual representation;
- The organisation, form and style of the notice, document or visual representation;
- The vocabulary, usage and sentence structure of the notice, document or visual representation;
- The use of any illustrations, examples, headings, or other aids to reading and understanding.

The CPA does not, however, stipulate that the provision must be in a person’s official language, because to do so would place an undue burden on suppliers.¹⁸⁴ Stadler points out that writing in plain language does not mean that the language must be simple or that the provisions of the exemption clause must be reduced, as information may be complex in nature.¹⁸⁵ All that is required is that the exemption clause must be understandable and transparent and as reader friendly as possible.¹⁸⁶ It is not the information that is simplified but the language.¹⁸⁷ However, despite the introduction of section 22, there are still contracts that are written in obscure and incomprehensible language. The reason why most contracts are written in obscure language is to allow suppliers to take advantage of the consumer’s inability to understand the contract.¹⁸⁸ Furthermore, the plain language requirement in the CPA is unrealistic as most of these contracts are drafted by attorneys who are not trained to identify and understand target audiences in the way that information designers are.¹⁸⁹

¹⁸¹ Ibid, section 22(1)(b).

¹⁸² Ibid, section 22(2).

¹⁸³ Ibid, section 22(2)(a)–(d).

¹⁸⁴ Jacobs et al “Fundamental consumer rights under the Consumer Protection Act 68 of 2008: A critical overview and analysis” (2010) 13 *PELJ* 330.

¹⁸⁵ Stadler *Consumer law unlocked* (2013) 104–112.

¹⁸⁶ Tait and Newman (2014) 35(3) *Obiter* 633.

¹⁸⁷ Supra note 185.

¹⁸⁸ De Stadler and Van Zyl “Plain-language contracts: Challenges and opportunities” (2017) 29 *SA Merc LJ* 97.

¹⁸⁹ Ibid.

If the requirement of plain language is met in terms of the CPA, consumers will be able to make an informed decision regarding whether they want to participate in the risky activity. This would also be in line with the preamble of the CPA, which provides that the aim of the right to plain language is “to improve access to, and the quality of, information that is necessary so that consumers are able to make informed choices according to their individual needs”.¹⁹⁰

4.3 Fair, reasonable and just terms and conditions

Section 48 prohibits the use of unfair, unreasonable or unjust terms or conditions in consumer agreements.¹⁹¹ This is further amplified in section 48(2)(b), which provides a list of instances when a term in an agreement will be regarded as being unfair. For example, a contractual term will be regarded as being unfair, unreasonable or unjust if:

- It is excessively one-sided in favour of any person other than the consumer or other person to whom goods or services are supplied;¹⁹² or
- The terms of the agreement are so adverse to the consumer as to be inequitable.¹⁹³

It is submitted that an exemption clause that excludes the supplier’s liability when the consumer was taking part in an activity that could not be regarded as being dangerous is regarded as being unfair, unreasonable, and unjust in terms of section 48.¹⁹⁴ Moreover, section 48(1)(c) provides that “a provision that requires a consumer to waive any rights, assume any obligation, and waive any liability of the supplier will be regarded as unfair, unreasonable and unjust”.¹⁹⁵ It may well be argued that an exemption clause constitutes a waiver of the consumer rights as it prevents the consumer’s right to access the court for judicial redress when they have suffered injuries as a result of the negligence of a supplier.

¹⁹⁰ Act 68 of 2008, Preamble.

¹⁹¹ Consumer Protection Act 68 of 2008.

¹⁹² *Ibid*, section 48(2)(b).

¹⁹³ *Ibid*, section 48(2)(c).

¹⁹⁴ Mupangavanhu (2014) 17(3) *PELJ* 1183.

¹⁹⁵ Act 68 of 2008.

4.4 Regulation 44

In addition to the sections in the CPA which deal with unfair terms, regulation 44 of the CPA contains a list of terms that are presumed to be unfair, unreasonable, and unjust in terms of section 48. This is commonly referred to as the “grey” list of terms. In terms of regulation 44(3)(a),¹⁹⁶ terms in a consumer agreement that excludes the supplier liability for death or personal injury are presumed to be unfair. This means a supplier wanting to exclude liability for death or injury will have to persuade the court that the exemption clause is fair.¹⁹⁷ However, it is unlikely that the court will uphold an exemption clause when negligence is shown when a person dies or is injured, especially when a consumer participates in an activity that cannot be considered dangerous, such as entering into premises via a hotel gate.¹⁹⁸ The implication of such an exemption clause that excludes the supplier’s liability for negligence is that it will not be considered fair in terms of section 48. Nevertheless, the court is likely to uphold such an exemption clause where risky activities are involved, provided the consumer voluntarily undertakes to expose him or herself to some form risk.¹⁹⁹ For instance, when a consumer gets injured at an amusement park, the supplier is, it is submitted, more likely to succeed in proving that the exemption clause is fair.

Where risky activities are involved, it may be more reasonable to allow a supplier to exempt itself from liability from mere negligence because it is far more likely in such a situation that accidents can occur. However, they will not be able to escape liability when they act in a reckless fashion. This is because consumers voluntarily seek to engage in adventurous activities, and such activities usually come with risk.²⁰⁰ Tait and Newman argue that “it would be against the interest of justice and fairness if a party is prevented by law from protecting herself from a civil liability claim despite the other party’s willingness to contract on that basis, especially in the context of high-risk situations and where the supplier has complied with the formal requirements of section 49”.²⁰¹

It is also important to take into account that the presumption in respect of section 44(3) only applies in respect of an exemption clause that excludes liability for death or injury and not for

¹⁹⁶ Supra.

¹⁹⁷ Mupangavanhu (2014) 17(3) *PELJ* 1182.

¹⁹⁸ *Naidoo v Birchwood Hotel* (Supra note 43).

¹⁹⁹ Tait and Newman (2014) 35(3) *Obiter* 641.

²⁰⁰ *Johannesburg Country Club v Stott* 2004 (5) SA 511 (SCA), para 15.

²⁰¹ Supra note 199

loss or damages to property.²⁰² Therefore a supplier wanting to avoid liability in respect of the death or injury of a consumer has to prove to the court that they are providing an inherently risky service such as bungee jumping or abseiling. By including an exemption clause, they are able to cut down the cost of doing business,²⁰³ such as having to carry the cost of expensive insurance. It may well be that the cost of insurance is so high that it may be impossible to offer certain services in which some consumers may want to participate. Furthermore, the supplier has to show that the consumer's attention was drawn to fact, nature, and potential effect of the exemption clause before participating in the activity. Therefore, the consumer was able to make an informed choice about whether or not to participate in the activity.

The supplier also has to show that the terms and conditions of the exemption notice are clearly visible, in written contracts. For example, it is sensible for the supplier to have the exemption notice on the front page of the contract close to the primary terms and written in a font different from that of the other terms so that it is easy for the consumer to notice the exemption clause.²⁰⁴ The supplier should also go further and point out the exemption clause to consumers and explain the consequences of the clause to consumers. In the case of a displayed notice, the supplier has to demonstrate to the court that the notice was displayed in a place where the consumer on entering the premises to participate in the risky activity could not have failed to observe the exemption provision.²⁰⁵ Where the consumer contracted with the supplier to participate in the risky activity in advance, such as by making an online booking, the supplier would have to display all the details of the activity on the web page,²⁰⁶ and the exemption provision should be highlighted in bold next to the primary terms of the agreement. This would enable the consumer to make an informed decision about whether they want to engage in the activity.

One feature of a written document that contains exemption clauses is a medical document where the consumer clarifies that they are medically fit and capable of participating in the activity and do not have any medical condition that would prevent them from participating in

²⁰² Naude and Eiselen *Commentary on the Consumer Protection Act* (2014) Reg 44–12.

²⁰³ McKay “Adventure tourism: opportunities and management challenges for SADC destinations” (2013) 45 (3) *Acta Academica* 38.

²⁰⁴ Naude and Eiselen *Commentary on the Consumer Protection Act* (2014) 49-3–6.

²⁰⁵ *Durban’s Water Wonderland v Botha* (Supra note 5).

²⁰⁶ Tait and Newman (2014) 35(3) *Obiter* 634.

the activity.²⁰⁷ However, not all consumers who participate in risky activities are honest about, or aware of, their level of fitness, and undertake to participate in an activity that could seriously threaten their well-being. In unfortunate circumstance when an accident occurs, consumers will invariably try to hold the supplier responsible for the damages that they suffer. The supplier will in such instances rely on an exemption clause to avoid liability. In proving that such reliance is reasonable and fair, the supplier can rely on the medical indemnity form that the consumer signed in which he/she acknowledged that that he/she was medically fit to participate in the activity.

Regulation 44(3)(b) prevents the supplier from “excluding or limiting the legal rights and remedies of a consumer against the supplier or another party in the event of total or partial breach by the supplier of any other obligation provided for in any agreement”.²⁰⁸ The effect of this regulation seems to make all exemption clauses which are not void for endeavouring to deprive a consumer of a right provided by the CPA, presumably unfair in terms of section 48.²⁰⁹ An example of such a clause is a clause that prevents a consumer from claiming under section 61 for injury, death, or damages to property.

The consequence of regulation 44(3) is that a supplier will not be able to avoid liability using the exemption clause where the consumer has not undertaken to engage in a risky activity.²¹⁰ The exemption clause will be regarded as being unfair in terms of section 48 of the CPA. This is endorsed in terms of section 48(1)(c), which provides that an agreement is prohibited if it requires “the consumer to waive any rights, assume any obligation, and waive any liability of the supplier”.²¹¹ Section 52(1)(a) read with section 52(3) of the CPA gives the court the power to strike down a provision in a contract if it contravenes section 48. The court may declare a contractual provision unfair in whole or part, and may make an order that is reasonable and just in the circumstances.

4.5 Blacklisted terms

The CPA also makes provision for so-called “blacklisted” terms that cannot directly or indirectly be included by the supplier in a consumer contract. For the purposes of this

²⁰⁷ Buckley ‘Adventure tourism management’ (2010). <https://www.amazon.com/Adventure-Tourism-Management-Ralf> (Accessed 20 June 2017).

²⁰⁸ Act 68 of 2008.

²⁰⁹ Naude and Eiselen *Commentary on the Consumer Protection Act* (2014) reg 44–17.

²¹⁰ Naude and Eiselen *Commentary on the Consumer Protection Act* (2014) sections 48–21.

²¹¹ Act 68 of 2008.

dissertation, section 51(1)(c) is particularly important. In terms of this section, “a supplier must not make a transaction or agreement that purports to limit the supplier 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.”²¹² As a result, a supplier cannot rely on an exemption clause where the death or injury of a consumer was the result of gross negligence on the part of the supplier. This means that exemption clauses which have in the past been very broadly worded to include any loss or damage “howsoever caused” can no longer be interpreted to allow the supplier to contract out of liability for gross negligence. The term “gross negligence” is not defined in the CPA, and it is not clear when conduct will be regarded as gross negligence, and when the action will constitute ordinary negligence.²¹³ It seems the legislator left it to the courts to determine what constitutes gross negligence by looking at whether the supplier could have avoided the harm suffered by the consumer by the exercise of reasonable care.

4.6 Adequate notice on limitation of risk

Section 49(1)(a)²¹⁴ provides that “a notice to the consumer or provision relating to the agreement that limits risk or liability of a supplier must be brought to the attention of a consumer”. Such exemption notice must be written in plain language as provided for in terms of section 22²¹⁵ of the CPA. The attention of the consumer must be drawn to the notice in a “conspicuous manner” and form that is likely to attract the attention of an ordinarily alert consumer.²¹⁶ The requirement “in a conspicuous manner” refers to the steps that must be taken by the supplier to bring the exemption clause to the attention of the consumer.²¹⁷ Tait and Newman argue that it is not enough for the supplier to print the exemption clause on the back of the document while the key terms are printed on the front, even if this is done in different fonts and the exemption clause is highlighted in bold.²¹⁸ They advise that when the exemption clause is contained in a written agreement it must be displayed on the front page with all the other the key terms to the agreement and be in a size and font that will result in its being noticed by the consumer.²¹⁹ If the exemption clause is contained in a displayed notice it

²¹² Act 68 of 2008, section 51.

²¹³ Sharrock “The General Principles of the Law of Contract” (2011) *Annual Survey of SA Law* 544.

²¹⁴ Act 68 of 2008.

²¹⁵ *Ibid*, Right to information in plain and understandable language.

²¹⁶ Act 68 of 2008, section 49.

²¹⁷ Tait and Newman (2014) 35(3) *Obiter* 640.

²¹⁸ *Ibid*.

²¹⁹ *Ibid*.

must be displayed at a place where a consumer would expect to find such a notice and must be visible and large enough for any consumer to be able to read.²²⁰

In addition, section 49(2)(c) provides that “ if an exemption a provision or notice concerns an activity or facility that is subject to risk ... that could result in serious injury or death, the supplier is required to draw the fact, nature and potential effect of the risk to the consumer in a manner that satisfies the requirements of subsections (3) and (5), and the consumer must consent by initialling or signing the provision or otherwise acting in a manner consistent with acknowledgement of notice, awareness of the risk and acceptance of the provision”.²²¹ The supplier is required to draw the consumer’s attention to the fact, nature and potential effect of the risk even if it is reasonably foreseeable by the consumer, which may result in serious death or injury. Van Eeden submits that “the phrase, fact, nature and potential effect clearly indicate that the supplier is required to ensure that the consumer has an adequate understanding and appreciation of the risk, as opposed to superficial awareness of the risk”.²²²

In circumstances where the consumer does not have an adequate understanding of the nature of the risk, the supplier will have to take further steps to ensure that the consumer understands the risk. Where necessary, the supplier should in the case of a written warning verbally explain the consequences of the exemption provision to the consumer. It is essential that when consumers undertake to participate in risky activities, suppliers take extra steps to ensure that they know, understand and appreciate the risks and consequences of participating in that activity. This would also apply to a situation where the consumer is well educated and could be expected to be aware of the risk. Perhaps suppliers of risky activities should go as far as highlighting the fact that such an activity could result in serious injury or death.

Furthermore, the CPA requires suppliers to draw consumers’ attention to the exemption clause before they engage in the activity or enter the facility.²²³ Therefore, when consumers make bookings online for a family fun day at a recreational park, the supplier will not be able to demand payment at that time and then present the document containing the exemption

²²⁰ *Durban’s Water Wonderland v Botha* (Supra note 5).

²²¹ Act 68 of 2008.

²²² Van Eeden *Consumer Protection Law in South Africa* (2013) Durban: LexisNexis 249.

²²³ Act 68 of 2008, Section 49(4)(b)(i).

clause to the consumers when they arrive at the facility.²²⁴ The supplier is required, at the time when the booking is made, to explain the implications and consequences of an exemption provision. It is submitted that the supplier should also send a copy of the document by email to consumers.²²⁵ This will give consumers the opportunity to change their minds and/or make a well-informed decision about whether they want to participate in the risky activity with full knowledge of the exemption clause.

Suppliers are also required to give consumers an adequate opportunity to receive and comprehended notices.²²⁶ This means that when suppliers present the exemption notice to consumers, they must give consumers an adequate opportunity to read and understand the consequence of the provision, and to ask suppliers any further questions about the terms and conditions of the agreement.²²⁷ Once consumers have an adequate understanding of the exemption notice, they will be able to make an informed decision about whether they want to participate in the risky activity. Once the service provider has taken all the necessary steps to draw the notice to the attention of the consumer, the consumer will be bound by the exemption clause.²²⁸

It is important when dealing with risky activities also to take into account section 58(1), which “requires a supplier of any facility that is subject to a risk of an unusual character or nature, a risk of which a consumer could not reasonably be expected to be aware, or which an ordinarily alert consumer could not reasonably be expected to contemplate, in the circumstances, or a risk that could result in serious injury or death”. The supplier must specifically, “draw the fact, nature and potential effect of that risk” to the attention of consumers in a form and manner that meets the standards set out in section 49. This further highlights the importance to the supplier of a risky activity of taking steps to ensure that a consumer has a complete understanding of all the risks involved before the consumer can be required to participate in the risky activity.

Naude points out that section 49 does not spell out the consequences when a supplier does not comply with its requirements. For this, one has to consider section 52 which deals with the

²²⁴ Naudé “The consumer’s ‘right to fair reasonable and just terms’ under the new Consumer Protection Act in comparative perspective” 2009 *SALJ* 509.

²²⁵ *Ibid.*

²²⁶ Act 68 of 2008, section 49(5).

²²⁷ Tait and Newman (2014) 35(3) *Obiter* 635.

²²⁸ *Durban’s Water Wonderland v Botha* (Supra note 5).

power of the courts to ensure fair terms.²²⁹ Section 52(4) provides that “if a term or condition of an agreement does not satisfy the requirements of section 49, the court may make an order severing the provision from the agreement, or declaring it to have no force or effect in terms of section 52(4)”. The effect of this provision is that unless the courts exercise their discretion to sever or nullify the provision, it continues to be part of the contract and may be relied on by the supplier.²³⁰ This means that an exemption clause that unfairly limits consumers’ rights will continue to have force, and apply to all consumers who enter into an agreement with the supplier unless it has been declared invalid by the court.

4.7 Liability for damages caused by goods

Section 61 introduces product liability for any damages or injuries suffered by consumers resulting from a product failure, defect or hazard, inadequate warnings, or instructions.²³¹ In terms of section 61(2),²³² a supplier refers to any person “who applies, supplies, installs or provides access to any goods, [and who] must be regarded as a supplier of those goods to the consumer and thus extends the concept of product liability to the supplier of services”. Therefore, a supplier of a risky activity can be held liable for damages or injuries suffered by consumers as a result of product failure, defect or hazard, or failing to give the consumer adequate instructions or warnings before taking part in the risky activity. This section imposes strict liability on the supplier as the consumer need not prove negligence on the part of the supplier. However, a supplier of a risky activity will not be held liable where the harm or injuries suffered by the consumer were caused by the consumer’s failure to comply with the instructions provided by the supplier prior to partaking in the activity, or where the claim is brought by the consumer more than three years after the consumer has suffered the damages or injuries.²³³

When the injuries suffered by consumers are caused by the supplier’s failure to maintain the equipment adequately and provide instructions as to how the activity is to be conducted, the supplier cannot escape liability by relying on the exemption clause, because to do so would be unfair to the consumer. This is further endorsed by regulation 44(3)(a), which provides that “it is unfair to exclude the supplier’s liability for damages or injuries caused to the

²²⁹ Naude “The consumer's ‘right to fair reasonable and just terms’ under the new Consumer Protection Act in comparative perspective” 2009 *SALJ* 518.

²³⁰ Sharrock “The General Principles of the Law of Contract” (2011) *Annual Survey of SA Law* 544.

²³¹ Act 68 of 2008.

²³² *Ibid.*

²³³ Act 68 of 2008, section 61(4).

consumer through the act or omission of the supplier in terms of section 61”.²³⁴ In order to avoid liability under section 61 of the CPA, suppliers or service providers of risky activities need to ensure that they adopt risk management strategies, such as ensuring that equipment used to facilitate the activity is in a good condition and replaced when it is necessary. Furthermore, suppliers should also conduct formal tests of the equipment used to facilitate the activity before consumers are required to participate in the activity. Suppliers must also employ skilled and trained staff who must conduct routine checks and supervise consumers while participating in the activity.

It is also advisable for suppliers of risky activities to take out product liability insurance to ensure that they are covered for potential claims that may arise as a result of harm suffered by consumer caused by any defects in the equipment.²³⁵ However, high insurance premiums may be unaffordable for suppliers, and they may be tempted to cut costs when it comes to ensuring that they have adequate insurance.²³⁶ This leaves consumers in the hands of the supplier if they have a valid claim. If suppliers cannot afford adequate insurance, they will have to carry the financial implications of the claim brought against them by consumers. A large claim could have the effect of crippling a business. As stated above, high insurance premiums also affect consumers because the costs are passed on to the consumer because the supplier will increase the cost of its services. In circumstances where the insurance premium is too high for the supplier, it is preferable for the supplier and insurance company to adopt a method whereby the risk is shared equally by them, in return for the supplier paying a reduced premium amount.²³⁷

4.8 Consideration of some previously decided cases

The purpose of this subheading is to consider some of the previously decided cases in order to see whether or not these cases would have been decided differently had the CPA been in operation at the time.²³⁸

²³⁴ Act 68 of 2008.

²³⁵ Katzew and Mushariwa “Product liability insurance in the wake of the Consumer Protection Act 68 of 2008” (2012) 24 *SA Merc LJ* 10.

²³⁶ Katzew and Mushariwa (2012) 24 *SA Merc LJ* 12.

²³⁷ Dickson and Dolnicar “No risk, no fun: The role of perceived risk in adventure tourism” (2014). <http://ro.uow.edu.au/commpapers/246> (Accessed 2 August 2017).

²³⁸ Given time and space constraints it is not possible to have an in-depth discussion of each of these cases, therefore only some relatively brief observations are made.

It is submitted that in *Afrox Healthcare (Pty) Ltd*, which involved a hospital contract with an exemption clause, the court would have come to a different conclusion had this case been decided after the commencement of the CPA.²³⁹ This is because the admission clerk did not draw the attention of the patient to the clause on admission. The court, in relying on section 58 read with section 49 of the CPA, would have expected the clerk to draw the attention of the patient to the exemption clause, and for the hospital to ensure that the exemption clause was not buried away in small print. Therefore, it is submitted that the court would have found that the exemption clause was unfair in terms of section 48, and the court would have had the power, in terms of section 52(3), to declare the exemption clause invalid and therefore not binding on the patient.

Durban's Water Wonderland v Botha concerned a mother and daughter who were injured when they were flung off a ride at the Durban's water amusement park. Evidence showed that the cause of the accident was the failure of a hydraulic system governing the vertical movement of the car in which they were seated.²⁴⁰ The mother brought a claim against the amusement park for damages that she had suffered and on behalf of her two-year-old child.²⁴¹ The amusement park relied on the indemnity clause exempting it from liability in respect of damages and injuries arising out of use of any of the facilities in the amusement park.²⁴² The court in this case had to address three issues:

1. Whether a disclaimer contained in a notice painted on the windows of the ticket offices in the amusement park had been incorporated into the contract governing the use of the park's amenities;
2. Whether on a proper construction of the notice the amusement park was exempted from liability for negligence; and
3. Whether the appellant, as operator of the amusement park, had been negligent.

The court found that it was clear from the language used in the disclaimer that any liability founded upon negligence in the design and construction of the amusement park amenities fell squarely within its ambit. Furthermore, whether the exemption clause formed part of the contract governing the use of the park's amenities was considered with reference to where the

²³⁹ D McQuoid-Mason "Hospital exclusion clauses limiting the liability for medical malpractice resulting in death or psychological injury: What is the effect of the Consumer Protection Act?" (2012) 5(2) *South African Journal of Bioethics and Law* 65.

²⁴⁰ *Ibid*, page 413.

²⁴¹ *Ibid*.

²⁴² *Ibid*.

exemption clause was displayed. The court held that the notice was displayed at a place where one would expect to find any notice containing terms governing the contract entered into by the respondent. A reasonable person approaching the office in order to purchase the ticket could not have failed to observe the notice painted in white on the cashier's window. Considering the nature of the contract and the circumstances in which it would normally be entered into, the existence of the notice could not have been unexpected to a reasonable person approaching the office to purchase tickets. Mrs Botha also testified and said that she had known that there was such a notice at amusement parks. Therefore, the court concluded that the amusement park had done everything it could reasonably do to draw the consumers' attention to the exemption notice.

If the judgment of Botha had been delivered after the commencement of the CPA, the court would have reached a different conclusion because the accident was caused by a failure in the hydraulic system governing the vertical movement of the ride in which they had been seated. The court would have found in favour of Mrs Botha regardless of whether the amusement park had taken steps to draw the clause to the attention of Mrs Botha, and of the fact that the notice was clearly visible to a person approaching the ticket office to purchase tickets. This is because the cause of the accident was the amusement park's defective ride. Therefore, it is submitted that because of the introduction of section 61 in the CPA, the amusement park would have been liable for the damages suffered by the plaintiff. This would have been a good decision if the amusement park was found liable for the injuries sustained by Mrs Botha and her daughter because it would have been unfair, unreasonable and unjust to allow the amusement park to escape liability using the exemption clause were the accident was caused by a failure in the hydraulic system governing the vertical movement of the ride.

In the case of *Duffield v Lilyfontein School*,²⁴³ Duffield fell from a zip-wire slide strung from the top of a scaffold platform to the ground level, while taking part in a school corporate adventure race. She was injured and she sued Lilyfontein School and three other defendants who were organisers of the race.²⁴⁴ Prior to taking part in the activity, Duffield had signed a document containing an exemption clause that excluded the corporate venture's liability.²⁴⁵ Duffield contended that the cause of the accident was the negligence of the staff operating the platform to which the zip-wire was affixed because the staff had failed to secure the safety of

²⁴³ (3327/2006) [2011] ZAECGHC 3; 2011 JDR 0039 (ECG).

²⁴⁴ *Duffield v Lilyfontein* (supra), para 2.

²⁴⁵ *Ibid*, para 5.

the harness around the plaintiff's torso correctly; alternatively, they had failed to ensure that the plaintiff herself had correctly secured the harness prior to her jumping off the platform.²⁴⁶ The indemnity form signed by the plaintiff was conditional upon its being established that the defendants had done everything that was reasonably necessary to ensure that stringent safety measures had been put in place during the race so as to limit the risk of personal accident or injury to the participants.²⁴⁷ The court found that the defendants had failed to take the measures necessary to ensure the plaintiff's safety and therefore they were liable for the damages suffered by the plaintiff.

In applying the CPA to the *Duffield* case, it is submitted that the court would have reached the same conclusion. Although Duffield's attention had been drawn to the exemption clause, and she had accepted by signing the written contract, the exemption clause stipulated that Lilyfontein would be able to escape liability only if necessary stringent safety measures had been taken in order to minimise the risk. In this case, the school had failed to take those measures necessary to minimise the risk as the staff operating the platform had failed to secure the harness around the plaintiff's torso correctly. Therefore, in such circumstances, the enforcement of the exemption clause by the court would have been unfair, unreasonable, and unjust in terms of section 48 of the CPA.

In *Naidoo v Birchwood Hotel*,²⁴⁸ the plaintiff checked into the hotel and signed a registration card with a clause that excluded the hotel's liability for "any injury to, or death of, any person or the loss or destruction of, or damage to any property on the premises, whether arising from fire theft or any cause, and by whomsoever caused or arising from the negligence (gross or otherwise) or wrongful act by any employee of the hotel."²⁴⁹ The following morning the plaintiff suffered serious bodily injuries when a heavy steel gate fell on top of him as he was leaving the hotel.²⁵⁰ The court had to determine whether the hotel was liable for bodily injuries sustained by the defendant.²⁵¹ The court was of the view that exemption clauses that exclude liability for bodily injuries in hotels and other public spaces generally have the effect of denying the claimant judicial redress. The court submitted that the plaintiff was a guest in the hotel.²⁵² To enter and exit was an integral part of his stay. A

²⁴⁶ Ibid.

²⁴⁷ Ibid, para 8.

²⁴⁸ Supra note 42

²⁴⁹ *Naidoo v Birchwood Hotel* (Supra note 43), para 37.

²⁵⁰ Ibid, para 2.

²⁵¹ Ibid, para 3.

²⁵² Ibid, para 53.

guest in a hotel should not take his life in his hands when he exits through the hotel gates.²⁵³ The court held that to deny him judicial redress for injuries he suffered in doing so, which were caused by the negligent conduct of the hotel, offends against the notions of justice and fairness.²⁵⁴ The court in *Naidoo v Birchwood Hotel* applied the principles that were enunciated in *Barkhuizen*, that a further enquiry is necessary where a contractual clause limits a person's right to a judicial remedy.²⁵⁵ It must be determined whether in the circumstances of a particular case the enforcement of such a contractual term would result in an injustice because of the particular circumstances of the case.²⁵⁶ The court came to the conclusion that the enforcement of such a clause would be unfair and unjust. In the words of Ngcobo J: "(a) court will bear in mind the need to recognise freedom of contract, but the court will not let blind reliance on the principle of freedom of contract override the need to ensure that contracting parties must have access to courts".²⁵⁷

The case of *Naidoo* can be distinguished from the case of *Durban's Water Wonderland*.²⁵⁸ *Durban's Water Wonderland* involved an exemption clause where there was an inherent risk associated with activity; and provided the consumer is aware of the risk and consents to the risk, it can more easily be argued that the exemption clause should be upheld. In *Naidoo*, there was no question of an inherent risk and so an exemption clause that excludes the hotel from liability, in these circumstances, should be regarded as unfair and unjust in terms of section 48 of the CPA.

A more recent case is that of *Klassen v Blue Lagoon Hotel*.²⁵⁹ In this case the court reached the conclusion that the decision in *Naidoo* was incorrect. Although the case was decided when the CPA was already in operation, no reference to the CPA was made. It is submitted that the court's decision in this case was correct as the evidence showed that the hotel had a properly functioning system in place in terms of which regular checks were conducted to ensure that the bathroom was clean. As required by section 49 of the CPA, steps were taken by the hotel to draw the exemption clause to the attention of Klassen as there was a notice displayed at the hotel entrance and on the guard house. Therefore, the exclusion clause should be regarded as fair in terms of section 48.

²⁵³ Ibid.

²⁵⁴ Ibid.

²⁵⁵ Ibid, para 54.

²⁵⁶ Ibid.

²⁵⁷ Ibid.

²⁵⁸ Supra note 5.

²⁵⁹ Supra note 49.

4.9 Concluding remarks

Since the introduction of the CPA, certain exemption clauses have mostly been banned, and while others can be included, this is on condition that adequate notice is given to consumers and that they are aware of the risks involved and agree to those risks. The problem is that consumers often do not read the contracts even when they are asked to sign them. This is because consumers are more interested in the services being offered rather than knowing the consequences of engaging in the services offered by the supplier. Another reason is that in written agreements, the document may be lengthy and complex, and the layout of the document may be designed to distract the consumer's attention.²⁶⁰ The font size plays an important factor and may discourage a consumer from reading the document.²⁶¹ Many contracts that consumers come across are written in a small font and where there is an exemption clause, it is usually hidden away in fine print. The terms used in the document also contribute to consumers not reading and understanding the document. For instance, the use of legal terms in a document may affect the consumer's ability to understand the terms and conditions,²⁶² and their capability of being able to make an informed decision about whether to engage in the services offered by the supplier. The benefit for the consumers who do read is that they are able to bargain better terms with the supplier that are to their benefit, such as arguing for the use of fairer terms by the supplier.²⁶³

The CPA has attempted to deal with these problems associated with exemption clauses and standard-form contracts by placing a much heavier responsibility on suppliers to ensure that consumers know and understand the risks involved with the activity and know and understand the terms of the contract into which they are entering. To encourage consumers to read contracts, suppliers must take steps to simplify the language and the structure of the contract in written agreements, by removing, for example, Latin phrases and having proper headings. In the case of displayed notices, the visual appearance of the notice must be appealing and easily readable. This will lead to fewer disputes about whether an exemption clause is fair or whether the attention of the consumer was drawn to the contractual provision. As seen in the above cases, when the courts are faced with disputes regarding an exemption clause, the main issues to be determined by the court are always whether the exemption

²⁶⁰ Gouws "A consumer's right to disclosure and information: Comments on the plain language provisions of the Consumer Protection Act" (2010) 22 *SA Merc LJ* 79.

²⁶¹ De Stadler and Van Zyl "Plain-language contracts: Challenges and opportunities" (2017) 29 *SA Merc LJ* 109.

²⁶² De Stadler and Van Zyl (2017) 29 *SA MERJ LJ* 97.

²⁶³ Naude "The consumer's 'right to fair reasonable and just terms' under the new Consumer Protection Act in comparative perspective" (2009) 126(3) *SALJ* 533.

clause is fair and reasonable, whether the consumer was aware of the existence of the exemption clause,, and when it comes to risky activities, whether the consumer was fully aware of the risks involved and consented to those risks. For this reason, as stated above, when it comes to certain risky activities such as bungee jumping or deep-sea diving, suppliers should go as far as warning consumers that there is the risk of serious injury and even death.

Even though the CPA imposes certain obligations on a supplier to ensure that the consumer is aware of and understands certain terms of agreements into which they enter, these duties are not absolute, as some form of alertness may be expected from the consumer. According to Mupangavanhu, “the CPA does not provide consumers with much protection as what it gives on one hand it takes with another, in relation to exemption clause”.²⁶⁴ This is because the CPA requires “the fact, nature and potential effect of the activity to be drawn to the attention of the consumer in a conspicuous manner that is likely to attract the attention of an ordinarily alert consumer”.²⁶⁵ The consequence of this provision is that when the supplier has taken steps to draw the consumer’s attention to the provision, the consumer cannot argue that he made a reasonable mistake in agreeing to the clause.²⁶⁶

²⁶⁴ Mupangavanhu “Fairness a slippery concept: the common law of contract and the Consumer Protection Act 68 of 2008” (2015) 48 (1) *De jure* 134.

²⁶⁵ *Ibid.*

²⁶⁶ *Ibid.*

CHAPTER FIVE: AUSTRALIAN CONSUMER LAW RELATING TO RISKY ACTIVITIES

5.1 Introduction

As stated above, the Australian position has been considered because it is useful to observe how other jurisdictions have dealt with the problem of liability when suppliers of risky activities are involved. In Australia, consumer issues relating to contracts entered into with the supplier are dealt with in terms of Australian Competition and Consumer Act of 2010 (CCA). The CCA came into operation on 1 January 2011; the Act aims to ensure consumer protection and fair business practices. The CCA in Schedule 2 sets out the Australian Consumer Law (ACL). The ACL includes consumer guarantees, which prevent the supplier from excluding liability when certain business practices are involved,²⁶⁷ but the ACL makes special provision for suppliers of recreational activities to exclude liability in terms of section 139A. Australian law also makes provision for the Civil Liability Act (CLA),²⁶⁸ which creates rules for dealing with risks and the nature and impact of warnings given by the supplier to the consumer. Furthermore, the CLA aims to make it easier for suppliers to enforce exemption clauses, as it allows suppliers to avoid liability for injuries sustained from obvious and inherent risks, and it makes special provision for the recovery of compensation for injuries sustained in risky “recreational” activities.

5.2 Australian Consumer Law Guarantees in terms of the Competition and Consumer Act 2010

5.2.1 Unfair contract terms

In terms of section 23(1) of the Australian Consumer Law Guarantees (ACL), a term is invalid if it is unfair and the contract is a standard-form contract. The court will declare the term unfair if:²⁶⁹

1. It would cause a significant imbalance in the parties’ rights and obligations arising under the contract;

²⁶⁷ Australian Competition and Consumer Act 10 of 2010, section 61.

²⁶⁸ Act 22 of 2002.

²⁶⁹ Consumer and Competition Act 10 of 2010, section 24(1).

2. It is not reasonably necessary to protect the legitimate interests of the party that would be advantaged by the term;
3. It would cause detriment to a party if it were to be applied or relied on; and
4. The unfair contract terms provisions do not apply to business-to-business contracts.

The onus is on the supplier to prove on a balance of probabilities that a term in their contract is fair. In determining whether a term in a contract would cause a substantial imbalance in the parties' contractual obligations and rights, the court would include a factual assessment of the evidence that is available.²⁷⁰ The party in favour of whom the term operates needs to provide evidence that its genuine interest is sufficiently compelling to overcome any harm or loss caused to the consumer, and therefore the term in the contract is reasonably necessary.²⁷¹ Such evidence includes the steps taken to mitigate the risk or, the particular industry practice.²⁷² Furthermore, the court in determining whether the term is unfair will have to take into account the extent to which the term is transparent.²⁷³ A contract term will be transparent if it is expressed in reasonably plain language, legible, presented clearly, and readily available to any party affected by the term.²⁷⁴ The fact that a term is not transparent does not mean that it is unfair, and transparency will not necessary overcome the unfairness of an exemption clause. Furthermore, in determining whether the contract is unfair, the court will take into account the contract as a whole. It is submitted that in considering the contract as a whole a court will often need to balance the legitimate interest of the supplier's business against the detriment the term would cause to the consumer if enforced.

5.2.2 Due care and skill

Section 60 of the Australian Consumer Law Act provides that "if a person supplies, in trade or commerce, services to a consumer, there is a guarantee that the services will be rendered with due care and skill". Significantly, since section 60 creates a guarantee, the consumer can recover damages for any harm suffered as a result of a failure to comply with the guarantee if it was reasonably foreseeable that the consumer would suffer such harm or loss because of such failure.²⁷⁵ The case of *Alameddine v Glenworth Valley Horse Riding* illustrates the

²⁷⁰ Ibid, para 5.23.

²⁷¹ Ibid, para 5.25–5.28.

²⁷² Ibid, para 5.31.

²⁷³ Ibid, para 5.11.

²⁷⁴ Ibid, para 5.37.

²⁷⁵ 267(4) of the Consumer and Competition Act 10 of 2010.

point.²⁷⁶ The plaintiff was injured while riding on a quad bike at the defendant's recreational quad biking park. The plaintiff was part of a group of quad bikers led by an instructor who were returning from a purpose-built quad biking track to the administration centre. The instructor accelerated, causing the riders behind him, including the plaintiff, to accelerate to keep up. The plaintiff lost control of her bike, fell off it, and was injured. The court held that the instructor had been negligent. The instructor was responsible for controlling the group's speed along the trail, and his speed on the return trip was much faster than it had been on the way to the track, such that the riders following him, including the plaintiff, had had trouble keeping up. The court further held that the plaintiff's excessive speed was brought about by the need to keep up with the instructor. Therefore, the instructor, in increasing his speed, caused and contributed to the plaintiff's accident. The court concluded that Glenworth was liable for breach of statutory guarantee for the failure to comply with the guarantee given to the plaintiff that the services would be rendered with due care and skill in terms of section 60.

The court in *Alameddine* also took into consideration that prior to arrival at the defendant's quad biking park, the plaintiff's mother had booked and paid for quad biking. Upon arrival at the defendant's recreational park, the plaintiff's sister signed a document containing an exemption clause on behalf of the plaintiff. The court held that the contract had been formed on the previous day when the plaintiff's mother had booked and paid for the activity. The plaintiff's mother was presented with the document containing the exemption clause only on the day of arrival at the recreational park. The court further held that the defendant could not rely on the exemption clause to avoid liability for his negligence because the contract had been concluded before the arrival of the plaintiff at the recreational park. The court's approach in *Alameddine* is in line with the CPA, as the CPA, in terms of section 49, would have required the supplier to notify the plaintiff's mother of the exemption clause before arrival at the quad biking recreational park. This would be to ensure that the plaintiff would be able to make a clear decision about whether he/she wanted to take part in the activity.

In the case of *Renehan v Leeuwin Ocean Adventure Foundation Ltd*,²⁷⁷ the plaintiff took part in sail training activity on a training ship owned by Leeuwin.²⁷⁸ She fell from the rigging of the sail training ship.²⁷⁹ The court found that the defendant was liable as he had failed to

²⁷⁶ (2015) NSWCA 219.

²⁷⁷ [2006] NTSC 4.

²⁷⁸ *Renehan v Leeuwin Ocean Adventure Foundation Ltd* (2006) (supra), para 1.

²⁷⁹ Ibid.

exercise due care and skill to ensure that the belt had been properly secured.²⁸⁰ Therefore, the exemption clause in the contract signed by the plaintiff was invalid and unenforceable.

Moreover, section 61 guarantees that the services supplied will be fit for the purposes for which they were intended.²⁸¹ In the event that any loss or damages arise as a result of a breach of this requirement, a consumer may have a claim of negligence against the supplier. However, this guarantee does not apply in situations where the consumer did not rely on (or it was unreasonable for the consumer to rely on) the skill or judgment of the supplier.²⁸² This guarantee also does not apply to any supplier of services who is a qualified professional in that area of expertise.²⁸³ A breach of a guarantee that the service is fit for the purpose it was intended is usually not based on a finding of carelessness, but instead on a failure of the services to fulfil that purpose even in the absence of carelessness.

5.2.3 The operation of exemption clauses

Section 64 provides that a term in a contract is void to the extent that the term purports to exclude, restrict, or modify any liability of a person for failure to comply with a guarantee, the exercise of any right conferred in terms of this provision, or the application of any of the provisions.²⁸⁴ Therefore, an exemption clause that operates to exclude the suppliers' liability for failure to comply with a guarantee and, restricts the exercise of rights conferred by any guarantee is void and unenforceable. However, section 139A allows for the exclusion of statutory guarantees in relation to risky recreational activities as provided for in the Act,²⁸⁵ especially in relation to sections 60 and 61 of the ACL; such provision will not be invalid under section 64 by the mere fact that it purports only to exclude and restrict such statutory guarantee.²⁸⁶ However, this section applies to liability only for death or personal injury, and will not apply to personal injuries that are caused by the reckless conduct of the supplier.²⁸⁷ In terms of the Act, the supplier's conduct is reckless if:²⁸⁸

- (a) The supplier is aware, or should reasonably have been aware, of a significant risk that the conduct could result in personal injury to another person; and

²⁸⁰ Ibid, para 21.

²⁸¹ Ibid.

²⁸² Consumer and Competition Act 10 of 2010, section 61(3).

²⁸³ Consumer and Competition Act 10 of 2010, section 61(4).

²⁸⁴ Consumer and Competition Act 10 of 2010.

²⁸⁵ Ibid.

²⁸⁶ Ibid.

²⁸⁷ Consumer and Competition Act 10 of 2010.

²⁸⁸ Australian Consumer Law Guarantees, section 139A(5).

- (b) The supplier engages in the conduct despite the risk and without adequate justification.

Even though section 139A allows suppliers of risky activities to exclude liability for any loss or harm suffered by the consumer, it does not set out how the exemption clause is supposed to be worded and incorporated into the agreement.

Moreover, section 267 of the ACL entitles a consumer to recover compensation if a guarantee is not complied with. This means that if a acts in a reckless fashion and breaches any one of the guarantees mentioned above, that supplier will not be able to rely on an exemption clause to avoid liability for any injury suffered by the consumer.

5.3 Civil Liability Act

The Civil Liability Act was introduced in 2002 to address the problems in relation to tort (delict) law and the resulting increase in insurance premiums. The Act was also introduced to promote the notion of personal responsibility of consumers who engage in risky activities which makes it difficult for them to succeed on a claim brought against the supplier where the risk is obvious or inherent.²⁸⁹ The Act makes it easier for suppliers to limit the liability arising from recreational activities where there is a risk warning, exemption clause, or disclaimer notice, and deems a warning given to a consumer to be sufficient even if it is the only warning given. The Act contains a number of sections, referred to as divisions, that aim to address the problems that arise when dealing with risky activities. For the purposes of this dissertation, the following divisions are relevant:

- Division 4 deals with assumption of risk. This is where the risk is obvious or is inherent in the activity. There is no proactive duty on the supplier to warn the consumer where the risk is obvious. Where the risk is inherent, the liability of the supplier is not excluded because there is a duty on the supplier to warn of the risk.
- Division 5 distinguishes between recreational activities and dangerous recreational activities.

²⁸⁹ Healey “Warning and exclusions post personal responsibility” (2006) 1(1) *Australian & New Zealand Sports Law Journal* 7–8.

5.3.1 Liability for obvious and inherent risk

In terms of section 5F(1), an obvious risk is a risk which is obvious to a reasonable person;²⁹⁰ or; a matter of common knowledge or is patent.²⁹¹ A risk can be obvious even if it has little chance of occurring or if it is not conspicuous, prominent, or physically observable.²⁹² A consumer who is injured as a result of an obvious risk in a risky activity is presumed to have been aware of the risk, except if he or she can prove on a balance of probabilities that he or she was not aware of the risk.²⁹³ A consumer is regarded as being aware of the risk if he or she is aware of the type or kind of risk, even if he and she is are not aware of the exact nature, extent, or manner of occurrence of the risk.²⁹⁴

The classification of what constitutes an obvious risk is the main area in which the courts have been able to provide guidance. In establishing whether a risk is obvious, the court will have to consider the circumstances of the case. In the case of *Streller v Albury City Council*,²⁹⁵ Streller attended an Australian Day Celebration held at the local park within the Municipality of Albury City Council (“the council”). The event had been organised by the council.²⁹⁶ Streller, aged 16, was an expert diver, and had jumped from a 10-metre platform. At the event Streller swung from a rope hanging from a tree branch into a river and struck his head on the riverbed, rendering him a quadriplegic.²⁹⁷ The main issue before the court was whether the council was liable for the injuries he had sustained.²⁹⁸ The court took into consideration whether at the time Streller proposed to use the rope swing to do the back flip, the likelihood of him being injured from impact with the riverbed “would have been obvious” to a reasonable 16-year-old in his position.²⁹⁹ The court held that the risk of injury from diving or landing head first in water which is or could be too shallow would surely be an obvious one to an adult exercising common sense and judgment.³⁰⁰ Furthermore, the court held that Streller had not checked the depth of the water by wading in the areas where he might possibly land.³⁰¹ There were people standing in the river, including near the middle

²⁹⁰ Civil Liability Act of 2002, section 5F (1).

²⁹¹ Ibid, section 5F(2).

²⁹² Ibid, section 5F(2).

²⁹³ Ibid, section 5G(1).

²⁹⁴ Ibid, section 5G(2).

²⁹⁵ [2013] NSWCA 348.

²⁹⁶ Ibid, para 1.

²⁹⁷ Ibid, para 2.

²⁹⁸ Ibid, para 3.

²⁹⁹ *Streller v Albury city council* [2013] NSWCA 348 para 32.

³⁰⁰ Para 33.

³⁰¹ Ibid.

and adjacent to the position of the tree and the rope swing.³⁰² The court held that this confirmed that there were variations in its depth due to sand bars, mud banks, and the like, and that it grew shallower towards the middle.³⁰³ The primary judge held that this risk of harm that existed would have been “obvious” to a reasonable person in Streller's position.³⁰⁴ Further, the court held that the obvious risk, which resulted in Streller’s injury, was one which made the activity in which he was engaged “dangerous”. The primary judge therefore concluded that since the risk had been obvious, the council was not liable for the harm suffered by Streller.

In the case of *Doubleday v Kelly*,³⁰⁵ a seven-year-old girl was injured while jumping on a trampoline wearing roller skates. The girl had been warned before not to go to the trampoline unsupervised. The main issue for determination was whether the harm that a child would injure themselves after they had been warned not to jump unsupervised was reasonably foreseeable. In order to determine whether the risk was “obvious” to a person of her age the court attributed her characteristics to the hypothetical reasonable person. The court held that the risk could not have been obvious to a seven-year-old child who had no previous experience in the use of trampolines or roller skates.³⁰⁶ The court also reasoned that it was foreseeable that there was a risk of injury if the child was to use the trampoline without adult supervision. Giving the child a warning not to use the trampoline unsupervised was not enough. The trampoline should have been folded up so no child could jump on it. The court therefore concluded that the risk could have not been obvious to a seven-year-old child and *Doubleday* was liable for the injuries sustained by the child.

In *Liverpool Catholic Club Ltd v Moor*,³⁰⁷ the plaintiff fell down the stairs at an ice-skating rink while wearing ice skates. The original judge acknowledged that the relevant risk was the risk of falling while walking downstairs when wearing ice skates.³⁰⁸ However, when determining whether that risk was obvious, the original judge also took into consideration the fact that the stairs were wet and of varying dimensions.³⁰⁹ Furthermore, the court held that the description that was provided by the plaintiff of how he had fallen down the stairs, and the

³⁰² Ibid.

³⁰³ Ibid.

³⁰⁴ Para 36.

³⁰⁵ [2005] NSWCA 151.

³⁰⁶ *Doubleday v Kelly* (Supra), para 28.

³⁰⁷ [2014] NSWCA 394.

³⁰⁸ *Liverpool Catholic Club Ltd v Moor* (Supra), para 41.

³⁰⁹ Ibid.

video footage showing how he had fallen , did not show any unreasonable conduct on the plaintiff's behalf.³¹⁰ The judge concluded by saying that the defendant had failed to prove that the plaintiff had had actual knowledge that he would fall down the stairs while wearing ice-skating boots.³¹¹ The original decision was overturned on appeal because the court took into account that he wore size thirteen boots; the blade was longer than the tread of the stairs.³¹² The appeal court judge concluded that it would have been obvious to a person in his position that the risk of falling was made significantly greater by the fact that he had worn boots.³¹³ His only contact with the surface was his skate blade, making it more difficult for him to keep his balance, and the blade was much longer than an ordinary shoe. Therefore, the risk had been obvious to the plaintiff.³¹⁴

The Civil Liability Act also excludes the supplier's liability for injury suffered by a consumer as a result of materialisation of an inherent risk.³¹⁵ An inherent risk is defined as something that cannot be prevented by the exercise of reasonable care and skill.³¹⁶ In the case of *Perisher Blue Pty Ltd v Nair-Smith*,³¹⁷ Perisher provided chair-lifts which carried skiers from a loading station at a lower point on a mountain to a station at a higher point. The chairs were attached to a cable and continuously moved in motion up and down. On all the chairs there was a lap bar (this prevented people from falling), which lifted up when people got onto the chair and was down when people were seated. Nair-Smith, while on a ski field trip, was injured when she tried to board a moving chair. Perisher argued that it was not liable for her injuries because Nair-Smith's injury was the result of the materialisation of a risk of harm inherent in the interaction between persons taking their seats and the mechanical limitations of the chair. Therefore, as provided for in section 5I, Perisher pleaded that it was not liable in negligence for the injury suffered by Smith-Nair.³¹⁸ Perisher's defence was rejected both in the trial court and appeal court. The courts held that the risk could have been prevented in the circumstances if the chair operator had observed the chair as it left the bull wheel (or had

³¹⁰ Para 31.

³¹¹ Para 30.

³¹² Para 40.

³¹³ Ibid.

³¹⁴ Ibid.

³¹⁵ Act of 22 of 2002, section 5I(2).

³¹⁶ Ibid, section 5I(2).

³¹⁷ (2010) 320 ALR 325.

³¹⁸ *Perisher Blue Pty Ltd v Nair-Smith* (Supra), para 24.

noticed the chair with its lowered bar earlier than he did),³¹⁹ and the risk could have been prevented by the exercise of reasonable care and skill.

5.3.2 Dangerous recreational activity and recreational activity

The Civil Liability Act provides a distinction between a dangerous recreational activity and a recreational activity. In terms of the Act, a dangerous recreational activity is an activity that involves a significant risk of physical harm.³²⁰ A recreational activity is any activity which includes:³²¹

1. Any sport (whether or not the sport is an organised activity); and
2. Any pursuit or activity engaged in for enjoyment, relaxation or leisure; and
3. Any pursuit or activity engaged in at a place (such as a beach, park or other public open space) where people ordinarily engage in sport or in any pursuit or activity for enjoyment, relaxation or leisure.

Healey argues that the range of activities included in the definition of a “recreational activity” is very wide and contains activities which have no element of risk.³²² It seems to include walking, shopping, dancing, as well as other risky activities, which was the main aim of the legislature.³²³

In relation to dangerous recreational activities, the supplier of a risky activity will not be held liable for harm suffered by the consumer as a result of materialisation of an obvious risk at a dangerous recreational activity engaged in by the consumer.³²⁴ This is the position even if the consumer was not aware of the risk.³²⁵ The concept of a dangerous recreational activity was considered in the case of *Alameddine v Glenworth Valley Horse Riding*.³²⁶ Glenworth argued that the plaintiff’s accident resulted from materialisation of an obvious dangerous recreational activity.³²⁷ The court rejected this argument, and held that the injuries sustained by Alameddine did not result from an obvious risk of quad biking.³²⁸ Nor was the risk

³¹⁹ Ibid, para 167.

³²⁰ Ibid, section 5K.

³²¹ Ibid.

³²² Healey “Warning and exclusions post personal responsibility” (2006) 1(1) *Australian & New Zealand Sports Law Journal* 22.

³²³ Ibid.

³²⁴ Act 22 of 2002; section 5L (1).

³²⁵ Ibid, section 5L (2).

³²⁶ [2015] NSWCA 219.

³²⁷ *Alameddine v Glenworth Valley Horse Riding* (Supra 326), para 10.

³²⁸ Ibid, Para 20.

inherent and incidental to quad biking, as “Glenworth portrayed a contrary impression on its website by describing quad biking as ‘surprisingly easy’”, and riders would receive safety briefing and individual training before riding on the quad bikes.³²⁹

In *Holroyd City Council v Zaiter*,³³⁰ a nine-year-old boy rode a bicycle down a grassed slope into a concrete drainage channel. This court found that section 5L was inapplicable because that activity (riding a bike) was not a dangerous recreational activity; and in any event, “the incidental risk was that the rider might fall off and hit his or her head on the ground or on the bike. The risk which eventuated here was not a fall off the bike, but falling a distance of two metres into an unfenced concrete channel.”³³¹

In the context of a recreational activity, a supplier owes no duty of care to a consumer who engages in recreational activity if a warning was given prior to the engagement in the activity.³³² A risk warning in a recreational activity is defined as a “warning that is given in a manner that is reasonably likely to result in people being warned of the risk before engaging in the recreational activity”.³³³ Furthermore, the supplier is not required to ascertain whether the consumer received or understood the warning or understanding of the warning.³³⁴ The warning given by the supplier may be in writing or oral.

The issue of whether a warning given by the supplier is effective has been considered in a number of cases. In the case of *In Action Paint Ball Games Pty Ltd v Baker*,³³⁵ Action Paint Ball provided facilities for paint ball and laser tag games to be played on its premises. The plaintiff participated in a game of paint ball laser gun. While playing the game, the plaintiff was running along one of the tracks when she tripped and fell over a tree root, and sustained a fracture to her left elbow. An employee of Action Paint Ball, who was responsible for supervising the participants of the game, had spoken to the children before commencing the game, and had provided warnings about safety and informed the participants of the rules of the game.³³⁶ The New South Wales court found that Action Paint Ball had been negligent. The primary judge held that there had been no warning of risk given to the children before the game; and the employee had not warned the children of specific obstacles such as tree

³²⁹ Para 38.

³³⁰ [2014] NSWCA 109.

³³¹ *Holroyd City Council v Zaiter* (Supra), para 91.

³³² Act of 2002, section 5M.

³³³ Section 5M(2).

³³⁴ *Ibid.*

³³⁵ [2013] NSWCA 128.

³³⁶ *Action Paint Ball Games Pty Ltd v* (Supra), para 6.

roots.³³⁷ On appeal, Action Paint Ball argued that the trial judge erred in finding it negligent. The court held that the trial judge had mistakenly found that the risk posed by the recreational activity was not the subject of a risk warning. The court further held that it was not necessary that a specific warning be given in respect of a specific hazard. The court also held that the plaintiff was not an incapable person for the purpose of section 5M(2), and had the capacity to understand the risk warning. The warning was also given in the presence of her father. In the circumstances, the appeal judge held that the warning given by Action Paint Ball was sufficient. The court also held that the seriousness of the harm was probably less in the bush land where the plaintiff was injured than in some other environment. The absence of any incidents in the bush land while performing the same activity should have been considered when determining what precautions Action Paint Ball should have taken. Finally, the court held that there was a social utility in children performing physical activities in a natural environment.³³⁸ The court concluded by saying there was no obligation on Action Paint Ball to remove the tree root in the exercise of its duty of care.³³⁹

5.3.3 IPP Report on the amended Civil Liability Act 22 of 2002 (CLA)

Major problems had arisen in Australia over the availability and affordability of public liability insurance.³⁴⁰ As a way of curtailing the problem, the IPP review panel was mandated to lodge an investigation by developing consistent approaches to negligence liability as a whole. On 30 September 2002 the panel review delivered the Review of the Law of Negligence Final Report (known as the IPP Report).³⁴¹ The IPP Review Report contained 61 recommendations that addressed certain aspects of negligence. Thereafter, on 5 December 2002, a consultation draft of the Civil Liability Bill was tabled in parliament.³⁴² The Bill in its final form implemented the relevant recommendations of the IPP Report and included provisions that were incorporated into the New South Wales (NSW) Civil Liability Amendment Act.³⁴³

One of the recommendations made by the IPP review panel in the IPP Report was that consumers should be held liable for the consequences of their own safety in risky

³³⁷ Ibid, para 18.

³³⁸ Ibid, para 36.

³³⁹ Ibid, para 37.

³⁴⁰ Bell-James and Baker "Public authority liability for negligence in the post-IPP era: Sceptical reflections on the policy defence" (2016) 40(1) *Melbourne University Law Review* 2.

³⁴¹ Ibid, 2–3.

³⁴² Ibid.

³⁴³ Ibid.

activities.³⁴⁴ This meant that the suppliers would not have the same responsibility of giving consumers information about the risks involved when participating in risky activities, in circumstances where the risk would have been obvious to a reasonable person.³⁴⁵ However, the report also takes into account that many people who participate in risky activities are children, who need and deserve special protection from risk of injury and death.³⁴⁶ It was with this in mind that the phrase “in the circumstances any reasonable person in the position of the participant” has been included in the Act.³⁴⁷ This was done in order to give enough room for the law to develop flexibly to provide protection for people who are not fully capable adults. Children are not able to take the same level of care for their own physical safety, nor are they always aware of the risks of the recreational activities in which they participate.³⁴⁸

The report also provides a distinction between inherent and obvious risk:³⁴⁹

“An inherent risk is defined as a risk of a situation or activity that cannot be removed or avoided by the exercise of reasonable care. An inherent risk may be obvious, but equally may not be. Conversely, an obvious risk may be inherent but equally may not be. It may be a risk that could be avoided or removed by the exercise of reasonable care. This means that an obvious risk may be a risk that a person will be negligent.”

What constitutes an obvious or inherent risk is not easily determined. IPP recommendations stated that it would be undesirable and impractical to define what constitutes an obvious risk because this is something which should be left to the courts to decide depending on the circumstances of every case.³⁵⁰

5.4 Concluding remarks

The legal position in Australia in respect of exemption clauses is distinguishable from the South African position. In Australia the Competition and Consumer Act prohibits the use of exemption clauses where the supplier failed to comply with a statutory guarantee,³⁵¹ but makes special allowance for exclusion of liability in risky activities in terms of section

³⁴⁴ Andrew “Review on the law of negligence final report” (2002), para 3.8 <http://www.review-law-negligence-final-report-september-2002> (Accessed 17 June 2017).

³⁴⁵ Ibid, para 4.11.

³⁴⁶ Ibid.

³⁴⁷ Ibid, para 4.13.

³⁴⁸ Ibid.

³⁴⁹ Ibid, para 4.15.

³⁵⁰ Ibid, para 4.15.

³⁵¹ Australian Consumer Law, sections 60–61.

139A.³⁵² However, a supplier will be able to avoid liability for personal injury or death if the harm suffered by the consumer was not caused by their recklessness.³⁵³ The CLA deals with issues relating to risky activities; the Act allows suppliers to avoid liability in circumstances where the risk is obvious and inherent in the activity. Furthermore, in terms of the Act a supplier of a risky activity will not be held liable for failing to warn the consumer of an inherent and obvious risk. This can be compared to South Africa, where the CPA requires a supplier of a risky facility to draw the consumer's attention to any risk and if the supplier fails to do so, they cannot rely on the exemption clause to avoid liability. The CLA also draws a distinction between adults and children, who engage in risky activities. A child will be bound by an exemption clause only where a parent has been notified of the risky activity prior to the child engaging in the activity. It is evident that the CLA aims to address the issues in risky activities and places the responsibility on consumers to take reasonable steps to prevent any injury that they may suffer as a result of participating in risky activities where the risks are obvious and inherent in the activity. This can be compared to the approach of the CPA which places the responsibility on suppliers who want to rely on exemption clauses to draw the consumers' attention specifically to the risks involved. The CPA does not distinguish between normal activities and risky activities, and regardless of whether or not the risks should be obvious to an ordinary consumer, the supplier has to take steps to point these out. The supplier also bears the onus of proving that exemption clauses which exclude liability for death or injury are fair.

³⁵² Competition and Consumer Act 10 of 2010.

³⁵³ Act 10 of 2010, section 64.

CHAPTER SIX: CONCLUSION

Before the introduction of the CPA the courts placed great emphasis on the principles of *pacta sunt servanda* and freedom of contract, even in circumstance when the enforcement of an exemption clause was unfair to a consumer, and many people would have thought that the supplier ought to have drawn the consumer's attention to the exemption clause. This was demonstrated clearly in the commentaries that discussed the *Afrox* decision. The common law placed a burden on the consumer who disputed the validity of the exemption clause to prove that the enforcement of the clause was contrary to public policy. The CPA changes this position. With regard to reckless conduct, it is no longer permissible to rely on an exemption clause, and in respect of so called "greylisted" terms, a supplier who wants to exclude liability for death or injury would have to persuade the court that the exemption clause is fair in terms of section 48. The consumer therefore carries the duty in respect of non-greylisted terms to prove to the court that the term is unfair.³⁵⁴ This position can be distinguished from the Australian position as a party that will benefit from the enforcement of the contractual provision will have to prove to the court that the enforcement of the provision is fair and necessary to protect their legitimate interest.³⁵⁵

One problem with the CPA is that it does not distinguish between children and adults who engage in risky activities. Children are regarded as being in a more vulnerable position than adults and deserve to be protected from any form of harm and injury. When dealing with children who participate in risky activities, merely taking steps to draw the contractual provision to the attention of the child's parent is, it is submitted, not sufficient. The supplier of a risky activity must ensure that there are stringent safety measures in place to ensure that children who engage in risky activities are protected. This would include placing height and age restrictions for children below or above a certain height and/or age, and ensuring that the equipment that is used to facilitate the activity is kept in a good condition.

Moving forward, it is important for the courts to consider whether a clause that limits the supplier's liability for death or bodily injury is fair and in line with the norms and values of society, as such a clause impacts upon the consumer's constitutional rights to life and bodily

³⁵⁴ Naude and Eiselen *Commentary on the Consumer Protection Act* (2014) 48–27.

³⁵⁵ Australian Consumer Law, Section 24(4).

integrity.³⁵⁶ The question as to whether an exemption clause is valid if it excludes a supplier's liability when it negligently causes the death of another was left open by Harms JA in the case of *Johannesburg Country Club v Stott*.³⁵⁷ Mupangavanhu submits that section 51(1) should be amended to include a prohibition against exemption clauses that limit the supplier's liability in respect of death or personal injury.³⁵⁸ This is especially necessary in circumstances similar to the case of *Naidoo*, where a hotel was involved, because in such places a duty rests upon the supplier to ensure that the place is safe. A consumer would not expect to face the kind of situation that Naidoo was subjected to.

It is, however, submitted that when it comes to risky activities, the use of exemption clauses should be permissible. This is because, when a consumer decides to participate in a risky activity, the consumer voluntarily undertakes to expose him- or herself to risks, provided he or she is aware of those risks. If the use of exemption clauses when it comes to risky activities is not allowed, many businesses would close down because they would not be able to meet the legal costs of a consumer's claim and would not be able to afford insurance because of high insurance premiums. However, a supplier of a risky activity will be able to rely on such exemption clauses only if they comply with the requirements of section 49, which requires a supplier of a risky facility or activity to draw the consumer's attention to the fact, nature, and potential effect of the notice before the consumer engages in the activity. A consumer whose attention is drawn to the fact, nature, and effect of the exemption notice is able to make an informed decision. In such circumstances, the enforcement of the exemption clause would be fair. Suppliers would also be unable to rely on exemption clauses that exempt them from reckless conduct, as this is outlawed in terms of the CPA.

In summary, therefore, suppliers of risky activities may include exemption clauses in their contracts, provided these clauses exempt them only from ordinary negligence, that they draw the clause(s) to the attention of consumers, and that consumers are properly warned about the risks which are involved in taking part in such activities. Consumers will then make a clear decision to continue to take part in the activity, and if something goes wrong, they will have agreed not to hold the supplier liable. It is submitted that there is a heavy responsibility on such suppliers to make sure that they adhere closely to the requirements of the CPA. Merely presenting a consumer with a form to sign without taking additional steps to ensure that the

³⁵⁶ Tait and Newman (2014) 35(3) *Obiter* 632.

³⁵⁷ 2004 5 SA 511 (SCA).

³⁵⁸ Mupangavanhu (2014) 17(3) *PELJ* 1190.

consumer is well aware of the risks he or she is taking will not, it is submitted, be sufficient. However, only time will tell just how far the courts will expect suppliers to go, in order to ensure that consumers do in fact make informed decisions.

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