7-1-1979

Contractual Liability of Physicians: The Interface of Tort and Contract

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CONTRACTUAL LIABILITY OF PHYSICIANS: 
THE INTERFACE OF TORT AND CONTRACT

INTRODUCTION

Contract actions are the last resort for victims of improper medical care, perhaps because the remedies for breach are slight compared to the recoveries available under malpractice claims. Few medical contract cases have been reported in the last fifty years, yet these cases are worthy of attention. They represent an excellent example of the interface of tort and contract, and at least one case has exposed not only the tension created by this overlap, but also the problems inherent in classic contract formation.

Historically, the medical contract action developed from ignorance, either of the availability of malpractice actions, or of the existence of claims until after tort actions were barred.

Contract has always provided a longer statute of limitations period

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In recent years the total number of actions against physicians has increased dramatically. It should be noted, however, that almost all of these cases are brought in tort, not contract. See Miller, The Contractual Liability of Physicians and Surgeons, 1953 Wash. U.L.Q. 413. According to Miller, there is a general tendency to use the word malpractice as a generic term connoting "any action against a physician or surgeon . . . However, the better and almost universal usage is to restrict 'malpractice' solely to cases involving negligent or unskilful conduct." Id. at 413.


than tort, and in an effort to circumvent the shorter period, plaintiffs often pled breach of contract, omitting allegations of "lack of skill" or "negligence" and claiming instead "improper performance of work." After initial reluctance to accept the theory of medical contracts, courts came to recognize that two or more causes of action could arise from the same wrong.

The most famous medical contract case, *Hawkins v. McGee*, applied the traditional expectation damage theory, holding that the measure of damages from an improperly performed operation is the difference in value between the promised condition and the surgery's actual result. Inadequate because it ignored the patient's physical and mental suffering, this remedy also required the jury.

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4. See id. at 361-63. In New York, for example, the contract statute of limitation period is six years, N.Y. CIV. PRAC. LAW § 213 (McKinney 1976); the malpractice limitations period is only two and one half years, N.Y. CIV. PRAC. LAW § 214-a (McKinney Supp. 1978).

5. Lillach, supra note 3, at 347.

6. See, e.g., *Monahan v. Devinny*, 223 A.D. 547, 229 N.Y.S. 60 (1928); Horowitz v. Bogart, 218 A.D. 158, 217 N.Y.S. 881 (1926). In *Horowitz*, the doctor agreed to remove the plaintiff's ulcer, but removed his appendix instead. Although the plaintiff suffered severe pain and mental distress, he did not discover the improper treatment until after the malpractice statute of limitations had expired. The court rejected the breach of contract complaint, stating that the only cause of action arising from the improper execution of medical services was in tort. Two years later in *Monahan*, the defendant chiropractor's treatment paralyzed the plaintiff. Although the malpractice claim was barred, the court suggested that it might permit a limited recovery under a breach of contract action. It was not until *Conklin v. Draper*, 229 A.D. 227, 241 N.Y.S. 529 (1930), that New York recognized medical contracts. In *Conklin*, the defendant removed the plaintiff's appendix, but left a surgical forceps inside the patient's abdominal cavity. The forceps was not discovered until four years later, and the malpractice statute of limitations period had expired. The court explicitly overruled *Horowitz*, holding that actions in tort and contract are separate and distinct. After *Conklin*, a patient could bring a timely action for breach of contract regardless of the tort statute of limitations. The major difference between the two causes of action became the recoverable damages.


The relationship of physician and patient can give rise to two distinct causes of action, one for improper treatment, another for failure of a promised result. The two causes of action are dissimilar as to theory, proof and damages recoverable. Malpractice is predicated upon the failure to exercise requisite medical skill and is tortious in nature. . . . An action in contract is based upon a failure to perform a special agreement.

*Lakeman v. LaFrance*, 102 N.H. at 304-05, 156 A.2d at 127 (citations omitted).

7. 84 N.H. 114, 146 A. 641 (1929). *Hawkins* is traditionally studied by first year law students, and is included in many contracts textbooks. See, e.g., L. FULLER & M. EISENBERG, BASIC CONTRACT LAW (3d ed. 1979); F. KESSLER & G. GILMORE, CONTRACT CASES AND MATERIALS (2d ed. 1970); I. MACNEIL, CASES AND MATERIAL ON CONTRACT (1971).
to determine the value of the hypothetically promised condition. One commentator has called traditional contract damages "anomalous and unsatisfactory" when applied to medical cases.  

Recent developments in medical malpractice have increased physicians' tort liability. Courts have preserved tort claims by redefining the limitations period, changing the accrual date from the time of the negligent act to the date of its discovery. As a result, much of the original need for the contract action has been eliminated. Nonetheless, within the traditional doctrinal framework, contract cases have expanded the scope of recovery by enlarging the range of the patient's foreseeable injuries.

A 1973 medical contract case, *Sullivan v. O'Connor*, held that traditional contract damage remedies were inadequate when surgery worsened a patient's condition. Alice Sullivan, seeking a rhinoplasty, consulted a plastic surgeon, who agreed to shorten her nose in a procedure requiring two operations. The surgery disfigured her nose, so the doctor operated again. The third operation was also unsuccessful, and the doctor told her that additional surgery would not improve her appearance. She sued for breach

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8. Miller, *supra* note 1, at 424. According to Miller, traditional contract damages were inadequate because the awards were designed only to place the plaintiff in as good a position as he would have been in had the breaching party performed the contract. This logic, appropriate where the injuries are commercially related, is inappropriate where the harms are nonpecuniary.

9. See, e.g., *Flanagan v. Mount Eden Gen. Hosp.*, 24 N.Y.2d 427, 248 N.E.2d 871, 301 N.Y.S.2d 23 (1969). The physician left a surgical clamp inside the patient's body that went undiscovered until after the malpractice statute of limitations period had expired. The New York Court of Appeals overruled *Conklin*, stating that the tort statute of limitations should not begin to run until the foreign object reasonably could have been discovered by the patient. Id. at 430-31, 248 N.E.2d at 872-73, 301 N.Y.S.2d at 26. Termed the "discovery rule," this modification of *Conklin* is justified as striking a balance between fairness to the patient and the elimination of stale claims. New York limits its discovery rule to cases in which the physician leaves a foreign object inside the patient's body, while other states have adopted broader discovery rules that do not begin the tolling of the limitations period until the negligence is discovered, regardless of whether a foreign object is involved. Id. at 431-32, 248 N.E.2d at 873-74, 301 N.Y.S.2d at 27. See, e.g., *Stafford v. Schultz*, 42 Cal. 2d 767, 270 P.2d 1 (1954); *Johnson v. Caldwell*, 371 Mich. 368, 123 N.W.2d 785 (1963); *Ayers v. Morgan*, 397 Pa. 282, 154 A.2d 788 (1959).

10. See, e.g., *Guilmet v. Campbell*, 385 Mich. 57, 188 N.W.2d 601 (1971); *Stewart v. Rudner*, 349 Mich. 459, 84 N.W.2d 816 (1957). In *Guilmet*, the doctor repeatedly assured the patient that the treatment would successfully cure his condition. When the treatment failed, the physician was held liable for all the foreseeable consequences. In *Stewart*, the Michigan Supreme Court permitted the patient to recover damages for her mental distress when the defendant physician failed to perform the agreed cesarian section and the baby was stillborn. The court noted that distress was a foreseeable result of the doctor's failure to perform the special operation. For a discussion of *Stewart*, see text accompanying notes 80-82 infra.

of contract, alleging that he failed to enhance her beauty as promised.\textsuperscript{12} The Massachusetts Supreme Judicial Court expanded the usual contract recovery, holding that the plaintiff's damages could include compensation for out-of-pocket costs, medical expenses, effects of awareness of the disfigurement, and pain and suffering from the third operation.\textsuperscript{13} The court found the traditional expectancy remedy both too narrow to compensate for the plaintiff's injuries and too difficult to estimate.\textsuperscript{14}

\textit{Sullivan} has both practical and theoretical implications. Practically, it extends contractual liability of physicians to include awards for pain and suffering.\textsuperscript{15} But the case is not likely to have a dramatic impact on physicians' liability: most lawsuits for the improper execution of medical services are timely brought in tort.\textsuperscript{16} \textit{Sullivan} is important, however, because the court refused to apply

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\item[\textsuperscript{12}] Id. at 579–80, 296 N.E.2d at 184. The plaintiff also brought a second action in tort, alleging that the doctor negligently performed the surgery. The jury returned a verdict for the plaintiff on the contract claim, and for the doctor on the malpractice cause of action.

The trial court instructed the jury that Sullivan was entitled to recover her out-of-pocket expenses, costs flowing from the breach, and damages for pain and suffering from the third operation. Both the defendant and the plaintiff appealed: the defendant claimed that only the out-of-pocket costs were compensable; the plaintiff challenged the court's failure to give instructions permitting awards for the difference in value between the promised and actual condition of the nose and for pain and suffering from the first two operations. Id. at 581, 296 N.E.2d at 185.

\item[\textsuperscript{13}] Id. at 589, 296 N.E.2d at 189. The court never had to decide whether Sullivan should be compensated for pain and suffering from the first two operations. Before the appellate arguments, the plaintiff waived her claim to damages for pain and suffering.

\item[\textsuperscript{14}] Id. at 586–89, 296 N.E.2d at 188–89.

\item[\textsuperscript{15}] Id. See also Note, Contractual Liability in Medical Malpractice—\textit{Sullivan v. O'Connor}, 24 De Paul L. Rev. 212, 213 (1974). \textit{Sullivan} represents a departure from the traditional manner in which courts have applied tort and contract damages. Tort recoveries "are for personal injuries, including the pain and suffering which naturally flow from the tortious act. In the contract action they are restricted to the payments made and to the expenditures for nurses and medicines or other damages that flow from the breach." Colvin v. Smith, 276 A.D. 9, 9-10, 92 N.Y.S.2d 794, 795 (1949).

\item[\textsuperscript{16}] In the last few years many states have modified contract proof requirements by placing a heavier burden on the plaintiff. Underlying this trend is a desire to safeguard the physician who makes statements assuring recovery, sometimes interpreted by the patient as establishing a warranty of treatment, though not intended by the physician to have that effect. To maintain a successful cause of action for breach of a medical contract in Delaware or Illinois, for example, the patient must show separate consideration in addition to payment for the regular medical service. See, e.g., Coleman v. Garrison, 349 A.2d 8 (Del. Super. Ct. 1967); Rogala v. Silva, 16 Ill. App. 3d 63, 305 N.E.2d 571 (1973). Michigan, in 1974, included medical contracts within its statute of frauds, requiring "[a]n agreement, promise, contract, or warranty of cure relating to medical care of treatment (to be) in writing and signed by the party charged." See Mich., Comp. Laws Ann. § 566.132 (g) (Supp. 1979). The practical effect of these requirements has been to limit physicians' contractual liability. See Comment, \textit{An Analysis of State Legislative Responses to the Medical Malpractice Crisis}, 1975 Duke L.J. 1417.

Traditionally, the malpractice cause of action has a more rigorous proof requirement than the breach of contract suit. A negligence claim requires the plaintiff to establish:
the case law and theory of the classical contract model, predicated on objective and formal rules. It recognized that in a medical contract action, such as *Hawkins*, the classical model often yields hollow results. Instead, the *Sullivan* court analyzed the nature of the injury resulting from the breach and attempted to develop a socially acceptable remedy by molding the damage theory to meet the case's needs.

I. THE CLASSIC MODEL

Classic contract law developed from the writings and philosophy of Christopher Columbus Langdell and Oliver Wendell Holmes; it was later incorporated by Samuel Williston into the first *Restatement of Contracts*. Langdell believed that the law should be made into a science, consisting of precise rules and

(1) the existence of a standard of care, (2) a failure to conform to that standard, (3) damages, and (4) a causal connection between the breach of the standard and the damages. 


Medical malpractice theory is based upon three component duties which a physician owes to his patient, i.e., (1) a duty to possess the requisite knowledge and skill such as is possessed by the average member of the medical profession; (2) a duty to exercise ordinary and reasonable care in the application of such professional knowledge and skill; and (3) the duty to use his best judgment in the application of this knowledge and skill.

53 A.D.2d at 1025, 386 N.Y.S.2d at 152 (citation omitted).

In contrast to the tort action, a breach of contract requires the plaintiff to demonstrate: (1) words or conduct illustrating a promise to provide a cure or special treatment, (2) a failure to abide by the agreement's terms, and (3) damages resulting from the breach. *Salem Orthopedic Surgeons, Inc. v. Quinn*, 79 Mass. Adv. Sh. 661, 386 N.E.2d 1268 (1979); *Robins v. Finestone*, 308 N.Y. 543, 127 N.E.2d 330 (1955). Breach of contract does not require a showing of improper execution of medical services, only proof of failure to achieve the promised results. The court noted that

claims arising out of 'malpractice, error, or mistake' [are] clearly legally distinguishable from [those] for breach of contract. The legal duty, the breach of which is covered, is wholly different. If a doctor makes a contract to effect a cure and fails to do so, he is liable for breach of contract even though he uses the highest possible professional skill.


doctrine to be mastered by "true lawyers." The case method of study that he introduced at the Harvard Law School was designed to meet this goal through selection of key appellate decisions from which the major legal principles could be extracted and studied.

Langdell's "science" was later "pieced together by his successors—notably Holmes, in broad philosophical outline, and Williston, in meticulous . . . scholarly detail." Holmes said contracts were "dealings between men, by which they make arrangements for the future. In making such arrangements, the important thing is not what is objectively true, but what the parties know." He believed contract theory should be a collection of rules creating a body of law that was "formal and external." One of the attractions of this theory was that it satisfied a "hunger for . . . national uniformity of . . . commercial law."

The Restatement of Contracts codified Holmes' theory into a body of rules. The consideration theory, incorporated into

21. Id. at viii–ix. As Dean of the Harvard Law School, Langdell believed that the law had developed slowly, and that this development could best be mastered by "studying the cases in which (the law) was embodied." Id. at viii. He recognized, however, that the vast number of decisions were worthless for the purpose of systematic study, making it necessary to carefully select and arrange the cases that had contributed to the development of the law's essential doctrines. Id. at ix. For a discussion of Langdell and the Harvard Law School, see J. Seligman, The High Citadel (1978).
23. O. Holmes, supra note 18, at 239.
24. Id. at 230. See G. Gilmore supra note 22, at 113 n.41. This phrase was handwritten by Holmes into his own copy of The Common Law. Holmes believed that contract theory should be objective. For a contract to be enforceable, the formal technical requirements of formation—offer, acceptance, and capacity—must have been met. Compliance with these requirements should be measured by an external standard, whereby a court will objectively evaluate the interactions of the parties. The role of the courts was thus clearly defined.

[They] should operate as detached umpires or referees, doing no more than to see that the rules of the game were observed and refusing to intervene affirmatively to see that justice or anything of that sort was done. Courts do not, it was said, make contracts for the parties. The parties themselves must see that the last i is properly dotted, the last t properly crossed; the courts will not do it for them.

Id. at 15. For an analysis of Holmes' external standards in criminal and tort law, see Comment, Oliver Wendell Holmes and External Standards of Criminal and Tort Liability: Application of Theory on the Massachusetts Bench, 28 BUFFALO L. REV. 697 (1979).
26. Consideration for a promise is defined as: "(a) an act other than a promise, or (b) a forebearance, or (c) the creation, modification or destruction of a legal relation, or (d) a return promise, bargained for and given in exchange for the promise." RESTATEMENT OF CONTRACTS § 75 (1932). See also G. Gilmore, supra note 22, at 18.
section 75 of the Restatement, became one of the key principles of the formal model. The exchange of consideration demonstrated the parties' intention to enter into a contract. It also enabled parties to develop expectations from their agreements, and permitted courts to remedy breaches. Without bargained-for consideration, an agreement became something less than a contract, neither enforceable nor subject to legal sanctions.27

Not only did there develop an objective test for the determination of whether a contract existed, there also evolved an objective standard for measuring damages. This approach was designed to protect the expectations of the contracting parties. Relief from the breach of an agreement was intended to exact the same cost as compliance.28 The traditional measure of damages became the "expectation interest" and its rule required placing the plaintiff "in as good a position as he would have occupied had the defendant performed his promise."29 The award usually is determined by the difference between the value of a good or service had the contract been performed, and its value after the breach, plus any incidental costs.30

The expectation interest was classic in its promotion of the economic and legal policy objectives of facilitating and encouraging contract formation.31 Parties could predict and determine the extent of their obligations, liabilities, and potential recoveries at the time of formation.32 It was also the easiest remedy to administer, since promisees did not have to prove detrimental reliance, but only the

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27. See Restatement of Contracts § 75, Comment C. A promise was not legally enforceable unless it was supported by bargained-for consideration. "The fact that the promisee relies on the promise to his injury, or the promisor gains some advantage therefrom, does not establish consideration without the element of bargain or agreed exchange." Id.

28. See Farnsworth, Legal Remedies for Breach of Contract, 70 Colum. L. Rev. 1145, 1147-48 (1970). The purpose of the remedy is to make the cost of nonperformance equal to the cost of performance, creating an incentive for parties to adhere to their agreements.


30. The expectation interest is considered the standard measure of damages in the commercial setting. See, e.g., U.C.C. § 2-706; Restatement of Contracts, § 329 (1932).


32. This is a Holmesian view of contract damage theory. See note 24 & accompanying text supra. Holmes believed that parties to a contract should be free to breach their agreements at will; the remedy for a breach should be no greater than the value of the nonoccurring promised event. O. Holmes, supra note 18, at 236. The expectation theory is compatible with Holmes' philosophy because it provides the nonbreacher with the value of the benefit he would have derived from the contract's performance. Hence, the expectation theory provides the nonbreaching party the largest potential recovery for the breach of a contract.
value that the breaching party's promise would have created. Thus, damage theory fosters contract formation and encourages parties to depend on their agreements.33

Illustrative of the application of the classic model to the medical contract is *Hawkins v. McGee*.34 In *Hawkins*, the defendant physician promised to restore the plaintiff's burned hand to normal. The defendant performed three operations, but was unable to heal the hand. Although the jury did not find that the doctor performed his work negligently, it did conclude that he breached the agreement to fix the hand.35 On appeal, the New Hampshire Supreme Court applied a classic Holmesian analysis, calling the standard by which the doctor's conduct was to be measured "external."36 The only compensable damages, therefore, were those that the "parties must have had in mind when the contract was made."37 Hence, the proper measure of damages was the difference in value between the promised normal hand and the resulting deformed hand.

Specifically excluded from the recoverable losses in *Hawkins* were pain and suffering, which were analogized to a cost of treatment that the patient was expected to bear. Pain was essentially

33. Fuller & Perdue, *supra* note 29, at 53–54. The expectation interest must be distinguished from the restitution and reliance theories. The restitution theory protects the nonbreacher by returning to him any benefit that his performance conferred upon the breacher. The purpose of the remedy is to prevent the defaulting promisor from being unjustly enriched. This is achieved by forcing the breaching party to disgorge his gains from the contract. In contrast, the reliance theory compensates the performing party for expenditures made in anticipation of the breacher's performance. This usually includes expenditures that are necessary for his compliance with the agreement, *See id.* at 53–54. Both the restitution and reliance interests attempt to restore parties to the position they occupied prior to the contractual arrangement. The reliance award, however, is not limited to the benefit conferred to the breaching party, but often includes other outlays. For a discussion of these theories in the medical context, see text accompanying notes 50–57, *infra*.

In order to receive a reliance damage recovery, the nonbreaching party must be able to substantiate his subjective dependence on the unperformed agreement. Not only is the substantiation difficult, but the problems of determining a "pecuniary measurement [of this dependence] are such that the business man knowing, or sensing, that these obstacles stood in the way of judicial relief would hesitate to rely on a promise . . . where the legal sanction was of significance to him." Fuller & Perdue, *supra* note 29 at 62.

34. 84 N.H. 114, 146 A. 641 (1929).
35. The trial court permitted the jury to consider two elements of damage: the positive ill effects on the plaintiff's hand, and pain and suffering. *Id.* at 116–17, 146 A. at 643.
36. *Id.* at 119, 146 A. at 644. For a discussion of the external standard, see note 24 & accompanying text *supra*.
37. 84 N.H. at 117, 146 A. at 643 (quoting Davis v. New England Cotton Yarn Co., 77 N.H. 403, 404, 92 A. 732, 733 (1914)).
part of the bargain and thus part of the agreed consideration within the meaning of classic theory. This consideration theory, the benefit-of-bargain rule, limited the plaintiff's recovery. In the Hawkins court's view, an award for the promised condition plus pain and suffering would have amounted to a double recovery. 38

Consistent with this perception of the consideration theory, however, is the one instance that allows the recovery of pain and suffering where more is endured than was reasonably anticipated by the treatment. The traditional view treats this added pain as an excess payment—not part of the bargain—and therefore not recoverable. Therefore, it "might be found that the plaintiff paid a higher price for the cure than was agreed. Ordinarily, if to obtain a promised result one is obliged to pay more than the agreed price, the excess payment may be recovered as well as the loss in not obtaining the result." 39

II. Reaction to the Classic Theory

The Realist movement, which arose in the early part of this century, was a critical reaction to legal formalism. In the view of the Realists, the law's purpose was not to assure only uniform and consistent doctrine with remedies resulting from an interplay of technical rules. The Realists believed, rather, that rules should be carefully framed to serve and reflect desired social behavior. 40

They were less concerned with doctrinal boundaries than with the "results of litigation." 41 The Realists maintained that courts should be freed from the confines of abstract principles, and made aware of their discretion to "solve problems in accordance with policy

38. See Fuller & Perdue, supra note 29, at 80–84. According to the classic theory, the total consideration for the medical treatment is the medical fees and attendant expenses, plus the pain and distress that is knowingly endured in order to reach the desired promised condition. Consequently, an award encompassing the value of the promised condition and pain and suffering would amount to a double recovery. "[A] man cannot claim the benefits of a bargain [the promised condition] without incurring its detriments [the pain and suffering]." Id. at 81.


40. See, e.g., Gordon, supra note 25, at 1220 n.24.

"Realism" must . . . be taken broadly as shorthand representing characteristics such as (a) awareness that law serves certain social purposes, (b) concern to make it serve those purposes better, (c) skepticism about the utility of rules expressed in conceptual form, and (d) preference for explicit articulation by the courts of rules in terms of their relationship to the social purposes they are framed to serve.

Id.

goals." Karl Llewellyn, an early leader of the Realist movement, wrote that the substantive rules of law were less important than many classical contract scholars assumed, and that strict adherence to formal technical requirements tended to misdirect legal discussion. Consequently, the Realists urged that the focal point of legal thought and training should shift from the study of formal rules to solutions to actual problems and analysis of social and legal behavior.

Application of the benefit-of-bargain rule to medical contracts, in the Realists' view, is an example of classical thinking gone awry. The desired social outcome from improperly executed medical services is compensation for all harms flowing from the injurious act, including compensation for physical and mental pain, medical costs, and lost earnings.

Equally important, the Realists believed that legal thinking suffered when results were forced to fit formal doctrine, often causing theoretical inconsistencies and unsettling consequences. Even if the classic expectation interest were applicable to medical contracts, for example, the Realists would assert that it is too difficult to administer practically. One of the primary functions of the classical model was to increase predictability of legal interaction. In most commercial situations, the expectancy remedy is simple to calculate: the injuries arising from the breach are pecuniary, and conditions before and after have corresponding dollar values. Medical contracts, however, do not lend themselves to simple arithmetic solutions, because the pre- and post-contract conditions concern human anatomy, which defies precise monetary valuation. The formalist goal of promoting legal certainty and

42. Id. at 809. Professors Friedman and Macaulay wrote that one of the major shortcomings of the classical theory was that it sought to turn contract law into an uniform and internally consistent body of rules. "Problems were analyzed because they fit this logical pattern, rather than because they were empirically determined to be socially or economically significant. Cases were labelled 'correct' mainly if they were consistent with the logical pattern of contract doctrine." Id. at 806. In contrast to the classic model, the Realists believed that blindly following rules caused courts to lose sight of goals that should be pursued.


44. See generally id.

45. For a discussion of the practical problems of the classical model in the medical context, see notes 63-64 & accompanying text infra.

46. The classical expectation remedy does not compensate the patient for these injuries. See text accompanying notes 34-39 supra.

47. See text accompanying notes 63-73 infra.

48. See text accompanying notes 29-33 supra.
consistent results, therefore, is inapplicable to medical cases. Any attempt to impose the precision envisioned by contract law on an injured patient is doomed to failure in the form of a fictional result.

III. SULLIVAN v. O'CONNOR

A. The Reliance Interest

Strains of Realist thought—particularly criticism of the Hawkins rationale and traditional damage theory—are evident in Sullivan v. O'Connor. Justice Kaplan, writing for the Massachusetts Supreme Judicial Court, noted that “[s]ome cases have taken the simple view that the promise by the physician is to be treated like an ordinary commercial promise, and accordingly that the successful plaintiff is entitled to a standard measure of recovery for the breach of contract.” The Sullivan court, however, considered the expectancy interest inadequate: while conceptually it may provide the patient with the greatest recovery, awarding damages for the value of the performed contract rather than for pain and mental distress, in practice this does not occur. The dollar value of the performed contract may in fact be less than the value of the pain and suffering endured in anticipation of performance and as a result of the breach. Accordingly, Justice Kaplan concluded that the expectancy measure did not satisfy the plaintiff’s injuries and it was too difficult for the jurors to properly value the injuries.

The court also considered the restitution interest. The defendant-doctor had argued that the plaintiff’s out-of-pocket costs

49. 363 Mass. at 586, 296 N.E.2d at 186. The court referred to the following cases: Cloutier v. Kasheta, 105 N.H. 262, 197 A.2d 627 (1964) (a physician who fails to provide treatment as promised may be held liable for breach of contract, and traditional contract principles govern, though in the instant case the plaintiff should have brought the action in tort); Lakeman v. LaFrance, 102 N.H. 300, 156 A.2d 123 (1959) (see note 6 supra); McQuaid v. Michou, 85 N.H. 299, 157 A. 881 (1932) (see notes 71–73 & accompanying text infra); and Hawkins v. McGee, 84 N.H. 114, 146 A. 641 (1929) (see text accompanying notes 34–39 supra).

50. The major problem confronting Justice Kaplan was that monetary values—the accepted measure of compensation for the breach of a legal duty—bear little or no relationship to the promised or resulting conditions, nor to the nonpecuniary “costs” of the contract—pain and suffering. In theory, the expectation interest would be harsh on the physician who has been absolved of negligence because the doctor would be required to compensate the patient for the value of a condition that is medically impossible to obtain. On the other hand, if the physician promised to perform unattainable services, he should be held accountable to all pecuniary and nonpecuniary costs endured by the patient in reliance on the agreement. See text accompanying notes 63–70 infra.
were the maximum extent of his liability, but the court rejected this view. "For breach of the patient-physician agreements under consideration, a recovery limited to restitution plainly seems too meager, if the agreements are to be enforced at all."52 Under the restitution theory, Sullivan's recovery would have been limited to the $625 medical expenses, which was the benefit to the doctor under the contract.

A more equitable measure of damages than either the expectation or restitution interests, noted Justice Kaplan, was provided by a series of cases that did not explicitly reject Hawkins.53 These cases awarded an "intermediate pattern of recovery"54; the remedies were not limited to a recovery of benefits conferred on the physician, nor were they similar to those provided by the difference in value test.55 Justice Kaplan stated that the purpose of the formulation is to put the patient in the position he occupied

52. 363 Mass. at 585, 296 N.E.2d at 187. For a discussion of the restitution interest, see note 33 supra.

53. 363 Mass. at 585, 296 N.E.2d at 187. The decisions cited by the court included the following: Stewart v. Rudner, 349 Mich. 459, 84 N.W.2d 816 (1957) (see notes 80-81 & accompanying text infra); Robins v. Finestone, 308 N.Y. 543, 127 N.E.2d 330 (1955) (damages for breach of contract do not include compensation for pain and suffering, but could encompass an award for money spent for post operative treatment and cures); Colvin v. Smith, 276 A.D. 9, 92 N.Y.S.2d 794 (1949) (damages should be limited to payments for medical treatment and for nurses and medicines); Frank v. Malinak, 232 A.D. 278, 249 N.Y.S. 514 (1931) (a physician who promised the patient that the operation would not leave any external scars was liable for the medical costs and for the disfigurement caused by the external incisions); and Frankel v. Wolper, 181 A.D. 485, 169 N.Y.S. 15 (1918) (a physician who did not achieve the promised results could not be held liable for the resulting pain and distress, but could be required to compensate the patient for medicines, expenses, and appliances used in the cure).

54. 363 Mass. at 585, 296 N.E.2d at 187.

55. Id. The court called this "intermediate pattern of recovery" a reliance measure of damages. Those cases cited by the court to support its adoption of this theory, however, did not compensate the patients for the detriment of pain and suffering. See note 53 supra. Thus, the term "reliance" is only partially descriptive of the actual award of damages. Perhaps these awards should be called "restitution-plus" recoveries because an award for pain and suffering would be necessary to fully return the patients to the positions they had occupied before the breach of the medical contract. Stewart may be considered an exception because the patient did receive an award for her distress. The case, however, cannot be called a reliance decision because the Michigan Supreme Court applied an expectancy remedy, but permitted the unusual recovery only because of the foreseeability of the injury. See notes 80-81 & accompanying text infra. Justice Kaplan later admitted that there were no reliance cases to support full application of the reliance interest to medical contract cases:

There is much to be said, then, for applying a reliance measure to the present facts, and we have only to add that our cases are not unreceptive to the use of that formula in special situations. We have, however, had no previous occasions to apply it to patient-physician cases.

363 Mass. at 586, 296 N.E.2d at 188.
before the parties entered the contractual arrangement, which is to "compensate [her] for the detriments she suffered in reliance upon the agreement." The court recognized the similarity of the intermediate measure of damages to a suggestion made by Lon Fuller and William Perdue in *The Reliance Interest in Contract Damages.* Under this formulation, Sullivan's award would have encompassed all costs and injuries endured as a consequence of the treatment: pain and suffering from all three operations, compensation for the worsening of the condition, out-of-pocket costs, and lost earnings if applicable.

Although none of the previous reliance cases awarded damages for pain and suffering, Justice Kaplan held that the same rationale that permitted the recovery of some expenditures made in reliance on the doctor's performance—expenses for medicines and nurses—permitted his court to compensate Sullivan for all expenditures incurred as a result of treatment. There was no reason, he added, to limit the recovery to monetary expenditures, since the suffering and mental distress would not have been endured by the patient had the parties not entered into the contractual arrangement. Consequently, all of the patient's costs in the course of treatment—pecuniary and psychological—were compensable so that the patient could be restored to the status quo.

**B. The Significance of Sullivan**

The Sullivan court's refusal to follow the strict expectancy damage formula, and its adoption of the reliance theory may be a step toward developing a more flexible body of civil obligation law. In the opinion of many commentators, tort and contract law should not be viewed separately, but should be considered one category of law. To the extent that Justice Kaplan sought to tailor the

57. *Id.* at 54. By placing the nonbreacher in the same position he occupied prior to the contractual relationship, this remedy has the effect of undoing harms resulting from the promisee's belief that the promisor would perform.
58. 363 Mass. at 588, 296 N.E.2d at 189.
59. *See notes* 54–56 *supra*.
60. 363 Mass. at 588, 296 N.E.2d at 189.
61. *Id.*
damage theory to provide the plaintiff with a socially desirable remedy, Sullivan v. O'Connor can be considered a contemporary Realist decision. Working within contract doctrine, yet without slavish adherence to its rules, the court identified the problem of the classical theory, and then provided relief unhampered by those shortcomings.

As the court recognized in Sullivan, the standard expectation theory, which treats a medical contract at breach as if it were an ordinary commercial contract, does not protect the expectations with which the physician-patient relationship was formed. Typical is the Hawkins formulation: "the present case is closely analogous to one in which a machine is built for a certain purpose and warranted to do certain work. In such cases, the usual rule of damages for breach of warranty in the sale of chattels is applied." Accordingly, the expectation interest presented two problems: the relief would not correspond to the patient's perception of the injuries; and it would be difficult for the jury to value those injuries.

Victims of improperly performed medical procedures generally view their injuries as both "money and time wasted in medical expenditures . . . and mental anguish and disappointment attendant upon the lack of cure," with the latter element as the predominant harm. Of course, these injuries are compensable by the damages allowed in a traditional tort action. Classic contract theory, on the other hand, compensates plaintiffs for the value of the unrealized physical condition, and, by operation of the benefit-of-bargain rule, excludes the costs incurred in attempting to achieve that condition—pain and suffering. The anticipated lost income envisioned by this formula never materializes in the medical contract, but rather is replaced by the out-of-pocket expense of pain and suffering. It is therefore absurd to apply a commercial, eco-

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63. 84 N.H. at 117, 146 A. at 643.
64. See generally Miller, supra note 1, at 423-35.
65. Id. at 426. Miller added "although the liability rests on breach of contract, the essential harm done is manifested in injury and mental suffering." Id. at 424. For a discussion of Sullivan's perception of her injury, see note 70 infra.
66. See Miller, supra note 1, at 424.
67. For a discussion of the benefit-of-bargain rule, see notes 38-39 & accompanying text supra.
nomically based theory that ignores the patient's perceived injury while remedying one not felt. In practice, the reliance award is identical to a malpractice tort recovery; both provide the same elements of recoverable damage. Justice Kaplan recognized the similarities between the damage recoveries of the two theories:

Recovery on a reliance basis for breach of the physician's promise tends to equate with the usual recovery for malpractice, since the latter also looks in general to restoration of the condition before the injury. But this is not paradoxical when it is noted that the origins of contract lie in tort.

The Sullivan court's adoption of the reliance theory made up for the path not chosen in litigation; it comported with the plaintiff's perception of the injury, and with the social policy of providing recoveries for needless pain and suffering resulting from the non-performance of promised medical services.

The court's refusal to apply the expectation interest's difference in value formula also resulted from a realistic appraisal of its inability to fairly award damages for the patient's nonpecuniary injuries. Justice Kaplan recognized that the expectation theory may be workable when the breach is commercially oriented, but thought it was unmanageable in a medical case. Not only would the trier of fact have to estimate the value of the promised condition, but the benefit-of-bargain rule would also require it to separate bargained-

68. Miller, supra note 1, at 424. Miller said the expectation interest is primarily geared towards commercial and mercantile contract settings.

Where the plaintiff would have gained an anticipated profit but for the breach by the defendant of his contractual obligation, it is readily understood why the defendant should be required to put the plaintiff in as good a position as he would have been had the promise been kept. This is the so-called "benefit-of-bargain" rule. However, this rationale can hardly be said to apply to . . . [medical contract] cases.

69. 363 Mass. at 588, 296 N.E.2d at 188 n.6. The parallel between a reliance award and traditional malpractice is exemplified by Becker v. Schwartz, 46 N.Y.2d 401, 386 N.E.2d 807, 413 N.Y.S.2d 895 (1978). In Becker, the defendant physician failed to test the plaintiff's unborn child for Down's Syndrome. The baby was born suffering from mongoloidism and the physician was found to be negligent. The court applied a standard malpractice recovery, stating that the remedy is designed to "place the [injured] party in the position he would have occupied but for the negligence of the defendant." Id. at 411, 386 N.E.2d at 811, 413 N.Y.S.2d at 900. The reliance recovery is virtually indistinguishable because it places the plaintiff in "as good a position he was in before the promise was made." Fuller & Perdue, supra note 29, at 54.

70. R. DANZIG, THE CAPABILITY PROBLEM IN CONTRACT LAW 25-27 (1978). Sullivan was less concerned with the doctor's failure to achieve the promised condition than with the enormous amounts of pain and suffering she endured as a result of the treatment.

71. 363 Mass. at 586, 296 N.E.2d at 188. See also Fuller & Perdue, supra note 29, at 374-86.
for from unbargained-for pain.\textsuperscript{72} One court had attempted to apply the consideration theory to the medical contract, but realized that in practice it was impossible to apply.

The suffering as a whole is incapable of division into the suggested groupings for the purpose of any satisfactory and reasonable division of allowance. The parts are so interconnected that the suffering of [the] condition is essentially a continuance of the suffering of treatment with the boundary line too difficult to be fairly ascertained.\textsuperscript{73}

In addition to demonstrating the practical significance of the reliance interest, the Sullivan decision exhibits the kind of judicial response envisioned by the Realists, based not on black letter rules, but on social desirability. For example, one important difference between the expectancy and the reliance theories is that the expectation award remains constant, regardless of the injured party’s expenditures during performance, while the reliance recovery varies with that party’s dependence on the defendant’s performance.\textsuperscript{74} Pain and suffering cannot be made objective; like the re-

\textsuperscript{72} Id. at 586, 296 N.E.2d at 188. Justice Kaplan said that attempting to put a dollar value on the formulation would put an “exceptional strain on the imagination of the factfinder.” Id. at 586, 296 N.E.2d at 188.

Moreover, in some situations the expectancy theory may be conceptually impossible to apply. In Doerr v. Villate, 74 Ill. App. 2d 332, 220 N.E.2d 767 (1966), the plaintiff was the mother of two retarded children. The defendant physician performed a vasectomy on the plaintiff’s husband, and promised that he would be unable to father any more children. In spite of the guarantee, the plaintiff became pregnant and gave birth to a third retarded child. The court sustained the contract cause of action and remanded the case to trial for damages. While the court was not faced with a choice of which contract damage theory to apply, the case nevertheless illustrates the problems of expectation interest in the medical setting. The difference in value—the value of having no child versus the value of having a retarded child—bears little relationship to the plaintiff’s injuries and is impossible to determine. Thus, it is an ineffectual remedy. The reliance interest, however, would provide a remedy patterned after recent tort wrongful conception cases—permitting a recovery for the cost of raising a retarded child. See, e.g., Comment, Wrongful Life and A Fundamental Right To Be Born Healthy: Park v. Chessin; Becker v. Schwartz, 27 BUFFALO L. REV. 537 (1978).

\textsuperscript{73} McQuaid v. Michou, 85 N.H. 299, 304, 157 A. 881, 884 (1932). The defendant promised to cure the plaintiff through a series of injections that was supposed to last five weeks. The treatment had to be stopped prematurely when the patient could not bear the pain. The New Hampshire Supreme Court applied a strict consideration theory, noting that pain and suffering was not compensable because it was part of the price the patient was willing to pay for the promised cure. The court, however, permitted a partial recovery for the suffering because more was endured than was reasonably expected. Id. at 303-04, 157 A. at 884.

\textsuperscript{74} See Fuller & Perdue, supra note 29, at 61. Under the reliance theory, the more the nonbreacher relied on the promisor’s performance, incurring expenses based on the contract, the greater the potential recovery. Hence, more is required to return the nonbreacher to the pre-contract position. In contrast, the expectation interest measures damages based on a party’s objective potential for gain from the agreement. The reliance award, therefore, provides a more personally tailored recovery that corresponds to dam-
liance award, it varies with each patient and injury. Hence, the
reliance interest not only provides a remedy that is easier to
administer, given the nature of the breach and resulting harms, but
also closely resembles the characteristics of the injury itself.

The court's willingness to award damages for pain and suffer-
ing is still another instance of its desire to design a remedy con-
sistent with the plaintiff's view of the injury, rather than to adhere
to the technical requirements of the classic model. According to
the Restatement of Contracts, damages for mental distress are
usually not compensable unless the breach results from reckless or
wanton behavior, and the defendant knew, or had reason to know,
that mental suffering was likely to result from nonperformance of
the contract. The underlying rationale of the Restatement was
that parties to a contract expect to derive financial gain: while it is
foreseeable that they may incur economic losses, it is not expected
that they will suffer psychological injuries. Thus, non-pecuniary
damages are considered too remote, and not within the contempla-
tion of the parties. The Realists, however, would call the applica-
tion of the Restatement a paper rule: "the accepted doctrine of the
time and place—what the book says the 'law is'." It acts as an
artificial barrier to a proper result. The Restatement recognizes
that not all contracts are commercial in nature and that in some
cases damages for mental suffering are permitted. Yet, strict ad-
herence to the Restatement has resulted generally in denial of
awards for pain and suffering. The Sullivan court did not find

age actually suffered by the nonbreacher, and is particularly appropriate in the medical
setting because of the nature of resulting injuries. For a further comparison of the
two theories, see note 33 supra.

75. Restatement of Contracts, § 341 (1932):

In actions for breach of contract, damages will not be given as compensation
for mental suffering, except where the breach was wanton or reckless and caused
bodily harm and where it was the wanton or reckless breach of a contract to
render a performance of such a character that the defendant had reason to know
when the contract was made that the breach would cause mental suffering for
reasons other than mere pecuniary loss.

76. Llewellyn, supra note 43, at 448.

77. Restatement of Contracts, § 341, Comment a (1932). "The most common con-
tracts of this kind are engagements to marry, contracts of carriers and innkeepers with
passengers and guests, and contracts for the carriage or proper disposition of dead bodies,
and contracts for the delivery of death messages." Id.

Safian, 257 A.D. 212, 12 N.Y.S.2d 568 (1939); Conklin v. Draper, 229 A.D. 227, 241 N.Y.S.
529 (1930). These cases illustrate the clear line distinguishing contract from tort actions.
Courts have narrowly defined the limits of recoverable damages in contract, permitting
them up to the point where the patient seeks an award for pain and suffering. In Robins,
for example, the New York Court of Appeals noted that the gist of the action was the
this reasoning persuasive,79 and instead construed the rule narrowly, citing Stewart v. Rudner,80 which declared that the general damage principles were applicable only to commercial contracts.

"[N]ot all contracts are purely commercial in . . . nature. Some involve rights we cherish, dignities we respect, emotions recognized by all as both sacred and personal. In such cases the award of damages for mental distress and suffering is commonplace, even in actions ex contractu."81

Although Justice Kaplan may have in fact overstated the frequency of medical contracts and awards for mental distress, his point is still well taken. It is arguable that the court reached a "socially desirable" result; but any attempt to reach a "socially desirable" result will necessarily engender difficulties, since it is rare for any available choice to be meritless. Yet, it is the willingness of the court to enter into such a decision-making process that is important. How to choose is never easy, but deciding to make a choice is the first hurdle. Thus once the court chose to reject the facility of the classical model, it faced the difficult question of what is socially desirable when a patient is "promised" a result by a physician. And, if courts are willing to find contracts in relationships like those between patients and physicians, perhaps based on psychological and sociological considerations, what of the promisors? Essentially, the question is asked and answered by saying that we want a socially desirable result, which seems to be the basis of civil obligation law. In Sullivan, the court was content to define social desirability by treating the medical promise in the manner in which most medical actions are treated, rather than as a separate basis of liability, caused perhaps by an aberration of proof. Now that at least one court has decided to reach this question, it may be time for other courts to proffer answers.

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failure of the physician to perform a promise. Hence pain and suffering was outside the scope of the recovery:

Nowhere in the complaint is there any statement that the plaintiff seeks to recover for his pain and suffering, which would be a relevant and material allegation if it were an action in malpractice. The damages sought are those suited to an action on contract, and help to characterize the complaint as one based upon a contract and not one based upon malpractice and negligence.

308 N.Y. at 547, 127 N.E.2d at 332. In cases where damages for pain and suffering were requested, courts usually classified the complaint as malpractice and applied the tort statute of limitation. See notes 4-6 supra.

79. 363 Mass. at 557, 296 N.E.2d at 188-89.
80. 349 Mich. 459, 84 N.W.2d 816 (1957). The plaintiff contracted with the defendant to deliver her child by caesarian section. When the physician failed to perform the operation, the child was stillborn, causing the mother to suffer severe emotional distress.
81. Id. at 469, 84 N.W.2d at 823.
CONCLUSION

Sullivan v. O'Connor is a departure from the traditional manner in which courts have resolved medical contract cases. The court indicated a preference for the reliance theory rather than the classic expectation interest, and implicitly stressed the dangers of blindly following a rule of law without first critically evaluating its purpose.

A narrow reading of Sullivan is that tort remedies may be obtained as a consequence of a contract breach by the use of the reliance theory. Yet Sullivan permits more than a tort recovery in contract; it also advances the tort notion of allocation of loss according to fault. One of the key distinctions between tort and contract has been that tort liability results from social convention or public policy, while contractual liability arises out of mutual agreement. Sullivan blurs that distinction. Once a duty has been established and breached, courts ought to apply the most meaningful remedy, rather than force their analysis to fit the requirements of a tort or contract label. Sullivan suggests that there is no reason to follow the divisions between the "compartments of the law." Originally, contract liability of physicians developed to circumvent the technical requirements of medical malpractice: Sullivan completes the circle by importing into the contract remedy the tort recovery. And Gilmore's point is raised again: the classical Holmes-Williston theory began to break down at its inception. Since the Restatement of Contracts, courts and statutes have whittled away at the classic structure, until torts and contracts have begun to merge into a single theory of civil obligation law. The Death of Contract, wrote Robert Gordon, demonstrates the inadequacies of the classic theory, long a "central preoccupation of the Case-Law Realists." Sullivan illustrates Gilmore's thesis. Not only does it present the difficulties of the classic theory, it also seeks to implement a socially desirable remedy by blending the concepts of tort and contract law into one homogenous theory.

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82. See generally O'Connell, supra note 62.
83. See Fuller, Book Review, 18 N.C.L. Rev. 1, 2 (1939). Professor Fuller criticized Williston's text for failing to account for cases on the "periphery of contract law." Id.
85. See Gordon, supra note 25, at 1217-18.
86. Id. at 1221.