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Contractual Liability in Medical Malpractice - Sullivan v. O'Connor

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CONTRACTUAL LIABILITY IN MEDICAL MALPRACTICE— *SULLIVAN v. O'CONNOR*

In an era when medical malpractice cases are on the increase, it is somewhat of a paradox that the physician's contractual liability has received sparse treatment by both the courts and commentators. Malpractice connotes negligence and, for this reason, little consideration has been given to the contractual relationship that may exist between doctor and patient. However, in some jurisdictions, this alternative to negligence persists and remains a viable theory for recovery.

A recent malpractice case[1] which recognizes the contractual relationship theory involved Ms. Sullivan, a professional entertainer who wished to change the shape of her nose to improve her appearance. She went to Dr. O'Connor, a plastic surgeon, who agreed to perform the surgery. Photographs were taken and a line was drawn on the picture over the bridge of the nose to illustrate the intended change. Ms. Sullivan was informed that the procedure, known as a rhinoplasty, would be completed in two operations.[2] After undergoing the operations it became evident that too much bone had been removed, leaving Ms. Sullivan with a nose which was "concave" to the midline at which point it became bulbous and asymmetrical.[3] This disfiguration required a third operation which failed to improve the nose, but further corrective procedures were considered too precarious. Ms. Sullivan filed suit against Dr. O'Connor, alleging in the first count of the complaint that she had entered into a contract with him to perform plastic surgery on her nose and thereby enhance her beauty, and that he had breached the contract by failing to achieve the desired result. The second count lay in negligence, alleging that Dr. O'Connor was negligent in performing the surgery.

While the jury found for the physician on the negligence count, it held him liable on the contract count. The jury was instructed that

1. Sullivan v. O'Connor, 296 N.E.2d 183 (Mass. Sup. Jud. Ct. 1973).

2. *See* S. SCHWARTZ, PRINCIPLES OF SURGERY 1782 (1969), which defines the procedure, indicating that the usual cosmetic nasal deformities are correctible by revision of the bony and cartilaginous architecture, which allows the soft tissue to readjust naturally. During a rhinoplasty, the permanent nasal hump is removed and the nasal bones are fractured so that the bridge of the nose may be made narrow.

3. 296 N.E.2d at 184.

the following damages were recoverable: (1) out-of-pocket expenses of $622; (2) damages flowing directly, naturally, proximately, and foreseeably from the breach of the promise; and (3) damages for the disfigurement of the nose, including the pain and suffering due to the disfigurement. The jury awarded a verdict of $13,500 against the defendant surgeon. On appeal, the verdict was upheld. *Sullivan v. O'Connor*, 296 N.E.2d 183 (MASS. SUP. JUD. CT. 1973).

Sullivan is significant in that it extends contractual liability by interpreting a physician's illustration of the proposed operation to be a binding promise of outcome. Also, *Sullivan* broadens the desirability of bringing malpractice-contract actions by granting damages for the patient's pain and suffering. This Note will briefly discuss the historical role of contract in malpractice cases to delineate the differences between malpractice actions brought under a negligence theory and those brought under contract. An analysis of contract actions in malpractice suits also will be considered for possible effect on the medical profession. Finally, *Sullivan's* departure from the established damage rule and recognition of a hybrid tort-contract damage award will be discussed.

HISTORICAL BACKGROUND

It is well settled that a physician may enter into an *express* contract with a patient to accomplish a particular result; a subsequent breach of that contract will entitle the plaintiff to a recovery irrespective of any negligence.[4] This rationale developed a century ago when most malpractice suits were pleaded on a theory of contract rather than on the then developing theory of negligence.[5] The early cases regarded the action in malpractice simply as a breach of an express or implied warranty that the physician possessed skill commensurate to that possessed by his professional colleagues in similar localities. If the usual skill and knowledge were found to be lacking, the physician was viewed as having breached his contractual duty and, on this ground, was held liable.[6] When

4. Bishop v. Byrne, 265 F. Supp. 460 (S.D. W. Va. 1967); Lakeman v. LaFrance, 102 N.H. 300, 156 A.2d 123 (1959); Hirsch v. Safian, 257 App. Div. 212, 12 N.Y.S.2d 568 (1939); Keating v. Perkins, 250 App. Div. 9, 293 N.Y.S. 197 (1937); Frank v. Maliniak, 232 App. Div. 278, 249 N.Y.S. 514 (1931); Monahan v. Devinny, 223 App. Div. 547, 229 N.Y.S. 60 (1928); Frankel v. Wolper, 181 App. Div. 485, 169 N.Y.S. 15 (1918), *aff'd*, 228 N.Y. 582, 127 N.E. 913 (1920).

5. *See generally* Miller, *The Contractual Liability of Physicians and Surgeons*, 1953 WASH. U.L.Q. 413 (1953) [hereinafter cited as Miller]; Comment, *The Implied Contract Theory of Malpractice Recovery*, 6 WILLAMETTE L.J. 275 (1970).

6. *See, e.g.*, Small v. Howard, 128 Mass. 131, 35 Am. R. 363 (1880) (an early example of an opinion considering whether the pleadings sounded in tort or contract).

a New Hampshire court, in 1853, decided that a physician was liable for breach of contract, the contractual liability was established from the mere fact that the physician had agreed to treat the patient.[7]

However, as the negligence theory became more widely used, the majority of courts abandoned the pleading on the contract by characterizing all such actions as torts.[8] In emphasizing the tort claim, courts have found the allegations of a contract in the complaint to be merely explanatory.[9] Today, the vast majority of jurisdictions adhere to this malpractice-tort position, while a small minority (mostly Southern states) recognize that a physician *impliedly* warrants to perform under a particular standard of care.[10] Even though the majority have repudiated the "implied warranty" theory, they continue to acknowledge that a physician is free to enter into an *express* contract which will result in contractual liability if breached.[11]

REASSURANCE V. GUARANTEE

Once the allegations are held to be sufficient to support a cause of action for breach of contract, the issue of liability rests upon the simple determination by the jury whether there was, in fact, such a promise made and whether there was a failure to perform. Valuable consideration is necessary to support the guarantee by the physician in order for the promise to be legally binding.[12] What constitutes a legally binding

7. Leighton v. Sargent, 27 N.H. 460, 59 Am. Dec. 388 (1853).

8. *See* Roush v. Wolfe, 243 Ky. 180, 47 S.W.2d 1021 (1932), where the court construed the pleadings on the contract as an action in tort. Other courts, while recognizing that the complaint stated a cause of action in tort, maintained that although there was a contractual relationship between the physician and the patient, when this duty was breached, it gave rise to tort liability. *See also* Jones v. Furnell, 406 S.W.2d 154 (Ky. 1966); Mirich v. Balsinger, 53 Cal. App. 2d 103, 127 P.2d 639 (1942); Seanor v. Browne, 154 Okla. 222, 7 P.2d 627 (1932); Barnhoff v. Aldridge, 327 Mo. 767, 38 S.W.2d 1029 (1931); Horowitz v. Bogart, 218 App. Div. 158, 217 N.Y.S. 881 (1926); Carpenter v. Walker, 170 Ala. 659, 54 So. 60 (1910).

9. Kuhn v. Brownfield, 34 W. Va. 252, 12 S.E. 519 (1890).

10. *See* Creighton v. Karlin, 225 So. 2d 288 (La. App. 1969); Brooks v. Robinson, 163 So. 2d 186 (La. App. 1964); Phelps v. Donaldson, 142 So. 2d 585, *aff'd*, 243 La. 1118, 150 So. 2d 35 (1963); Manning v. Serrano, 97 So. 2d 688 (Fla. 1957); Scott v. Simpson, 46 Ga. App. 479, 167 S.E. 920 (1933); Sellers v. Noah, 209 Ala. 103, 95 So. 167 (1923); Stokes v. Wright, 20 Ga. App. 325, 93 S.E. 27 (1917).

11. Kozan v. Comstock, 270 F.2d 839 (5th Cir. 1959); Johnston v. Rodis, 251 F.2d 917 (D.C. Cir. 1958); Cloutier v. Kasheta, 105 N.H. 262, 197 A.2d 627 (1964); Zostautas v. St. Anthony De Padua Hosp., 23 Ill. 2d 326, 178 N.E.2d 303 (1961).

12. *See* Gault v. Sideman, 42 Ill. App. 2d 96, 191 N.E.2d 436 (1963) (court held that in order to consider a warranty to cure enforceable, it is necessary for the plaintiff to allege and prove the making of the warranty, the patient's reliance thereon,

promise is considered a question of law, as the dividing line between representation of fact and opinion in medical diagnosis can be deceptive. This principle is well illustrated in *Hawkins v. McGee*[13] where the New Hampshire Supreme Court held that, despite the impossibility of the promise, the court must determine whether or not the plaintiff could have possibly imputed a contract interpretation to the words uttered. In *Hawkins*, the physician, although unskilled in the art of skin grafting, had sought out the plaintiff whose hand had been severely burned in an electrical fire and had offered to make the hand "one hundred percent perfect." When the operation did not result in a perfect hand, the plaintiff sued the physician for breach of contract. In holding for the plaintiff, the court completely rejected the physician's contention that he had merely expressed his opinion to the plaintiff, *i.e.*, that even if the words "one hundred percent perfect hand" were uttered, no reasonable person would interpret them to be made with the intention of making a guarantee.[14] Emphasis was placed on the physician actively recruiting the plaintiff's consent to operate on the injured hand. The court reasoned that since the solicitation surpassed all limits of normal physician-patient reassurances, the plaintiff could have relied on the statement; as a consequence, the statement was held to constitute a specific, clear, and express promise to effect a particular result.

Hawkins was one of the first cases which directly dealt with the difficulty of distinguishing between a doctor's therapeutic reassurances to an apprehensive patient and a binding guarantee of a certain outcome. This dilemma is further complicated by the fact that the physician and the patient are often the only parties present when the alleged contract is made. A dissatisfied patient, therefore, may blame the attending physician when the outcome is not favorable simply because the reassurances of the doctor seemed to warrant only advantageous results.

Noel v. Proud,[15] decided by the Kansas Supreme Court, illustrates how a medical opinion may be construed as a representation of fact. In this case, the plaintiff, who was suffering from a hearing defect, sought the advice of Dr. Proud, a physician at the University of Kansas Medical Center.

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and a consideration); Wilson v. Blair, 65 Mont. 155, 211 P. 289 (1922) (court held that in order for such a contract or warranty to be enforceable, it must be supported by a *special* consideration, other than the consideration supporting the contract to operate on the patient). *See also* Rogala v. Silva, 16 Ill. App. 3d 63, 305 N.E.2d 571 (1973).

13. 84 N.H. 114, 146 A. 641 (1929).

14. *Cf.* McQuaid v. Michou, 85 N.H. 299, 157 A. 881 (1932).

15. 189 Kan. 6, 367 P.2d 61 (1961). *See* J. WALTZ & F. INBAU, MEDICAL JURISPRUDENCE 47 (1971) for a discussion of this case.

An operation was recommended; Dr. Proud confided, "[w]hile the operations might not have any beneficial effect, your hearing will not be worsened as a result of the operation."[16] The plaintiff sued for breach of express contract when, following the surgery, his hearing deteriorated. In upholding the trial court's decision that the complaint stated a cause of action, the Kansas court indicated that the legal effect of the doctor's opinion was equivalent to a special contract for a particular effect. The majority rejected the argument that the physician was merely expressing his opinion as to the possible consequences of the treatment.

The dissent, on the other hand, pointed to the public policy considerations which must be examined in all cases where an express contract is being construed by the courts. In alluding to the evasive dividing line between opinion and representation, the dissent stated that

> [d]espite the allegations as to "agreements, promises and warranties," it seems to me—looking at this matter from a practical and realistic standpoint—that the real contention in this case is that the patient was the victim of "bad medical advice". . . .[17]

Logically noting that bad medical advice is actionable under a negligence theory, the dissent objected to the molding of medical opinions into a tort-contract hybrid theory of liability where all utterances of the doctor must be closely scrutinized. Since winning a patient's confidence has an important therapeutic aspect, it is not difficult to imagine the many pitfalls facing an unwary practitioner. At the same time, such holdings could be used to protect equally unwary patients. A logical analogy would increase the liability of all professional persons by extending this strict accountability to them.[18]

Despite the implications of *Noel*, the only physician who will knowingly make a contract for a cure is one who is a fool or who thinks himself capable of miracles.[19] However, an honest doctor who sincerely believes that he has only expressed an opinion of great hope for a critically ill patient may be held to a contract by an over-sympathetic jury who desires to compensate the unfortunate plaintiff. Most patients admittedly are unaware of whether the utterances made by a physician are legally binding or not. Yet, due to the confidence which the patient has in the doctor, an unsuccessful treatment may appear as a complete failure to the dejected patient. For this reason, a poor medical result is often enough

16. 189 Kan. at 11, 367 P.2d at 66.

17. *Id.* at 13, 367 P.2d at 67.

18. *See* Miller, *supra* note 5, at 418.

19. *See generally* Miller, *supra* note 5; J. WALTZ & F. INBAU, MEDICAL JURISPRUDENCE (1971).

to delude the disappointed patient into turning an overly optimistic prognosis into a guarantee for a complete cure.[20]

A poor medical result was the basis for a Washington state decision which allowed an action against a dentist who had indicated to a patient that she would be completely satisfied with her partial plate.[21] Writing a critical dissent, Justice Finley maintained that characterizing the action as contract allowed the ghosts of common law pleadings to rule the court from the grave.[22] While acknowledging that foolish remarks may be made by professionals, the dissent argued that the court was without power to rewrite such statements into binding contracts.

BURDEN OF PROOF

When courts are permitted to infer contracts from speculative oral statements, it is not surprising that the physician's scope of liability is greatly broadened by bringing an action for breach of express contract. From the plaintiff's standpoint, the possibility of pleading a case in contract is attractive since it makes his burden of proof significantly lighter. No allegation of negligence or carelessness on the part of the doctor need be proven. This implies that the doctor's potential liability is increased under the contractual theory, while under negligence theory it is limited to actions where fault is proven.

In *Guilmet v. Campbell*,[23] the Michigan Supreme Court significantly eased this burden of proof by allowing the jury to determine whether verbal assurances constituted a contract. The plaintiff was suffering from a severe peptic ulcer. His family physician recommended a specialist, Dr. Campbell, who advised a gastric resection—a removal of all or part of the stomach. To convince the plaintiff to undergo the surgery, the specialist emphasized that there was "no danger in the operation," "that he could return to work in 3 to 4 weeks," and "the operation would make a new man out of him. . . ."[24] The plaintiff consented to the

20. *See generally* HIRSH, *Insuring Against Medical Professional Liability*, 12 VAND. L. REV. 667 (1959); Alexander v. Alton Ochsner Medical Foundation, 276 So. 2d 794 (La. Ct. App. 1973); Peters v. Gelb, 303 A.2d 685 (Del. Super. Ct. 1973); Wilkinson v. Vesey, 110 R.I. 606, 295 A.2d 676 (1972); Donaldson v. Maffucci, 397 Pa. 548, 156 A.2d 835 (1959).

21. Carpenter v. Moore, 51 Wash. 2d 795, 322 P.2d 125 (1958).

22. *Id.* at 800, 322 P.2d at 128.

23. 385 Mich. 57, 188 N.W.2d 601 (1971). *See* 219 J.A.M.A. 431 for a critical discussion of *Guilmet*.

24. 385 Mich. at 62-63, 188 N.W.2d at 603-04. *But see* Marvin v. Talbott, 216 Cal. App. 2d 383, 30 Cal. Rptr. 893 (1963), where the court stated the only evidence offered in support of the plaintiff's claim was that the physician had warranted a

surgery, but an immediate cure did not result. Due to complications, a severe loss of weight followed the surgery and the plaintiff was forced to undergo three subsequent operations. Guilmet sued the physician for negligence and breach of contract to cure. While the jury returned a verdict of $50,000 on the contract count, it found for the specialist on the negligence count. The court ruled that the trier of fact, the jury, should decide whether a physician's statement to a patient was merely a therapeutic reassurance or a promise to cure. This ruling opened a previously closed door and permitted jurors, rather than the judge, to decide whether a binding contract had been made.[25] The plaintiff's burden of proof was thus reduced since expert testimony demonstrating lack of due care was no longer necessary. The jury, on the other hand, was free to compensate the plaintiff for an alleged result which, the dissent argued, "none but the Diety could possibly agree to perform."[26]

Under *Guilmet*, the practitioner's liability is greatly increased since the jury, in determining whether the doctor's reassurances amounted to a "warranty," may disregard as irrelevant all evidence that he exercised the highest standard of care. For this reason, the dissent in *Guilmet* decried the court's

> unwarned, unprecedented, wholly gratuitous and destructively witless war of "contract liability" upon a brother profession which, by the multifold harassment of malpractice actions, has been forced already to undertake what is professionally known as "defensive medicine."[27]

Arguably, this delegation of the usual role of the court in deciding what constitutes a legally enforceable promise to the finder of facts, the jury, may end in more carefully worded consent forms, increased use of disclaimers, and, all in all, more defensive medicine.

By using the advantageous aspects of *Guilmet* to the fullest extent, the *Sullivan* court extended the physician's liability to a further point on the continuum. While both *Guilmet* and *Sullivan* dealt with situations in which the patient freely consented to the surgery performed, *Sullivan* may be distinguished because it involved elective septal surgery while *Guilmet* dealt with corrective surgery—a standard medical procedure for the treatment of peptic ulcers. It is submitted that the plaintiff in *Guilmet* was seriously ill; his failure to respond to the standard medical

successful operation and cure. In recommending the surgery, the defendant stated it would "make a new man" out of the plaintiff. The court found that the promise to "make a new man" out of the plaintiff was incapable of performance and obviously not intended as a warranty.

25. Guilmet v. Campbell, 385 Mich. 57, 69, 188 N.W.2d 601, 606.

26. *Id.* at 88, 188 N.W.2d at 615.

27. *Id.* at 76, 188 N.W.2d at 610.

procedure may have been the reason for a poor result and the need for subsequent surgery. In contrast, the plaintiff in *Sullivan* merely desired to change her appearance for cosmetic purposes.

It is significant that neither the specialist in *Guilmet* nor the surgeon in *Sullivan* was found negligent. Despite this lack of negligence, the jury in *Guilmet* found contractual liability to compensate for the plaintiff's ill health; the court in *Sullivan* rewrote the law of contractual liability and inferred a promise from a photograph taken by the physician. The photograph had been taken to enable the surgeon to study the nose; certain markings had been entered thereon.[28] Disregarding the ruling in *Guilmet* that the jury must find a specific promise to effect a definite outcome, the court in *Sullivan* allowed an express contract to be deduced from the "representation" made on the photograph. The holdings in *Guilmet* and *Sullivan* contradict the basic premise of the negligence theory which examines the standard of care exercised by the physician to determine whether or not he met the community standard of care or the skill which he claimed to possess.

It is submitted that in the area of aesthetic surgery, an action for breach of contract may be due to the patient's disillusionment rather than to an actual breach.[29] It may be logically implied that in a situation involving elective plastic surgery, the patient's desire for a change of appearance may outweigh the medical necessity of the operation. If the preceding hypothesis is valid, then the courts hearing breach of contract cases between plastic surgeons and their patients are confronted not only with the patient's unfortunate condition, but also with the patient's psychological feelings that his natural self is inadequate.[30] This presumption of the patient's self-dissatisfaction is well illustrated in *Sullivan* where, though the results of the operations had not been as anticipated, the plaintiff was

28. Brief for Plaintiff at 5, Sullivan v. O'Connor, 296 N.E.2d 183 (Mass. Sup. Jud. Ct. 1973).

29. *Cf.* Gluckstein v. Lipsett, 93 Cal. App. 2d 391, 209 P.2d 98 (1949). The plaintiff in *Gluckstein* had plastic surgery. Following the operation, the appearance of the patient was far worse than prior to the surgery. The court stated that the results demonstrated a lack of due care and skill, and only such lack of due care and skill could have brought about the patient's present condition. Whether this type of circular reasoning is unique to cases involving plastic or cosmetic surgery is unclear.

30. *See* 222 J.A.M.A. 1102 (1972) for an analysis of the types of persons who seek cosmetic surgery. Generally, it was concluded that some persons seeking aesthetic surgery are unhappy with their lives and consider themselves unattractive. Thus when the surgery fails to correct all shortcomings, the patient's emotional response may be that the physician is at fault. It was contended that such patients are so hard to please, that if anything unexpected happens, those patients immediatey contemplate litigation.

unable to demonstrate that the nose, scarred by surgery, caused her to lose any employment as an entertainer.[31]

STATUTE OF LIMITATIONS

In addition to the lighter burden of proof, the plaintiff in a malpractice-contract action may have a longer time to file suit than that allowable in a tort action. In the jurisdictions not utilizing the discovery rule (which holds that the statute of limitations begins to run at the time of discovery of the adverse result rather than at the perpetration of the act), the usual two year statute of limitations applicable to tort actions may expire before the negligent act of the physician is discovered.[32] In order to give such a plaintiff a chance of recovery, courts have allowed contract actions when the negligence actions have been barred by the running of the statute.[33] By permitting the characterization of the basis of the complaint as a contractual relationship, the courts allow the plaintiff more time in which to bring the suit—a longer statute of limitations becomes applicable.[34] Massachusetts has alleviated this increased period

31. 296 N.E.2d at 185.

32. For jurisdictions holdings that the statute of limitations in malpractice commences at the time of the discovery of the adverse result, *see* Urie v. Thompson, 337 U.S. 163 (1949); Quinton v. United States, 304 F.2d 234 (5th Cir. 1962); United States v. Reid, 251 F.2d 691 (5th Cir. 1958); Lipsey v. Michael Reese Hosp., 46 Ill. 2d 32, 262 N.E.2d 450 (1970); Waldman v. Rohrbaugh, 241 Md. 137, 215 A.2d 825 (1966); Weinstock v. Eissler, 224 Cal. App. 2d 212, 36 Cal. Rptr. 537 (1964); Springer v. Aetna Cas. & Sur. Co., 169 So. 2d 171 (La. App. 1964); Johnson v. Caldwell, 371 Mich. 368, 123 N.W.2d 785 (1963); Schaffer v. Larzelere, 410 Pa. 402, 189 A.2d 267 (1963); Spath v. Morrow, 174 Neb. 38, 115 N.W.2d 581 (1962); Fernandi v. Strully, 35 N.J. 434, 173 A.2d 277 (1961); Seitz v. Jones, 370 P.2d 300 (Okla. 1961). *Contra*, Hill v. Hays, 193 Kan. 453, 395 P.2d 298 (1964); Philpot v. Stacy, 371 S.W.2d 11 (Ky. 1963); Roybal v. White, 72 N.M. 285, 383 P.2d 250 (1963); Tantish v. Szendey, 158 Me. 228, 182 A.2d 660 (1962); Davis v. Bonebrake, 135 Colo. 506, 313 P.2d 982 (1957).

33. The Illinois statute of limitations bars actions in negligence brought more than two years after discovery of the act or ten years following the act itself. ILL. REV. STAT. ch. 83, § 22.1 (1973). *See* Barrios v. Sara Mayo Hosp., 264 So. 2d 792 (La. App. 1972); Doerr v. Villate, 74 Ill. App. 2d 332, 220 N.E.2d 767 (1966); Camposano v. Claiborn, 2 Conn. Cir. 135, 196 A.2d 129 (1963); Robins v. Finestone, 308 N.Y. 543, 127 N.E.2d 330 (1955); Giambozi v. Peters, 127 Conn. 380, 16 A.2d 833 (1940). For a discussion of the *Robins* case, *see* 31 ST. JOHN'S L. REV. 123 (1956); 7 SYRACUSE L. REV. 165 (1956); 2 N.Y.L.F. 121 (1956).

34. In Illinois, the statute of limitations for an oral contract is five years. ILL. REV. STAT. ch. 83, § 16 (1973). For a discussion of other jurisdictions, *see, e.g.*, Lillich, *The Malpractice Statute of Limitations in New York and Other Jurisdictions*, 47 CORNELL L.Q. 339 (1962). *See also* Note, *Torts—Statute of Limitations in Medical Malpractice Cases—Justice Sought and Almost Attained*, 21 DEPAUL L. REV. 234 (1971); Note, *Medical Malpractice: A Survey of Statutes of Limitations*, 3 SUFFOLK U.L. REV. 597 (1969); Note, *Malpractice and the Statute of Limitations*, 32 IND. L.J. 528 (1957).

of liability for the physician by adopting a three year statute of limitations which is applicable whether the action sounds in tort or contract.[35] Once the longer statute of limitations is held applicable, the potential plaintiff may discover contract damages are unsatisfactory because they traditionally have not included the large awards for pain and suffering recoverable in negligence actions.

CONTRACT V. TORT DAMAGES

The type of damages requested in malpractice suits has been considered by the courts in characterizing the pleadings. Courts often use the plaintiff's request for tort-like damages (*i.e.* pain and suffering) as a reason to designate the action as tortious and thus apply the negligence statute of limitations. The Supreme Court of Missouri concluded that an action was one in tort if the basic allegations in the complaint demonstrated that the purpose of the suit was the recovery of damages against the doctor in an unliquidated amount for personal injuries sustained as a result of a wrongful act on the part of the attending physician.[36] The New York court, in *Colvin v. Smith*,[37] reached the same conclusion by determining that

> 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. The action in contract is based upon a failure to perform a special agreement. Negligence, the basis of the one, is foreign to the other. The damages recoverable in malpractice 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 thereof.[38]

By holding that a claim seeking damages for pain and suffering is incompatible with a contract action, courts have discouraged the malpractice-contract suit.[39]

Although the potential award is less than in tort, the possibility of holding the physician liable for some amount is greatly increased when the action is brought in contract. As previously stated, if a doctor makes

35. MASS. GEN. LAWS ANN. ch. 260, § 4 (Supp. 1974). For other jurisdictions having similar statutes, *see* CODE of ALA., TIT. 7, § 25(1) (Cum. Supp. 1973); ARK. STAT., TIT. 37-205 (1962); IND. ANN. STAT., TIT. 34-4-19-1 (1973); MINN. STAT. ANN. § 541.07 (Cum. Supp. 1974); VERNON ANN. MO. STAT. § 516.140 (Cum. Supp. 1974); S.D. COMP. LAWS § 15-2-15 (1967).

36. Barnhoff v. Aldridge, 327 Mo. 767, 38 S.W.2d 1029 (1931).

37. 276 App. Div. 9, 92 N.Y.S.2d 794 (1949).

38. *Id.* at 9-10, 92 N.Y.S.2d at 795.

39. *Cf.* Hertgen v. Weintraub, 29 Misc. 2d 396, 215 N.Y.S.2d 379 (1961).

a special contract and then fails to perform, he is liable for the breach even though he exercised the highest possible professional skill. No expert medical testimony is required; encounters with the so-called "conspiracy of silence" no longer hinder the potential plaintiffs.[40] Furthermore, once held liable, the physician may find his malpractice insurance unwilling to indemnify him.[41] In *McGee v. United States Fidelity and Guaranty Co.*[42]—litigation subsequent to *Hawkins v. McGee*—the physician was held liable on his special contract which the first circuit concluded did not arise under the "malpractice, error or mistake" clause covered by the insurance. When expensive malpractice insurance fails to reimburse the physician for part of the cost of litigation, the physician must pay the expenses out of his own pocket. Although this is not a harsh outcome when the plaintiff is entitled to recover only out-of-pocket damages, it could ultimately affect health care prices if the physician decides to recoup the costs of such litigation through increased fees. The inarticulated premise is that as contract actions become more prevalent, the general public will have to bear the soaring cost of medical services. As the claims for pain and suffering become more frequent, the costs would continue to increase but at a faster pace.

Pain and Suffering Claims Under Contract

Historically, damages for pain and suffering were not recoverable in a contract action. Due to an increased mobility, however, an exception soon developed with respect to common carriers. It is now well established that a contract for passage on a common carrier implied that the traveller would be treated in a reasonable manner.[43] If a breach of a duty by the common carrier caused an intentionally inflicted mental anguish to a person having a contract of carriage, damages were given for pain and suffering. In similar holdings, courts have awarded damages for mental suffering where the contract was personal in nature and so coupled with the sensibilities of the parties that a breach would necessarily precipitate mental anguish.[44] Recognizing the need for re-

40. *See* Waltz & Inbau, Medical Jurisprudence 54, for a discussion of expert medical testimony and the "conspiracy of silence."

41. Safian v. Aetna Life Ins. Co., 260 App. Div. 765, 24 N.Y.S.2d 92 (1940), *aff'd*, 286 N.Y. 649, 36 N.E.2d 692 (1941). *Contra*, Sommer v. New Amsterdam Cas. Co., 171 F. Supp. 84 (E.D. Mo. 1959) (by analogy); Cadwallader v. New Amsterdam Cas. Co., 396 Pa. 582, 152 A.2d 484 (1959) (by analogy); Sutherland v. Fidelity & Cas. Co., 103 Wash. 583, 175 P. 187 (1918).

42. 53 F.2d 953 (1st Cir. 1931). See Hirsh, *supra* note 20, at 673-76.

43. Gebhardt v. Public Service Coordinated Transport, 48 N.J. Super. 173, 137 A.2d 48 (1957); Medlin v. Southern Ry., 143 S.C. 91, 141 S.E. 185 (1928).

44. Emmke v. De Silva, 293 F. 17 (8th Cir. 1923); Crawford v. Hotel Essex

covery of damages other than those directly related to the breach of contract, courts, over the years, gradually extended the common carrier exception to encompass mishandling of dead body cases, which frequently elucidate how mental suffering is closely connected to breach of contract. The Supreme Court of North Carolina held that, despite the absence of negligence, the plaintiff could recover damages for mental suffering when her spouse's body was not correctly interred.[45] The plaintiff in *Lamm v. Shingleton* had contracted with an undertaker to bury her spouse in a watertight vault. During a subsequent storm, the vault rose to the surface, making reinterment necessary. The plaintiff sued on the breach of contract; at trial, the judge instructed the jury that the plaintiff could recover on her claim for mental suffering only if the jury found that the suffering was caused by the defendant's negligence. The defendant was found not negligent and recovery for pain and suffering was denied. On appeal, the court reversed the decision of the lower court and held that mental suffering is the natural corollary to a breach of a contract which is personal in nature and closely connected to personal feelings.[46]

The common carrier exceptions were integrated into the *Restatement of Contracts*[47] which acknowledged that circumstances do exist where a breach of contract will cause more than a mere pecuniary loss. The *Restatement* declares that when the breach is wanton or reckless and causes bodily harm and the defendant knew such a breach would precipitate mental anguish, damages for pain and suffering are recoverable. Although the *Restatement* emphasizes that mere conscious neglect to perform a contractual obligation is not a sufficient ground for permitting the recovery of such damages, an argument may be made for allowing such damages when the contract is personal in nature and mental anguish is the natural consequence of such a breach.

Boston Corp., 143 F. Supp. 172 (D. Mass. 1956); Windeler v. Scheers Jewelers, 8 Cal. App. 3d 844, 88 Cal. Rptr. 39 (1970); McClean v. University Club, 327 Mass. 68, 97 N.E.2d 174 (1951); Kellogg v. Commodore Hotel, 187 Misc. 319, 64 N.Y.S.2d 131 (1946); Frewen v. Page, 238 Mass. 499, 131 N.E. 475 (1921); Lipman v. Atlantic Coast Line R.R., 108 S.C. 151, 93 S.E. 713 (1917).

45. Lamm v. Shingleton, 231 N.C. 10, 55 S.E.2d 810 (1949).

46. *Id.* at 14, 55 S.E.2d at 813.

47. *Restatement of Contracts* § 341 (1932) states:

> 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.

EXPANDING MALPRACTICE-CONTRACT DAMAGES

The *Restatement* view was expanded in *Stewart v. Rudner*[48] when the Michigan Supreme Court held that damages for pain and suffering could be recovered in an action in contract. The plaintiff in *Stewart* had requested that her baby be delivered by Caesarian section and the doctor agreed. When the baby was due, the plaintiff's physician was not present and she was delivered through natural childbirth by a staff doctor who was unaware of the agreement. As a consequence, the infant was stillborn. The plaintiff sued the physician for breach of contract; the jury returned a verdict of $5,000 for the plaintiff. The defendant appealed, arguing that it was an error to charge the jury that damages for mental suffering were recoverable in a contract action.[49] In upholding the award of damages for pain and suffering, the Michigan court noted that not all contracts are commercial in nature; some contracts may involve "rights" and "emotions" which are sacred and personal in nature.[50] Using the common carriers exception by way of analogy, the court determined that the pain and suffering flowing from a personal contract were not remote but foreseeable and therefore affirmed the verdict for the plaintiff stating that

> [w]hen we have a contract concerned not with trade and commerce but with life and death, not with profit but with elements of personality, not with pecuniary aggrandizement but with matters of mental concern and solicitude, then a breach of duty with respect to such contracts will inevitably and necessarily result in mental anguish, pain and suffering. In such cases the parties may reasonably be said to have contracted with reference to the payment of damages therefor in event of breach. Far from being outside the contemplation of the parties they are an integral and inseparable part of it.[51]

The general rule of "no damages for mental suffering in a contract action" was considered inappropriate for a situation where the plaintiff's well-being is dependent on the performance of the duty undertaken.[52] In creating an exception to the general rule, the Michigan court allowed the plaintiff a recovery for the wrong suffered, even though the procedures performed by the staff physician were commensurate with the skill required in natural childbirth. In essence, the court "over-wrote" the *Restatement* position since the physician's failure to perform would

48. 349 Mich. 459, 84 N.W.2d 816 (1957). *See also* Comment, *Physicians and Surgeons—Liability to Patient for Breach of Contract*, 21 NACCA L.J. 29 (1958).

49. *See, e.g.*, Brooks v. Herd, 144 Wash. 173, 257 P. 238 (1927).

50. Stewart v. Rudner, 349 Mich. 459, 469, 84 N.W.2d 816, 823 (1957).

51. *Id.* at 471, 84 N.W.2d at 824.

52. *Id.* at 469, 84 N.W.2d at 823.

not be considered wanton or reckless. It is submitted that, in Michigan, under *Stewart*, malpractice suits pleaded in contract may request and receive damages for pain and suffering.[53]

In the wake of *Stewart, Sullivan* was decided in Massachusetts. The court in *Sullivan* charged the jury that the plaintiff could recover all damages flowing directly, naturally, proximately, and forseeably from the breach. From this charge, the jury returned a verdict of $13,500, of which nearly $13,000 represents damages for the plaintiff's pain and suffering. *Sullivan*, a case of first impression in Massachusetts, upheld the contract-tort hybrid damages by using the common carrier cases and *Stewart* as precedent. Although the *Sullivan* and *Stewart* decisions may be distinguished by their facts, they lead to the conclusion that contract actions may be brought to cover a wide range of situations—from a complete omission to an unsatisfactory medical result. Both decisions extended the standard recommended in the *Restatement* and allowed damages for pain and suffering to compensate for injury incurred in a personal contract. Since neither court limited recovery to the facts of that particular case, the implication, in reading *Stewart* and *Sullivan* together, is that any breach of a contractual obligation by a physician may result in recovery of contract-tort hybrid damages which include awards for the resultant pain and suffering. In effect, if not in substance, *Sullivan* extends liability by indicating that litigation-minded patients will be able to recover in contract, without the burden of proving negligence, when they are the victims of a treatment which results in deplorable consequences and requires subsequent remedial procedures. The holding in *Sullivan* erodes the tort concept of negligence by sanctioning an identical result, with an identical recovery, without the burden of proving that the defendant was at fault. In so doing, the Massachusetts court has created the ultimate medical nightmare.

CONCLUSION

The full effect of the Massachusetts Supreme Judicial Court's decision has yet to be fully felt by the medical profession. While the change in the existing law may not be as dire as the predictions indicate, it most certainly will encourage pleading of malpractice actions in the alternative, with one count sounding in contract and the other in tort. The judiciary

53. *See generally* Guilmet v. Campbell, 385 Mich. 57, 188 N.W.2d 601 (1971), which allowed the recovery of $50,000 in a contract action against the physician who was found not to be negligent. It is significant that the decision is devoid of any discussion concerning the amount of damages awarded. It may be assumed that a recovery of $50,000 for a gastric resection was not limited to out-of-pocket expenses.

has issued an invitation to the general public to impose liability on the medical profession, whether or not fault on the part of the practitioner may be found. Using the *Sullivan* decision as a precedent, the future plaintiff will have an opportunity to present its case to a jury without expert medical testimony and avoid the "conspiracy of silence" problem. This may provide a temptation for disappointed patients to construe unguarded utterances of the attending physician as allegations of promise. The problem will be compounded when the *Sullivan* rule is adopted in jurisdictions having a statute of limitations for contract which exceeds the period for tort actions.

The surge of malpractice suits in recent years is a reflection of the economic climate—inflation, unemployment, and the "Reasonable Person" seeking an easy dollar.[54] By allowing a patient a recovery in contract for grievous disappointment, the severity of the situation increases. In upholding damages for pain and suffering, the Massachusetts court awarded the plaintiff far more than anticipated, penalizing the physician. More likely than not, malpractice insurance will provide no protection against these awards. While public policy requires that the general populace be protected in its dealings, it is submitted that public policy also commands that the medical practitioner be equally insulated in his pursuit of his profession. The impact of liability on a defendant-physician judged negligent is miniscule in comparison to the impact on the physician who is held to have breached a contract. While in the former, the physician has a means of "spreading the risk" through indemnity by malpractice insurance, the latter must accept the full financial responsibility himself. This will ultimately force the honest, sincere physician to practice defensive medicine, arming himself with consent forms, releases, disclaimers, and tape-recorded consultations.

In order to avoid this consequence, one remedy would be to legislatively declare all contracts between patients and physicians void as a matter of public policy. A more sensible solution would be to eliminate the recovery of damages for pain and suffering. In so doing, the spurious plaintiff, in search of high awards, will attempt to prove fault under a negligence theory, while a remedy will remain for the rare plaintiff who is injured by the breach of an express contract, rather than by the physician's negligence. A reversal of the rule announced in *Sullivan* would achieve this result.

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54. *See generally* Chicago Tribune, Apr. 28, 1974, at 1, col. 3,