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The influence and interpretation of the Consumer Protection Act, 68 of 2008 on hospital exemption clauses

by

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Declaration of originality

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Summary

Exemption clauses are commonly used in hospital contracts to exclude the liability of the hospital or hospital personnel for personal injury or death and presented to the patient on a take-it-or-leave-it-basis. Patients usually sign these contracts containing the exemption clauses because it is impossible to negotiate the terms of the contract. Exemption clauses that are not contrary to public policy are enforceable between parties. Courts have generally favoured the application of the principles of freedom of contract and *pacta sunt servanda* to determine the enforceability of exemption clauses. The *Consumer Protection Act*, 68 of 2008 (CPA) was recently enacted, and among other things, it addresses the unfairness that is associated with exemption clauses and aims to improve consumer awareness. The common law principles were modified by the CPA. Exemption clauses, after the enactment of the CPA, are only enforceable if it complies with the requirements as set out in the Act. Exemption clauses must be drafted in plain and understandable language especially clauses that can be construed to be unfair and the risks pertaining to these clauses must also be drafted in an understandable manner. Such a clause must be brought to the patient's attention and a consumer must sign next to the clause after any term that can be interpreted as unfair terms and risks that is associated with such term is explained to him. A drafter should take into consideration greylist and blacklist terms when drafting exemption clauses, since certain clauses are prohibited and other terms are presumed to be unfair. A drafter can include a term that excludes liability for personal injury of the patient, but the hospital or its personnel will have to prove that such term is fair under the circumstances. A clause that excludes liability for death is not permissible. The enactment of the CPA was long overdue and it was vital, especially in respect of fairness of exemption clauses and the protection of patients against unfair contract terms.

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1. Introduction

As far back as 1925, the court held the following in *Schierhout v Minister of Justice*[1]:

> "If the terms of an agreement are such as to deprive a party of his legal rights generally, or to prevent him from seeking legal redress at any time in the Courts of Justice for any future injury or wrong committed against him, there would be good grounds for holding that such an undertaking is against the public law of the land."

This crucial judgment has not generally been followed by courts to determine whether exemption clauses should be construed as against public policy. Courts have generally favoured the application of the principles of freedom of contract and *pacta sunt servanda*. This means that parties have equal bargaining rights and that they are free to choose to either accept or decline any term of the contract and further, that parties will be held contractually bound to the terms of the contract that they freely and willingly accepted.[2] Thus, if a contracting party signs a contract, his signature constitutes consent, and having freely and voluntarily consented to the terms of the contract, such contract should be enforceable. The only instances in which an exemption clause was set aside were on the basis of misrepresentation or a mistake.[3] These defences were, however, seldom successful for the reason that a party's signature implied that he explicitly acknowledged that he has read and understood the terms and conditions as contained in the contract. The approach followed by courts to establish the enforceability of exemption clauses, however, leads to unfairness. This view was supported by Sachs J in *Barkhuizen v Napier* where he remarked that "exemption clauses are clauses that are drafted in advance by the supplier of goods or services and presented to the consumer on a take-it-or-leave-it-basis."[4]

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1 1925 AD 417.

2 Kanamugire "The future of Standard Form Contract in South Africa with particular reference to recent developments in the Law" 2013 *Mediterranean Journal of Social Sciences* 337-338.

3 The two main requirements that courts consider in order to determine if an agreement was reached between the parties are consensus and reasonable reliance.[3] If a court established, on the basis of these two requirements, that the agreement was reached, then the court will come to the conclusion that this contract is enforceable by relying on the freedom of contract principle, which is a fundamental common law rule. The courts determined that the contract is enforceable because of the following conclusion drawn by relying on the freedom of contract rule: 'parties are free to negotiate the terms of their agreement and the contract will be honoured as soon as contract has been reached and if necessary will be enforced by the courts. Newman "The application of the plain and understandable language requirement in terms of the Consumer Protection Act – can we learn from past precedent? 2012 *Obiter* 638.

4 *Barkhuizen v Napier* 2007 (7) BCLR 691 (CC) par 135.

The legislature recently enacted the Consumer Protection Act.[5] This Act contains provisions which specifically deal with the unfairness which usually goes hand in hand with the use of exemption clauses in standard form contracts.[6] Various provisions were introduced by the CPA, which impacted the use of certain clauses as used by suppliers with the purpose of excluding the liability of suppliers for harm that was caused to the consumers through the negligent conduct of the supplier.[7] It can therefore be said that this Act has a profound impact on the law of contract and also particularly on the use of exemption clauses in standard form contracts.[8]

This dissertation will focus specifically on hospital exemption clauses and the impact of the CPA on such clauses. Hospital exemption clauses seek to protect the hospital, doctor, surgeon and anesthetist from claims arising as a result of death, or physical or psychological injury suffered by a patient except in cases of gross negligence. The primary questions in this study are whether or not hospitals can still, after the enactment of the CPA, rely on exemption clauses which excludes liability for personal injury or death and whether exemption clauses can still be enforced by courts after the enactment of the CPA. In order to answer these questions the common law pertaining to exemption clauses as well as the factors to determine the enforceability of exemption clauses will be discussed, whereafter the impact of the CPA on the application of exemption clauses will be considered. Furthermore, the drafting of exemption clauses will be examined and guidelines will be given on how to draft an exemption clause, bearing in mind the sections of the CPA that have to be considered.

In the next paragraph, the common law rules pertaining to enforceability of exemption clauses will be discussed. The most influential cases in this respect will also be considered to show how courts argue the enforceability of exemption clauses.

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5 68 of 2008 (hereinafter referred to as "the CPA").

6 Kanamugire *et al* "The current status of exemption clauses in the South African law of contract" 2014 *Mediterranean Journal of Social Sciences* 164-165.

7 Tait *et al* "Exemption provisions and the Consumer Protection Act, 2008: Some preliminary comments" *Obiter* 2014 629.

8 Kanamugire *et al* 2014 *Mediterranean Journal of Social Sciences* 164-165.

2. Common law rules pertaining to the enforceability of exemption clauses

2.1. What is an exemption clause?

Exemption clauses are commonly inserted into standard form contracts. Standard from contracts have been defined as follows:

> "contracts that are drafted in advance by the supplier of goods or services and presented to the consumer on a take-it-or-leave-it basis, thus eliminating opportunity for arm's length negotiation."[9]

Exemption clauses are "contractual terms that aim to limit, alter or exclude the liability, obligations or remedies of a contracting party that normally originate from a contract."[10] Clauses exempting liability have been recognised by many names in standard form contracts, for example 'exemption clauses', 'exclusionary clauses', 'exculpatory clauses' and 'waivers.' An exemption clause is however not the same as an indemnity clause. An indemnity clause is a provision in a contract that one party relies on to indemnify the other party from any liability for claims that arises out of the activity.[11]

Exemption clauses therefore relate to any agreed deviation from the ruling law in respect of contractual or delictual liability that affects the rights, obligations, duties and procedural remedies normally emanating from a specific contract.[12] Hospital exemption clauses are used with the intention of protecting the hospital, doctor, surgeon and anaesthetist from any claim instituted by a patient for death, physical or psychological injury suffered by a patient as a result of negligent conduct of these staff members.[13]

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9 Stoop PN "The current status of the enforceability of contractual exemption clauses for the exclusion of liability in the South African Law of contract" (2008) *SA Merc LJ* 496. Sachs J in *Barkhuizen v Napier* 2007 (7) BCLR 691 (CC) par 135.

10 *Ibid.*

11 http://www.insurancegateway.co.za (accessed on 20 March 2015).The following serves as an example of an indemnity clause:" the cleaning company agrees to indemnify the bank in respect of any injury to a person on the premises arising out of the cleaning of the premises."

12 Van der Merwe (2007) 297 and Kanamugire *et al* (2014) *Mediterranean Journal for Social Sciences* 165.

13 McQuoid-Mason D "Hospital exclusion clauses limiting for medical malpractice resulting in death or physical or psychological injury: What is the effect of the Consumer Protection Act? 2012 *SALJ* 65.

2.2 Common law principles pertaining to exemption clauses

The fundamental common law principles that courts will rely on to determine the enforceability of exemption clauses are the freedom of contract principle, the *caveat subscriptor* principle and the parol evidence principle. The court will, when determining the enforceability of an exemption clause, firstly rely on the *caveat subscriptor* principle and will hold the patient bound to the agreement since the signature of the patient creates the impression in the mind of the hospital that there was consensus although the patient has not read the contract. The court will also rely on the freedom of contract principle in that the patient was free to negotiate the terms of the agreement. In terms of the parol evidence rule, the contract as a whole is enforceable and no extrinsic evidence can be led by either party to contradict or add to the written terms of the agreements.[14] These principles will now be discussed separately.

2.2.1 Freedom of contract principle

The general rule pertaining to freedom of contract which was affirmed by the courts is as follows: "public policy generally favours the utmost freedom of contract and requires that commercial transactions should not be unduly trammeled by restrictions on that freedom".[15] In *Wells v South African Alumenite CO*[16] the judge held that freedom of contract requires that

> "men of full age and competent understanding shall have the utmost liberty of contracting, and that their contracts, when entered into freely and voluntarily, shall be held sacred and shall be enforced by courts of justice."[17]

The basis of this principle is that the parties to the contract have certain bargaining rights and can exercise these rights by amending terms of the contract and by either accepting or declining to proceed with the contract.[18] However, in order for a supplier to rely on this principle, he must prove that the contract is lawful and legally possible.

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14 Tennant "The Consumer Protection Act and the five common law principles" 2013 *De Rebus* 36.
15 *Standard Bank of SA ltd v Wilkinson* 1993 (3) SA 822.
16 1937 AD 69.
17 *Wells v South African Alumenite CO* 1937 AD 69 at 73.
18 Tennant (2013) *De Rebus 36.*

This exception requires that the contract must not be contrary to common law and legally executable.[19] It can thus be said that this principle is "based on the notion that no one can be forced to contract."[20] Parties will be held bound by the terms of an exemption clause in terms of this principle since they freely and voluntarily entered into the contract although they had the opportunity to negotiate the terms of the contract. Therefore, they must abide to the commitments as set out in the contract.[21]

2.2.2 *Caveat subscriptor* principle

Caveat subscriptor means "let the signer beware" because both parties will be held bound to the terms of the contract that they agreed to and have to comply with any obligation as set out in the agreement.[22] It is, therefore, extremely important that a party must read the terms of the contract before signing it since he will be bound to these terms. A party cannot later raise the defence that he was unaware of the terms of the contract.[23] The reason why the signatory, who did not read the terms of the agreement, is bound to the contract after signing it is because he creates the impression in the mind of the other party to the contract that he is agreeing to the contract through affixing his or her signature.[24]

The *caveat subscriptor* rule is very well illustrated in *George v Fairmead (Pty) Ltd*,[25] where Judge Innes C J held that

> "when a man is asked to put his signature to a document, he cannot fail to realise that he is called upon to signify, by doing so, he assents to whatever words appear above his signature."

19 Tennant (2013) *De Rebus 36.*
20 Stoop "Background to the regulation of fairness in consumer contracts" 2015 *SA Merc LJ* 196.
21 Stoop 2015 (*SA Merc LJ)* 197.
22 Wessels "Faktore en beleidsoorwegings by die bepaling van 'n kontraksparty se regsplig teenoor 'n derde party: 'n kritiese bespreking van *Viv's Tippers (Pty) Ltd v Pha Phama Staff Services (Pty) Ltd t/a Pha Phama Security* 2010 4 SA 455 (HHA)" 2012 *Litnet Akademies* 218.
23 Kanamugire (2013) *Mediterranean Journal of Social Sciences* 336-337. The reason why a party who signs an agreement is held bound to the terms of the agreement is because he creates an impression in the other party's mind that he is agreeing to the terms of the contract.
24 Kanamugire (2013) *Mediterranean Journal of Social Sciences* 336.
25 1958 2 SA 465(A).

Innes C J further noted that the aforementioned statement can be seen as "hard and onerous," but pointed out that if a party signs an agreement containing unfair terms, then the party must be held bound to the terms unless he can show that there was fraud involved.[26] He accordingly advised that parties must make sure that they fully understand the terms of the contract before agreeing thereto.[27] A party to a contract can only escape liability if fraud, undue influence or duress can be proven or that it is not reasonable under the circumstances for the other party to be under the impression that he had agreed to such contractual terms. [28] Therefore, the effect of this principle is that a party who signs an exemption clause will be bound by the terms although he cannot read, does not understand the legal meaning of the clause or did not read the contract. It does not matter "how onerous, unreasonable or unexpected such terms may be."[29]

2.2.3 Parol evidence rule

The basis of this rule is that, if parties agree that a contract must be reduced to writing, then the contract concluded between them will be accepted by the courts as the sole evidence if a dispute arises. This means that once a transaction is reduced to a written contract, all other talks and discussions between the parties regarding the transaction will become irrelevant in the determination of the extent of the contract.[30] Any party to the agreement will be prevented under this principle to lead extrinsic evidence that will contradict or alternatively add to the written terms of the contract.[31] Extrinsic evidence will not be allowed when the contract is interpreted, for the reason that both parties agreed to the information as contained in the terms by reducing the contract to writing and by affixing their signature to the contract.[32] This rule prohibits the parties to the contract to make use of evidence to prove the intention of the parties since such evidence will result in changing the terms of the agreement.[33] Evidence regarding any

[26] Kanamugire *et al* (2014) *Mediterranean Journal of Social Sciences* 168.
[27] Kanamugire (2013) *Meditteranean Journal of Social Sciences* 337.
[28] *Ibid.*
[29] *Ibid.*
[30] Cornelius (2007) 96.
[31] Tennant (2013) *De Rebus* 37.
[32] *Ibid.*
[33] Cornelius (2007) 97.

prior oral or collateral agreement is also prohibited[34] as is the opinion of the drafter of the contract regarding the contract terms. [35]

There are, however, some exceptions to the application of the parol evidence rule. The parol evidence rule is only applicable if the whole transaction is incorporated into the written agreement. [36] Evidence will be allowed to prove the existence of a tacit term in the contract. [37] It is also permissible for a party to lead evidence "to rectify a written contract or to amend the clause containing the date on which the contract was signed by the parties or to prove the existence of a suspensive condition which is not included in the writing."[38] Evidence is also permissible to identify parties or things that is mentioned in the contract.[39] The last exception where the parol evidence rule does not apply is where it is alleged that there is a common mistake, disagreement, fraud, duress or undue influence and evidence can be lead to support or oppose such an accusation.[40]

There is some dispute as to whether evidence can be led to prove the intent of the parties since this evidence can amend the contract as it stands or alternatively qualify the terms of the contract.[41] According to Cornelius, it has been held in various cases that the parol evidence rule does not prevent evidence that is presented to prove the true intention of the parties especially where the parties does not accept the contract as it is or if the parties never intended for the contract to contain specific terms. [42]

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34 Cornelius (2007) 97.
35 *Ibid.*
36 Cornelius (2007) 98.
37 Cornelius (2007) 97.
38 Cornelius (2007) 98.
39 Cornelius (2007) 99.
40 *Ibid.*
41 *Ibid.*
42 *Ibid.*Cornelius referred to the following case law: *Douglas v Raynes* 1907 TS 34 37; *Zanberg v Van Zyl* 1910 AD 302; *Kilburn v Estate Kilburn* 1931 AD 501.

2.3 Grounds on which exemption clauses can be challenged

2.3.1 Lack of Consensus

A party will often contend that he is not bound to an exemption clause contained in a contract due to the fact that he was labouring under a reasonable mistake as to the contents of the contract.[43] This argument implies that such party is of the opinion that there was a lack of consensus between the parties regarding the exemption clause or the entire contract.[44] Consensus between parties is a requirement for any legally binding contract, however consensus can sometimes be obtained in an improper way for example by way of misrepresentation, duress and undue influence.[45] Misrepresentation is of importance in respect of exemption clauses.[46] Any contract can be rescinded where there is a misrepresentation and it is also a "ground for restitution where it is equitable."[47] A contract will be declared as void if lack of consensus exists or where the mistake by the party who denies the existence of the contract is both reasonable and material.[48]

George v Fairmead (Pty) Ltd[49] serves as an example of a case were the plaintiff contended that he made a reasonable mistake in respect of the contents of the contract. The plaintiff knew that he was signing a contract, but failed to read the contract.[50] It was held by the court that he did not, in fact, make a reasonable mistake. The court came to this conclusion by solely relying on the *caveat subscriptor* principle. The mistake by the plaintiff would have been seen as reasonable if the defendant had known of the plaintiff's mistake, but failed to correct it.[51] This would have amounted to a misrepresentation which could have lead the court to follow a more flexible application of the *caveat subscriptor* principle, and a party would thus not be held

43 Stoop (2008) *SA Merc LJ* 497-498
44 Stoop (2008) *SA Merc LJ* 497.
45 Stoop (2008) *SA Merc LJ* 501.
46 *Ibid.*
47 Stoop (2008) *SA Merc LJ*. 501.
48 Stoop (2008) *SA Merc LJ*. 497. In *Allen v Sixteen Stirling Investments (*Pty) Ltd 1974 (4) SA 164(D) the erf was incorrectly described and pointed out to Allen. Court held that the contract was accordingly void because Alen's mistake was both material and reasonable.
49 1958 (2) SA 465 (A).
50 Stoop (2008) *SA Merc LJ*. 498.
51 *Ibid.*

bound to the terms of the contract if he could prove that he was misled as to the contents thereof.[52]

2.3.2 Public policy

Courts have the power to declare an exemption clause void if it is against public policy.[53] Public policy can be defined as follows:

> "it is a concept that is interpreted in the light of society's interest and the interest of the individual contract party; and it is derived from the fundamental values evidenced in the Constitution, accordingly the courts take fundamental constitutional values into consideration when the duty to develop Common Law is fulfilled."[54]

In *Barkhuizen v Napier*[55] the constitutional court held that, in deciding whether a contract term is constitutional or not, the court must determine whether the terms are in contradiction with public policy as informed by the constitutional rights and values found in the Bill of Rights.[56] According to Carstens and Pearman the right to life and bodily and psychological integrity are embodied in the Bill of Rights and it has been said that compelling a patient to waive these rights in order to obtain medical treatment or to be admitted to a hospital "would surely be contrary to public policy".[57] In *Swinburne v Newbee Investments*,[58] Willis J held that such clauses infringe on the constitutional rights to life, bodily and psychological security, and are therefore contrary to public policy.[59]

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52 Stoop (2008) *SA Merc LJ* 499.
53 Stoop (2008) *SA Merc LJ*. 502.
54 *Ibid.* As discussed in par 2.4.2.
55 2007 (5) SA 323 (CC).
56 McQuoid-Mason (2012) *SALJ* 66.
57 *Ibid*. Carstens *et al* (2007) 560-561.
58 2010 (5) SA 296 (KZD).
59 In this case it has been suggested that the Common Law should be modified in light of the constitution, to prohibit exclusions from negligence causing death or bodily or psychological harm McQuoid-Mason (2012) *SALJ* 65.

2.4 Important cases pertaining to hospital exemption clauses

2.4.1 *Douglas Desmond Burger v Medic-Clinic Limited*[60]

In this case the nursing staff discharged Mr Burger from the hospital without contacting his doctor. Mr Burger fell at home as a result of his symptoms and injured himself. The court had to decide for the first time whether the exemption clause as mentioned in the hospital's document was enforceable. The exemption clause read as follows:[61]

> "I, the undersigned hereby consent to the administration of a General/Local anesthetic and to the performance of an operation upon Mr D. Burger (the patient) for Hemorrhoidectomy and excision of polyps by Surgeon Dr D. Grolman. Therefore by signing this consent to operation form, a patient and any person who signs this form on behalf of such patient, indemnify the Medi-Clinic Group of Companies, as well as their employees, officials and agents against all liability to such patient and to the person who signs this form on behalf of such patient, for any loss or damage which originates from any cause whatsoever. I hereby authorise Medi-Clinic Limited to destroy in any manner which they deem fit any tissue or part of my/ the patient's body which may be removed during an operation to be performed on me/the patient in this hospital."[62]

As a general rule, courts interpret exemption clauses narrowly and restrictively when a court has to determine whether the clause is enforceable.[63] In this case the court also followed a narrow approach and held that the clause was very widely worded[64] and only covered incidents arising out of, or related to, the administration of the anesthetic or the operation.[65] The aggrieved patient's counsel argued that the exemption clause was against public policy. The court therefore held that the exemption clause is not against public policy. The court, came to this conclusion by focusing on freedom of contract principle in that parties are free to conclude an

60 97/25429; unreported judgement Witwatersrand Local Division.
61 Carstens *et al* "An assessment of the use of disclaimers by South African Hospitals in view of the constitution, foreign law and medico legal considerations" 2003 *SAPR/PL* 431.
62 *Ibid.*
63 Jansen *et al* "Hospital disclaimers: *Afrox Health Care v Strydom* "2003 *Journal for Judicial Science* 210.
64 Jansen *et al* (2003) *Journal for Judicial Science* 210- 211.
65 Jansen *et al* (2003) *Journal for Judical Science* 211.

agreement as well as the principle of *pacta sunt servanda*.[66] The court failed to duly consider the fairness of the exemption clause.

2.4.2 *Afrox Health Care v Strydom*[67]

A second dominant judgment where the court had to consider whether an exemption clause, as contained in hospital admission forms, should be enforceable is in *Afrox Health Care v Strydom.* In this case the patient was admitted to hospital for an operation and post-operative medical treatment. The nurse that looked after the patient after the operation applied a bandage too tightly which later caused the patient injuries due to the fact that the blood flow to a sensitive part of his body was cut off. The aggrieved patient sued the hospital for the pain and suffering as result of the nurse's negligent actions. The hospital argued that they are not liable for the pain and suffering as suffered by the patient since the patient signed an exemption clause that formed part of his admission papers that excluded the hospital from liability.[68] The exemption clause as cited in the admission document reads as follows:

> "I absolve the hospital and/or its employees and/or agents from all responsibility and indemnify them from any claim instituted by any person (including a dependent of the patient) for damages or loss of whatever nature (including consequential damages or special damages of any nature) flowing directly or indirectly from any injury (including fatal injury) suffered by or damage caused to the patient or any illness (including terminal illness) contracted by the patient, whatever the causes are, except only with the exclusion of intentional omission by the hospital, its employees or agents."

The aggrieved patient's counsel argued that the patient should not be bound to the exemption clause for the reason that the clause was against public policy. There were four primary arguments raised on the patient's behalf as to why the clause was against public policy. Firstly, it was argued that the patient was in a weaker bargaining position than the hospital.[69] The court rejected this argument and held that there was no evidence led to show that the aggrieved patient was in a weaker

66 Carstens *et al* (2003) *SAPR/PL* 431.
67 2002(6) SA 21 (SCA).
68 *Afrox Health Care v Strydom* 2002(6) SA 21 (SCA) at par 6.
69 McQuoid-Mason (2012) *SALJ* 66.

bargaining position than the hospital.[70] Secondly, the argument that this exemption clause excluding liability allows hospital personnel to carry out their duties in a non-professional manner. The court held that there are adequate sanctions provided by the health service professional board and statute law that can be relied upon by hospital to guarantee that their staff act in a professional manner.[71] The court also added that a private hospital will not allow negligence on the part of their staff since it will damage the hospital's reputation and competitiveness.[72]

Thirdly, it was argued that the exemption clause exempted hospital personnel from gross negligence. The court did not allow this argument and held that the aggrieved patient's counsel failed to rely on gross negligence on the part of the nursing staff in their pleadings and this was not alleged by the counsel. Counsel only made reference to alleged negligence. The court further held that if gross negligence did offend public policy it would not have automatically rendered the clause invalid.[73] Lastly it was argued that the hospital was a provider of medical services and that the clauses conflicted with his constitutional right of access to health care.[74] The counsel relied upon section 27(1)(a) of the Constitution[75] which states that every person has a right to medical services and also argued that providers of medical treatment/services should not by manner of an exemption clause exclude their liability. [76] The court ruled in favour of the aggrieved patient's counsel that the provisions of section 27(1)(a) had to be taken into account, although the Constitution was not operative at the time when the agreement was concluded.[77] The indemnity clause did however not infringe the right of access to healthcare.[78] It was further held by the court that it was in the public interest that contracts that were concluded between parties freely and seriously and where both parties had the necessary capacity to conclude a contract should have been enforced. The court thus

70 *Afrox Health Care v Strydom* 2002(6) SA 21 (SCA) at par 12.
71 McQuoid-Mason (2012) *SALJ* 66.
72 *Ibid.*
73 *Afrox Health Care v Strydom* 2002(6) SA 21 (SCA) at par (13) at 35 F- H.
74 McQuoid-Mason (2012) *SALJ* 66.
75 *Constitution of the Republic of South Africa*, 108 of 1996.
76 Jansen *et al* (2003) *Journal for Juridical Sciences* 213.
77 *Afrox Health Care v Strydom* 2002(6) SA 21 (SCA) at par 17. It is obvious that Section 39(2) of the Constitution has no retrospective nature.
78 Jansen *et al* (2003) *Journal for Juridical Sciences* 213.

dismissed all the main arguments raised on the patient's behalf and held that the hospital exemption clause was not against public interest.[79]

The aggrieved patient's counsel argued as a last resort that there rested a duty on the admission clerk to have pointed out an exemption clause or alternatively to have drawn the patient's attention to the exemption clause and the clerk failed to do so. The court relied on the common law principle of *caveat subscriptor* and stated that the 'point of departure was that a party that signs a contract without reading same was bound to the terms of the contract.'[80] The court held in accordance with this statement that a party who signed a contract without reading the contract was legally constrained by the provision of the contract and it was regarded that he was aware of the provisions and expressively agreed to the provision by signing the contract.[81] However, there are exceptions where there is a legal duty on the party to point out surprising terms to the other party in the contract, where the party knew or ought to have known that the other party is under a mistaken belief about certain provisions of the contract.[82] The court held that the exemption clause is not a surprising term as parties are nowadays used to the fact that exemption clauses form part of standard contracts.[83]

In light of the above it is evident that the Supreme Court of Appeal ruled in favour of the hospital.

2.5 Critique against using exemption clauses in hospital contracts

The use of the exemption clauses in contracts are mostly criticised by academic writers because the contracting party in a stronger bargaining position exploits the contracting party in a weaker bargaining position.[84] This is done by drafting such clauses in an excessively one-sided manner in favour of the party in the stronger

79 Jansen *et al* (2003) *Journal for Juridical Sciences* 213.
80 Stoop (2008) *SA Merc LJ* 500.
81 *Afrox Health Care v Strydom* 2002(6) SA 21 (SCA) at paragraph 36 and Jansen *et al* (2003) *Journal for Judicial Science* 214.
82 Stoop (2008) *SA Merc LJ*. 454. Van Der Merwe *et al* (2003) 43 -5.
83 Naudé *et al* "Exemption clauses- A rethink occasioned by *Afrox Healthcare Bpk v Strydom* 2002(6) SA 21 (SCA) '2005 122 *SALJ* 454.
84 Stoop PN (2008) *SA Merc LJ*. 497.

bargaining position. This manner of drafting of exemption clauses results in unfair contractual terms.[85]

Exemption clauses in contracts that exempt private hospitals from the liability for bodily injuries or death caused by the negligent actions by their employees are by nature unfair. The patient goes to great lengths to make arrangements to undergo the operation such as organizing an appropriate date with the doctor, informing the medical aid of the operation to be undertaken as well as arranging leave from work.[86] If a patient is confronted by an exemption clause at the last minute before the operation, then he will sign the document, as it will not be a realistic option for him to cancel the operation and go to another hospital to seek better contract terms.[87] The possible reasons why most patients will sign the contract without arguing about the unfair terms are because

> "[T]here is little perceived practically in attempting to resist the terms of the standard-form contract, or because the terms are couched in obscure legalese and hidden in the fine print of the contract. Most consumers simply sign or accept the contract without necessarily knowing about the presence of the exemption provisions or without appreciating the implications of signing such a contract."[88]

Another danger that is associated with the use of exemption clauses is that the average consumer is ignorant of the meaning of such and will therefore just sign the contract.[89] Furthermore, the patient has no control over the imposition of the unfair terms because the hospital will not agree to any amendments to the terms. Accordingly it can be determined that the only freedom left to the patient is to sign or not to sign the contract, but the patient will still sign because he needs to undergo the treatment.[90] It is evident in light of the above that the patient will be put in an unequal bargaining position as the patient is in a weaker position and the supplier has an unconscionable advantage by adding in the exemption clause.[91]

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85 Kanamugire (2013) Mediterrranean Journal of Social Sciences 342-343.
86 Naudé *et al* (2005) *SALJ* 461.
87 Naudé *et al* (2005) *SALJ* 461.
88 Tait *et al* (2014) *Obiter* 630.
89 Kanamugire (2013) *Mediterranean Journal of Social Sciences* 343.
90 *Ibid.*
91 *Ibid.*

Strauss is of the opinion that exemption clauses with respect to injuries of the patient, whether the contract is concluded with a health-care worker or with the hospital, ought to be regarded as null and void and contrary to public policy.[92] According to Naudé and Lubbe, the exemption clause erodes a patient's trust in the motives of the service provider.[93] Retief also makes it abundantly clear in the following that she does not support the exemption clauses in hospitals:

> 'It is, however, unacceptable that big institutions, corporations or other groups with unrestricted financial resources and adequate insurance can refrain from fulfilling their responsibilities by exempting themselves from liability in the easiest possible way.'[94]

According to Retief exemption clauses should be declared invalid by the courts and legislation should intervene. Retief relied on the verdict of *Newman v East London Town Council*[95] to emphasize her point of view. In this case the council relied on the exemption clause in order not to be held liable. The court held that the council was not sheltered by the exemption clause as the council "cannot shelter themselves behind the terms of their contracts"[96] The crucial problem with exemption clauses as identified by Chimuka and Kanamugire is that "courts have not been able to deal with the problems posed by exemption clauses effectively and exemption clauses have continued to flourish at an alarming rate."[97]

I agree to some extent with Strauss that exemption clauses excluding liability for any claims that the patient might have due to the negligence of the hospital should not be enforced and are contrary to public policy. Exemption clauses like these should not be allowed because it is against the constitutional right to access healthcare.[98] It is pointless to argue that patients have freedom of contract since patients cannot fully exercise this right due to the fact that no hospital will ever amend their admission documentation to accommodate the patient's request. The patient will thus have no other option but to sign the contract as it is. The main issue with these clauses is that

92 Naudé *et al* (2005) *SALJ* 456.
93 Stoop PN (2008) 20 *SA Merc LJ* 456.
94 Jansen *et al* (2003) *Journal for Judicial Science* 216.
95 (1985) 12 SC 61.
96 Jansen *et al* (2003) *Journal for Juridical Sciences* 216.
97 Kanamugire *et al* (2014) *Mediterranean Journal of Social Sciences* 164.
98 McQuoid-Mason (2012) *SALJ* 66.

courts still allow these clauses without taking fairness as a factor into consideration. The question that still remains is what the most suitable manner is to deal with these clauses.

In the next paragraph, the focus will be on the movement from unequal bargaining power to client awareness due to the enactment of the CPA. The CPA had an immense impact on common law principles. Furthermore, the sections of the CPA which are specifically applicable to exemption clauses will be discussed. Particular attention will be paid to the requirement of plain language since this is the most important consideration for drafters of exemption clauses.

3. The impact of the introduction of the CPA on exemption clauses

3.1 General

There has been a lot of controversy on whether the CPA is applicable to transactions involving the supply of goods and services in the medical industry.[99] However, it is evident from the definitions of consumer, goods and services that the CPA is applicable to the medical industry although some of the definitions are very widely defined in the Act. Patient does fall under the definition of consumer and service is defined in terms of the Act as "not limited to the work performed by a person for the direct or indirect benefit of another and includes the provision of information, advice or consultation."[100] This definition with regard to the medical industry refers to services rendered by a health practitioner in the form of consultations, advice, or any other medical intervention, such as an operation.[101] 'Goods' in terms of section 1 of the CPA is largely explained and includes "anything marketed for human consumption."[102] It is evident that medicine falls under this definition.[103]

99 Nöthing Slabbert *et al* "The application of the Consumer Protection Act in the South African health care context: concerns and recommendations 2011 *XLIV CILSA* 170.
100 *Ibid.*
101 *Ibid*.
102 Nöthing Slabbert *et al* (2011) XLIV CILSA 170-171.
103 Loubser *et al* (2012) 72.

The main objective of the CPA, is the protection of the rights of the consumer, while establishing the duties for suppliers with respect to a consumer agreement. [104] The introduction of the CPA had a drastic impact on the common law rules pertaining to standardised contracts especially with regard to exemption clauses.[105] Section 49 states that exemption clauses that are unfair may not be enforced against an aggrieved person. This section also sets out requirements that a drafter should comply with, when drafting exemption clauses. The most crucial requirement that will be dealt with is that the clause must be in plain and understandable language. Section 52 contains a list of the following factors that can assist a court to determine whether a particular clause is unfair, namely: parties relative capacity, education, experience, sophistication and bargaining position.[106] In regulation 44(3) the legislator sets out terms that can be seen as unfair until proven otherwise by the supplier.

In this paragraph the impact of the CPA on the common law rules pertaining to exemption clauses will be discussed. In particular, the effects of the CPA on freedom of contract, *caveat subscriptor* and the parol evidence principle will be examined. Thereafter, the two branches of contractual fairness more particularly, contractual and substantive fairness will be examined. Next, the definition and the application of plain and understandable language will be analysed in depth in this paragraph. It is still permissible to include technical terms although plain and understandable language is a requirement in drafting of exemption clauses. Therefore, the interpretation of technical terms will be dealt with and lastly the restrictive nature of exemption clauses will be examined.

3.2 Impact of the CPA on Common law rules

3.2.1 Freedom of contract

Certain sections of the CPA limits the parties' freedom of contract.[107] This right has been restricted firstly by section 48, which states that "the supplier must not enter into

[104] Tennant (2013) *De Rebus* 36.
[105] Kanamugire (2013) Mediterranean Journal of Social Sciences 348-350.
[106] http://www.esselaar.co.za/legal-articles/search-plain-language (accessed on 10 October 2014).
[107] Tennant (2013) *De Rebus* 36.

an agreement with a consumer on terms that are unfair, unjust or unreasonable."[108] Section 48(2) contains factors which should be considered to determine whether a term is unfair, unjust or unreasonable. These factors that are taken into account to determine whether a term is unjust, unreasonable or unjust are as follows:

> "(a) if it is excessively one-sided in favour of any person other than the consumer or other person to whom goods or services are to be supplied;
> (b) the terms of the transaction or agreement is so adverse to the consumer as to be inequitable;
> (c) the consumer relied upon false, misleading or deceptive representation, as contemplated in section 41 or a statement of opinion provided by or on behalf of the supplier, to the detriment of the consumer; or
> (d) the transaction or agreement was subjected to a term or condition, or a notice to a consumer contemplated in section 49(1) and
> (i) the term, condition or notice is unfair, unreasonable, unjust or unconscionable; or
> (ii) the fact, nature and effect of that term, condition or notice was not drawn to the attention of the consumer in a manner that satisfied the applicable requirements in section 49."

Regulation 44(3) sets out specific terms which can be regarded as unfair, unreasonable or unjust, however the supplier will have the opportunity to prove why inclusion of these terms is not unfair.[109] It can thus be said that these terms form part of a grey list. In the case of grey listed terms, the onus rests on the supplier to prove that the term under the particular circumstances is fair.[110]

Some of the regulations that refer to exemption clauses that are deemed to be unfair unless proven otherwise by the supplier are as follows:[111]

> "44(3)(a) excluding or limiting liability of the supplier for death or personal injury to the consumer through an act or omission of that supplier subject to Section 61(1) of the Act; 44(3) (b) excluding or restricting the legal rights or remedies of the consumer against the supplier or another party in the event of total or partial breach by the supplier of any of the obligations provided for in the agreement, including the right of the consumer to set off a

108 Tennant (2013) *De Rebus* 36.
109 Tennant (2013) *De Rebus* 36.
110 Naudé "The consumer's right to fair, reasonable and just terms under the new Consumer Protection Act in comparative perspective" 2009 (*SALJ*) 520.
111 Kanamugire *et al* (2014) *Mediterranean Journal of Social Sciences* 172.

> debt owed to the supplier against any claim which the consumer may have against the supplier;
> 44(3) (d) limiting, or having the effect of limiting the supplier's vicarious liability for its agents;

The inclusion of the aforesaid regulations is perceived as "a major improvement from the common law where there were no identifiable terms to indicate unfair exemption clauses."[112] An example of an indemnification with reference to regulation 44(3) (a) that would be considered to be unfair is where a doctor requires of a patient to indemnify the doctor or personnel against any harm that the patient may suffer as a result of medical treatment or an operation.[113]

Another section that restricts the parties' right to freedom is section 51.[114] This section sets out blacklisted terms, in other words prohibited terms that may not be inserted by the supplier.[115] In respect of such terms, a supplier will not be afforded the opportunity to prove that the term is fair and the consumer also does not have to demonstrate why such term is unfair, unreasonable or unjust.[116] An example of a prohibited term that will automatically render the hospital contract void is if the hospital excludes liability for any gross negligence conduct on the part of the hospital or its personnel.[117]

3.2.2 *Caveat subscriptor*

In terms of the common law, the onus was on the consumer to read and understand the terms as expressed in a written agreement. The CPA has, to a certain extent, shifted this onus from the consumer to the supplier.[118] Firstly, a drafter who drafts agreements on behalf of the supplier should, in accordance with section 22 of the CPA, ensure that the contract in general, and the exemption clause in particular, is drafted in a plain and understandable manner. The drafter should further ensure that any financial obligation as set out in the contract must have an additional clause that

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112 Kanamugire *et al* (2014) *Mediterranean Journal of Social Sciences* 172.
113 Van den Berg "The Consumer Protection Act: implication for medical practice" 2011 *South African Family Pract* 600.
114 Tennant (2013) *De Rebus* 36.
115 *Ibid.*
116 Letzler (2012) *De Rebus* 24.
117 *Ibid.*
118 Tennant (2013) *De Rebus* 36

states the breakdown of how this financial obligation was calculated.[119] It is thus the responsibility of the drafter to draft a contract as well as any financial obligation in a manner that the consumer will understand what is expected from him. Secondly, section 49 requires the supplier to bring certain terms to the attention of the consumer as well as the risks and liability associated with agreeing to such terms, although the contract is drafted in an understandable manner.[120] The *caveat subscriptor* rule will still be applicable and a consumer will be held bound to the terms of the agreement if the contract was drafted in an understandable manner and was explained to him by the supplier.

3.2.3 Parol evidence rule

Section 48 of the CPA, as discussed above, is in conflict with the parol evidence rule because the CPA provides that the consumer may take a matter to the National Consumer Tribunal or relevant court.[121] The National Consumer Tribunal or relevant court "may look beyond the written contract to determine whether its terms are fair, just or reasonable and may also take the surrounding circumstances into account as set out in section 52(2) of the CPA."[122] The parol evidence rule is still applicable although it is permissible in terms of section 48 read together with section 52(2) to give extrinsic evidence to the court or National Consumer Tribunal in order to determine whether a term is unfair, unjust or unreasonable.[123]

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119 Tennant (2013) *De Rebus* 36.

120 *Ibid*. Terms that must be brought to the patient's attention will be discussed in par 4.3 below.

121 Tennant (2013) *De Rebus* 37.

122 Tennant (2013) *De Rebus* 36.These surrounding circumstances are as follows:" the fair value of the foods or services; the nature of the parties' agreement; their relationship to each other; and their relative capacity, education, experience sophistication and bargaining position; the conduct of the consumer and supplier respectively; the extent to which any document relating to the transaction or agreement were drafted in plain language; whether the consumer knew or ought reasonably to have known of the existence and extent of any particular provision of the agreement that is alleged to have been unfair, unreasonable or unjust, having regard to any trade custom and any previous dealings between the parties."

123 Tennant (2013) De Rebus 38.

3.3 Contractual fairness

Contractual fairness has two branches, namely substantive fairness and procedural fairness. Procedural fairness addresses conduct during the bargaining process and is mostly focused on ensuring transparency.[124] Transparency consist of two elements, namely transparency in relation to the contract and transparency in the sense of not being positively misled, pre-contractually or during the performance of the contract, regarding aspects of the goods, services, price and terms.[125] A document will comply with the first element if it is available in plain and understandable language and if it is well-structured. Thus, important sections of the document must be given prominence since these sections are vital for the consumer or because it grants a consumer certain rights.[126] The focus of the plain language requirement under section 22 of the CPA is to advance procedural fairness. This will however be a challenge and in some situations there will be limits in applying the plain and understandable language requirement since consumers in South Africa are often functionally literate.'[127]

The two elements of procedural fairness are imperative to take into consideration when drafting consumer documents since it usually assists a consumer to protect themselves against substantive unfairness.[128] The reason for this is because "with a high level of transparency the consumer has the chance to exercise a reasonable degree of informed agreement."[129] A high level of transparency has according to Nebbia

> "…to do with, among other things, aspects such as information disclosure, awareness of the terms, the size of the print, the clarity of the language, and the interpretation and format, as these procedural factors relate to circumstances surrounding the manner in which the agreement is reached."[130]

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124 Stoop *et al* "Unpacking the right to plain and understandable language in the Consumer Protection Act 68 of 2008" (2013) *PER* 518/614.
125 Stoop (2015) *SA Merc LJ* 215.
126 *Ibid.*
127 Stoop *et al* (2013) *PER* 518.
128 Stoop (2015) *SA Merc LJ* 215.
129 Stoop *et al* (2013) *PER* 518.
130 *Ibid.*

Substantive fairness can be described as follow:

> "it is a distinct virtue of good contracts, which can be measured, as we have seen, against the price of the contract, by a balancing of interest default rules, reasonable expectations, or proactively, by disallowing terms with certain substantive features."[131]

Substantive fairness further relates to the fairness that parties agrees to and can be either general or individual.[132] If fairness is established on factors relating to consumers' welfare for example "conduct of the supplier and the consumer, knowledge of a specific term, impact of the terms on the consumer then it will be individualized."[133] Fairness will be generalised if established by relying on factors external to the contracting parties for example "fair value of goods and services, or the availability of alternatives from competitors."[134]

3.4 Plain and understandable language requirement in terms of section 22

A milestone judgment that finally gave effect to the plain language requirement is, *Standard Bank v Dlamini.*[135] Mr Dlamini bought a second hand vehicle from Standard Bank and concluded a hire-purchase agreement with Standard bank with the assistance of the dealership. This agreement was not written in plain and understandable language and the dealership did not explain the terms of the contract to Mr Dlamini. An essential material term that was not explained to Mr Dlamini is that he must notify the dealership as well as the Bank that he is cancelling the contract. Mr Dlamini returned the vehicle because the vehicle was defective[136] and only notified the dealership that he is cancelling the agreement and not Standard Bank. Standard Bank instituted an action against Mr Dlamini to terminate the agreement since they have not received any payment of installments after the return of the vehicle. The dealership concluded the agreement with Mr Dlamini although he was functionally illiterate and did not understand English.[137] The judge held, after considering the facts, that the

131 Stoop (2015) *SA Merc LJ* 217.
132 Bhana "Contract Law and the Constitution:Bredenkamp v Standard Bank of South Africa (Ltd) SCA 2010 4 SA 468 (SCA) 2014 SAPL 514.
133 Stoop 2015 *SA Merc LJ* 215.
134 *Ibid.*
135 2013 (1) SA 219 (KZD).
136 http://www.esselaar.co.za/legal-articles/search-plain-language (accessed on 10 October 2014).
137 http://www.esselaar.co.za/legal-articles/search-plain-language (accessed on 10 October 2014).

agreement as a whole was unlawful because it was not drafted in plain language, "to the extent that Mr Dlamini was not informed of the material terms of the contract."[138]

The most important aim that section 22 wants to achieve is to empower consumers to understand the contracts they sign and further to make informed decisions.[139] However, the definition of plain language is also seen as problematic since it is very broadly described and does not give drafters the appropriate direction as to what specifically is required from them.[140] The meaning of plain[141] and understandable language according to section 22 of the CPA is as follows:

"(1) The producer of a notice, document or visual representation that is required, in terms of this Act or any other law, to be produced, provided or displayed to a consumer must produce, provide or display that notice document or visual representation –

(a) In the form prescribed in terms of this Act or any other legislation, if any, for that notice, document or visual representation, or

(b) In plain language if no form has been prescribed for that notice, document or visual representation[142]

(2) For the purposes of this Act, a notice, document or representation is in plain language if it is reasonable to conclude that an ordinary consumer of the class of persons for whom the notice, document or visual representation is intended, with average literacy skills and minimal experience as a consumer of the relevant goods or services, could be expected to understand the content, significance and import of the notice, document or visual representation without undue effort, having regard to –

(a) the context, comprehensiveness and consistency of the notice, document or visual representation;

(b) the organization, form and style of the notice, document or visual representation,

(c) the vocabulary, usage and sentence structure of the notice, document or visual representation; and

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

138 http://www.esselaar.co.za/legal-articles/search-plain-language (accessed on 10 October 2014).

139 Stoop *et al* (2013) *PER* 543. See also Jacobs *et al* "Fundamental Consumer Rights under the Consumer Protection Act 68 of 2008: A critical overview and analysis 2010 *PER* 330

140 Stoop *et al* (2013) *PER* 531.

141 The word 'plain' in the context of section 22 should be interpret by drafters "rather to be equated to understandable or acccesible." http://www.esselaar.co.za/legal-articles/search-plain-language (accessed on 10 October 2014).

142 It is evident that according to section 22(1) that if there is no form is prescribed then the contract should be in plain language.

Accordingly, the following essential terms to define plain and understandable language will be discussed: average literacy skills, minimum experience as a consumer of the relevant food and services; significance and import; and without undue effort.

Average literacy skills imply that the drafter must take the class of person's literacy skills for whom the document, notice or representation is meant for into consideration when drafting such document.[143] The drafter should, in respect to minimal experience as a consumer of the relevant goods or services, understand that he should draft for a first time consumer of particular goods or services.[144] The phrase "content significance and import" means that the document must be drafted in a manner to ensure that the consumer fully understands the document as well as the impact of the document on the consumer, thus its significance and effect.[145] "Without undue effort" means that a document was not drafted in plain and understandable language if the consumer has to make use of a dictionary or alternatively consult with an advisor to understand the document and the consequences of agreeing to it.[146] Section 22(2) (a) – (d) will be analysed in the subparagraphs that follows since these sections are imperative and a drafter must comply with it in order for an exemption clauses to be perceived as drafted in plain and understandable language.

3.4.1 Section 22(2) (a) – context,[147] comprehensiveness[148] and consistency

It is vital that the use of the terminology and style must be consistent throughout the document.[149] Judges will mostly consider the context of the contract and whether the same term was used consistently throughout the contract in order to determine

143 Stoop *et al* (2013) *PER* 531.
144 Stoop *et al* (2013) *PER* 531. In other words drafters should focus on the consumer with the least experience and not just the average consumer."
145 *Ibid.*
146 Stoop *et al* (2013) *PER* 532.
147 *Ibid*. The word 'context' refers to 'how and when consumers read a document or the way that the document is used by the consumer.
148 *Ibid.* Comprehensiveness' means that the document must give fully detailed information. Comprehensiveness' further shows 'that it is not only necessary to take account of how a document is written but further of what it is written.
149 Stoop *et al* (2013) *PER* 531.

whether the error was *iustus* or not and further how a reasonable person would have interpreted these terms.[150]

3.4.2 Section 22(2) (b) – The organisation, form and style[151]

The drafter should ensure that the structure of the document is set out in a specific format with the aim of highlighting important information on the top of the document and the document should not contain any small print.[152] *Fourie v Hansen*[153] is an example of a case where the court considered the importance of using style in a contract to point out the exemption clause. It was held by the court that "the concerned clause should have at least been printed in a different colour ink, or underlined or printed in another font size to draw the attention of the reader."[154]

3.4.3 Section 22(2) (c) - The vocabulary, usage and sentence structure

This section refers to the principles that make a document readable for example, "using short sentences, the active voice, personal pronouns and short words, and the drafter should especially avoid using technical jargon."[155]

3.4.4 Section 22(2) (d) – The use of any illustrations, examples, headings and other aids for reading

The drafter can make use of "illustration examples, headings or other aids to reading

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150 In *Diners Club SA v Livingstone* 1995 (4) SA 493 (W) the court more explicitly stated its disapproval with regards to the impact that the context of the terms as contained in the contract had on the other party. This is apparent from the following: "The whole get-up of the enrolment form is such as to mislead a person into thinking that only the company was being considered for enrolment."

151 Stoop *et al* (2013) *PER* 531. This requirement refers to the structure of the document.

152 *Ibid.*

153 2000(1) ALL SA 540 (SCA). Kanamugire *et al* (2014) *Mediterranean Journal of Social Sciences* 170.

154 *Ibid.*

155 This is an essential section that will determine whether the consumer is familiar with the words used in the contract as well as the meaning thereof and further whether the contract is easy to read. Stoop *et al* (2013) *PER* 533.

and understanding" to communicate information that is difficult to the lay person.[156] Many contracts have a clause that states the contract should be interpreted without the headings.[157] However, a drafter cannot put in a clause like the aforementioned since this section states that headings should be used as an aid for reading a document.

3.5 An assessment of the interpretation of technical terms in exemption clauses

It can be especially challenging to draft exemption clauses that are used by hospitals or hospital personnel since these clauses might contain technical terms that a lay person might not understand. A drafter should be mindful when he inserts a technical or specialised word in an exemption clause. The drafter should ensure that this word in the context will mean the specialised or technical meaning that the certain sector of the community for whose intention the clause is used will give to the word. This word should also represent the specialised legal meaning in contracts that is given to such word, unless it is evident from the intent of the parties that the word should not have such a specialised meaning. It is permissible for an interpreter to rely on a dictionary to look up the meaning of a specialised or technical word."[158] Evidence can be led to prove the meaning of such a specialised or technical word. However, the problem that arises out of the aforesaid manner of defining a specialised or technical word is that 'some words over the years received specialised legal meanings that could be very different from the meanings that are ascribed to these words in the dictionary.'[159] A solution to this problem is that if a contract contains such technical terms then the legal technical meaning should be given in the contract, but if it is evident from the contract as a whole or the context of the contract that the legal technical meaning given is different from the intention of the parties then the court cannot rely on the legal technical meaning.[160]

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156 Stoop *et al* (2013) *PER* 533.One of the benefits of using headings that are in a different font size and style is that it will assist consumers in finding specific information quicker when they read the contract.

157 Newman (2012) *Obiter* 644.

158 Cornelius (2007) 181.

159 *Ibid*.

160 *Ibid.* However, "no evidence of the meaning of legal technical terms in our law may be presented, but a court will take judicial notice of such meaning." This is also a presumption that parties will not deviate from the meaning assigned to words unless the context indicates otherwise.

3.6 The restrictive interpretation of exemption clauses

It has been held in several cases that exclusionary and indemnity clauses should be interpreted restrictively in terms of the common legal approach.[161] The courts after implementation of the CPA follow a more restrictive approach to determine the enforceability of exemption clauses.

This restrictive approach flows from the *contra proferentem rule* of interpretation.[162] Visser is of opinion "that one may further conclude that it is a substantive rule of law (and not merely a question of interpretation) that exemption clauses should be expressed clearly and without ambiguity, or they will be ineffective."[163] The courts especially rely on the *contra proferentem* rule when it has to make a ruling whether or not an exemption clause is fair or unfair. Milne JP explained the application of this rule in *Florida Road Shopping Centre (Pty) Ltd v Caine*[164] as follows:

> "The *contra proferentem* rule is not a rule for ascertaining of the intention of the parties and operates only to enable a court to adopt, against the proposer or stipulator, the stricter of two meanings of which the language of a contract is more or less equally capable. It is not to be used unless the ordinary rules of interpretation have been exhausted in an attempt to arrive at the true intention of the parties."[165]

The *contra proferentem* rule means that "doubtful or ambiguous words should be interpreted against the person who is responsible for the wording, or for whose benefit the words have been inserted."[166] There is also a presumption that is in line with the *contra proferentem* rule. This presumption states that:

> "an interpreter of a contract can 'presume that parties only intended what was reasonable and should interpret a contract in such a way that one party does not receive an unreasonably or unfair advantage over the other party."[167]

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161 *Afrox Healthcare Bpk v Strydom* at par 9 and 10 at 34D – D/E, G and H-I; *Drifters Adventure Tours CC v Hircock* 2007(2) SA 83 (SCA) at par 87 E.

162 Stoop (2008) *SA Merc LJ* 504.

163 *Ibid.*

164 1968 (4) SA 587(N).

165 It is thus apparent from this statement that the *contra proferentem rule* will be applied if the wording of the contract is vague and does not reflect the true intention of the parties. The court will then determine the terms against the *proferens*.

166 Cornelius (2007) 191. This rule is based on the "idea that it is open to the *proferens* to choose his or her words carefully."

167 Cornelius (2007) 130.

Scott JA in *Durban's Water Wonderland (Pty) Ltd v Botha*[168] pointed out the following with respect to the approach of the *contra proferentem* rule:

> "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… 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'."[169]

This approach means that if the drafter made use of clear and unambiguous words to express a term then a drafter must adhere thereto.[170] The term will on the other hand be interpreted against the *proferens* if there were any ambiguous words used to express the term. However, it is necessary to ease the limitation of the *contra proferentem* rule due to "economic realities, the concentration of economic power and production of consumer goods in the hands of corporations, the use of standard form contracts and the inexperience and ignorance of individuals."[171]

Section 4(4) sets out similar requirements as set forth by the *contra proferentem* rule. This section states the following:

> "To the extent consistent with advancing the purposes and policies of this Act, the Tribunal or court must interpret any standard form contract or other document prepared or published by or on behalf of a supplier or required by this Act to be produced by a supplier, to the benefit of the consumer
>
> (a) So that any ambiguity of the consumer for more than one reasonable interpretation of a part of such a document is resolved to the benefit of the consumer; and

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168 1991 1 ALL SA 411 (A).

169 Cornelius (2007) 192. See also Mupangavanhu "Exemption clauses and the Consumer Protection Act 68 of 2008: An assessment of *Naidoo v Birchwood Hotel* 2012 6 SA 170 (GSI)" 2014 *PER* 1173.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. It is clear from this approach that ambiguity may be used to reduce the effect of an exemption clause on the contract denier in terms of the damages suffered. One can just come to the conclusion that court will prefer the interpretation that is less favourable to the other party of the contract since the *proferens* was given the opportunity to fully express him or herself in clear and unambiguous terms.

170 Mupangavanhu (2014) *PER* 1174.

171 The parties to a contract are frequently not on equal footing which will result that the one party has an unfair advantage over the other. Cornelius (2007) 192.

(b) So that any restriction, limitation, exclusion or deprivation of a consumer's legal rights as set out in such a document or notice is limited to the extent that a reasonable person would ordinarily contemplate or expect having regard to

(i) The content of the document;

(ii) The manner and form in which the document was prepared and presented; and

(iii) The circumstance of the transaction or agreement."

One can derive form the above "that where exemption clauses are concerned, the court is required to interpret any standard form contract or any other document prepared or published by or on behalf of the supplier to the benefit of the consumer."[172] Thus the consumer will be given rights instead of depriving the consumer from its rights.[173] It can thus accordingly be said that section 4(4) of the CPA gives statutory authority to the *contra proferentem* rule and "its inclusion gives certainty to the law."[174]

In the next paragraph the focus will be the drafting of hospital exemption clauses. Guidelines will be suggested that drafters can rely on to successfully exclude liability for personal injury. Essential terms that must be brought to the patient's attention and the procedure that the hospital must rely on will also be dealt with in this paragraph.

4. The drafting of hospital exemption clauses

A drafter can ensure that the hospital is exempted from liability in certain instances by ensuring that the exemption clause is properly drafted. A drafter can further ensure that a patient will be held liable by ensuring that the exemption clause forms part of a notice.[175] In *Minister of Education v Stuttaford & Co (Rhodesa) (Pty) Ltd* it was held that "[l]iability for negligence can be excluded or limited, if the proper words are chosen for the contract."[176]

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172 Kanamugire *et al* (2014) *Mediterranean Journal of Social Sciences* 173.

173 *Ibid.*

174 *Ibid.*

175 Tait *et al* (2014) *Obiter* 630

176 Marx *et al* "Revisiting the interpretation of exemption clauses *Drifters Adventure Tours CC V Hircock* 2007 2 SA 83 (SCA) 2007 Obiter In *First National Bank of South Africa Ltd v Rosenbaum* 2001 (4) SA 189 (SCA) paragraph 6 it was held at 195G -196C that: "even where an exclusionary clause is couched in language sufficiently wide to be capable of excluding liability for a negligent failure to fulfill a contractual obligation (such as "any liability whatsoever"), it would not be regarded as doing so if there was another realistic and not fanciful basis of potential liability to which the clause could apply and so have a field of meaningful application."

In the paragraphs that follow certain fundamental elements that are essential to take into consideration when drafting exemption clauses will be dealt with namely establishing liability, the extent to which liability is excluded, incorporation of notice requirements that is compulsory for exemption clauses and lastly guidelines that a drafter can rely on when drafting exemption clauses.

4.1 Establishing liability

Hospital liability exists where a patient takes legal action against the hospital personnel for any serious injuries that he sustained as a result of the personnel's intentional misconduct or gross negligent conduct or slightly negligent conduct and or even conduct without negligence.[177] This is a principle that has been applied by courts throughout the years, although the patient assented to an exemption clause.[178] *Wagener v Pharmacare Ltd Cuttings Pharmacare Ltd*[179] is an exceptional case where this is best illustrated. The patient lost her arm as a result of defective local anaesthetic.[180] The essential enquiry that arose out of this case is whether liability can be incurred even if the breach occurred without fault on the respondent's part.[181] This enquiry was answered negatively because liability could not be imposed in the absence of fault. The court concluded that it is the responsibility of legislature to impose the strict liability in cases in which this principle is applicable.[182]

4.1.1 Strict liability

The legislature did act in accordance with the aforementioned judgment and introduced the strict liability principle with the introduction of the CPA.[183] According to this principle

177 Jansen *et al* (2003) *Journal for Juridical Science* 215.
178 Carstens *et al* 2003 SAPR/PL 454.
179 2003(4) SA 284 (SCA).
180 In respect to the Regibloc the court accepted the following: that the Regibloc was manufactured by the respondent and was already defective when it was handed into the respondent's control, that it was administrated in accordance with the respondent's accompanying instructions and that as a result thereof the patient was allegedly harmed due to its defective condition. Van Eeden (2009) 39.
181 In relying on *Ciba-Geigy (Pty) Ltd v Lushof Farms (Pty) Ltd* 2002(2) SA 447 (SCA) the court held that the conduct on part of the respondent was unlawful.
182 Jacobus *et al* (2010) *PER* 383.
183 Jacobus *et al* (2010) *PER* 383.

> "the entire supply chain could incur joint and several liability, irrespective of whether or not they were negligent and harm resulted, either wholly or partly, as a consequence of: supplying any unsafe goods; a product failure, defect, or hazard, in any goods and inadequate instructions or warning provided to the consumer (patient) pertaining to any hazard arising from, or associated with, the use of goods.[184] The supply chain refers to the following people: 'producer, importer, distributor, or retailer of any goods, and sometimes even a supplier of services, who, in conjunction with the supply of services gives the consumer (patient) access to certain goods.'[185]

It is thus evident from the above that this principle only applies to the supply of unsafe goods and or the implant of unsafe, hazardous or defective prosthesis or other medical device and not to any medical procedure or surgical operation.[186] The following goods serve as examples as set out in the strict liability principle: pacemakers, blood,[187] prosthesis and other medical devices. The type of harm that is covered by this section extends to "death, injury or illness and or pure economic loss caused by the resulted harm."[188] The patient can only be successful with a claim if he proves on a balance of probabilities that there is a causal relationship between the harm suffered by him and the product provided by the health-care practitioner.'[189] However, it should be noted that the patient who instituted a claim, will still be liable for adverse cost if he cannot prove the aforementioned successfully in court.[190]

A drafter should in respect of latent defects consider whether the harm that the patient can claim for should extend to consequential damages. Consequential damages do not form part of the definition of 'harm' in the CPA and the drafter can exclude liability

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184 Van den Berg (2011) *S Afr Fam Pract* 599.
185 *Ibid.*
186 Nöthling Slabbert "Medicine and the Law the Consumer Protection Act: No-fault liability of health care Providers 2011 *SAMJ* 800-801.
187 Blood is generally a product that is associated with extremely onerous liability because the damages caused by contamination may be extremely high.[187] A patient will most likely institute a claim against the doctor because he is the most recognisable part of the supply chain. However, the doctor can raise a defence that it is not his fault and that it was unreasonable to expect of him to have discovered the unsafe product characteristic or failure. The problem that arises due to harm caused by contaminated blood is that The National Blood Bank will be seen as the distributor is a non-profit organization and the manufacturer is an anonymous person and cannot be held liable. The National Blood Bank can however rely on the defence that it was unreasonable to expect the Bank to have discovered the unsafe product characteristic or failure, in terms of Section 61(4) (v). Loubser *et al* (2012) 72.
188 Section 61(5). Nöthing Slabbert (2011) *South African Medical Journal* 801.
189 http://www.biomedcentral.com/1472-6639/14/15 (accessed on 15 July 2015).
190 http://www.biomedcentral.com/1472-6639/14/15 (accessed on 15 July 2015).

for this type of damage.[191] Van Eeden defines consequential damages as follows: "damages caused by the defective product as distinguished from the cost and defect itself".[192] Consequential damages can also be described as a damage that is caused to the patient by a latent defect in the goods implanted or given to him.[193] If a drafter wants to exclude liability for this type of damage, then he must do so unambiguously and "clearly exclude liability for latent defects and for consequential damages flowing from such latent defects."[194] However, if the hospital personnel know about any latent defect then they must inform the patient thereof.[195]

Section 61 should be read together with section 54(1) (b) and (c). Section 54(1)(b) states that "a consumer (patient) has the right to performance of service in a manner and quality that a consumer (patient) is generally entitled to expect and section 51(1)(c) requires a doctor to use and install goods that are free from defects."[196] A patient who wants to institute an action against the doctor for injuries sustained as a result of installed medical devices must prove that the device installed is defective.[197] A doctor can however avoid being held liable by the patient by raising the defence that it is unreasonable to expect of him or her to have discovered the unsafe product, characteristic, failure, defect or hazard especially because of his role in the marketing of goods to the supplier.[198] The drafter should set out in the exemption clause that if

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191 Barnard J "The influence of the Consumer Protection Act 68 of 2008 on the warranty against latent defect, voetstoots clauses and liability for damages" 2012 *De Jure* 482.

192 Thus in the example of the implant of the prosthesis, the actual damage will be harm that is caused to the patient by the defective product and consequential damages will be that the patient was harmed due to the defective prosthesis for example scarfed his or her legs. Van Eeden "A guide to the Consumer Protection Act" (2009) 66 read together with Barnard J "The influence of the Consumer Protection Act 68 of 2008 on the warranty against latent defect, voetstoots clauses and liability for damages" 2012 *De Jure* 482.

193 http://bcir.com/liability_for_Latent_Defects.htm (accessed on 23 October 2015).

194 Katzew *et al* "Product Liability Insurance in the wake of the Consumer Protection Act 68 of 2008 2012 *SA Merc LJ* 12 read together with http://bcir.com/liability_for_Latent_Defects.htm. (last accessed on 23 October 2015).

195 The hospital personnel will be held liable if they knew or ought to have known about the latent defect.

196 It is evident from the aforesaid sections that section 54(1) (b) refers to the supply of medical treatment and performing of surgeries and (c) implants or medical devices free from defects. Section 56 (1) should be also noted because according to this section "an implied warranty must be provided in each transaction or agreement relating to the supply of goods to the consumer, and that the importer, distributor and the retailer each warrants that the goods comply with the requirements and standards contemplated in the CPA. Van den Heever "Impact of the Consumer Protection Act in the health care context" 2012 *De Rebus* 24.

197 Govan "New Consumer Protection Act, No. 68 of 2008 October" 2009 *SADJ* 384.

198 *Ibid.*

the patient is not satisfied with the services provided by the health care practitioner then he has the following choices of recourse

> "to refer the complaint to the National Consumer Tribunal or National Consumer Commission; to consult with an alternative dispute resolution officer and or to institute a civil claim in a court with the necessary jurisdiction."[199]

The exemption clause should further in respect of a transgression committed by a nurse be amended because the CPA now provides that the employer or principal is jointly or severally liable, together with an employee or agent, for anything executed or omitted in the course of his or her employment or activities on behalf of the principal (excluding criminal activity).[200] However, this section does not extend to independent contractors for example, the anaesthetist. The health care practitioner can only be held liable if he had to exercise control over the anaesthetist or failed to prevent them from harming the patient.'[201] The drafter can also no longer waive a liability as a result of failure on the part of the health care practitioner to perform a service properly.[202]

However, there are defences that a drafter must inform the health care practitioner about and that should be contained in the exemption clause in the event that a no-fault liability claim is brought against a health care provider. The defences are as follows:

(I) "the unsafe feature of the product, or the hazard, failure or defect, results from non-compliance with any public regulation;

(II) the alleged unsafe feature, hazard, failure or defect did not exist in the goods when they were supplied to another person alleged to be liable;

(III) it is unreasonable to expect the distributor or retailer to have detected the unsafe feature, failure, defect or hazard; or

(IV) the claim for damages is brought 3 years after the said death or injury occurred."[203]

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199 Oosthuizen "The new Consumer Protection Act and the GP Anaesthetist" 2012 *CME* 219.

200 Van den Berg 2011 *S Afr Fam Pract* 6.

201 McQuoid-Mason "What constitutes medical negligence?" (2010) *South African Heart* 250. In this example the surgeon will not be vicariously liable. However the surgeon will be 'personally responsible for negligently interfering with the work of the anaesthetist or failing to prevent the anaesthetist from harming the patient.'

202 http://www.bregmans.co.za (accessed on 20 March 2015).

203 Section 61(4) of the CPA. Nöthling Slabbert (2011) *SAMJ* 801.

4.1.2 Gross negligence

The accepted principle, prior to the introduction of the CPA, was that a patient can sue the hospital for personal injuries or other damages if this harm was a result of the intentional misconduct or grossly negligent conduct of any of the hospital personnel.[204] The CPA introduced section 51(1) (c) which strictly prohibits a supplier to be exempt from gross negligent conduct. In terms of this section a drafter cannot draft an exemption clause that limits or exempts the liability of the hospital or hospital personnel for any direct or indirect loss due to the gross negligence conduct of the hospital personnel.[205] The inclusion of the aforesaid term will automatically render the exemption clause void.[206]

A problem which does arise in this regard is that there is no clear distinction between ordinary and gross negligent conduct. The reasons for the aforementioned are due to the fact that complications often occur without negligence and professional medical errors of judgment are not necessarily regarded as negligent.[207] A definition on what conduct constitutes gross negligence can however be formulated by relying on the interpretations of judges in following judgments. Gross negligence can be described "as a degree of negligence that is so high that it can be described as a serious and reckless disregard or carelessness."[208] The judge in *Rosenthal v Marks*[209] defined gross negligence as conduct which "connotes recklessness, and entire failure to give consideration to the consequences of his actions, a total disregard of duty."[210] The most paramount example that explains which conduct constitutes gross negligence can be found in *Masstores (Pty) Ltd v Murray & Roberts Construction (Pty) Ltd.*[211] In this case a subcontractor was hired by Murray and Roberts. The subcontractor

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204 In *Afrox Health Care v Strydom* judgment it was held that the 'meaning of a disclaimer clause, in the context of the facts of the case should be interpreted restrictively to exclude gross negligence.' Carstens *et al* (2003) *SAPR/PL* 454.

205 A clause like this is strictly prohibited and forms part of the blacklist terms.

206 Nöthling Slabbert (2011) *South African Medical Journal* 801.

207 However, in principle the degree of negligence on the part of the doctor or any other hospital personnel makes no difference to his or its civil or criminal liability. Carstens *et al* (2003) *SAPR/PL* 454.

208 Nöthling Slabbert *et al* (2011) *XLIV CILSA* 177.

209 1944 TPD 172.

210 This definition was followed by the judge in *Government of the Republic of South Africa (Department of Industries) v Fibre Spinners & Weavers (Pty) Ltd* 1978 (2) SA 794 (A) who held that gross negligence "smacks of wanton irresponsibility."

211 2008 (6) SA 654 (SCA).

employees' were cutting the roof of Mass Stores with an angle grinder. The employees were standing on a ladder and there was a rack full of flammables under the ladder. A fire broke out which destroyed the entire store and all of its contents.[212]

4.2 The extent to which liability is excluded

4.2.1 Exclusion of risk pertaining to exemption clauses

There should be a fair apportionment of risk in a hospital exemption clause and a drafter should ensure that the contracting parties are fully aware of the risk that they are agreeing to after reading the clause.[213] The drafter can ensure that this requirement is met by "narrowing the scope of the disclaimer, so that the clause excludes liability for losses where the hospital is not at fault, or which were not foreseeable when the hospital contract was entered into."[214]

One of the most vital aspects that a drafter should take into consideration when drafting an exemption clause is whether the operation or medical treatment is classified as a high risk or low risk activity.[215] A provision drafted to exclude the liability of the hospital or its hospital personnel for death or personal injury that the patient sustained as a result of a medical procedure will be construed as unfair in terms of section 48 if this procedure is seen as a normal risk activity.[216] An exemption clause that exempts liability for a high risk procedure undertaken by the patient will more fairly be considered as 'fair' due to the fact that the patient had to carefully consider all the risks pertaining to the activity and had to make a concise decision thereafter whether he wanted to proceed with the procedure.[217]

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212 http://www.polity.org.za/article/interpreting-an-exemption-clause-2009-06-26 (accessed on 30 May 2015).
213 Van den Heever (2012) *De Rebus* 23.
214 http://www.bregmans.co.za (accessed on 20 March 2015).
215 Tait *et al* (2014) *Obiter* 640.However, according to Tait and Newman it might be "against the interest of justice and fairness if a party is prevented by law from protecting himself / herself from liability despite the other party's willingness to contract on that basis, particularly in the context of a high-risk situation and where there has been full compliance with the test of incorporation."
216 Tait *et al* (2014) *Obiter* 640
217 Tait *et al* (2014) *Obiter* 641.

The CPA has not given any guidelines whether a drafter can exclude liability for slight negligent conduct of the hospital or its hospital personnel. Tait and Newman are of opinion that a clause like the aforesaid is permissible and rely on the following finding as held in *Johannesburg Country Club v Stott* to affirm their opinion:[218]

> "Slight liability may have no consequences in one case; in another it may have catastrophic consequences. Death is but one of them. I would need considerable persuasion before concluding that a party to a contract who wishes to protect him or herself against the possibility that a moment's intention may result in an enormous civil liability for damages, is to be prohibited by law from doing so despite the other party's willingness to contract on that basis."[219]

A clause excluding liability for slight negligence will be seen as fair if the clause is drafted in line with the requirements as set out in section 49 of the Act. The reason for this is because a significant part of the hospital or its hospital personnel case, that the exemption clause is fair, will be based on the fact that the patient made the decision to partake in the high risk activity, although the risks that is usually associated with undergoing such an activity were explained to him.[220]

4.2.2 Exclusion of bodily injury or death

A clause that excludes liability for bodily injury or death as a result of negligent conduct by hospital personnel is regarded as a grey list term in terms of regulation 44(3)(a).[221] A drafter is allowed to include a clause like this although it is a clause that is presumed unfair.[222] There will rest an onus on the hospital or its hospital personnel to prove that this clause is fair (if the drafter of the exemption clause includes a clause like the aforementioned), especially if the patient decides to institute a claim against the

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218 2004 5 SA 511(SCA). In this case the husband and wife were both members of the Johannesburg Country Club. The husband was struck by lightning on the golf course while he was trying to find shelter. He died as a result of the injuries that he sustained. The wife proceeded to institute legal action against the Country club and the Country Club relied on the following exemption clause:" The club shall in no circumstances whatsoever be liable for any loss of or damage to the property of any member of guests brought onto the premises of the Club whether occasioned by theft or otherwise, nor shall the Club be held responsible or in any way liable for personal injury or harm however caused to members or their children or their guest on the Club premises and/or grounds."

219 Tait *et al* (2014) *Obiter* 641.

220 *Ibid.*

221 Mupangavanhu (2014) *PER* 1179.

222 *Ibid.*

hospital or its hospital personnel as a result of personal injury.[223] A drafter should, however, when including a term like this, state in clear and understandable language that the activity as mentioned in the term is a high risk activity.[224] According to Cornelius, "clauses which exempt liability for negligently causing the death of another party is not directed at the demise of that party, but rather at the protection of the other party if a party should indeed, in the course of executing the contract be killed."[225] The cases referred to below illustrate the court's opinion of clauses that exempt liability for personal injury as a result of negligent conduct.

In *Naidoo v Birchwood Hotel*[226] the court had to determine whether the hotel can be held liable for the injuries sustained by the plaintiff as a result of a steel gate that fell on him. The court held that the hotel must be held liable and could not hide behind the exemption clause that the plaintiff signed.[227] The court accordingly came to the conclusion that if a hotel or other institution denies a person to claim for "bodily injuries suffered as a result of negligent conduct of the hotel or other institution, it offends the notion of justice and fairness."[228]

In *Johannesburg Country Club v Stott*,[229] the court had to examine whether it is constitutional to use exemption clauses that specifically exclude liability for death or personal injury by the supplier where the husband and wife were both parties of the Johannesburg Country Club and agreed to the exemption clause. Harms interpreted the exemption clause and concluded that "it only provides exemption against liability for personal injury or harm and not against any claims of dependents."[230] Another question that the court had to determine was whether the exemption clause was contrary to public policy. [231] It was the view of the court that a clause like this will be contrary to public policy because "it runs counter to the high value that common law

223 Tait *et al* 2014 *Obiter* 640.
224 Also refer to par 4.2.1 above in this regard.
225 Cornelius "Golf: alidity and enforceability of exemption clauses in South African law" 2006 *the International Sports Law Journal* 3.
226 2012(6) SA 170.
227 The court also felt that to allow a hotel to rely on an exemption clause that "exclude liability for bodily harm in hotels and other places generally have the effect of denying a claimant judicial redress."
228 http://www.wylie.co.za/Article/188/ (accessed on 20 March 2015).
229 2004 5 SA 511(SCA).
230 Cornelius (2006) *International Sports Law Journal 2.*
231 Mupangavanhu (2014) *PER* 1174.

and especially the Constitution[232] place on the sanctity of life."[233] In conclusion the court held that the deceased cannot exempt the club from such liability because a party cannot include a clause which excludes claims from independent dependents.[234] Thus, bearing this judgment in mind, one can come to the conclusion that it is worthless to draft an exemption clause which exempts a party from any liability for death of another party as a result of negligence conduct.[235] A patient that dies as a result of medical treatment or surgery cannot institute an action, but an action can however be instituted by the deceased's immediate family since they are not parties to the contract that was concluded.[236]

4.2.3 Exclusion for conduct of third parties

The general rule in terms of common law is "that the doctrine of privity of contract prevents the application of an exemption clause to third parties." Two persons cannot by contract impose the burden of an exemption clause on another who is not a party to that contract.[237] A third party can only be held bound to the terms of the contract if he consents to the contract.[238]

4.2.4 Independent contractors

Provision should be made in the hospital exemption clause for the fact that the hospital will not be liable for the negligent conduct of an independent contractor or the

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232 *Constitution of the Republic of South Africa*, 108 of 1996.

233 In *Naidoo v Birchwood Hote*l the judge also held that "provisions excluding liability of a party for negligently causing the death of another would, in all likelihood, not withstand a constitutional challenge." Stoop (2008) *SA Merc LJ* 503.

234 Mupangavanhu (2014) *PER* 1179.

235 The principle of privity of contract should be taken into account due to the fact that this principle states that the parties to the contract will be held bound to the terms and third parties will only be subjected to those terms if the parties consent to be bound. Cornelius (2006) *International Sports Law Journal* 4.

236 Cornelius (2006) *International Sports Law Journal 3.*

237 Wessels (2012) Litnet Akademies 218.

238 The judgement of *Viv's Tippers v Pha Phama Staff Services* affirms that a drafter can draft a clause which exempts the hospital from any liability that arises out of the negligent conduct of third parties to a contract if drafted in clear and unambiguous terms. The aforementioned is evident from the following: "an exclusion of liability clause in a security contract excludes claims in delict by third parties, as well as claims from the other contracting party in terms of the contract. http://www.webberwentzel.com/wwb/content/en/newsletters-current/ (accessed on 31 May 2015).

employees of the contractor. In *Chartaprops 16 (Pty) Ltd v Silberman,*[239] Mrs Silberman slipped on a pool of slippery substance in a mall. An independent contractor company namely Advanced Cleaning was appointed by Chartaprops to clean the floors of the mall.[240] The Supreme Court of Appeal correctly applied the common law principle that states that a Chartaprops is not liable for the wrongs committed by an independent contractor or its employees and accordingly disagreed with the judgement handed down by Nugent J.A. in the High Court.[241] The majority added that Chartaprops complied with the duty of care that rests on it, because the company took reasonable precautions to avoid that any person entering the premises would be harmed.[242] The court accordingly held that Advanced Cleaning was liable for the claim for personal injuries as claimed for by Mrs Silberman and not the mall.

4.3 The incorporation of notice requirements that is compulsory for exemption clauses

When drafting an exemption clause a drafter should ensure that the clause does not contain any term or condition if it directly or indirectly:

- "waive or deprive a consumer of a right in terms of the Act;[243]
- avoid a supplier's obligation or duty in terms of the Act;[244]
- set aside or override the effect of any provision of the Act;[245]
- authorise the supplier to do anything that is unlawful in terms of the Act;[246]
- or fail to do anything that is required by the Act;[247]

239 2009 (1) SA 365 (SCA).
240 The High Court concluded that 'Chartaprops and Advanced Cleaning were jointly and severally liable to Mrs Silberman because the employees of Advanced Cleaning failed to take reasonable steps to detect the slippery substance and to remove this hazard. Botha "The buck stops… where, exactly? On outsourcing and liability towards third parties 2013 *Obiter* 486.
241 Botha (2013) *Obiter* 486.
242 Botha (2013) *Obiter* 486.The precautionary steps taken were that the Centre manager consulted with the cleaning supervisor every morning and personally inspected the floors on a regular basis to ensure that the property was properly cleaned. The court accordingly came to the conclusion that Chartaprops did:" all that a reasonable person could do towards seeing that the floors of the mall were safe."
243 Section 51(1) (b) (I) of the CPA.
244 Section 51(1) (b) (ii) of the CPA.
245 Section 51(1) (b) (iii) of the CPA.
246 Section 51(1) (B) (IV) (a) of the CPA.
247 Section 51(1) (B) (IV) (bb) of the CPA.

- it purports to limit or exempt a supplier of goods or services from liability for any loss directly or indirectly attributable to the gross negligence of the supplier or any person acting for or controlled by him;[248] or
- constitute an assumption of risk or liability by the consumer for a loss contemplated in subparagraph (i);[249]"

These terms and conditions are seen as blacklist terms and conditions and a drafter should ensure that the exemption clause does not include any of the aforesaid terms and conditions since it will automatically render the contract void.[250] Section 51 which includes these terms and conditions is perceived as problematic for the reason that it "does not deal with negligence on its own and by consequence the exclusion of liability for negligence on the part of a supplier is not excluded."[251]

4.3.1 Terms and risks that must be brought to the patients' attention in the manner and form as prescribed by section 49

The hospital should ensure that the notice is strategically placed in the hospital in order for the patient to be aware of the notice and the hospital personnel should also take reasonable steps in order to bring the notice to the patients' attention.[252]

The CPA states that in the event that a contract contains any notice that purports to limit in any way the risk or liability of the supplier or any other person; or constitutes an assumption of risk or liability by the consumer; or impose an obligation on the consumer to indemnify the supplier or any other person for any cause; or be an acknowledgement of any fact, it must be drawn to the attention of the consumer in the form and manner as prescribed by the CPA.[253] In addition, to the aforementioned section, if a provision or notice concerns any activity or facility that is subjected to any risk – of an unusual character or nature, the presence of which the consumer could not reasonably be expected to be aware of, or notice, or which an ordinary alert consumer

248 Section 51(c) (I) of the CPA.
249 Section 51(c) (ii) of the CPA.
250 http://www.bregmans.co.za (accessed on 20 March 2015). A term that exempts the hospital from performing any obligation that the hospital must comply with in terms of the CPA is an example of a null and void term.
251 http://www.cover.co.za/short-term-insurance/ (accessed on 20 March 2015).
252 http://www.cover.co.za/short-term-insurance/ (accessed on 20 March 2015).
253 Section 49 (1)(a) –(d).

could not reasonably be expected to notice or contemplate in the circumstances; or that could result in serious injury or death, the supplier must specifically draw the fact, nature and potential risk to the attention of the consumer in the form and manner as prescribed by the CPA.[254]

The hospital or its hospital personnel should bring a clause to the attention of the patient if it purports to limit the risk or liability of the hospital or its hospital personnel.[255] Another clause that should be brought to the patient's attention is a clause which imposes an obligation on the patient to indemnify the hospital or its hospital personnel for any cause or any clause that purports to be an acknowledgement of any fact by the patient.[256] A drafter should ensure that the following risks are set out in the clause if he includes the aforesaid clauses which concern an activity that the patient will be undertaking: any risk of "unusual character or nature; or if an ordinary alerted consumer could not reasonably be expected to notice or contemplate the risk in the circumstances; or if the risk could result in serious injury or death."[257] It is the responsibility of the person explaining the contract to the patient to inform the patient in detail about these facts, nature and effects of the risks.

A drafter should also make provision for a clause that sets out material risks relating to the activity that the patient will be undertaking. The patient should be informed about the following material risks namely:

> (i) " risks which a reasonable person in the position of the patient, if warned of the risk, would attach significance to; and
> (ii) risks that the doctor should have been reasonably aware of and that the patient would attach significance to if warned about these risks."[258]

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254 Section 49(2)(a) –(c).

255 This will constitute an assumption of risk or liability by the patient. Section 49(1) (b) of the CPA. McQuoid-Mason (2012) *SALJ 66*.

256 *Ibid*. Section 49(1) (c) of the CPA.

257 http://www.iol.co.za/business/personal-finance/no-blame-no-shame-1.1752411# (accessed on 13 May 2015). Mcquoid-Mason (2012) *SALJ* 67.

258 A doctor should also in terms of section7 (3) read together with section 6(1) of the National Health Act 61 of 2003 inform the patient about a range of different diagnostic procedures and treatments that he can consider as an alternative and must inform the patient of the benefit, risks cost and consequences that are generally associated with these options. McQuoid-Mason "Michael Jackson and the limits of patient autonomy" 2012 *SAJNBL*.

A patient has a right to redress if any risks pertaining to the activity that he undertook was not pointed out to him or alternatively not explained to him and it is the responsibility of the drafter to include a clause which informs the patient of this right.[259]

4.3.2 Requirements in terms of section 49 that a drafter must comply with

A drafter can minimise the hospital's liability that is usually associated with unfair contract by ensuring that the exemption clause is drafted in plain and understandable language. The doctor or other person delegated by the doctor must inform the patient about the risk in a "conspicuous[260] manner and form that is likely to attract the attention of an ordinary alerted patient, having regard to the circumstances of each case."[261] This requirement must be done either:

> "before the patient enters into the agreement; or before the patient gains access to the facility where the service will be rendered or alternatively before the consideration of the service is required, whichever occurs first." The patient must be given adequate time to clarify and comprehend the meaning of the terms and risks pertaining to the service.[262]

The person dealing with the exemption clause with the patient should ensure that the patient who agrees to the exemption clause should sign or initial next to the clause as proof that the patient fully acknowledges the clause and is aware of the risks involved and accordingly accepts this clause.[263] It is crucial that person obtains informed consent[264] from the patient since it is a requirement of a legal and ethical nature and lack of consent will result in assault.[265]

The following are ways that a drafter can rely on to limit liability that is usually associated with exemption clauses:

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259 Tait *et al* (2014) *Obiter* 636.

260 There is no clear meaning of what format will be seen as sufficiently conspicuous to alert a consumer. It is however evident that it will not be sufficient to print an exemption clause in a different font and colour on the reverse side of an agreement. Naudé (2009) *SALJ* 507.

261 Section 49(1) read together with section 49(4). Naudé (2009) *SALJ* 507.

262 Section 49(4) of the CPA. Mcquoid-Mason (2012) *SALJ* 67 read together with Nöthling Slabbert *et al* (2011) *XLIV CILSA* 177.

263 *Ibid.*

264 Informed consent requires the following:" a description of the treatment, procedure or study, the indications for the proposed procedure, the risks involved, alternatives to this, the consequences of refusing treatment, and the ability of the person receiving the consent to evaluate the patient's or parent's understanding of the discussion." Thomas "Parental refusal Legal and Ethical Consideration 2015 *South African Journal of Anaesthesia and Analgesia*.

265 http://www.biomedcentral.com/1472-6639/14/15 (accessed on 15 July 2015).

1. Listing certain types of loss that a party will not be liable for. [266]
2. Stating that the contract contains the whole of the parties' agreement. [267]
3. Setting a limit on the amount of damages a party will be liable for.[268]
4. Excluding certain remedies that would otherwise be available to the party that is not in breach.[269]

4.4 Guidelines that a drafter can rely on when drafting exemption clauses

4.4.1 Parties to the contract

The exemption clause is a contractual provision between the parties of the contract and can only be enforceable between parties.

4.4.2 Establishing liability

In respect of section 61, a drafter should note that anyone in the supply chain can be held liable for any harm suffered by the patient due to the supply of any unsafe goods or product failure, defects or hazards in any goods, or inadequate instructions or warnings regarding to the hazardous use of the goods.[270] A drafter can exclude consequential damages as a result of a latent defect if this defect is a defect that the hospital personnel were not aware of at the time of the operation. If it is determined that the hospital personnel should have been aware of the latent defect then the hospital as well as the hospital personnel will be held liable for any injuries that the

266 A drafter should first carefully consider what types of loss the hospital should be exempt from.

267 This is a special type of exemption clause and states that "the entirety of the agreement between the parties is set out in the contract and limits the liabilities of the parties to a contract to only what is covered under that contract. "http://www.out-law.com/en/topics/projects--construction/construction-claims/exclusion-and-limitation-clauses/ (accessed) on 20 March 2015)

268 The hospital has one of the following options: can take out insurance and limit the amount that the patient can claim to the amount that is reasonable under the circumstances alternatively do not exclude liability and agree to pay a certain amount for the damages suffered.

269 By inserting a clause like this, the drafter will ensure that the 'patient's remedies for breach of contract is limited to the remedies as set out in the contract, and excludes all Common Law and other remedies. By making use of a clause like this a drafter further will reduce the 'scope for claims in relation to the contract which means they can be very useful.' http://www.out-law.com/en/topics/projects--construction/construction- claims/exclusion-and-limitation-clauses/ (accessed) on 20 March 2015).

270 Dinne "Exposure to the consumer court under the Consumer Protection Act – more litigation for the medical industry?" 2009 *SAJBL* 44.

patient sustained. A drafter must exclude liability for consequential damages in clear and unambiguous terms.

The drafter cannot draft a clause that excludes liability for any transgressions committed by the staff, for example if nurses act on their own discretion. The reason for this restriction is because the CPA now provides that the employer or principal is jointly or severally liable, together with an employee or agent, for anything executed or omitted in the course of his employment or activities on behalf of the principal (excluding criminal activity).

A drafter should insert a clause that states that the transfer of blood constitutes a high risk activity and the hospital or its personnel should explain the risks that are associated with blood since this is a product that is subjected to onerous liability.[271] Blood is usually tested at the various centres that are responsible for collecting blood.[272] It is therefore possible for the drafter to exclude any liability arising out of the transfer of blood. However, the patient will still be able to institute an action against the hospital or its personnel due to the liability for any disease that the patient got due to the transfer of contaminated blood. The hospital or hospital personnel can still raise the defence that it was unreasonable to expect of them to have discovered the unsafe product characteristic or failure.[273]

The drafter cannot include a clause that limits or exempts the hospital or hospital personnel from liability for any loss directly or indirectly the result of the gross negligence of the hospital personnel.

The exemption clause should contain a clause that makes provision for methods of recourse that a patient can rely on if he is not satisfied with the service received by the hospital or its hospital personnel. These options are as follows: 'to refer the complaint to the National Consumer Tribunal or National Consumer Commission; to consult with

271 Loubser *et al* (2012) 88.
272 Loubser *et al* (2012) 88-89.
273 Loubser *et al* (2012) 72.

an alternative dispute resolution officer and or to institute a civil claim in a court with the necessary jurisdiction.'[274]

4.4.3 The extent to which liability is excluded

The drafter can make sure that this requirement is met by narrowing the scope of the disclaimer, so that the clause excludes liability for losses where the hospital or its hospital personnel are not at fault, or which was not foreseeable when the hospital contract was entered into.[275] A drafter can include a term that excludes liability for bodily injury as a result of negligent conduct by hospital personnel if the injury sustained was as a result of undertaking high risk surgery or procedure. If the injury sustained is as a result of a low risk activity then the clause exempting liability will be seen as unfair. The drafter can make provision for a clause that exempts the hospital or its hospital personnel from any risk that might result even from the slightest negligence.[276]

An independent contract should be drafted between the hospital and independent contractors. The terms pertaining to liability must be clearly set out in order to protect the hospital from any claims patients might institute due to conduct of the independent contractor. The hospital exemption clause should also include a term that clearly states that the hospital will accept no responsibility for any claims instituted by a patient as a result of negligent conduct by third parties.

A clause excluding liability for death will be pointless because the patient will not be able to institute a claim. His immediate family can however institute a claim because they are not bound by the terms of the contract. A drafter can include a term that excludes liability for independent contractors. However, it is advisable that the rights and obligations of the parties to the contract must be set out in clear terms.

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274 Oosthuizen (2012) *CME* 219.
275 http://www.bregmans.co.za (accessed on 20 March 2015).
276 Tait *et al* (2014) *Obiter* 641.

4.4.4 Ways to limit liability that is usually associated with exemption clauses

4.4.4.1 Listing certain types of loss that a party will not be liable for.

The drafter can, under this heading, state that the hospital or its hospital personnel are exempt from any liability for consequential damages due to the performance of a procedure or medical treatment and or implant of medical device or prosthesis.

4.4.4.2 Stating that the contract contains the whole of the parties' agreement.

A drafter should ensure that the following elements are contained in this clause namely:

> "a statement that the contract comprises the entire contract between the parties, that the contract supersedes any agreement that were made previously; a statement that the parties have not relied on any representation not set out in the contract, and an acceptance that the only remedy available to the parties is breach of contract, or any other remedies set out in the contract."[277]

4.4.4.3 Setting a limit on the amount of damages a party will be liable for.

A drafter can in respect of this limitation decide not to exclude liability and draft a clause that states that the hospital or its personnel will pay extra costs that the patient incurred as a result of the hospital personnel's conduct. Another clause that must be dealt with under this heading is claims instituted by third parties for the death of the breadwinner. It will be difficult to put a limitation on the amount, however, the reasonableness criterion should be applied to determine what will be reasonable under the circumstances. A drafter can also put a limitation on the amount that can be claimed in respect to injury or illness and or pure economic loss caused by the resulted harm. The amount must be limited only to the cost of the hospital stay and additional cost that the patient incurred as a result of his stay in the hospital.

[277] http://www.out-law.com/en/topics/projects--construction/construction-claims/exclusion-and-limitation-clauses/ (accessed) on 20 March 2015).

4.4.4.4 Excluding certain remedies that would otherwise be available to the party that is not in breach.

By inserting a clause like this, the drafter will ensure that the patient's remedies for breach of contract are limited to the remedies as set out in the contract, and exclude all common law and other remedies.

5. Conclusion

The homogenous viewpoint with respect to exemption clauses is that it is a clause that is presented to a consumer on a take-it-or-leave-it basis and a patient has no other option but to sign the contract if he wants to proceed with the contract. Drafters abused this clause by excluding liability for personal injuries or death since they knew that a patient usually does not read a contract because it is written in a way to hide these clauses in fine print and the consumer usually does not understand the terms of the contract. It is obvious, when reading the judgments of influential court cases pertaining to hospital exemption clauses that courts were cautious about intervening with issues of contracts in that contracts are "an expression of free will between two contracting parties."[278] The main principles in respect of drafting of exemption clauses, which appears from judgments prior to the enactment of the CPA, can be summarized as follows: firstly, exemption clauses in the contract must be agreed upon; and secondly, these clauses should be brought to the consumer's attention by underlying it or printing the section in bold. It is evident from *Afrox Health Care v Strydom* and *Douglas Desmond Burger v Medic –Clinic Limited*[279] that drafters in the past only drafted exemption clauses which would be in the best interest of the supplier (hospital).

The urgent need for the enactment of new consumer laws were specifically recognised in *Afrox Health Care v Strydom*, since the patient was put into an unequal bargaining position and had no other option but to sign the contract. These judgments as set out above can be seen as steppingstones which paved the way for the enactment of the CPA in 2008.

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[278] Kanamugire *et al* (2014) *Mediterranean Journal of Social Sciences* 174.
[279] 97/25429; unreported judgement Witwatersrand Local Division.

The introduction of the CPA, caused confusion for drafters in that the exemption clause as it was previously known, was now unenforceable and could be perceived as being against public policy. This piece of legislation was, however, a necessity since exemption clauses that are drafted in line with the requirements of the CPA will be enforceable and not against public policy. An exemption clause that is drafted in this manner will actually comply with general principles of contract law since there will be true consensus[280] obtained from contracting parties. It can thus be said that this piece of legislation brought true compliance with the law of contract.[281]

The focus was shifted from freedom of contract to consumer awareness and the protection of consumers against unfair contract terms with the enactment of the CPA.[282] The freedom of contract principle was modified by the CPA, but the issue of unfairness was not fully resolved since in some situations the hospital's rights will be restricted. The burden of understanding has shifted with enactment of this legislation from the patient to the hospital and it is the responsibility of the hospital to draw certain clauses to the attention of the patient in order to rely on the *caveat subscriptor* rule if the patient should dispute the clause. Section 48 of the CPA is in conflict with the parol evidence rule in that this section affords the consumer the opportunity to take a contract to the National Consumer Tribunal or relevant court if he feels that the clause is unfair. The parol evidence rule will still be applicable although section 48 read together with Section 52(2) will allow for extrinsic evidence to be led in order to determine whether the contract is unfair, unreasonable or unjust.

Exemption clauses must, in terms of section 22, be drafted in plain and understandable language. The aim of this section is to empower consumers to understand the contract in order to make an informed decision whether to proceed with the contract. A further identified challenge that drafters are faced with in terms of this section, is that drafters are not sure how to write in plain and understandable language since this clause does not give a clear indication of what is required of them.

280 Kanamugire (2013) *Mediterranean Journal of Social Sciences* 350.
281 *Ibid.*
282 Kanamugire (2013) *Mediterranean Journal of Social Sciences* 348.

Drafters should not see this as a problem since it gives a drafter the freedom to draft the clause on guidelines that he prefers. For example, he can decide to draw attention to risks in a different colour and font and underline them, as long as the method chosen by him fulfills all the requirements as set out by section 22. It will however be necessary for courts to give guidelines at some stage.[283] The use of technical terms in hospital exemption clauses have not fallen away with the enactment of the CPA. The best judgment that drafters should rely on as a guideline when drafting an exemption clause is *Walker v Redhouse*[284] since the court found the exemption clause to have been written in plain and understandable language.

It is essential for a drafter to exclude liability of any third party for negligent conduct committed by an independent contractor or its employees. The drafter should further also insert a clause to exclude the hospital or its hospital personnel from consequential damages. The drafter can include a clause which limits liability or excludes liability since the hospital or its hospital personnel will still be afforded the opportunity to argue why the terms should be construed as fair. A useful guideline that a drafter can rely on to simplify an exemption clause is to exclude liability for losses where the hospital or its hospital personnel were not at fault, or which was not foreseeable when the hospital contract was entered into. A drafter can include a clause which indemnifies the hospital or its hospital personnel from liability for an injury that arises out of slight negligent conduct of the hospital or its hospital personnel since there is no clear indication in the CPA, whether the exclusion of this negligence is inadmissible

With both *Afrox Health Care v Strydom* and *Douglas Desmond Burger v Medic –Clinic Limited* the nurse acted on her own discretion and the patient got injured because of her negligent conduct. Hospitals and doctors together with the nursing staff will be held jointly and severally liable for any transgressions on the part of any personnel. This places the doctor in an extremely difficult situation since the patient will mainly sue him because he is the most identified person in the supply chain. It is therefore vital that the hospital and doctor take out insurance to protect themselves for the reasons as set out above.

283 Newman (2012) *Obiter 647*.
284 2007 (3) SA 514 SCA.

In conclusion, the introduction of the CPA caused the common law rules to be amended in order to be more flexible to accommodate the patient. It is still permissible for drafters to include a clause which exclude the liability of the hospital or hospital personnel for any claim for personal injuries of the patient. A drafter cannot exclude liability for death since this is a pointless clause because the exemption clause only binds the parties to agreement and not third parties. There should be a fair apportionment of risk in a hospital exemption clause and a drafter should ensure that the contracting parties are fully aware of the risk that they are agreeing to after reading the clause. However, it is advisable to exclude liability where it is a high risk activity since the hospital or its hospital personnel will most likely be able to argue successfully that the patient knew that he was undertaking a high risk activity. The exemption clause and risks must be drafted in plain and understandable language and the patient's attention should be drawn to these risks and he should sign next to the clause as confirmation that the risks were explained to him or her and that he understood it.

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