EXEMPTION CLAUSES — A RETHINK

OCCASIONED BY AFROX HEALTHCARE

BPK V STRYDOM

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1 INTRODUCTION

Extensive statutory control over standard-form contracts, including exemption clauses in them, has become the norm in many overseas jurisdictions as part of a general pre-occupation with the control of unfair contract terms.1 Because of the delay in the enactment of the Law Commission’s proposed Control of Unreasonableness, Unconscionableness or Oppressiveness in Contracts or Terms Act,2 South African law as yet knows no general measure for the statutory control of unfair contracts terms in general and exemption clauses in particular.3 There are indications that the introduction of such a law is regarded with disfavour in judicial circles, and that existing common law devices or techniques are regarded as adequate for controlling abuse attendant on the resort to exemption clauses, whether in standard contracts or otherwise.4

This contribution considers exemption clauses in South African law with particular reference to contracts for medical treatment, without professing to treat all aspects exhaustively. It does not consider the possible application of the rules on duress and undue influence as a result of admission procedures, nor the position where a medical emergency results in a case of necessity.5

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3 The Consumer Affairs (Unfair Business Practices) Act 71 of 1988 and the various provincial Consumer Affairs Acts promulgated in response to it have apparently not yet been used to invalidate a provision of this kind. See C F C Van der Walt ‘Beheer oor onbillike kontraksbedinge — quo vadis vanaf 15 Mei 1999’ 2000 TSAR 33 on the role of the Unfair Contract Terms Committee which operated under s 3A of Act 71 of 1988.

4 See J J F Hefer ‘Billikheid in die kontraktereg volgens die Suid-Afrikaanse regkommissie’ 2000 TSAR 142.

5 Blackburn v Mitchell (1897) 14 SC 338.
Instead, we propose to reinvestigate a central tenet of contractual thinking, namely that parties are free to vary liability that the law imposes for the breach of duties normally attendant on specific types of contract, against the background of the decision in *Afrox Healthcare Bpk v Strydom*. After reviewing the present state of our law (part II), we consider historical authorities suggesting that parties are not in fact free to modify or exclude liability under a contract in a way opposed to the nature or essence of the contract (part III). Thereafter the implications of such an approach for the modern law are considered and the court’s finding in *Afrox* is revisited (part IV).

II THE PRESENT POSITION

It is apparent from *Afrox Healthcare Bpk v Strydom* that common-law devices for controlling exemption clauses are few in number and of limited scope. In this leading decision the court upheld a clause in a contract with a private hospital exempting the hospital and its employees and its agents from all liability from any cause, including injury, apart from injury caused intentionally.

The reliance theory embodied in the iustus error doctrine prevents, in appropriate circumstances, the incorporation of an exemption clause into a contract. In *Afrox*, however, the court held that the exclusion clause was objectively speaking not unexpected and the rule rather than the exception in standard-form contracts. The court accordingly rejected the patient’s argument that the hospital’s admission clerk had a legal duty to inform him about the exemption clause when he signed the hospital’s admission form.

The *Afrox* court also re-affirmed the ruling in *Brisley v Drotsky* that ‘abstract’ considerations such as good faith were not legal rules which could be relied on directly to curb the enforcement of contractual provisions. The court was prepared to accept that under *Sasfin v Beukes* the unconscionability of a contractual provision may render it contrary to public policy and hence unenforceable in appropriate circumstances. Nevertheless, the ambit of the *Sasfin* judgment was so severely restricted in *Brisley v Drotsky* that one might be forgiven for thinking that the public policy measure is of little practical relevance to the control of unfair contractual provisions beyond its well-established application in respect of wilful wrongdoings. The court in *Afrox* accordingly had little difficulty in rejecting the argument that the clause was contrary to public policy. There was, it was said, no

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* Supra note 6.
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* *Du Toit v Atkinson’s Motors Bpk* 1985 (1) SA 563 (A).
* Paragraph 36 at 42.
* Paragraphs 33–36 at 41C–42D.
* 2002 (4) SA 1 (SCA).
* Paragraphs 31–32 at 40G–41B.
* 1989 (1) SA 1 (A).
* Government of the Republic of South Africa v Fibre Spinners & Weavers (Pty) Ltd 1978 (2) SA 794 (A); cf Cameron JA in *Brisley v Drotsky* supra note 11 paras 90 and 91.
evidence that the patient was in a weaker bargaining position than the hospital.\textsuperscript{15} The mere fact that the clause was ostensibly wide enough to exclude liability for gross negligence also did not make it contra bonos mores.\textsuperscript{16} The court recognized the significance of the constitutional mandate of courts to develop the common law in order to reflect the spirit of the Bill of Rights and the interests of justice\textsuperscript{17} to the public policy standard for the enforceability of contracts.\textsuperscript{18} The inclusion of exemption clauses in agreements concluded by suppliers of medical care did not, however, directly or indirectly affect the constitutional right to medical care as contended by the plaintiff,\textsuperscript{19} and the court also rejected the argument that the elimination of the sanction of a claim for damages would promote unprofessional and negligent patient care.\textsuperscript{20} As regards the public policy standard, the court fell back on the elementary principle, virtually elevated into a constitutional value,\textsuperscript{21} that public interest requires the enforcement of contracts freely and earnestly entered into.

The only remaining regulatory measure of a general nature is that of a restrictive interpretation of the exemption clause. Although the court in \textit{Afrox} seemed to be inclined to recognize that exemption clauses require special treatment,\textsuperscript{22} the question did not arise for decision because the respondent had not alleged gross negligence on the part of the appellant.\textsuperscript{23} It was suggested that had he done so, the clause could have been restrictively interpreted so as to exclude liability for ordinary negligence only.\textsuperscript{24}

The ultimate theoretical foundation for the \textit{Afrox} approach is the essentialia-naturalia model regarding the terms and consequences of specific contracts still adhered to in South Africa.\textsuperscript{25} This model allows parties to supplement their agreement on the essentialia of a contract by means of incidental provisions even to the extent of qualifying or excluding altogether the operation of the naturalia of the contract.\textsuperscript{26} The \textit{Afrox} decision regards the obligation of a medical service provider to observe reasonable and professional care as belonging to the naturalia of the contract, and as such
capable of variation by contrary agreement. From this perspective, the exclusion of liability in Afrox amounts to an unobjectionable exercise of the freedom to structure the legal consequences of one’s agreement.

The emphasis in Afrox on freedom of contract accords with the decision in *Elgin Brown & Hamer (Pty) Ltd v Industrial Machinery Suppliers (Pty) Ltd.* Here, in a strictly commercial context, it was held that there is no rule against interpreting an exemption clause as excluding liability for damages resulting from a fundamental breach. A fortiori also, there is no substantive rule of law limiting the capacity of parties to incorporate such a widely phrased clause in their agreement, at least not where the breach amounted to a positive malperformance as opposed to a ‘total non-performance’. The impression then is that apart from the notion of public policy, our law knows no substantive limitation of freedom of contract in so far as the capacity of parties to structure the consequences of their agreement is concerned.

The South African position is nevertheless rather more complicated than it would appear to be at first sight. There is, in the first instance, recognition in *Van der Westhuizen v Arnold* that the special significance of ‘the most fundamental obligation of the seller — to give undisturbed possession of the merx to the buyer’ renders attempts to exclude liability in respect of its breach problematic. In this case an evicted purchaser sought to recover from the seller, by way of an action for damages, an amount paid to the owner under a settlement agreement. Although the exemption clause on the face of it read as a ‘complete catch-all, saving the seller from any liability that might arise by operation of law or by virtue of representations or warranties’, the majority of the court held that the clause had to be read as protecting the seller against liability for defects only. Although the contra proferentem rule was in strict theory inapplicable because it is only available where the words yield no clear meaning, and although it was said that there is no clear warrant for construing exclusion clauses differently from other provisions, Lewis AJA nevertheless professed a need for a ‘wary’ interpretation of clauses that seek to limit or oust common

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27 The respondent’s claim was brought on the basis that his contract with the hospital was subject to a ‘stilswyende bepaling’ (tacit clause) that he would be treated in a professional manner and with the exercise of due care (see para 2 at 32).
28 1993 (3) SA 424 (A).
29 At 430–1.
30 At 430. The judgment dealt with a positive malperformance and the court refrained from considering the position in the case of total non-performance, ie where the guilty party made no performance at all.
31 The capacity to do so is of course limited by considerations of public policy: see *Morrison v Anglo Deep Mines Ltd* 1905 TS 775 at 781; *Rich & Byatt v Union Government (Minister of Justice) 1912 AD 719*; and see eg, in relation to the so-called in duplum rule: *F & I Advisors (Edms) Bpk v Eerste Nasionale Bank van SA Bpk* 1999 (1) SA 515 (SCA); *Standard Bank of South Africa Ltd v Oceanate Investments (Pty) Ltd* 1998 (1) SA 811 (SCA) at 828D.
32 2002 (6) SA 453 (SCA) para 34 at 468B.
33 At 458B, per Heher AJA.
34 Per Lewis AJA at 468A.
35 At 469E.
36 Lewis AJA professed a need for a ‘wary’ interpretation of clauses that seek to limit or oust common
law rights where the exclusion is ‘very general in its application’ and concerned ‘the most fundamental obligation of the seller — to give undisturbed possession of the merx to the buyer’.

In *Vrystaat Motors v Henry Blignaut Motors*, the court furthermore affirmed the view of the Roman-Dutch writers that a pactum de non evictione praestanda does not prevent a claim for repayment of the purchase price upon eviction, but only a claim for any additional damages. It is true that the Appellate Division in the *Vrystaat Motors* and *Alpha Trust* cases had difficulty with the notion that the duty to repay the purchase price on eviction is invariable. In fact, the court in *Vrystaat Motors* stated that the reasons for the rule were not entirely satisfactory from the viewpoint of logic. Such a sentiment is understandable from the perspective of the truism that the warranty against eviction is part of the ‘reëlende reg’, that is, the naturalia of the contract. The court nevertheless firmly rejected Mostert’s contention that the rule ought for this reason not to be recognised in the modern law, by holding that the rule is not in fact part of the ‘reëlende reg’.

In view of the traditional approach to freedom of contract and the position adopted in *Elgin Brown & Hamer (Pty) Ltd v Industrial Machinery Suppliers (Pty) Ltd*, the treatment of the pactum de evictione non praestanda in the *Vrystaat* case is problematic. It is submitted, however, that proper regard to the historical origins of the essentialia-naturalia model might not only provide the *Vrystaat* case with a theoretical basis but also facilitate the development of criteria, if not for a substantive limitation on contractual freedom of contract, then at least for determining when the exercise thereof may be contrary to public policy.

III CONTRACTUAL EXCLUSION OF THE ESSENCE OF A CONTRACT

The essentialia-naturalia model: a historical perspective

The essentialia-naturalia model regarding the components and consequences of specific contracts stems from the Aristotelian notion that every thing has a
nature or essence. This concept of 'essences' was applied to contracts by, amongst others, Thomas Aquinas and the medieval commentator Baldus, who concluded that each type of contract had a nature or essence from which certain obligations followed 'naturally'. The nature or essence of an agreement was defined by its end or purpose, which in the case of sale, for example, simply entailed the exchange of a thing for a monetary price with a view to affording the purchaser the permanent enjoyment of the subject matter of the sale. The essentialia of a contract were regarded as the obligations entailed by its definition. They are included in or encompassed by 'the concepts used to formulate the definition'. The naturalia or natural terms of a contract were the means to the end expressed in the definition of the contract. That a party who desired the end would also desire the means, justified reading terms into the contract.

This approach to the question of the naturalia and the essence of contracts was taken up by the Late Scholastic school of jurists and is but one theme addressed by them during the 16th and early 17th centuries in an attempt to develop an encompassing system of natural law by means of a synthesis of Roman legal texts with the moral theology of Thomas Aquinas. In their reliance on Aquinas, a 13th century Dominican monk, who had 'baptized Aristotle' by fusing the tenets of Aristotelian philosophy with the religious tradition of Christianity, the Late Scholastics transformed the casuistry of the received body of the Roman law of contracts into a doctrinal structure comprising a set of general concepts arranged in a systematic relationship to one another. This system of general principles, 'Thomistic and Aristotelian in ground plan and Roman in much of its detail', was taken up by Grotius and other authors of the Northern Natural Law school whose works in turn exercised a profound influence on modern civil and common law thinking on contract. In this sense, the scholarship of the Late Scholastics is relevant to South African law.
A challenge to the Afrox decision

The notion that the essentialia-naturalia model entails a limitation on the variability of liability under a contract presents a challenge to the traditional ideal of contractual freedom espoused in the Afrox case. It is clear that the originators of the essentialia-naturalia model placed great emphasis on the parties’ purpose or end. Consistent with this teleological focus, the medieval commentator Baldus and the late Scholastics required that contractual provisions agreed to by the parties had to be consistent with the nature of the contract, in other words, with the contract’s purpose or end. The parties could therefore not modify the consequences of a contract in a manner opposed to the nature of the contract itself. There was thus a limit to how extensively the parties could modify the naturalia of their contract by express agreement.

The present-day relevance, if any, of Aristotelian and Thomistic notions

The question is of course as to the present-day relevance, if any, of these Aristotelian and Thomistic notions about the essence of a contract. The philosophical underpinnings of this approach, the Aristotelian metaphysics of essence, have long been abandoned. Even as in the 17th century the Late Scholastic model was being taken up by legal scholars, its philosophic premises were under attack by philosophers of the Enlightenment. By the mid 18th century the Aristotelian-Thomistic model had been supplanted as a philosophical paradigm, a development reflected in legal thinking by the demise of the Natural Law tradition and the rise of the classical theory of contract with its tendency to reduce virtually all of contract doctrine to the will theory as well as the recognition of freedom of contract as a tenet of public policy. South African law still reveals many of the characteristics of the classical theory, and this is particularly so in respect of the emphasis on freedom of contract. The question, therefore, is whether any argument in favour of a substantive limitation on contractual freedom and its possible extension into a principle of more general application can be based on what, on the face of it, appears to be an obsolete mode of thought incompatible with a system of contract based on the precepts of individual will and private autonomy.

In our view, the demise of its original metaphysical basis is not a convincing argument for rejecting the Thomistic view on the variability of contractual consequences by means of incidental provisions. Apart from a
resurgence of Aristotelian-Thomistic reasoning in modern legal theory,\(^{65}\) this approach is still reflected in the substance of contract doctrine and is supported by parallels between the teleological concerns of the Thomistic view and developments in this regard in the modern law.

**Remnants of Thomistic thinking in modern law**

The system of general principles and concepts of contract developed by the Late Scholastics survived the collapse of the philosophical system that underpinned them. Many of these notions, absorbed into attempts during the 19th century to restate contract law in terms of the will theory, remain as familiar features of the modern doctrinal landscape.\(^{66}\) More particularly, the idea that the essential or fundamental obligations under a contract cannot be excluded by agreement of the parties, or at least that such an exclusion is problematic, is still encountered in modern jurisdictions.

This view has been accepted in case law in Belgium, where this criterion has been applied strictly so that only the totally essential obligations may not be amended and liability for their consequences excluded.\(^{67}\) In Germany, a comparable rule was given statutory force in para 9 AGBG (Gesetz zur Regelung des Rechts der Allgemeinen Geschäftsbedingungen) of 1976, which is the statute governing standard-form contracts. A stipulation in a standard contract was presumed to be invalid for unreasonably prejudicing the command of good faith, where it ‘so limits essential rights or duties inherent in the nature of the contract that attainment of the purpose of the contract is jeopardized’.\(^{68}\) This provision was replaced in 2002 by one to similar effect in para 305b of the BGB, dealing with standard contracts. The English Unfair Contract Terms Act, 1977 also provides that where one party deals as consumer or on the other’s written standard terms of business, the other party cannot by reference to a contract term claim to be entitled to render a contractual performance substantially different from that which was reasonably expected of him, or in respect of the whole or any part of his contractual obligation, to render no performance at all except insofar as the contract term satisfies the requirement of reasonableness.\(^{69}\) Worthy of note also is that the same act renders the exclusion of liability for the equivalent in English law of the breach of a warranty against eviction ineffective.\(^{70}\) The notion that an exclusion clause which undermines the fundamental purpose of a contract is objectionable is therefore not wholly without recognition in modern law.


\(^{66}\) Gordley *The Philosophical Origins* op cit note 49 at 7–8.


\(^{68}\) § 9(2)(ii) AGBG, translated by Tjittes in Beale et al op cit note 1 at 514.

\(^{69}\) Section 3(2).

\(^{70}\) Section 6(1)(a). See *Van der Westhuizen v Arnold* supra note 26 at 469C–D.
Thomistic reasoning finds substantive resonance in our courts’ insistence that the seller’s liability for eviction cannot be totally excluded by contrary agreement. In support of this conclusion the court in *Vrystaat Motors v Henry Blignaut Motors*71 quoted Pothier to the effect that, ‘as the buyer is not obliged to pay and does not in fact pay the price, but in consequence of the seller’s promise to cause him to have the thing, if the seller does not fulfil this promise, the cause (causa) for which the buyer pays the price no longer subsists, and the seller, being in possession of it without cause, is consequently bound to restore it’.72

Differently stated, the reason or causa why the buyer pays the price, and therefore his contractual purpose or end, is to obtain undisturbed possession of the merx. According to Van Heerden JA in *Vrystaat*, the buyer agrees to pay the price in the expectation that he will not be evicted: ‘Immers die koper onderneem om die prys te betaal in die stellige verwagting dat hy nie uitgewin sal word nie’.73 From this it is also apparent that a nexus of reciprocity exists between the buyer’s duty to pay the price and the seller’s duty to deliver and to afford the buyer undisturbed possession.74

Despite some uncertainty regarding the essential elements of a sale in the modern law,75 the purpose of the parties is not simply that the buyer be given initial possession of the merx upon delivery. Instead, the buyer expects to be given sustained enjoyment of the merx.76 Whatever might have been the position in Roman law, therefore,77 the buyer is on account of the principle of reciprocity today entitled to recover the price where as a result of eviction she is deprived of the seller’s counter-performance.78 That this is so despite the existence of a pactum de evictione non praestanda in the contract is explicable on the basis that the exclusion of reciprocity between the duty to pay and the warranty against eviction would be contrary to the essence of a contract of sale, at least to the extent that the pactum purports to exclude the necessary corollary of the seller’s duty to give undisturbed possession, namely the obligation to repay the purchase price upon eviction. If the sanction for

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71 1996 (2) SA 448 (A) at 457E–F.
72 Pothier *Contract of Sale* translated by Cushing 115. See also Voet 21 2 31; Van der Keusel *Praelectiones ad Gr 3 15 4 Th 640; Van Leeuwen C 1 4 19 14.
73 At 457E.
74 De Buys v Centenary Finance Co (Pty) Ltd 1977 (3) SA 37 (T) at 45.
78 Although the cancellation or termination of a reciprocal contract normally brings about the extinction of the reciprocal performance duties of the parties (see Zimmermann op cit note 50 at 811 and Benöhr op cit note 77 at 1 on the notion of conditional synallagma), the principle of reciprocity survives the cancellation or termination of the contract: the mutual duties to make restitution of whatever has been received under the contract that arise on cancellation or termination stand in a reciprocal relationship to one another (Custom Credit Corporation (Pty) Ltd v Shembe 1972 (3) SA 462 (A); Bonne Fortune Beleggings Bpk v Kaldahri Salt Works (Pty) Ltd 1974 (1) SA 414 (NC); Baker v Probert 1985 (3) SA 429 (A)).
breaching the seller’s most fundamental duty is totally removed, the duty itself becomes meaningless. Absent a basic reciprocal relationship between the duty to pay and to deliver and maintain sustained possession, the agreement would have to be dealt with as a donation or otherwise a wholly aleatory agreement entailing a gamble by the so-called purchaser on a possibility that the agreement will result in his obtaining free and undisturbed possession, which is clearly not what the parties intend. Even on a narrower view of the essentialia of sale, the duty to warrant against eviction is one so intertwined with the basic end or purpose of the contract of sale that to permit a term purporting to exclude all liability for eviction to immunise a seller against the duty to repay the price is inconsistent with the fundamental purpose of the parties.

Exclusion of liability: a teleological perspective

In the Roman-Dutch sources relating to the pactum de evictione non praestanda an agreement which in effect excludes an essential obligation under the contract is denied legal recognition on the grounds that it would result in undue enrichment of the seller who would be entitled to retain the purchase price although in effect giving nothing in return. The underlying premise is that this result cannot be justified because the parties intended a contract of sale, which entails a bilateral contract involving an exchange of performances. A term which deprives the buyer of a claim to the recovery of the purchase price in the event of eviction violates the notion of an exchange that lies at the heart of the transaction.

This approach reflects the concerns underlying the general doctrines of contract law developed by the late Scholastics, namely Aristotelian and Thomistic moral conceptions about human virtues. The human virtues comprised precepts of conduct of various kinds, the observance of which constituted a good life. Every virtue was conceived of as importing a standard of behaviour amounting to a mean between two extremes pertaining to various aspects of human life. A number of virtues were pertinent to human interaction involving the disposal of goods. Apart from

77 See note 76 above.
80 This analysis is supported by the treatment in our law of the case where a purchaser knowingly purchases a res aliena. See Van der Westhuizen v Yskor Werknemers se Onderlinge Bystandsvereniging 1960 (4) SA 803 (T) at 812B where it was held that: ‘Waar ‘n koper wetende ‘n res aliena koop, sonder kwade trou en sonder om uitdruklik of deur sy optrede te kenne te gee dat hy ‘n emptio spei aangaan, dan is hy, by uitwinning geregtig op terugvordering van die koopprys, maar dan nie op verhaal van die id quod interdum nie.’ If the tentative suggestion in the Alpha Trust case supra note 43 at 743 that an amount may possibly be deducted from the purchase price where the evicted merx was a rapidly depreciating asset should ever be taken up by our courts, it could be argued that the corollary of the duty to give undisturbed possession, namely the duty to compensate the buyer in an amount less than the price, cannot be excluded by agreement.
81 See note 72 and the accompanying text.
82 Van Eikema-Hommes op cit note 56 at 19.
83 William T Bluhm Theories of the Political System (1965) 116 and 117; Van Eikema Hommes op cit note 56 at 19; Bertrand Russel History of Western Philosophy (1961) 185 and 190; Gordley The Philosophical Origins op cit note 49 at 20.
84 Bluhm op cit note 83 at 110 and 117; Russel op cit note 83 at 186; Oechsler op cit note 63 at 57.
the virtue of promise keeping,\textsuperscript{85} the virtues of liberality and commutative justice were of particular relevance. The virtue of liberality was relevant to the disposal of one’s goods by donation and prescribed that one ought to observe a mean between prodigality and meanness.\textsuperscript{86} The virtue of commutative justice on the other hand entailed the observance of a mean between seeking too much or too little in respect of the disposal of one’s material goods in exchange for other goods and enjoined the observance of equality in exchange of goods.\textsuperscript{87} Apart from the notion that a substantive equivalence between performances is to be maintained,\textsuperscript{88} a further element was that the terms of contractual arrangements involving an exchange of performances should not disturb a minimum degree of proportionality between the interests of the parties.\textsuperscript{89} It is as a criterion or measure for this balance that the notions of contractual essences and commutative justice acquire significance for the modern law. At the very least, the notion of commutative justice entails that transactions that are not intended to constitute gifts should involve an exchange of performances in return for one another. The obligations that constitute the essential elements of the contract type that the parties purported to conclude embody the irreducible points beyond which the parties cannot, without changing the character of the transaction, absolve the one of liability to the detriment of the other.

The Aristotelian and Thomistic view of the virtues and essences applied to contracts is in actual fact based on the centrality of the parties’ contractual purpose, and the need to regard contract types teleologically. This teleological focus cannot be faulted, and is reflected in a renewed interest in value-based reasoning in modern legal theory.\textsuperscript{90} The law of specific contracts still identifies contract types on the basis of recurring, typical contractual purposes served by them, and the rules related to each contract type are and should be co-determined by its particular purpose.\textsuperscript{91}

Similarly, the centrality of ‘virtues’ such as commutative justice is comparable to the ‘abstrakte oorwegings’ which was stated to be of fundamental importance to contract law in the \textit{Afrox} decision.\textsuperscript{92} The imposition in the Thomistic scheme of a standard of commutative justice ‘die het midden houden tussen te veel en te weinig gewinzucht’,\textsuperscript{93} embodies an ethical perspective that is echoed in the modern debate. There is a

\textsuperscript{85} Gordley \textit{The Philosophical Origins} op cit note 49 at 10–11.
\textsuperscript{86} Gordley \textit{The Philosophical Origins} op cit note 49 at 14; Russel op cit note 83 at 186; Bluhm op cit note 83 at 110.
\textsuperscript{87} Van Eikema Hommes op cit note 56 at 22; Oechsler op cit note 63 at 57–9.
\textsuperscript{88} This aspect has been irrelevant for our law since the demise of \textit{laesio enormis}.
\textsuperscript{89} Van Eikema Hommes op cit note 56 at 24.
\textsuperscript{90} See note 65 above.
\textsuperscript{91} The economic purpose of the contract type must, for example, be taken into account when formulating default rules. See Tjakie Naudé ‘The function and determinants of the residual rules of contract law’ (2003) 120 SALJ 820 at 825 and authorities there cited.
\textsuperscript{92} Paragraph 32 at 40–41; cf G F Lubbe \textit{Bona fides, billikheid en die openbare belang in die Suid-Afrikaanse kontraktereg} (1990) 1 Stell LR 1; G F Lubbe ‘Estoppel, vertrouensbeskerming en die struktuur van die Suid-Afrikaanse Privaatreëg’ 1991 TS4R 1; Dale Hutchinson ‘Non-variation clauses in contract: Any escape from the Shifren straitjacket?’ (2001) 118 SALJ 720.
\textsuperscript{93} Van Eikema Hommes op cit note 56 at 22.
growing body of thought to the effect that in so far as good faith (bona fides) is an underlying principle of contract law, it imports, amongst other dimensions, that the pursuit of one’s own interests be tempered by a measure of concern for those of others. The constitutional value of dignity dictates not only that agreements voluntarily entered into must be respected by the law, but also that the law of contract should secure ‘a framework within which the ability to contract enhances rather than diminishes our self-respect and dignity’. The notion that human dignity as a constitutional constraint on human choice might render an agreement entered into contrary to public policy has been recognised in respect of an agreement that infringes on a person’s bodily integrity, and also in respect of an agreement that reduces a person to economic servitude. It is reflected in our common law’s condemnation of agreements that promote forced labour and constitutes the essential premise of the Saffin decision that an agreement which is so tyrannically one sided and destructive of the legitimate interests of one’s contractual partner as to reduce him or her in an economic sense to a slave, is contrary to public policy.

In principle, an exclusion clause which infringes the essence of a contract by undermining the basic relationship of reciprocity existing between the undertakings characteristic of the contract envisaged by the parties should likewise be regarded as legally problematic on account of its tendency to reduce a contracting party to an object of economic gratification of the other.

Conclusion

Although the judgment of the Supreme Court of Appeal in the Afrax case affirms the need for a teleological approach to the understanding and future development of the South African law of contract, the court’s approach does not permit the richness of our historical heritage to play a role in the law regarding exemption clauses. The judgment did not take into consideration

94 Brisley v Drotsky supra note 11 para 32 at 40–1.
96 Lubbe (1990) 1 Stell LR 1 op cit note 92 at 20.
97 See the reliance in Afrax supra note 6 para 22 at 38D on Cameron JA’s statement to this effect in Brisley v Drotsky supra note 11 para 94 at 35F.
99 See the remarks in the minority judgment of O’Regan and Sachs JJ in S v Jordan (Sex Workers Education & Advocacy Task Force as Amici Curiae) 2002 (6) SA 642 (CC) para 74.
100 Coetzee v Comitis 2001 (1) SA 1254 (C).
101 Eastwood v Shipstone 1904 TS 294; Gqoboka v Peppler 1947 (4) SA 580 (W).
102 See Saffin (Pty) Ltd v Beukes supra note 13 at 1344–14A; Lubbe (1996) 1 Stell LR 1 op cit note 92 at 20–2.
103 Cf Lubbe (1990) Stell LR 1 op cit note 92 at 23–4. The decision in Wynns Car Care Products (Pty) Ltd v First National Industrial Bank Ltd 1991 (2) SA 754 (A) does not militate against the reasoning advanced here. Because of a lack of reciprocity between the lessee’s duty to pay the rental and the supplier’s duties under the maintain and service agreements (759B, H–J), there was no need to consider the applicant’s contention that a clause purporting to exclude a reliance on the exceptio non adimpleti contractus was contrary to public policy.
the *Vrystaat* case, and reduces that decision to an anomaly. In the absence of further reflection, the *Afrox* decision might readily close the door on the recognition of the Thomistic heritage evident in Roman-Dutch sources and previous decisions of the Appellate Division. The significance of this tradition becomes apparent once it is understood that the essence of a contract is no longer a metaphysical concept, but rather a criterion deriving from the basic socio-economic purpose of the parties. It therefore has policy relevance and a technical meaning for contract law going beyond the mere classification of contracts. The Thomistic analysis of the essential characteristics of the various specific contracts provides a benchmark for establishing whether a particular transaction amounts to a truly autonomous act serving the interests of both parties.

Whether the exclusion clause in *Afrox* undermines the fundamental characteristics of a contract to provide medical services will be considered more fully below. It is firstly necessary to consider how the teleological reasoning advanced here can be fitted into the South African doctrinal structure.

**IV TELEOLOGICAL REASONING AND ITS IMPLICATIONS FOR THE MODERN LAW**

*Introduction*

Judicial pronouncements regarding the need for wary treatment of exemption clauses which in general terms impinge on undertakings fundamental to particular types of contract reflect the concerns of the teleological approach adverted to in the preceding section. In addition, it is necessary to consider the implications of this line of reasoning for the iustus error doctrine and the possible extension of the rule in the *Vrystaat* case into one of general application.

The latter question is the most problematic. The Thomistic analysis of essences in the context of the invariability of terms arguably defeats its own laudable purpose of giving effect to the actual purpose of the parties. Does the exclusion of terms that reflect the typical purpose of a contract type not merely show an intention to deviate from it, and is a blanket denial of the freedom to do so not in fact inimical to a teleological approach? The Thomistic analysis of essences arguably results in a formalistic Begriffsljursprudenz-reasoning, reverting to the obsolete notion of a numerus clausus of contract types. Modern law allows far greater leeway to parties to structure their contract as they wish. A blanket denial of variation contrary to the typical contractual end also disregards other policy considerations relevant to the question of legality.

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104 See note 38 and accompanying text.
Accordingly, we reject a blanket prohibition of variations contrary to the perceived basic contractual end or essence of a contract. The proper approach would be to investigate the implications of Thomistic reasoning for the established approach to public policy as the general standard for the enforceability of contracts and contractual terms. That an exemption clause undermines the reciprocity between the parties’ envisaged essential obligations might perhaps merely be one indicator that a party’s autonomy has been impaired. A proper consideration of this aspect by the courts in various contexts may eventually yield what in Germany are referred to as ‘Fallgruppen’,106 i.e. categories of cases in some of which, by analogy to the Vrystaat case, a substantive rule against variation is adopted, while other cases might be dealt with differently, for example by the development of a presumption of unlawfulness or illegality or simply by the application of the normal approach to public policy.

The relevance of the parties’ basic contractual purpose to the iustus error approach

When a party signs a standard contract without reading it, the point of departure is that he is bound to the terms thereof as he created a reasonable reliance to that effect.107 If the signor objects that he never agreed to a specific clause therein, he must establish that he did not know about or consent to the term and that his mistake was reasonable and excusable. A mistake is iustus where it was brought about by the contract assertor, or where the latter knew or ought to have known that the other party was mistaken but failed to speak.108 One instance where the assertor ought to have known that the other party labours under an incorrect impression is where the document contains a surprising term.109 This was accepted as good law in Afrox,110 but the court found that the exclusion clause was not in fact ‘surprising’.

We submit that a clause which purports to vary the consequences of the contract in a manner contrary to the essence of the contract by undermining the reciprocity between the essential obligations envisaged by the parties is ‘surprising’. A party may reasonably expect the terms of a written document to be consistent with the typical purpose of the envisaged contract. If this expectation is contradicted by the written document, it is certainly surprising, and there is, in principle, a legal duty to point out the discrepancy where, to the knowledge of the assertor, the other party never read the relevant part of the contract. The assertor of the exemption clause is asserting

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106 On Fallgruppen see Axel Beater ‘Generalklauseln und Fallgruppen’ 1992 Archiv des civilistische Praxis 82.
109 Christie op cit note 107 at 203 with reference to cases like Dlово v Brian Potter Motors Ltd 1994 (2) SA 518 (C) at 525A–D; Fourie v Hansen [2000] 1 All SA 510 (W) at 516d–517a; Keens Group Co (Pty) Ltd v Latter 1989 (1) SA 686 (C).
110 Paragraphs 33–4 at 41.
something contrary to the very basic undertaking that he ostensibly makes in concluding the contract in the first place.  

To recognise variation contrary to the basic purpose of the contract as an indicator of a surprising clause is good policy. It persuades the users of standard-form contracts to communicate with consumers, thereby promoting substantive equality: the consumer who knows of the term then has the choice to bargain for amendment of the term or to seek alternatives in the market.

The legality of exemption clauses

(a) The relevance of the basic contractual purpose

As the law stands, the presumption of legality will be displaced where it appears that the party seeking to rely on the exemption clause is guilty of wilful misconduct, or that the situation falls within the ambit of *Sasfin v Beukes* and that the agreement or term is so unconscionable as to be unenforceable. Because of the difficulty of developing a criterion for the application of the *Sasfin* decision in particular instances, the tendency has been to narrow down its possible application to the point of suggesting that it does not apply to provisions that are not per se illegal.

It has been contended here that the fact that an exemption clause derogates from the consequences that are characteristic of the contract type entered into by the parties provides a pointer to the permissible extent of contractual freedom. The undermining by an exemption clause of what is at one level understood as an exchange of performances marked by reciprocity results in the imbalance between the interests of the parties that lies at the basis of the decision in *Sasfin v Beukes*. That a court may in such circumstances be justified in intervening by declaring a term unenforceable in order to protect the autonomy and therefore the dignity of the party objecting to the term seems unobjectionable in principle.

(b) Exemption clauses in contracts for medical services

A contract between a doctor and patient entails an undertaking to examine, diagnose and treat the patient against payment of compensation in the usual manner, or as required by circumstances. Unless agreed upon, a medical practitioner does not undertake to cure the patient or to guarantee a specific

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111 In the English case of *Gold v Essex County Council* [1942] 2 KB 293 at 302–3 the court stated that ‘[in] the case of a nursing home conducted for profit [and therefore also a private hospital] a patient would be surprised to be told that the home does not undertake to nurse him’.

112 *Afrox* supra note 6 para 10 at 34.

113 *Brisley v Drotsky* supra note 11 para 31 at 18; *Afrox* supra note 6 para 8 at 33–4.

outcome. \(115\) The undertaking is to act with the degree of care and skill reasonably to be expected of an average practitioner in the field. \(116\) By acting in a careless, negligent manner, the service provider not only commits a breach of contract, but is also liable in delict for loss suffered by the patient in consequence of negligent conduct. \(117\) A contract concluded between patient and a hospital authority is dealt with on par with that between a doctor and patient in so far as it relates to the medical treatment of a patient by hospital staff. \(118\)

Strauss argues that an exemption clause in respect of injury to the patient, whether in a contract with a health-care worker or with a hospital, ought to be regarded as null and void as contrary to public policy. \(119\) Apart from the need to protect the patient’s fundamental interest in his bodily inviolability, Strauss considers the patient inherently vulnerable as regards the conclusion of the contract. The exemption clause also erodes a patient’s trust in the motives of the service provider. A patient may readily conclude that the service provider is more concerned with its commercial interests than providing care and complying with professional standards. \(120\)

Whether the exemption clause also undermines the fundamental characteristics of the contract is to some extent problematic. It can be argued that the minimum content of the hospital’s obligation is merely to provide medical care. On such an analysis of the essence of the obligation, it is only where the negligence amounts to a failure to care for the patient, that is, not caring for him at all and ignoring his needs, that the operation of the exemption clause will be affected, and then only to the extent that it purports to exclude the hospital’s liability to repay a portion of the hospital costs allocated towards nursing care.

It is at least arguable, however, that the degree of skill expected of the medical service provider is part of the primary or essential obligation undertaken by him, so that a clause which purports to exempt the service provider from liability for lack of such skill is contrary to the essence of the

\(115\) Buls v Tiatatlovakis 1976 (2) SA 891 (T) 893; Kovabkly v Koeg (1910) CTR 822; McQuoid-Mason & Strauss op cit note 114 para 193; Strauss & Strydom op cit note 114 at 105–6; A Strauss Doctor, Patient and the Law 3 ed (1991) 40.

\(116\) Mitchell v Dixon 1914AD 519; Van Wyk v Lewis 1924 AD 438; Castell v v De Coe 1993 (3) SA 501 (C); Peingle v Administrator Transvaal 1990 (2) SA 379 (W); McQuoid-Mason & Strauss op cit note 115 paras 193 and 204; Strauss & Strydom op cit note 114 at 106, 111 and 262 and 268; Strauss op cit note 115 at 40. The duty extends to post-operative care (Blyth v Van den Heever 1980 (1) SA 393) and applies to any one exercising a medical function: S v Mahlalela 1966 (1) SA 226 (A) (herbalist), cf Tulloch v Marsh 1910 TPD 453, Sutherland v White 1911 EDL 407 (dentists), Willet v Palmer 8 EDC 141 (chemist).

\(117\) Strauss & Strydom op cit note 114 at 111.

\(118\) Strauss & Strydom & Strauss op cit note 114 para 193.

\(119\) Strauss op cit note 115 at 305. Strauss & Strydom op cit note 114 at 324 if argue that such an agreement of waiver between a doctor and patient is contra bonos mores. The same considerations apply to a contract with any health care provider, including a hospital. Strauss op cit note 115 at 305 suggests that the legislature should invalidate such exemption clauses. He states, without reference to any reasons, that our courts are not at liberty to declare these clauses invalid, on the authority of J M Burchell and R. P. Schaffer ‘Liability of hospitals for negligence’ 1977 Businessman’s Law 109. These authors also do not give any reasons nor authority for their view and it is also simply repeated by N J B Claassen and T Verschoor Medical Negligence in South Africa (1992) 102.

agreement and jeopardizes the attainment of the parties’ basic purpose. Significant is the emphasis in the case law on the fact that the practitioner’s duty is not in the nature of a guarantee to effect a cure or some other outcome or result, but rather an obligation of exertion or best efforts (inspanning), i.e., an undertaking to employ a certain degree of care and skill. The interdependence of the undertaking to exercise due care and skill and the duty of the patient to pay is apparent from Randall v Orr. In this decision, which concerned a major operation undergone by a patient, it was stressed that the practitioner is entitled to remuneration not only for the time and labour employed in respect of the patient but also for the special degree of professional training and skill necessary to perform the operation. The converse surely applies to the patient who in principle undertakes to pay not merely for time and labour expended, but specifically also for the exercise of due care and expertise in the course of treatment. This latter element is accordingly arguably an essential element reciprocally related to the duty of the patient to pay. To permit an exclusion of the liability for negligence and to water down the duty of the medical service provider to a mere duty to expend time and labour on the patient irrespective of the quality of the treatment, is to reduce the protection of the patient to a level that undermines the principle of reciprocity. By subverting the character of the transaction as an exchange, the exemption offends against the underlying principle of good faith and the dignity of the patient.

Giving effect to this conclusion would result in a closer alignment of South African law with the position in related legal systems.

In respect of business liability, the English Unfair Contract Terms Act, 1977 provides that ‘a person cannot by reference to any contract term . . . exclude or restrict his liability for death or personal injury resulting from negligence’. Similarly, the European Community Council Directive on Unfair Terms in Consumer Contracts has caused several other European countries to prohibit the exclusion or restriction of business liability to consumers for death or personal injury by way of standard contract terms. This has been done in Germany and the Netherlands, for example. In France, and in the United Kingdom’s Unfair Terms in Consumer Contracts Regulations, as in the EC Directive itself, terms excluding liability for bodily injury are not totally blacklist as in Germany and the Netherlands.

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121 Kovalsky v Krig (1910) 20 CTR 822; Buls v Tzafandakis 1976 (2) SA 891 (T) 893.
122 Strauss & Strydom op cit note 114 at 105–6. See Barry Nicholas French Law of Contract (1992) 50–6 regarding the differentiation between obligations de resultat and obligations de moyen in French law. See also article 5.4 of the Unidroit Principles of International Commercial Contracts.
123 (1908) 18 CTR 462.
124 In addition, if a damages claim, being the sanction for breach of the hospital’s primary duty to render professionally acceptable medical care, may be excluded, this primary duty becomes meaningless and ineffective, which flies in the face of the patient’s primary reason for concluding the contract.
125 Section 2(1): ‘Business liability’ is defined as essentially liability arising from things done in the course of a business. See s 1 for the full definition.
126 93/13/EEC.
127 For Germany, see para 309(7)(a) BGB. For the Netherlands, see art 6:236 BW.
Instead, this type of term is listed in the indicative list of terms that are likely to be held void for unfairness if they do in fact fall within the broad definition of ‘unfair terms’,129 for example, by creating a significant imbalance in the rights and obligations of the parties.130 Even before these legislative innovations, the traditional view in a number of European countries was that professionals (beoefenaars van vrije beroepen) could not in principle exclude their liability for negligence.131 This was often based on ethical norms and justified by the relationship of trust with the client.132 In particular, the Belgian writer Dirix notes that it was generally accepted in most, if not all, European countries that exclusion clauses were unlawful in respect of medical liability.133 A number of jurisdictions in the United States of America have also declared agreements drafted by a hospital excluding liability for personal injury to a patient invalid.134

(c) Broader policy considerations and the need for a differentiated approach

Although a provision that varies the essence of a contract is in principle problematic, public policy is an open norm. The need to protect the interests of the patient or other contracting party must be weighed up against ‘ander beleidsoorwegings’135 that might be relevant. From the constitutional perspective also, a finding that an exemption clause offends against the right to dignity or any other constitutional right is not the end of the enquiry. Such an infringement may be justified in terms of s 36(1) of the Constitution, provided that a limitation of the right in question is, in view of the factors mentioned in this provision, ‘reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom’. On this basis also, broader policy considerations will be relevant in finally determining whether any objection to the exemption clause is sustainable.

From this it follows that there is a need for a differentiated approach that is sensitive to the particular type of contract in which an exemption clause occurs and the context within which it operates. One should, for instance, guard against the assumption that the approach advocated here will entail that an exemption clause in a building contract or a contract for the repair of a motor vehicle will necessarily have to be dealt with in the same way as one in a contract for medical services. Although there is an undertaking to pay for services to be rendered in all these cases, the duty to observe a particular

129 The definition of ‘unfair terms’ is found in article L 132–1 of the Code de la consommation and Regulation 5 of the UK Regulations.
130 There is thus an overlap between the English Unfair Contract Terms Act, 1977 and the Unfair Terms in Consumer Contracts Regulations supra note 128. See the Law Commission for England and Wales Unfair Terms in Contracts (Consultation Paper 166, 2002) which proposes to replace these two instruments with one statute.
132 Herbots op cit note 67 at 11.
133 Op cit note 131 at 170.
134 Strauss op cit note 115 at 305.
135 Afrox supra note 6 para 10 at 341.
standard of care in so doing does not always stand on the same footing. In a contract for medical services, given that the service provider does not undertake a specific result, the standard of care is of fundamental importance and its exclusion offends against the essence of the contract. In other instances, the thrust of the contract is usually directed at achieving a result, eg that the work should conform to particular specifications, so that the duty to observe a particular standard of care is of a supplementary nature, ie a naturale of the contract and capable of exclusion. There is therefore a need for proper understanding of the essence of the various specific contract types. The notion of ‘essence’ should be restricted to obligations that are essential in the light of the basic contractual purpose of the parties to such a contract. An exclusion of the naturalia is on this view not always destructive of the essence of a contract. Few people would argue that a voetstoots clause cannot be relied upon as a matter of course to exclude the seller’s liability under the aedilitian edict. The question is whether in a particular instance, an incidental provision is contrary to the essence of the contract or not.

An analysis along these lines should also go some way to resolving the tension between the Vrystaat case and the Elgin Brown decision. Whereas a breach of a supplementary duty to observe a particular standard of care is properly classified as an instance of positive malperformance, as was done in the Elgin Brown decision, it is questionable whether such a classification is apt in a case where a contract for medical services is breached in a negligent way. The tying on of a bandage in a manner which results in the loss of a limb does not comply with the contract at all. It is, in the words of Elgin Brown, a ‘complete non-performance’. Whereas in such a case the exemption clause is objectionable unless justified by broader policy considerations, its inclusion in a contract such as the one considered in Elgin Brown is in accordance with public policy unless it is established that the breach was a wilful one or the clause is otherwise hit by the Sasfin principle.

(d) The Afrox decision revisited

Contrary to the finding in the Afrox decision, it is submitted that an exemption clause in the medical context is ‘surprising’ for the purposes of the iustus error doctrine. It effectively allows the hospital to provide a service which is substantially different from the essential obligation normally imported by the contract, namely the provision of professionally acceptable medical care. The fact that at least some hospitals in South Africa, and apparently all medical practitioners, refrain from contracting out of this duty by way of exemption clauses suggests that this obligation and its corollary of compensating patients who did not receive such care are regarded as ethical duties in this sector. Its exclusion is accordingly unexpected, and this is all the
more so to the extent that the patient is debilitated and utterly dependent on the health-care workers.

The treatment of illegality in Afrox all too easily placed the contract with a medical service provider in the wider categories of ‘commercial transactions’, ‘standard contracts’ and ‘contracts of services’ instead of carefully considering the special nature of and the policy considerations relating to this sub-type of contract. In so doing it unreflectively applied abstract general principles appropriate to purely commercial transactions to the case without regard to the differentiated approach required by the open norm of public policy. That the business interests of the hospital were accorded more weight than the patient’s non-commercial interests is shown by the remark that exemption clauses have become the norm rather than the exception in ‘standaard kontrakte’ and that, ‘wat die perke van sulke klousules betref, word dit blykbaar grotendeels bepaal deur wat besigheidsoorwegings, soos die opweging van besparing aan versekeringspremies, mededingendheid en die moontlike afskrikking van potensiële kliënte’ (sic).

This approach overlooks the foundations on which the medical professions are built — that of a caring relationship between health-care worker and patient. A contract to obtain medical care is not a simple commercial transaction. What is at stake here is the interest in the patient’s bodily inviolability and not merely his patrimonial interest. Where such an interest is affected by a term that excludes the essence of a contract designed to protect it, there is every reason to regard it as objectionable in principle. It results in an imbalance between the interests of the parties which reduces the patient to an object of commercial gain, which is not to be countenanced. Our courts’ insistence that ‘public policy generally favours the utmost freedom of contract, and requires that commercial transactions should not be unduly trammelled by the restrictions on that freedom’, while affirming the general point of departure of our law, also provides some basis for the proposition that there might be room for a differentiated approach in respect of contracts that do not amount to arm’s length transactions involving purely commercial interests.

There is therefore a cogent argument to be made for the view that such provisions are, in fact, per se illegal. The circumstances of each particular case and the special policy considerations relating to the provision of health care must be considered to establish whether there is in a particular case any justification for the infringement of a patient’s right to dignity.

137 See e.g. Afrox supra note 6 at 34A-B and E-F.
138 At 34E-F.
139 At 34F (emphasis added). See also, in the context of the iustus error doctrine, the conclusion of the court that it could see no reason ‘om in hierdie opsig privaathospitale in beginsel van ander verskaffers van dienote te onderskei nie’ (at 42C).
140 Q’Esser op cit note 120 at 69. As Esser notes, a patient looks for virtues like compassion, integrity and trust-worthiness when seeking health care.
141 Strauss op cit note 115 at 305; D P Sulmasy ‘What’s so special about medicine’ (1993) 14 Theoretical Medicine 27 at 28.
142 Sasfin (Pty) Ltd v Beukes supra note 13 at 9E (emphasis added).
Apart from the cursory reference to the importance of ‘business considerations’ as an incentive for the exclusion of liability, the court referred to only two other policy considerations which specifically relate to medical contracts.

The court’s dismissal of the allegation that patients are in a weak bargaining position was all too quick. It must be remembered that when a patient is presented with the admissions form containing the exclusion clause he has already booked his bed, and has often decided and agreed to undergo a procedure or operation with a specific doctor and made all the necessary arrangements for leave at work, and so forth. To pull out of all these arrangements at the last moment and to arrange alternative treatment elsewhere — if available at all — due to a confrontation with the exemption clause is not a realistic option, and his bargaining power is definitely decreased by his interest to have the operation as planned.

The contention on behalf of the patient that to exempt a private hospital from liability might promote negligent medical care elicited three answers. Firstly, said the court, nursing personnel are still bound to their professional code and subject to the statutory authority of their professional body. Secondly, negligent conduct would prejudice the hospital’s reputation. Thirdly, the court rejected the argument as contradictory, as it amounts to a contention that the personnel would be intentionally negligent. Why the protection of a fundamental interest of the patient should be entrusted to extra-legal considerations rather than the law of contract is unclear. The real question in any event is is not that the hospital should be protected as long as it and its staff strive to avoid negligence, but rather what happens when negligence does occur.

The availability and cost of insurance in the private hospital sector should in principle be relevant to the question of unlawfulness, as should be the possibility of the patient insuring herself against the risk of negligent health care. If liability insurance in this sector is or does become so prohibitively expensive or limited that all private hospitals in South Africa would be forced to close their business, there would be a policy justification for a fair limitation (as opposed to an exclusion) of liability for negligence, provided the patient gives informed consent to this limitation. Considerations such as the economic impact of the potential liability of private hospitals to patients on the maintenance of a sustainable health care system must therefore be taken into account and given due weight. Whether such broader community interests will outweigh the need to ensure fairness in a particular case.

143 At 34E–F.
144 Paragraph 12 at 35C–D and see text to note 15 supra.
145 Burchell & Schaffer op cit note 119 at 109 state that if such clauses (although valid in their view) are used extensively, would-be patients will be faced with the inevitable choice between signing away their remedies should they suffer harm as a result of negligence or trying to find treatment elsewhere.
146 At 37I.
147 At 38A.
148 At 38A.
cannot be established in the abstract, however. In order to be persuasive, arguments based on such considerations will have to be of a more detailed nature than the cursory references to ‘besigheidsoorwegings, soos die opweging van besparing aan versekeringspremies, mededingendheid en die moontlike afkrikking van potensiële kliënte’ referred to in the *Afrox* decision.\(^{149}\)

The complexity of the issues regarding the legality of limitation clauses in medical contracts appears from the decision of the Medical Protection Society (MPS), the most important insurer of medical practitioners in South Africa, to cap the indemnity provided to certain plastic surgeons treating overseas patients who come to South Africa with the particular purpose of undergoing medical treatment here, the so-called ‘scalpel safari’ tourists.\(^{150}\) Treatment of these patients carries the risk of high claims for damages based on the cost of care and earnings in the overseas country. The MPS has understandably decided that other South African doctors should not be required to subsidise this practice by increased insurance premiums, which are calculated in the light of claims experience in South Africa. Conceivably, the insurers of private hospitals may follow suit in capping liability in respect of some scalpel safari patients. The position of such a patient who makes a conscious decision to opt for medical treatment here in spite of the risk of injury and a cap on liability, whilst high-quality medical care is also available in his own country, cannot summarily be equated to that of South African patients who may also be admitted under a variety of circumstances requiring differentiated treatment.

V CONCLUSION

There is much to be said for legislation to protect contracting parties, and especially consumers, against unfair terms in standard contracts. Until such legislation is passed, courts may provide greater protection to contracting parties than they were hitherto prepared to do, on two bases.

First, they can hold that a term which purports to vary the consequences of a contract in a manner opposed to the parties’ basic contractual purpose is surprising, so that there arises, in principle, a duty on the contract assertor to point out that term to the other party. A signatory who did not know of the term may therefore escape its effect on the basis of a *iustus error*. An exemption clause would be opposed to the parties’ basic purpose if it seeks to undermine the relationship of reciprocity existing between the essential undertakings characteristic of the contract envisaged by the parties. In this sense, the clause would be contrary to the nature or essence of the contract.

Secondly, a clause that undermines the relationship of reciprocity existing between the essential undertakings characteristic of the contract gives a court

\(^{149}\) *At 34F.*

\(^{150}\) Circular letter sent by the Medical Protection Society to all South African plastic surgeons in February 2005.
reason to question the legality of the clause. Such a clause may show that the
party objecting to the clause had no bargaining power, and that his
autonomy was fatally impaired with the assertor taking improper, uncon-
scionable advantage of that position. This may very likely be the case when a
consumer faced with a standard contract is involved. In purely commercial
transactions where the parties are bargaining on equal terms such a clause
could very likely be reasonable and lawful, however, especially if it was
specifically negotiated. In any event, regardless of a serious disparity in
bargaining power, other policy considerations may lead a court to find that
such a clause was reasonable and lawful in the circumstances.

JUDICIAL OFFICERS AND TRANSFORMATION

‘Judicial officers have a central role to play in maintaining a legal framework conducive
to democracy and development, and to building a culture of rights that is a goal of our
constitutional endeavour. Ours is an unequal society, in which past distributions affect
the day to day living conditions of the great majority of the people of the country. If large
sections of the community live in conditions in which they are unable to sustain their
dignity, this raises not only moral concerns regarding the way we organise our lives, but
also creates fault lines that can lead to the fragmentation of our society and the lack of
respect for law and government.

This is the environment in which judicial officers presently carry out their duties. What
the Constitution demands of them is that a legal order be established that gives substance
to its founding values — democracy, dignity, equality and freedom; a legal order
consistent with the constitutional goal of improving the quality of life of all citizens, and
freeing the potential of each person. The challenge facing us as a nation is to create such a
society; the challenge facing the judiciary is to build a legal framework consistent with this
goal.

What does this mean for judicial officers? Courts are bound by the Constitution and
the law, and are required to decide cases in accordance with established legal norms.
Under our Constitution the normative value system and the goal of transformation, are
intertwined. . . .

Judicial officers are no longer required to enforce unjust laws; instead they are required
by the Constitution to uphold the Constitution, to give effect to its Bill of Rights and to
do so in a manner which promotes the values that underlie an open and democratic
society. Looking back over the past ten years I believe that we can say with confidence
that this has been done.’

Arthur Chaskalson Farewell speech on his retirement as Chief Justice of the Republic of South
Africa Constitutional Court, 2 June 2005.