

## Hospital exclusion clauses limiting liability for medical malpractice resulting in death or physical or psychological injury: What is the effect of the Consumer Protection Act?

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In 2002 the Supreme Court of Appeal ruling in *Afrox Healthcare Beperk v. Strydom* held that the common law allows hospitals to exclude liability for medical malpractice resulting in death or physical or psychological injury – except in the case of gross negligence. The effect of this judgment has now been superseded by the provisions of the Consumer Protection Act of 2008, which came into effect in March 2011. The Act states that unfair, unreasonable or unjust contract terms are prohibited and that certain terms and conditions have to be drawn to consumers' attention and cannot be buried in the small print.

It is argued that as a result of the Act, exclusion clauses that unfairly, unreasonably or unjustly protect hospitals from liability for death or bodily or psychological injury caused by the fault of their staff, may be declared by the courts to be invalid and not binding on consumers. They may also be regarded as unconstitutional.

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In *Afrox Healthcare Beperk v. Strydom*,<sup>1</sup> the Supreme Court of Appeal held that the common law recognises hospitals' ability to exclude liability for medical malpractice resulting in death or physical or psychological injury, provided that the exclusion does not cover gross negligence. The Court rejected the notion that upholding exclusion clauses that exempt hospitals from liability for negligence causing death or bodily or psychological injury are a breach of the right of access to healthcare stipulated in the Constitution,<sup>2</sup> or are contrary to public policy.<sup>1</sup>

Recently, however, 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.<sup>3</sup> Events have now been overtaken by the Consumer Protection Act,<sup>4</sup> which states that unfair, unreasonable or unjust contract terms<sup>5</sup> are prohibited,<sup>6</sup> and that certain terms and conditions have to be drawn to consumers' attention.<sup>7</sup> The Act also states that the common law should be developed 'as necessary to improve the realisation and enjoyment of consumer rights generally'.<sup>8</sup>

This paper deals with the common law position regarding hospital exclusion clauses that limit liability for medical malpractice resulting in death or bodily or psychological harm, and the constitutional position regarding such exclusion clauses. It will also consider when, under the Consumer Protection Act, such clauses may be regarded as unfair, unreasonable or unjust contract terms, and when certain terms and conditions have to be drawn to consumers' attention.

### Common law position regarding hospital exclusion clauses that limit liability for medical malpractice resulting in death or bodily or psychological injury

In the *Afrox* case,<sup>1</sup> the admission form signed by the patient included the following exclusion clause:

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 dependant of the patient) for damages or loss of whatever nature (including consequential damages or special damages of any nature) flowing directly or indirectly from any injury (including fatal injury) suffered by or damage caused to the patient or any illness (including terminal illness) contracted by the patient, whatever the causes are, except only with the exclusion of intentional omission by the hospital, its employees or agents.<sup>1</sup>

In the *Afrox* case, the patient had been admitted for an operation and post-operative medical treatment. After the operation, a nurse had negligently caused him injury by applying a bandage too tightly and cutting off the blood supply to a sensitive part of his body. The patient sued the hospital and the latter denied liability based on the above exclusion clause.<sup>1</sup>

The patient argued that he should not be bound by the exclusion clause, on the grounds that the clause was against the public interest because:

a) There was unequal bargaining power between the patient and the hospital.

- b) The clause exempted hospital personnel from carrying out their duties professionally.
- c) The clause excluded hospital personnel from gross negligence
- d) The hospital was a provider of medical services and the clause conflicted with his constitutional right of access to healthcare.

In the alternative, the patient argued that the clause was also in conflict with the principles of good faith, and that the admission clerk should have drawn his attention to the exclusion clause, and had not done so.<sup>9</sup>

The court in the Afrox case<sup>1</sup> rejected the patient's arguments concerning the public interest on the following grounds. First, in respect of the claim of unequal bargaining power, there was no evidence that the patient was in a weaker bargaining position than the hospital. As regards the claim that the provision protected hospital staff who did not carry out their duties professionally, the court held that there are sufficient sanctions by health service professional bodies and statute law to ensure compliance with professional rules, and that in any event it would not be in the interests of a private hospital's 'reputation and competitiveness' to allow negligence by its staff. The court agreed with the patient's submission that exclusion from gross negligence was contrary to the public interest, but found that gross negligence had not been alleged by the patient in this case. Lastly, the court held that the clause did not conflict with the constitutional right of access to healthcare because the Constitution<sup>2</sup> also recognises that contractual freedom and contractual conditions, such as indemnity against negligence by nursing staff, are part of the freedom to contract.<sup>9</sup>

In respect of the alternative arguments, the Afrox case rejected the 'good faith' argument on the basis that good faith may be one of the foundations of the law of contract, but is not a rule of law of itself, nor is it an independent basis for negating the exclusion clause. It also held that there was no duty on the clerk to explain the clause to the patient (which the patient had signed without reading), and the patient could not say that he did not expect such a clause in the contract because today such clauses are the rule rather than the exception.<sup>9</sup>

The Afrox case<sup>1</sup> has been severely criticised by a number of writers on the basis that the decision of the court was out of touch with reality for several reasons:

- a) The professional bodies do not in practice sufficiently protect the public from errant members, and information about their decisions is not easily accessible.
- b) Patients do not regularly 'shop' at hospitals to find the best terms and conditions.
- c) Patients are unlikely to expect clauses excluding professional liability in hospital admission forms when they are subjected to advertising campaigns stating how good the professional staff at the relevant hospitals are.
- d) Giving patients access to hospitals that put their life or health at risk and then denying patients redress undermines the constitutional right of access to healthcare.<sup>10</sup>

A provision in the exclusion clause in the Afrox case, that was unenforceable but was not relevant to the decision, was the attempt

to indemnify the hospital if the patient had died, 'from any claim instituted by any person (including a dependant of the patient)'. Under the common law, such clauses are of no force and effect unless the person excluded also agrees to the terms in the exclusion clause.<sup>11</sup>

## Constitutional implications of hospital exclusion clauses limiting liability for medical malpractice resulting in death or bodily or psychological injury

Although in the Afrox case the Supreme Court of Appeal held that exclusion clauses limiting liability for medical malpractice resulting in death or bodily or psychological injury do not limit access to healthcare, it can be argued that they may undermine the constitutional rights to life<sup>12</sup> and bodily and psychological integrity.<sup>13</sup> The judge who gave the judgment in the Afrox case has himself suggested that if the case had been argued on the basis that 'any contractual exemption from liability for death and/or personal injury is *per se* contrary to public policy, the result may very well have been different'.<sup>14</sup> This statement was quoted in passing by a provincial high court judge who suggested that such clauses infringe on the constitutional rights to life and bodily and psychological security, and are therefore contrary to public policy.<sup>15</sup>

The Constitutional Court has held that, in deciding the constitutionality of contract terms, the court must ascertain whether the terms are contrary to public policy, as informed by the Constitutional rights and values found in the Bill of Rights.<sup>16</sup> The rights 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'.<sup>17</sup> The matter has now been dealt with by the Consumer Protection Act<sup>4</sup> which came into effect on 31 March 2011.

## The effect of the Consumer Protection Act on hospital exclusion clauses limiting liability for medical malpractice resulting in death or bodily or psychological injury

The Consumer Protection Act<sup>4</sup> provides that unfair, unreasonable or unjust contract terms<sup>5</sup> may result in the court setting aside the exclusion clauses that a provider of services, such as a hospital, seeks to rely upon.<sup>18</sup> In addition, certain terms and conditions have to be drawn to the attention of consumers,<sup>19</sup> otherwise they too may be set aside.<sup>20</sup>

### Unfair, unreasonable or unjust contract terms

The Consumer Protection Act<sup>4</sup> prohibits suppliers from imposing exclusion clauses on consumers that require a consumer to waive the liability of the supplier on terms that are unfair, unreasonable or unjust, or if such terms are imposed as a condition of entering into an agreement.<sup>21</sup> In the hospital context, the consumers are the patients and the suppliers are the hospitals.

The Act lists the criteria for when a term or condition of a contract is unfair, unreasonable or unjust. These include:

- a) A term or condition is excessively one-sided in favour of any person other than the consumer.

- b) Terms of the transaction or agreement are so adverse to the consumer as to be inequitable.
- c) The consumer relied upon a false, misleading or deceptive representation or statement of opinion provided by or on behalf of the supplier, to the detriment of the consumer.
- d) The transaction or agreement was subject to a term, condition or notice that is unfair, unreasonable, unjust or unconscionable, or the fact, nature and effect of that term, condition or notice was not drawn to the attention of the consumer as required by the Act.<sup>22</sup>

If these criteria had been applied to the exclusion clause in the Afrox decision mentioned above, the clause would have been declared unfair, unreasonable or unjust in terms of (a), (b) and (d) above<sup>22</sup> and invalidated in terms of the Act.<sup>18</sup> Therefore, had the Consumer Protection Act<sup>4</sup> been in force at the time, the patient in the Afrox case would have succeeded against the hospital.

## Terms and conditions that have to be drawn to the attention of consumers

The Consumer Protection Act<sup>4</sup> provides that certain terms and conditions must be drawn to the attention of consumers, particularly exclusion clauses that limit the liability of service providers. The Act sets out how this must be done.<sup>19</sup>

Notices to consumers or provisions in consumer agreements must be drawn to consumers' attention if such notice or provisions:

- a) limit in any way the risk or liability of the supplier or any other person for any cause
- b) constitute an assumption of risk or liability by the consumer
- c) impose an obligation on the consumer to indemnify the supplier or any other person for any cause
- d) are an acknowledgement of any fact by the consumer.<sup>23</sup>

The conditions referred to in (a), (b) and (c) above were included in the exclusion clause that protected the hospital from liability in the Afrox case, and, had the Act been in force, they would have had to have been drawn to the patient's attention.

In addition the supplier must specifically draw the fact, nature and potential effect of the certain risks to the consumer's attention, and the consumer must have agreed to the provision or notice by signing or initialling it or otherwise indicating acknowledgment of the notice, awareness of risk and acceptance of the provision. This is required for any risk:

- a) that is of an unusual character or nature
- b) the presence of which the consumer could not reasonably be expected to be aware of or notice, which an ordinarily alert consumer could not reasonably be expected to notice or contemplate in the circumstances
- c) could result in serious injury or death.<sup>24</sup>

Protection from liability for the latter in (c) above was included in the Afrox case exclusion clause, and, had the Act been in force, the hospital would have had to have drawn it to the attention of the patient as he had alleged in his claim – although it is submitted that such a provision would in any event be unconstitutional, as well as being unfair, unreasonable and unjust, and could be struck out

by the patient. However, the court in the Afrox case might still have found – wrongly, it is submitted – that (a) and (b) did not apply, because in its view such clauses are the rule rather than the exception and reasonable consumers should expect them.

The Act also prohibits exclusion clauses being cast in complicated language and buried in the small print. It provides that any such provisions, conditions or notices must be written in plain language,<sup>25</sup> and must be drawn to the attention of the consumer in a conspicuous manner and form likely to attract the attention of an ordinarily alert consumer having regard to the circumstances. Furthermore, this must be done before the consumer enters into the agreement; begins to engage in the activity; enters or gains access to the facility; or is required or expected to pay for the transaction.<sup>26</sup> Finally, the consumer must be given an adequate opportunity in the circumstances to receive and comprehend the provision or notice.<sup>27</sup> At the time of the Afrox case there was no legal requirement for this to be done, and it seems that in any event the patient signed the agreement without reading it.

As in the Afrox decision, the Act prohibits the use of exclusion clauses that exclude liability for gross negligence.<sup>28</sup>

## Conclusion

The decision in the Afrox case held that the common law recognises the ability of hospitals to exclude liability for medical malpractice resulting in death or physical or psychological injury – save in the case of gross negligence. However, this has now been superseded by the provisions of the Consumer Protection Act. The Act states that unfair, unreasonable or unjust contract terms are prohibited and that certain terms and conditions have to be drawn to the attention of consumers and cannot be buried in the small print. Exclusion clauses that unfairly, unreasonably or unjustly protect hospitals from liability for death or bodily or psychological injury caused by the fault of their staff may be declared invalid and not binding on consumers; they may also be regarded as unconstitutional.

## References

1. Afrox Healthcare Beperk v. Strydom 2002 (6) SA 21 (SCA).
2. The Constitution of the Republic of South Africa. Pretoria: Government Printer, 1996.
3. Cf. Swinburne v. Newbee Investments (Pty) Ltd 2010 (5) 296 (KZD).
4. SA Government. Consumer Protection Act No. 68. Pretoria: Government Printer, 2008.
5. Section 48 of the Consumer Protection Act No. 68 of 2008.
6. Section 52(4) of the Consumer Protection Act No. 68 of 2008.
7. Section 49 of the Consumer Protection Act No. 68 of 2008.
8. Section 4(2)(a) of the Consumer Protection Act No. 68 of 2008.
9. Cf. Carstens P, Pearman D. Foundational Principles of South African Medical Law. Durban, LexisNexis 2007: 451-458.
10. See e.g. Carstens P, Pearman D. Foundational Principles of South African Medical Law. Durban, LexisNexis 2007: 464-468.
11. Jameson's Minors v. Central South African Railways 1908 TS 576;583-584.
12. Section 11 of the Constitution of the Republic of South Africa, 1996.
13. Section 12(2) of the Constitution of the Republic of South Africa, 1996.
14. Brand J. The role of good faith, equity and fairness in the South African Law of Contracts: The influence of the common law and the Constitution. SALJ 2009;126(1):71-90.
15. Wallis J in Swinburne v. Newbee Investments (Pty) Ltd 2010 (5) SA 296 (KZD).
16. Barkhuizen v. Napier 2007 (5) SA 323 (CC).
17. Carstens P and Pearman D. Foundational Principles of South African Medical Law. Durban, LexisNexis 2007:560-561.
18. Section 52(3) of the Consumer Protection Act No. 68 of 2008.
19. Section 49 of the Consumer Protection Act No. 68 of 2008.
20. Section 52(4) of the Consumer Protection Act No. 68 of 2008.

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21. Section 48 of the Consumer Protection Act No. 68 of 2008.
22. Section 48(2) of the Consumer Protection Act No. 68 of 2008.
23. Section 49(1) of the Consumer Protection Act No. 68 of 2008.
24. Section 49(2) of the Consumer Protection Act No. 68 of 2008.
25. Section 49(3) of the Consumer Protection Act No. 68 of 2008.
26. Section 49(4) of the Consumer Protection Act No. 68 of 2008.

27. Section 49(5) of the Consumer Protection Act No. 68 of 2008.
28. Section 51(1)(c) of the Consumer Protection Act No. 68 of 2008.

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