

THE CONTRACTUAL LIABILITY OF PHYSICIANS AND SURGEONS

ARNOLD J. MILLER†

Almost all legal writing on the subject of the liability in damages of physicians and surgeons to their patients has dealt with malpractice.¹ Their liability for breach of express contract has been very little treated. Indeed, this field of study has received singularly less attention and discussion than its importance warrants.

In this article a clear-cut dichotomy is maintained between the liability of the physician or surgeon for breach of express contract, on the one hand, and malpractice, on the other hand. It is recognized that some persons use malpractice in a generic sense to connote any action against a physician or surgeon regardless of its nature or form. With them one cannot quarrel for theirs is simply a choice of terminology, "de gustibus non disputandum," and is not based on any particular view of the substantive law underlying the claim. However, the better and almost universal usage is to restrict "malpractice" solely to cases involving negligent or unskillful conduct on the part of the physician and surgeon, and it is so used here.²

BREACH OF IMPLIED CONTRACT

Malpractice in the pertinent legal literature is inextricably bound up with the idea of breach of implied contract. This was especially true of the older cases wherein malpractice was regarded simply as a form of breach of implied contract. The physician or surgeon was spoken of as impliedly holding himself out as possessing the degree of learning, skill and experience

† Member, Massachusetts Bar. The author wishes to express his thanks to a colleague, Samuel Perman, Esq., for some valuable insights into the problems dealt with.

1. It should be borne in mind that the subject matter of this article applies with equal validity to dentists and perhaps to some other practitioners of the healing arts. It is applicable in a somewhat lesser degree to attorneys. To have dealt with them all would have tended to make the article somewhat unwieldy.

2. A good working definition is that provided in MALOY, MEDICAL DICTIONARY FOR LAWYERS 318 (1942): "The treatment of a disease by a physician or surgeon in an unskillful manner, or in a manner contrary to accepted rules, causing injurious results to the patient."

ordinarily possessed by the profession in similar localities.³ When he failed to exercise such usual knowledge and skill, he was regarded as having breached his contractual duty to his patient.

At the same time, many courts recognized that an essential element of tort liability, namely negligent conduct, pervaded such cases and consequently allowed declarations which sounded either in tort or contract for the same or similar causes of action.⁴ In some cases the two theories were separated in alternative counts;⁵ in others there was only one count with the allegations sounding interchangeably in negligence or breach of contract.⁶ In some jurisdictions pleading tended to be a technical and tricky matter. Thus in Indiana an action for malpractice which averred that ". . . they undertook as surgeons, for the sum of one hundred dollars paid them by the plaintiff, to attend and care for for him; that they so negligently. . . [etc.]," was held to be an action in contract,⁷ but a complaint which failed to make such an averment was held to be based on tort.⁸ In Minnesota, however, it was held that an action against a physician to recover for negligent and unskillful treatment is based on a breach of con-

3. The authorities are numerous. *Force v. Gregory*, 63 Conn. 167, 27 Atl. 1116 (1893); *Small v. Howard*, 128 Mass. 131 (1880); *Leighton v. Sargent*, 27 N.H. 460 (1853); *McCandless v. McWha*, 22 Pa. 261 (1853); *Wilmot v. Howard*, 39 Vt. 447 (1867).

The same language is used extensively in more recent cases also. *Dorr v. Fike*, 177 Ark. 907, 9 S.W.2d 318 (1928); *Roberts v. Parker*, 121 Cal. App. 264, 8 P.2d 908 (1932); *Kuehnemann v. Boyd*, 193 Wis. 588, 214 N.W. 326 (1927).

For a good discussion of the ramifications of this standard of skill, see Note, 35 MINN. L. REV. 186 (1951).

4. *Carpenter v. Walker*, 170 Ala. 659, 54 So. 60 (1910); *Kuhn v. Brownfield*, 34 W. Va. 252 (1890).

5. *Mallen v. Boynton*, 132 Mass. 443 (1882) (tort, with an alternative count in contract); *Hibbard v. Thompson*, 109 Mass. 286 (1872) (contract, with an alternative count in tort).

6. A good example is *Sherlag v. Kelley*, 200 Mass. 232, 86 N.E. 293 (1908), where the declaration in contract ran as follows:

"And the plaintiff says . . . the defendant held himself out as possessing the knowledge, skill and ability usual among physicians, and that believing the defendant to have such knowledge, skill and ability, he, the plaintiff, employed and paid him . . . to give her the proper and necessary medical care, attention . . . which the defendant promised and agreed to render; . . . but wholly failed and neglected to do so, and so unskillfully, negligently and carelessly attended her. . ."

Id. at 233.

7. *Staley v. Jameson*, 46 Ind. 159 (1874); *accord*, *Burns v. Barenfield*, 84 Ind. 43 (1882).

8. *Reinhardt v. Friederich*, 58 Ind. App. 421, 108 N.E. 258 (1915); *Harrod v. Bisson*, 48 Ind. App. 549, 93 N.E. 1093 (1911).

tract to treat plaintiff with ordinary professional skill and is not an action of tort.⁹

It did not follow, moreover, that the same court which recognized the overlapping nature of the two approaches to liability by allowing flexibility in the matter of declarations would extend this flexibility to substantive matters. Thus in *Harriott v. Plimpton*,¹⁰ where the plaintiff, who was engaged to marry *M*'s daughter, was examined by defendant physician at *M*'s request and was mistakenly reported by the defendant to have venereal disease, the Massachusetts Supreme Judicial Court set aside a verdict for the plaintiff on the ground that there was no privity of contract, even though the plaintiff had brought his action in tort.¹¹

Gradually, however, out of the confusion and contradiction there arose a more reasoned and logical view which harmonized within itself the two overlapping theories. This view held that the consensual relation of physician to patient forms the basis of a duty and it is this duty, when violated by the negligent conduct of the physician, which gives rise to tort liability. In *Carpenter v. Walker*,¹² Mayfield, J., expressed this reasoning in precise fashion:

All the allegations as to a contract are mere matters of inducement and to show the relation between the parties, and to show that there was a breach of a duty, owing by the defendant to the plaintiff, based upon or growing out of the contractual relations between the parties. The gravamen of the action, in each count, is clearly the breach of this duty owing by the defendant to the plaintiff, and not a mere breach of the contract itself. . . .

The action against a physician for malpractice need not be based upon a contract though it may be, and usually is. It is sufficient if based upon his legal obligation. The action for malpractice is essentially in tort, and hence it is immaterial by whom the physician is employed.¹³

9. *Burke v. Maryland*, 149 Minn. 481, 184 N.W. 32 (1921); *Finch v. Bursheim*, 122 Minn. 152, 142 N.W. 143 (1913).

10. 166 Mass. 585, 44 N.E. 992 (1896).

11. Another difference might arise where the physician has contributed his services gratuitously and there is, therefore, no contract of employment. In an action for malpractice based on negligently caused injuries the physician has been held liable even though his services were gratuitous. *McNeveins v. Lowe*, 40 Ill. 209 (1866); see *McCandless v. McWha*, 22 Pa. 261, 269 (1853) (action on the case for malpractice).

12. 170 Ala. 659, 54 So. 60 (1910).

13. *Id.* at 663, 54 So. at 61; accord, *Barnhoff v. Aldridge*, 327 Mo. 767, 38 S.W.2d 1029 (1931).

In more concise form this same view has also been stated: "Theoretically, it seems to be correct to regard the action as one tortious in its nature growing out of the breach of duty incident to a consensual relation."¹⁴

Today, while courts will display considerable differences with regard to the nature and form of an action for malpractice, this view which regards it as essentially tortious has gained much ground and perhaps has become the majority view.¹⁵ To the extent, then, that the tortious explanation of the nature of malpractice has gained in acceptance, the line of demarcation between malpractice and true contractual liability, without the confusion formerly attendant upon imputations of breach of implied contract, has become more clearly defined.

BREACH OF EXPRESS CONTRACT

The number and variety of claims against physicians and surgeons involving the breach of express contracts are by no means insignificant. It seems to be clear law in many jurisdictions that a physician is free to contract as he chooses and will be held to his promise.¹⁶ This has been held to be so even where the physicians believed at the time that the promise could not be fulfilled.¹⁷ Although it is well settled that in the absence of a special contract to that effect a physician will not be held to warrant the success of his treatment,¹⁸ nevertheless, even courts which are reluctant to do so, will, where the promise to cure is clear, not refrain from regarding such a contract as valid.¹⁹

14. 41 AM. JUR. Physicians & Surgeons § 120 (1942).

15. ". . . [A] majority, perhaps, of the cases treat the action as one that is essentially tortious in its nature, but hold that the tort may be waived, allowing a suit in *assumpsit*." *Ibid.* To the same effect, see LOTT & GRAY, LAW IN MEDICAL AND DENTAL PRACTICE 12 (1942).

16. *Vanhooser v. Berghoff*, 90 Mo. 487 (1886); *Conklin v. Draper*, 229 App. Div. 227, 241 N.Y. Supp. 529 (1st Dep't 1930); *Brooks v. Herd*, 144 Wash. 173, 257 Pac. 238 (1927); see *Wilson v. Blair*, 65 Mont. 155, 167, 211 Pac. 289, 293 (1922) (by implication); *Kernodle v. Elder*, 23 Okla. 743, 747, 102 Pac. 138, 139 (1909).

Contracts of the "no cure, no pay" type were held valid in *Lake v. Baccus*, 59 Ga. App. 656, 2 S.E.2d 121 (1939); *Zinze v. Frasca*, 133 N.J.L. 63, 42 A.2d 373 (Sup. Ct. 1945); *Smith v. Hyde*, 19 Vt. 54 (1846).

17. *McQuaid v. Michou*, 85 N.H. 299, 157 Atl. 881 (1932).

18. *Bonnet v. Foote*, 47 Colo. 282, 107 Pac. 252 (1910); *Coombs v. King*, 107 Me. 376, 73 Atl. 468 (1910); *Champion v. Kieth*, 17 Okla. 204, 87 Pac. 845 (1906).

19. In *Marty v. Somers*, 35 Cal. App. 182, 169 Pac. 411 (1917), an allegation of undertaking to cure was held to sound in tort, but an allegation of warranty of successful treatment was held in *Crawford v. Duncan*, 61

With the bringing of an action for breach of express contract, the scope of liability of the physician is greatly broadened. No allegation of negligence or carelessness need be made or proved.²⁰ The burden of the plaintiff becomes immeasurably lighter.²¹ He no longer has the onerous task of providing expert medical testimony as to the negligence of the defendant, the traditional stumbling block in all malpractice suits, unless the suit happens to be one of those somewhat rare occasions when the doctrine of *res ipsa loquitur* applies. Once the allegations are held to be sufficient to support a cause of action for breach of contract, then 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.

From the standpoint of the plaintiff, therefore, the possibility of making out a case resting on a breach of express contract is an enchanting one, and one at the same time fraught with much danger to the physician.²² It requires no great imagination to visualize the many pitfalls which may lie in wait for the unwary practitioner. The dividing line between opinion and representation of fact, *e.g.*, in matters of medical diagnosis, or opinion and promise, *e.g.*, in matters of treatment, is often very thin and deceptive. How easily a variation on the theme of, "Don't worry,

Cal. App. 647, 215 Pac. 573 (1923), to state a cause of action for breach of oral agreement. *Cf.* *Henkel v. Beitsch*, 22 Pa. Dist. 895 (1913).

20. In *Safian v. Aetna Life Ins. Co.*, 260 App. Div. 765, 24 N.Y.S.2d 92 (1st Dep't 1940), the court asserted: "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." *Id.* at 768, 24 N.Y.S.2d at 95.

21. In *Keating v. Perkins*, 250 App. Div. 9, 293 N.Y. Supp. 197 (1st Dep't 1937), the defendant, a dental surgeon, was extracting four teeth from the plaintiff when a gold inlay became detached from one tooth and became lodged in plaintiff's throat. The plaintiff sued, alleging a contract by the dentist "to extract the said teeth and each and every part thereof from within the plaintiff's body." *Id.* at 10, 293 N.Y. Supp. at 198. The breach assigned was the failure to extract the gold filling from his body. On defendant's motion, the trial court dismissed the complaint as stating no cause of action. The appellate court reversed on the ground that the defendant, by failing to deny, must be deemed to admit the allegations and would then be liable on his contract regardless of the degree of care exercised by him. This case is severely criticized in 5 U. OF CHI. L. REV. 156 (1938), on the ground, *inter alia*, that it made for absolute liability and allowed the plaintiff to escape the difficulty of proof of negligence by a strained construction of the contract.

22. It has been decided by the courts in New York that a malpractice insurance policy carried by a physician does not cover him for liability for breach of contract. *Safian v. Aetna Life Ins. Co.*, 260 App. Div. 765, 24 N.Y.S.2d 92 (1st Dep't 1940) (one dissent); see note 20 *supra*.

you'll be all right" uttered by the physician or, by the same token, "I can get blank dollars for you on the basis of those injuries" uttered by a boastful and inane lawyer, can be converted into a promise even by the well intentioned but mistaken claimant—a fortiori by the litigious and fraudulent minded.²³ Indeed, it was an actual case in the practice of a colleague and the stimulating discussions which arose therefrom that provided the inspiration for this article. The facts of the case were simple. The claimant, after unsuccessful treatment of his condition by various physicians, sought the services of the defendant, who had rather a successful record of treatment of the disease. Unthinkingly and ill-advisedly this physician wrote on a prescription blank the words: "Complete cure—\$200." The plaintiff thereafter contended that this was a guaranty or promise of cure, whereas the defendant replied that what he meant by "cure" was "treatment" and that the words simply signified that the complete course of treatment was to cost \$200,²⁴ that in any case a physician never cures but only provides the conditions and environment which enable nature to effect a cure. Fortunately, or unfortunately, as the case may be, the matter was settled out of court and the issues never met with judicial determination.

The elusive dividing line between opinion and representation, of course, is encountered in other branches of the law, particularly in the law of sales,²⁵ but the physician-patient relationship presents unusual facets to the problem. Often an important factor in medical treatment is reassuring the distraught and

23. The facts in *McDonald v. Dr. McKnight, Inc.*, 248 Mass. 43, 142 N.E. 825 (1924), presented an interesting possibility. This was an action in tort for the negligent extraction of a tooth by an unlicensed employee of the defendant. As a result of the extraction plaintiff's jaw became infected and he suffered greatly. On the outside of the defendant's office was a sign saying, "Dr. McKnight, Inc. Nap a minute, painless extraction." Although there was some mention of contractual relations between the parties, the reference was apparently to the customary implied obligation to use proper skill and ability and no specific issue was raised based on the words of the sign.

24. An admiralty libel was brought by a seaman for maintenance, care and cure in *Muise v. Abbott*, 160 F.2d 590 (1st Cir. 1947), and it was there stated that "cure" as there used did not mean a positive cure, which obviously in some cases may be impossible, but care in the sense of necessary medical and nursing attention for a reasonable time. This is the usual admiralty rule.

25. "It is not easy to draw the line accurately between affirmation of fact on the one hand and statements of opinion on the other." 1 WILLISTON, SALES § 202 (rev. ed. 1948).

fearful patient. The winning and maintaining of a patient's confidence is frequently an instrument of vital therapeutic value. Physicians are therefore wont to use encouraging expressions to implant hope and to ease anxiety. A policy by the courts of strict accountability for such utterances could result in placing a truly onerous burden on the conscientious and busy practitioner, thereby adversely affecting the expeditious treatment of many patients. Public policy would not be served by such a course.

The contrary view is rather forcefully expressed by Allen, J., in *McQuaid v. Michou*,²⁶ in the following words:

Argument is advanced that contracts to cure are against public policy. The reason suggested is that their enforcement tends to dissuade a doctor from encouraging his patients and giving them hope as an important aid to their improvement or recovery, in the fear that his words will be taken as a promise. The line between a promise and an opinion is not so narrow and shadowy that language may not be well chosen to express one in clear distinction from the other, and it is a simple matter for a doctor to make it definite that he guarantees no good results. Moreover, if the promise were held illegal, a patient ignorant of its illegality would be misled in placing reliance on it, while if he were aware of its lack of binding force, his knowledge would tend to prevent confidence in it and the gain of freedom of statement would be lost in its known irresponsibility.²⁷

It is submitted that this reasoning by the New Hampshire court is subject to several criticisms. It is highly doubtful that many patients think in terms of legality or illegality with reference to statements made by a physician at the time, or that knowledge or ignorance of the binding force of such statements plays much part in the confidence which the patient reposes in the physician. Even were it to be known that such statements were not binding, it is asserted that the majority of patients would still place reliance on and confidence in them in direct proportion to the positiveness with which the physician assures them that he can and will help.

But it is to the more important issue of public policy rejected by the New Hampshire court that the writer of this article wishes to turn his attention. The practical effect of the court's

26. 85 N. H. 299, 157 Atl. 881 (1932).

27. *Id.* at 302, 157 Atl. at 883.

reasoning is to treat a contract between physician and patient for medical services in the same light as any other commercial contract. If the law is to deal with a contract of this type as it would any mercantile contract and to treat the parties as though dealing at arm's length with each other, should not the physician have the corresponding rights as well as liabilities? Thus, if the physician is to be held free to contract and to be liable on his promise, no matter how foolish or ill-advised, should he not then be free to provide for his own protection in advance by the simple expedient, let us say, of having the patient sign a printed form, in consideration of his agreement to treat him, absolving the physician of any and all liability whether based on negligence or purported representation? We are not here dealing with any question of the physician's taking any undue advantage of the patient. Of course it is clear that in other respects the relationship between the two is a confidential one, as is the relationship between attorney and client, and that a court of equity will carefully scrutinize any contractual advantage obtained by a physician from a patient.²⁸ We are here talking of a contractual arrangement to be entered into prior to the establishment of the relationship. Would the courts uphold such a contract absolving the physician of liability or would they strike it down as being against public policy?²⁹

In the case of *Hales v. Raines*,³⁰ which may be unique in that respect, this question was actually raised and discussed. In that case the defendant, a physician and surgeon, was sued for malpractice as a result of burns received through X-ray treatment. The defense introduced was that

“. . . before applying said rays to plaintiff's hand, defendant informed plaintiff that the treatment of eczema by the use of Roentgen or X-rays was a new and imperfectly understood mode of treatment; . . . that there was always peril to the patient under said treatment, which peril it was impos-

28. 5 WILLISTON, CONTRACTS § 1625A (rev. ed. 1937).

29. While at first blush there may seem to be an analogy, the rationale behind the majority rule that consent to an illegal operation for abortion thereafter bars recovery in a civil action for damages is quite different. The woman who consents to an illegal abortion is considered a *particeps criminis* and the courts will not lend her their assistance in recovering damages. The reasoning is clearly not based on any affirmation of the terms of the contract. See *Miller v. Bennett*, 190 Va. 162, 56 S.E.2d 217 (1949).

30. 162 Mo. App. 46, 141 S.W. 917 (1911).

sible for a physician to anticipate; that plaintiff told defendant if he (defendant) would treat him with the said rays he would assume all known and unknown risks incident to the use of said Roentgen or X-ray, whereupon defendant applied such treatment."³¹

To this defense the St. Louis Court of Appeals replied:

Assuming, then, that the matter of assumed risk was properly an issue in the case, *it may be said that we believe the full measure of the agreement touching that matter should be regarded forbidden by the precepts of public policy alone.*

*We deem it to be contrary to the precepts of public policy to declare such agreement valid in the full measure of its scope, and entail upon plaintiff, as within it, the consequences of defendant's negligence in exposing his hand nine separate times within one-half inch of the tube; for consent concerning such matters avails nothing, unless due care and skill is employed by the physician.*³²

There is authority, then, as well as reason for declaring that the relationship of physician to patient is one to which the caveat emptor type of philosophy is alien. The physician will not be allowed to absolve himself from responsibility, for his profession is too far charged with matters of public interest and weal. Surely there is as high a degree of public policy involved here as there is, for example, in a statute which renders null and void, on the declared grounds of its being against public policy, a clause in a lease designed to exculpate or hold the lessor or landlord harmless from liability.³³

There are, it is true, situations where considerations of public policy operate to protect only one of the parties to a relationship. These situations generally arise where developments in the economic and social life of the community have made one party

31. *Id.* at 63, 64, 141 S.W. at 922.

32. *Id.* at 64-66, 141 S.W. at 922, 923. (Italics added.)

33. MASS. ANN. LAWS c. 186 § 15 (Supp. 1952), provides:

Any provision of a lease or other rental agreement relating to real property whereby a lessee or tenant enters into a covenant, agreement or contract, by the use of any words whatsoever, the effect of which is to indemnify the lessor or landlord or hold the lessor or landlord harmless, or preclude or exonerate the lessor or landlord from any or all liability to the lessee or tenant, or to any other person, for any injury, loss, damage or liability arising from any omission, fault, negligence or other misconduct of the lessor or landlord on or about the leased or rented premises or on or about any elevators, stairways, hallways or other appurtenance used in connection therewith, and not within the exclusive control of the lessee or tenant, shall be deemed to be against public policy and void.

better able to shoulder the burden of liability (for example, as between employer and employee) or to add it to his costs and transfer it to the consumer.³⁴ However, it is submitted that such considerations are not present with respect to the physician and patient relationship, and the cases are clearly dissimilar.

There are compelling arguments, then, as outlined in the foregoing, that a strong public policy permeates all aspects of any contractual arrangement between physician and patients and operates to lift it out of the field of discourse of ordinary commercial contracts. It operates to prevent the physician from escaping his responsibilities to the society he serves, and should operate, it is here contended, to protect the physician in the pursuit of his healing art against strict liability for the consequences of unguarded utterances and from the fertile imaginations of the fraudulent minded.

The question arises, consequently, as to how this protection can best be afforded. One possibility that might be suggested is that the courts, or the legislatures more appropriately, strike down as null and void on the grounds of public policy *all* actions of contract based on promises or warranties of cure made by physicians. It may be questioned, however, whether this method would best serve the interests of the public or the medical profession in that, while it would indeed protect the honest and sincere practitioner, it would at the same time provide a haven of refuge for the charlatan and the quack and enable them to mulct the public more efficiently.³⁵ Possibly a better method, although one not so clear cut in application, would be for the courts to exercise much more circumspection in allowing such cases to go to the jury. Claims based on promises ambiguous in nature and susceptible of any reasonable interpretation in favor of the defendant should, on motion of counsel, be dismissed. Courts have often reserved to themselves the determination of issues of fact under the guise of calling them questions of law where there

34. "The theory underlying the workmen's compensation acts never has been stated better than in Lloyd George's campaign slogan, 'The cost of the product should bear the blood of the workman.'" PROSSER, TORTS 519 (1941).

35. In *Safian v. Aetna Life Ins. Co.*, 260 App. Div. 765, 768, 24 N.Y.S.2d 92, 95 (1st Dep't 1940), Dore, J., argues that to extend malpractice insurance coverage to cases of express contract would serve only to protect medical charlatans.

... seems to have been a distrust of the jury's ability to answer questions of fact that call for nice discrimination and an educated mind. The interpretation of written documents has largely been withdrawn from the jury in this way. The general rule is that interpretation of a writing is for the court.³⁶

The same reasoning, it is suggested, might be applied to oral contracts of physicians as well. A dictum of the court in *Hawkins v. McGee*,³⁷ states:

It may be conceded, as the defendant contends, that before the question of the making of a contract should be submitted to a jury, there is a preliminary question of law for the trial court to pass upon, *i.e.* whether the words could possibly have the meaning imputed to them by the party who founds his case upon a certain interpretation.³⁸

While this dictum reveals a mild orientation in the correct direction, the argument is submitted that the courts might well strike out more boldly in that direction, openly declare actions of contract based on promises alleged to be made by physicians generally to be against public policy and refuse to allow them to go to the jury unless wholly clear and unambiguous.

THE MEASURE OF DAMAGES

Another difficult aspect of the law with respect to the contractual liability of physicians and surgeons involves the proper limitation of damages. The measure of damages for breach of contract is generally expressed as one intended to put the plain-

36. 3 WILLISTON, CONTRACTS § 616 (rev. ed. 1936). In 5 U. OF CHI. L. REV. 156, 157 (1933), criticism of *Keating v. Perkins*, 250 App. Div. 9, 293 N.Y. Supp. 197 (1st Dep't 1937), was levelled on the ground that even though the court be correct in assuming that the contract alleged was admitted by the answer, nevertheless,

... admission of a contract by failure to deny it submits the construction of the contract to the court. The rule is well established that in construing a contract greater regard should be had for the intent of the parties than for particular words used in its expression.

The argument of the writer of the Note is persuasive in view of the highly unrealistic phraseology of the allegations in the *Keating* case, viz.: "To extract the said teeth and each and every part thereof from within the plaintiff's body." *Id.* at 10, 293 N.Y. Supp. at 198.

37. 84 N.H. 114, 146 Atl. 641 (1929).

38. *Id.* at 116, 146 Atl. at 643. The court correctly speaks of the meaning to be imputed to the words of the parties and does not confuse this problem with the question of the "intent to contract," as did the defendant. The defendant argued that no reasonable man would understand that the words were used with the intention of entering into any contractual relation whatever. However, "intent to contract" is an irrelevant factor in the law of contracts. 1 WILLISTON, CONTRACTS § 21 (rev. ed. 1936).

tiff in as good a position as he would have been in had the defendant kept his contract,³⁹ including also compensation for any consequences which were reasonably foreseeable and within the contemplation of the parties at the time the contract was entered into.⁴⁰ Traditionally, under this rule, physical pain⁴¹ and mental suffering⁴² are not proper elements of damage. Normally, only in tort actions or, more pointedly, actions for malpractice, are pain and suffering or mental anguish allowed as elements of damage.⁴³ Moreover, a tort rule of damages allows compensation also for impaired earning capacity,⁴⁴ loss of time,⁴⁵ and consequential damages.⁴⁶

It would seem that a strict adherence to a contract measure of damages could in many cases lead to anomalous and unsatisfactory remedies. These are cases where, although the liability rests on breach of contract, the essential harm done is manifested in injury and mental suffering. It is suggested that the rationale behind the contractual measure of damages is based on commercial and mercantile considerations involving factors of anticipated profit or loss. 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

39. 5 WILLISTON, CONTRACTS § 1338 (rev. ed. 1937).

40. RESTATEMENT CONTRACTS § 330 (1932); 1 SEDGWICK, DAMAGES § 141 (9th ed. 1912). This, in essence, is the rule of the famous case of *Hadley v. Baxendale*, 9 Ex. 341 (1854).

41. *Conklin v. Draper*, 229 App. Div. 227, 241 N.Y. Supp. 529 (1st Dep't 1930), *aff'd without opinion*, 254 N.Y. 620, 173 N.E. 892 (1930); *Monahan v. Devinny*, 223 App. Div. 547, 229 N.Y. Supp. 60 (3d Dep't 1928); *Frankel v. Wolper*, 181 App. Div. 485, 169 N.Y. Supp. 15 (2d Dep't 1918); *Frechette v. Ravn*, 145 Wis. 589, 130 N.W. 453 (1911).

42. 5 WILLISTON, CONTRACTS § 1340A (rev. ed. 1937). RESTATEMENT, 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.

43. *Harrod v. Bisson*, 48 Ind. App. 549, 93 N.E. 1093 (1911); *Coombs v. King*, 107 Me. 376, 78 Atl. 468 (1910); see also note 40 *supra*.

44. *Dorr v. Fike*, 177 Ark. 907, 9 S.W.2d 318 (1928).

45. *Ibid.*

46. *Reeves v. Lutz*, 179 Mo. App. 61, 162 S.W. 280 (1913) (recovery allowed for loss of wife's services). A later appeal in *Reeves v. Lutz*, 191 Mo. App. 550, 177 S.W. 764 (1915), did not discuss this point.

so-called "benefit-of-bargain" rule. However, this rationale can hardly be said to apply to the aforementioned type of cases.

A few jurisdictions have indeed invoked what amounts to a tort rule of damages in cases where the action was unquestionably based on breach of contract. These cases involved failure of the defendant to perform his contract, resulting in needless pain and suffering to the plaintiff. Thus, in *Coffey v. Northwestern Hosp. Assoc.*,⁴⁷ where there was a breach of contract by defendant to provide hospital services, the court reasoned that the physical pain and mental anguish suffered might fairly be said to have been within the contemplation of the parties when the contract was made. In *Galveston, H. and S.A. Ry. Co. v. Rubio*,⁴⁸ the appellant having breached its agreement to provide medical care and attention, the court held that damages for both mental and physical suffering were recoverable even though the damages sought were for breach of contract since the very subject matter of the contract was the health of the employee.⁴⁹

Even a court which had expressly approved the contract rule of damages, including the proposition of suffering not being an element of damages,⁵⁰ nevertheless in an action for breach of contract to cure plaintiff of a disease very ingeniously provided for such damages, declaring:

Her condition due to the treatment would reflect and show such suffering, as practically a part of it, and enhance the difference between it and a condition of cure. While the excess of suffering would be in evidence, it would be received only to show her condition. And such suffering as an incident of her condition and widening the difference between her condition and cure, would receive allowance by reason of its inclusion in such difference.⁵¹

47. 96 Ore. 100, 183 Pac. 762 (1919), *rehearing denied*, 96 Ore. 113, 189 Pac. 407 (1920).

48. 65 S.W. 1126 (Tex. 1901).

49. In *Hood v. Moffett*, 109 Miss. 757, 69 So. 664 (1915), a physician who failed to attend a woman during her confinement despite the fact that his services had been contracted for was held liable for the pain and suffering resulting therefrom. The court, without discussion, accepted that there was liability for the physical pain and argued that when physical pain is an element of damage mental anguish accompanying it is also an element thereof.

50. *McQuaid v. Michou*, 85 N.H. 299, 303, 157 Atl. 881, 883 (1932) (citing with approval the rule in *Hawkins v. McGee*, 84 N.H. 114, 146 Atl. 641 (1929)).

51. *McQuaid v. Michou*, 85 N.H. 299, 304, 157 Atl. 881, 884 (1932).

Damages for suffering were thus, at least in some degree, brought within the terms of the contract measure of damages.

From the foregoing cases it may be seen that some courts will not, where the fact situation is inappropriate, slavishly follow a contract rule of damages even where the action is based on an express contract. It remains to be asked whether a contract rule of damages would not then be appropriate in a case where the issue of pain and suffering is not an essential factor. Such a fact situation might be similar to that presented by *Hawkins v. McGee*,⁵² where the defendant allegedly promised, "I will guarantee to make the hand a hundred per cent perfect hand."⁵³ There the measure of damages was, in keeping with the contract rule, held to be the difference between the value of a perfect or good hand as promised and the value of the hand in its present condition, including any incidental consequences fairly within the contemplation of the parties when they made their contract.⁵⁴ Upon analysis, however, even in this fact situation the contract rule of damages appears to be not wholly appropriate. Clearly the harm done here by the breach resolves itself into: (a) money and time wasted in medical expenditures and treatments; (b) mental anguish and disappointment attendant upon the lack of cure. The remedy offered, it may be seen, is designed to give the plaintiff "benefit-of-bargain" damages as though the contract involved an item of commerce or trade. Such a measure of damages would seem to square neither with the psychological nor the economic basis of the plaintiff's complaint of harm done and would mete out an inordinately severe penalty to the physician. One might well speculate as to what would be the award of damages under a similar rule where a physician promised to cure his patient of a disease which later turned out to be incurable cancer. Ostensibly the jury would be charged that the measure of damages would be the difference between a healthy patient as promised and one in the plaintiff's present pathetic condition. It must be borne in mind that even the highest degree of skill and care displayed by the defendant in his treatment of the plaintiff would have no bearing on the ultimate result as long as he failed to fulfill his promise, nor even, as mentioned previously, would

52. 84 N.H. 114, 146 Atl. 641 (1929).

53. *Id.* at 115, 146 Atl. at 643.

54. *Id.* at 118, 146 Atl. at 644.

the fact that defendant believed at the time that the condition was incurable.⁵⁵

Somewhat similar difficulties have arisen with respect to the proper measure of damages to be applied in an action of deceit.⁵⁶ A minority of courts, including the federal courts, follow the "out-of-pocket" rule allowing the plaintiff to receive the difference between the value of what he has parted with and the value of what he has received. The majority follow the "loss-of-bargain" rule. As Dean Prosser declares, "Few courts have followed

55. See note 17 *supra*. Other defenses which the physician might raise in an effort to avoid liability are: (a) that the contract was void from the outset due to impossibility of performance, and (b) that the contract was voidable due to mistake. On neither ground, however, does it appear that he could escape liability. With reference to argument (a), even if it were to appear that the impossibility is an objective one and not one due to the limitations of the individual, which would be a questionable conclusion in view of the fact that scientists are seeking a cure for cancer and may one day soon find it, still there is authority which states:

There is . . . no more difficulty in finding a binding contract to perform something in fact impossible from the outset, if the facts or their import are unknown to the parties, than there is in making a contract in which a promisor takes the risk of supervening impossibility.

6 WILLISTON, CONTRACTS § 1933 (rev. ed. 1938). RESTATEMENT, CONTRACTS § 456, comment *c* (1932), states:

Parties may bind themselves by contract to perform what is in fact impossible. . . It is only where the promisor has no reason to know of the facts to which the impossibility is due, and where he does not agree to bear the risk of their existence that the formation of a contract is prevented.

Neither one of these exculpatory factors would seem to apply to the hypothetical case of the cancer patient. First, the physician had the opportunity to examine the patient and, therefore, cannot be said to have had no reason to know of the facts to which impossibility is due. Secondly, when a physician undertakes to effect a cure, he, of necessity, undertakes to bear the risk of possible complications, for there is ever present the element of uncertainty in these matters.

In *Reid v. Alaska Packing Co.*, 43 Ore. 429, 73 Pac. 337 (1903), a promisor was held liable on his contract to sell salmon packed in Alaska "exactly like Puget Sound fancy Sockeye" even though, as far as was known, fish of that sort were not found in Alaska. The court indicated that Alaska still was partly unexplored and the promisor could conceivably import the fish to be packed in Alaska. See also *Beacon Tool & Machine Co. v. National Products Mfg. Co.*, 252 Mass. 88, 147 N.E. 572 (1925), where a promisor was held liable on its contract to make a certain machine to perform certain functions even though the difficulties in the way of the performance of the contract were insuperable.

The hypothetical case might be said to come more appropriately under the heading of mistake. With reference, then, to argument (b) the law seems to be well settled that the physician could not avoid liability since the mistake clearly would be unilateral, and the mistake of only one party to a contract does not of itself render the transaction voidable. RESTATEMENT, CONTRACTS § 503 (1932).

56. For an excellent discussion of this problem see PROSSER, TORTS § 90 (1941).

either rule with entire consistency, and various proposals have been made to introduce some flexibility into the measure of damages.⁵⁷ The case of *Selman v. Shirley*,⁵⁸ is cited by him with approval as being a well considered decision likely to be followed in other jurisdictions. This decision makes provision for a flexible rule of damages depending upon the circumstances, including, alternatively, restitution, "out-of-pocket" losses to be awarded "where the circumstances disclosed by the proof are so vague as to cast virtually no light upon the value of the property had it conformed to the representations,"⁵⁹ and "loss-of-bargain" damages.

On the basis of similar reasoning adapted to situations like that of the *Hawkins* case, one might well argue that the "out-of-pocket" measure of damages is the most appropriate remedy available. Admittedly this would leave the plaintiff uncompensated for mental anguish and disappointment, but this would generally be true of almost all contract actions and true even of tort actions where there is no physical injury. Apparently this is the actual result of the New York decisions which hold that in malpractice actions damages are recoverable for personal injuries including pain and suffering, whereas in contract actions damages are restricted to the payments made and to the expenditures for nurses and medicines or other damages that flow naturally from the failure to perform.⁶⁰

The burden of all the foregoing, then, suggests that there be not the one contract rule of damages in cases dealing with the liability of physicians and surgeons to provide medical treatment as promised, but a flexible rule. This rule would best adjust the conflicting interests of all parties, not excluding that of the general public, by providing: (a) a tort measure of damages for fact situations where the essential harm lies in needless actual physical injury, pain and suffering, and (b) an "out-of-pocket" measure of damages providing compensation for expenses and loss of time where there is a failure to perform but no physical harm.⁶¹

57. *Ibid.*

58. 161 Ore. 582, 85 P.2d 384 (1938), *aff'd* 91 P.2d 312 (Ore. 1939).

59. *Id.* at 609, 85 P.2d at 394.

60. *Colvin v. Smith*, 276 App. Div. 9, 92 N.Y.S.2d 794 (3d Dep't 1949); see note 41 *supra*; 2 CARMODY, NEW YORK PRACTICE 704 (perm. ed. 1930).

61. To provide a deterrent to quacks and charlatans a rule awarding

THE STATUTE OF LIMITATIONS

Another legal distinction of basic importance between actions for breach of contract and actions for malpractice lies in the different periods of limitation prescribed by statute. Generally the various jurisdictions provide a six year statute of limitations for contracts, whether oral or written, and a two year period for bodily injuries,⁶² including injuries due to malpractice. Some statutes like that of Missouri⁶³ provide that "all actions . . . for damages for malpractice, error, or mistake shall be brought within two years from the date of the act of neglect complained of"; others like that of Massachusetts⁶⁴ specify that "actions of *contract or tort* for malpractice . . . shall be commenced only within two years next after the cause of action accrues."⁶⁵ Even where the applicable statute fails specifically to mention actions of contract, it is nevertheless often stated that the majority rule is that the limitation period prescribed for actions against physicians, surgeons and dentists for malpractice or negligence causing personal injuries applies to an action for any such causes notwithstanding the fact that the complaint therein is in form an action on contract.⁶⁶

Again a caveat must be inserted at this point, for confusion has crept into the law by reason of the fact that actions for negligent treatment may, at the plaintiff's option, frequently be brought either *ex contractu* or *ex delicto*, as discussed earlier in this article. It may, therefore, be erroneous to conclude that a given jurisdiction which follows the majority rule will do so, not only for actions based on breach of implied contract, but also for actions based on breach of express contract. Thus in *Marty v. Somers*,⁶⁷ an allegation of undertaking to cure was held to sound in tort and the limitation for malpractice actions was applied, while in *Crawford v. Duncan*,⁶⁸ an allegation of warranty of suc-

punitive damages for mental anguish and suffering in cases of deliberate misrepresentation might also be adopted along the lines suggested in RESTATEMENT, CONTRACTS § 341 (1932). See note 42 *supra*.

62. See Littel, *A Comparison of the Statutes of Limitation*, 21 IND. L.J. 23 (1945), for tables showing the arithmetic means in years for various actions.

63. MO. REV. STAT. § 516.140 (1949).

64. MASS. GEN. LAWS c. 260 § 4 (1932).

65. (Italics added.)

66. See Note, 74 A.L.R. 1256 (1931).

67. 35 Cal. App. 182, 169 Pac. 411 (1917).

68. 61 Cal. App. 647, 215 Pac. 573 (1923).

cessful treatment was held to indicate an action for breach of oral agreement rendering the statute of limitations for malpractice not applicable. In *Conklin v. Draper*,⁶⁹ the first count of a complaint was held to be based on malpractice and to be barred by the two year statute of limitations but the second count was held to be purely contractual and not barred even after the passage of four years.

Cases have frequently arisen where the negligence of the physician or surgeon was not uncovered until after the tort or malpractice period of limitations had tolled. In those numerous jurisdictions where it is held that the statute begins to run from the time of the perpetration of the act rather than from the time of the discovery thereof,⁷⁰ recovery is barred and great hardship is occasioned the plaintiff.⁷¹ As a result there have been attempts by some courts to liberalize the harshness of this rule by finding in a proper case negligent failure by the physician to uncover the injury during subsequent treatment, or fraudulent concealment thereof, or a violation of the confidential relation of physician-patient.⁷² It has been suggested that some courts may also be circumventing the harshness of this rule by applying the longer contract period of limitations when the period for malpractice actions would otherwise be indicated.⁷³ If this be at all true, then it is a highly questionable method of procedure.

In a case of contractual breach where there is no element of physical injury and attendant claim for pain and suffering and therefore no close kinship to a true malpractice action, it may well be asked whether the contract period of limitations is not the only correct rule to apply. Query in such a case whether even a statute such as that of Massachusetts which specifically mentions "actions of contract or tort" would be held to require the

69. 229 App. Div. 227, 241 N.Y. Supp. 529 (1st Dep't 1930), *aff'd without opinion*, 254 N.Y. 620, 173 N.E. 892 (1930).

70. *Capucci v. Barone*, 266 Mass. 578, 165 N.E. 653 (1929); see Note, 74 A.L.R. 1318 (1931) (stating the general rule to be that the period begins to run from the date of the wrongful act and not the date of discovery thereof).

71. For a discussion of this problem, see Note, 38 ILL. L. REV. 323 (1944); 9 MO. L. REV. 102 (1944).

72. See Note, 63 HARV. L. REV. 1177, 1222 (1950); see note 71 *supra*.

73. Note, 16 ST. JOHN'S L. REV. 101, 104 (1941), which looks upon the holding with reference to the second count in *Conklin v. Draper*, 229 App. Div. 227, 241 N.Y. Supp. 529 (1st Dep't 1930), as such an attempt.

application of the shorter period in view of the fact that such actions are described as actions for "malpractice."⁷⁴

Nevertheless, it should be borne in mind that two possible arguments may be adduced to bring even such cases within the purview of the period prescribed for malpractice actions. The first is the strong tendency of the legislatures as illustrated by the numerous malpractice statutes to cut down the extent of liability of physicians and surgeons, whose purpose must be expected to carry much weight with the courts, and the second is that contracts to heal and cure do not truly belong to the family of mercantile agreements which are the *raison d'être* of the longer period of limitations.

THE ELECTION OF REMEDIES AND RES JUDICATA

Pertinent to the distinction between liability for malpractice and liability for breach of contract is a discussion of the doctrines of the election of remedies and of *res judicata*.⁷⁵ These doctrines are normally brought into play where the plaintiff first seeks to recover against the physician in an action of tort or, less likely, of contract, and this having proved unsatisfactory for a variety of possible reasons, thereafter seeks to recover in a second action based on contract. There is a split of authority whether the second action may be barred. Courts which have barred the second action have done so on the grounds of either one of the above doctrines. Much confusion has existed, however, with respect to a clear understanding and proper application of these terms, yet they are clearly distinct.⁷⁶

In *Stokes v. Wright*,⁷⁷ where judgment had been rendered against the plaintiff in an action of tort for injuries sustained due to a negligent operation, the court barred a subsequent action for breach of contract based on the operation, declaring:

74. In *Forman v. Wolfson*, 327 Mass. 341, 98 N.E.2d 615 (1951), *cert. denied*, 342 U.S. 888 (1951), plaintiff brought an action in tort by writ dated March 15, 1944, alleging injury due to negligence in a facial operation performed apparently a little after March, 1942. There was a verdict for defendant. In Dec., 1945, plaintiff brought an action for breach of warranty in connection with the same operation. Held, the second action was barred by virtue of *res judicata*. The possibility that the second action might have been barred by the short statute of limitations for malpractice was not raised or considered.

75. For one use of the term "*res judicata*" see *RESTATEMENT, JUDGMENTS*, Introductory Note 157 *et seq.* (1942).

76. *RESTATEMENT, CONTRACTS* § 381, comment *f* (1932).

77. 20 Ga. App. 325, 93 S.E. 27 (1917).

In the view which we have taken of the question, it is not so much a matter of *res adjudicata*, but an election of remedy When he elected to sue in tort and actually commenced his action for the tort, and prosecuted it to an adverse decision, his right to sue on the contract was lost.⁷⁸

The analysis by the court in this case appears to be defective. Where an action has gone to judgment it becomes erroneous to speak of the election of remedies. The precise difference between the two doctrines lies in that very fact, namely that one pertains to legal consequences before judgment and the other to legal consequences after judgment.⁷⁹ The *Stokes* case, then, properly involved a question of *res judicata* and not the election of remedies. As a practical matter, the frequency with which the doctrine of election may properly be applied to cases of the type with which we are here concerned is probably severely limited, for the authorities seem to agree that where a plaintiff has merely elected a remedy, but not pursued it to judgment, then the alternative remedy should not be barred to him, unless followed by a material change of position by the other party in reliance thereon, provided also that the plaintiff shows reasonable grounds for making the change of remedy.⁸⁰ As stated by Professor Corbin,

[t]his makes the conclusiveness of an "election" depend upon the existence of facts sufficient to create an "estoppel" The mere bringing of a suit asking one remedy rather than another practically never affords ground for an estoppel and is not sufficient reason to deny an application for an alternative remedy.⁸¹

It would seem clear from the foregoing that almost all the cases of the type dealt with in this article properly come within the scope of the doctrine of *res judicata*, *i.e.*, cases where the first cause of action went to final judgment. Where judgment was rendered in favor of the plaintiff, it is said by the authoritative writers in the field that his cause of action is "merged" in the judgment and the judgment is substituted therefore;⁸² where

78. *Id.* at 327, 93 S.E. at 28.

79. RESTATEMENT, JUDGMENTS § 64, comment *a* (1942); 5 CORBIN, CONTRACTS § 1217 (1951) (maintaining it to be "gross error" to hold the second action barred by an "election" in such cases).

80. RESTATEMENT, CONTRACTS § 381 (1932).

81. 5 CORBIN, CONTRACTS § 1220 (1951).

82. RESTATEMENT, CONTRACTS § 381, comment *f*, § 444 (1932); RESTATEMENT, JUDGMENTS § 47, § 64, comment *a*, Introductory Note 157 *et seq.* (1942).

judgment favored the defendant, it is said that the issues to the extent that they were or ought to have been finally determined have been "discharged by adjudication" and further litigation thereon is barred.⁸³

Decisions wherein the defense of *res judicata* has been raised and decided appear to be hopelessly irreconcilable. The New York cases hold that a cause of action for malpractice which has been previously dismissed with judgment awarded to defendant is no bar to a present action on a contract. It is stated that the two causes of action are not the same; they are dissimilar as to theory, proof, and damages recoverable.⁸⁴ The Massachusetts Supreme Judicial Court, on the other hand, has stated upon similar facts that the second cause of action is barred, declaring: "there is present every element essential for invoking the doctrine of *res judicata*—identity of cause of action and issues, the same parties, and judgment on the merits by a court of competent jurisdiction."⁸⁵

The New Hampshire Supreme Court in *McQuaid v. Michou*,⁸⁶ reached the same conclusion as the New York court, spelling out its reasoning in a little more detail. The court argued that the doctrine of *res judicata* was not applicable since the issue of liability for malpractice in the prior case involved negligence and was different from the issue to effect a cure. The failure to prove liability for malpractice did not disprove the promise to cure nor was the promise to cure any more than a collateral matter in the prior case.⁸⁷

Perhaps the last word has not been said on the matter, however, and the courts may really not be so irreconcilable as they now appear. It must be remembered that the New York court, despite its language upholding the dissimilarity of the two actions, has, in connection with the problem of applying the proper statute of limitations, decided more than once that an action may in reality be one for malpractice despite its superficial guise

83. RESTATEMENT, CONTRACTS § 449 (1932), RESTATEMENT, JUDGMENTS § 48 (1942).

84. *Colin v. Smith*, 276 App. Div. 9, 92 N.Y.S.2d 794 (3d Dep't 1949).

85. *Forman v. Wolfson*, 327 Mass. 341, 343, 98 N.E.2d 615, 616 (1951), *cert. denied*, 342 U.S. 888 (1951); see note 74 *supra*.

86. 85 N.H. 299, 157 Atl. 881 (1932).

87. *Id.* at 300, 157 Atl. at 882.

as an action on the contract.⁸⁸ So too, perhaps, in a case where the allegations indicate the making of an actual contract, rather than repeat the usual formalized language designed to meet the requirements of an action on the contract, the Massachusetts court may unbend from its present unyielding attitude.

On the basis of the decisions as they now stand, however, it would appear that the arguments of the New York and the New Hampshire courts are more compelling in their logic and that judgment for the defendant in a prior action for malpractice based on negligent conduct should not be a bar to a subsequent action by the plaintiff based on the breach of an express contract.

CONCLUSION

It is well settled that a physician or surgeon may be liable for breach of express contract. With the statement of that legal proposition, however, no inkling is given of the ramifications of a difficult problem. Analysis shows that contracts made by physicians and surgeons to provide a cure or to provide specific medical treatment differ sharply from ordinary commercial contracts in two broad respects: (a) they are impressed with a strong public policy, and (b) their fact situations are utterly lacking in the profit motive encountered in commercial transactions.

Distinction (a) finds its main implications in the area of the imposition of liability. In an action on the contract for failure to perform as promised, the plaintiff has a much simpler task of proof than in an action for malpractice. The invitation is there to construe unguarded utterances of the attending physician as allegations of promise. The dangers inherent to the physician, whose malpractice insurance would then afford no protection, are pointed out, and the argument is made that public policy not only requires the protection of the public in its dealings with medical practitioners but also requires the protection of the practitioner in the pursuit of his highly essential profession. This protection, it is suggested, can best be afforded not by legislatures making all contracts to cure void on the ground of public policy, as this would enable quacks and charlatans to operate in safety, but by the courts declaring unequivocally that

88. *Horowitz v. Bogart*, 218 App. Div. 158, 217 N.Y. Supp. 881 (1st Dep't 1926); *Frankel v. Wolper*, 181 App. Div. 485, 169 N.Y. Supp. 15 (2d Dep't 1918), *aff'd without opinion*, 228 N.Y. 582, 127 N.E. 913 (1920).

such contracts are not ordinary commercial contracts, but are charged with a public policy, and thereafter arrogating to themselves as preliminary questions of law the interpretation of the words of the alleged contract, as they now do for written instruments. If the words used can, upon any reasonable interpretation, be those of opinion rather than promise, then the case should not be allowed to go to the jury.

Distinction (b) finds its main implications in the field of the proper measure of damages to be applied. The fact situation in these cases can generally be resolved into two categories: (1) where physical injury, pain and suffering resulted from the physician's failing to fulfill his contract, and (2) where no such injury resulted but the plaintiff did undergo medical expenditures, possible loss of time and earnings, and grievous disappointment at the lack of cure or successful treatment. In neither category does a contract measure of damages based on a "benefit-of-bargain" rule, and designed to put the promisee in as good a position as he would have been in had the promisor kept his contract, offer a satisfactory remedy. With reference to category (1), such a contract measure of damages would generally deny plaintiff recovery for injury, pain and suffering, and with reference to category (2), it would tend to award the plaintiff far more than he ever anticipated and to penalize the physician severely. It is therefore suggested that a flexible measure of damages be adopted, similar to the one developing in the law of deceit, awarding the plaintiff what is substantially a tort measure of damages for situations in category (1) and "out-of-pocket" losses, but not damages for grievous disappointment and distress, for situations in category (2). It is noted that such "out-of-pocket" losses are substantially what is being awarded by the New York courts in cases of breach of contract against physicians.

Further ramifications of the problem are found in deciding the correct statute of limitations to be applied to breaches of express contract. The issue is bedeviled by confusion as to what is connoted by the term "action of contract." The history of malpractice actions shows the theories of tort and breach of implied contract to be inextricably bound up together. The majority of courts allow actions to be brought interchangeably *ex contractu* or *ex delicto* for causes of negligent conduct by a physician. The

gravamen or gist of such actions, it became recognized, lay in tortious misconduct. Nevertheless, the courts continued to recognize the designation of such actions as actions of contract, if the plaintiff so chose to bring them. For such "actions of contract" the various jurisdictions usually apply the short statute of limitations indicated for malpractice or bodily injuries, rather than the longer statute of limitations for contracts. In some cases they follow the general rule to that effect; in other cases the applicable statute expressly mentions actions of contract for malpractice. When, however, the cause of action is based on breach of express contract, the issue becomes clouded over. A few jurisdictions have distinguished between the two situations and have invoked the longer period of limitations for contracts based on express promises. It remains to be seen whether the other jurisdictions will follow without critical analysis generalized statements about "actions of contract."

Finally, there is the problem as to whether a judgment for the defendant in an action for malpractice bars a subsequent action on an express contract. Here the doctrine of *res judicata* comes into play, not that of the election of remedies as is sometimes improperly stated. Again confusion arises due to the failure to distinguish properly between actions based on implied contract and actions based on express contract. Although the cases appear to be irreconcilably in conflict, some barring the subsequent action and others allowing it, the suspicion is entertained that where the allegations in an appropriate case indicate the making of an actual contract rather than repeat the usual formalized language designed to meet the requirements of an action on the contract, even courts which have hitherto barred the subsequent action will reconsider their position, and thus, indeed, adopt the better view and allow the subsequent action.

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CONTRIBUTORS TO THIS ISSUE

PAUL A. FREUND—Fairchild Professor of Law, Harvard University. A.B. 1928, Washington University; LL.B. 1931, Harvard Law School; S.J.D. 1932, Harvard Law School. Law secretary to Mr. Justice Brandeis, 1932-33. With Treasury Dep't and Reconstruction Finance Corp., Washington D. C. 1933-35; Dep't of Justice (Solicitor General's Office), 1935-39, 1942-46. Lecturer in Law, Harvard University, 1939-40. Visiting Professor, Stanford University, Summer 1950. Author of several articles and contributor to law reviews. Admitted to practice in District of Columbia, 1935.

HENRY J. SCHMANDT—Assistant Professor of Government, St. Louis University. B.S. 1947, St. Louis University; LL.B. 1938, Benton College of Law; M.A. 1948, St. Louis University; Ph.D. 1950, St. Louis University. Assistant Professor of Political Science, University of Detroit, 1950-52. Member of Missouri Bar. Contributor to various law reviews and bar journals.

ARNOLD J. MILLER—Attorney at Law, Worcester, Massachusetts. A.B. 1939, Yeshiva College; A.M. 1941, Brown University; LL.B. 1943, Harvard School of Law. Member Massachusetts and Federal Bars. Contributor to various bar journals.