Law School 101
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Nicole N. Morris is a member of the faculty at Emory University School of Law. She is a professor in practice and director of the TI:GER program (Technological Innovation: Generating Economic Results), an innovative partnership between Emory and Georgia Institute of Technology (Georgia Tech) that brings together graduate students in law, business, science and engineering to work on ways to take innovative ideas from the lab to the marketplace. As a professor in practice, her areas of expertise include patent law, patent litigation, patent prosecution, IP licensing, and strategy.

Prior to joining the Emory faculty, Professor Morris was the former managing patent counsel at The Coca-Cola Company in Atlanta, Georgia. While at The Coca-Cola Company, Nicole was responsible for the development and implementation of the Company's global patent strategy and providing day-to-day advice & counseling to business stakeholders, including freedom-to-operate and competitive assessments and counseling concerning IP related agreements.

Professor Morris has over ten years of experience practicing patent law in large and mid-sized law firms and has represented clients in patent and trademark litigation matters, as well as patent prosecution matters. Professor Morris also worked as an engineer for six years with 3M and Eli Lilly and has over twenty years of experience working with consumer products and technology commercialization.

Professor Morris is a frequent speaker on patent law topics including patent prosecution, patent litigation, IP licensing, and the role of corporate counsel in patent transactions. She is also a member of the American Intellectual Property Law Association, Atlanta IP Inn of Court, Atlanta Bar Association, Georgia Lawyers for the Arts (Board Member), and serves as Treasurer of the Minority In-House Counsel Association. In 2013, Professor Morris was awarded the 2013 Rising Star Corporate Counsel Award from the *Atlanta Business Chronicle* and featured in the August 2013 issue of *Corporate Counsel* magazine.

Professor Morris is licensed to practice before the United States Patent and Trademark Office and is admitted to practice in the states of Georgia, Minnesota, Massachusetts, and in the District of Columbia.

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Visiting Day Sample Case

Sullivan v. O'Connor

Nicole Morris
Director of TI:GER and Professor of Practice

363 Mass. 579 (1973)
296 N.E.2d 183

ALICE SULLIVAN
v.
JAMES H. O'CONNOR.

Supreme Judicial Court of Massachusetts, Suffolk.

Argued March 6, 1973.
Decided May 9, 1973.

Present: TAURO, C.J., REARDON, QUIRICO, KAPLAN, & WILKINS, JJ.

John F. Finnerty for the defendant.

Francis C. Newton, Jr., for the plaintiff.

KAPLAN, J.

The plaintiff patient secured by a jury verdict of $13,500 against the defendant surgeon for breach of contract in respect to an operation upon the plaintiff's nose. The substituted consolidated bill of exceptions presents questions about the correctness of the judge's instructions on the issue of damages.

The declaration was in two counts. In the first count, the plaintiff alleged that she, as patient, entered into a contract with the defendant, a surgeon, wherein the defendant promised to perform plastic surgery on her nose *580 and thereby to enhance her beauty and improve her appearance; that he performed the surgery but failed to achieve the promised result; rather the result of the surgery was to disfigure and deform her nose, to cause her pain in body and mind, and to subject her to other damage and expense. The second count, based on the same transaction, was in the conventional form for malpractice, charging that the defendant had been guilty of negligence in performing the surgery. Answering, the defendant entered a general denial.

On the plaintiff's demand, the case was tried by jury. At the close of the evidence, the judge put to the jury, as special questions, the issues of liability under the two counts, and instructed them accordingly. The jury returned a verdict for the plaintiff on the contract count, and for the defendant on the negligence count. The judge then instructed the jury on the issue of damages.

As background to the instructions and the parties' exceptions, we mention certain facts as the jury could find them. The plaintiff was a professional entertainer, and this was known to the defendant. The agreement was as alleged in the declaration. More particularly, judging from exhibits, the plaintiff's nose had been straight, but long and prominent; the defendant undertook by two operations to reduce its prominence and somewhat to shorten it, thus making it more pleasing in relation to the plaintiff's other features. Actually the plaintiff was obliged to undergo three operations, and her appearance was worsened. Her nose now had a concave line to about the midpoint, at which it became bulbous; viewed frontally, the nose from bridge to midpoint was flattened and broadened, and the two sides of the tip had lost symmetry. This configuration evidently could not be improved by further surgery. The plaintiff did not demonstrate, however, that her change of appearance had resulted in loss of employment. Payments by the plaintiff covering the defendant's fee and hospital expenses were stipulated at $622.65.

The judge instructed the jury, first, that the plaintiff *581 was entitled to recover her out-of-pocket expenses incident to the operations. Second, she could recover the damages flowing directly, naturally, proximately, and foreseeably from the defendant's breach of promise. These would comprehend damages for any disfigurement of the plaintiff's nose — that is, any change of appearance for the worse —including the effects of the consciousness of such disfigurement on the plaintiff's mind, and in this connection the jury should consider the nature of the plaintiff's profession. Also

consequent upon the defendant's breach, and compensable, were the pain and suffering involved in the third operation, but not in the first two. As there was no proof that any loss of earnings by the plaintiff resulted from the breach, that element should not enter into the calculation of damages.

By his exceptions the defendant contends that the judge erred in allowing the jury to take into account anything but the plaintiff's out-of-pocket expenses (presumably at the stipulated amount). The defendant excepted to the judge's refusal of his request for a general charge to that effect, and, more specifically, to the judge's refusal of a charge that the plaintiff could not recover for pain and suffering connected with the third operation or for impairment of the plaintiff's appearance and associated mental distress.[1]

The plaintiff on her part excepted to the judge's refusal of a request to charge that the plaintiff could recover the difference in value between the nose as promised and the nose as it appeared after the operations. However, the plaintiff in her brief expressly waives this exception and others made by her in case this court overrules the defendant's exceptions; thus she would be content to hold the jury's verdict in her favor.

We conclude that the defendant's exceptions should be overruled.

It has been suggested on occasion that agreements *582 between patients and physicians by which the physician undertakes to effect a cure or to bring about a given result should be declared unenforceable on grounds of public policy. See *Guilmet* v. *Campell,* 385 Mich. 57, 76 (dissenting opinion). But there are many decisions recognizing and enforcing such contracts, see annotation, 43 A.L.R. 3d 1221, 1225, 1229-1233, and the law of Massachusetts has treated them as valid, although we have had no decision meeting head on the contention that they should be denied legal sanction. *Small* v. *Howard,*128 Mass. 131. *Gabrunas* v. *Miniter,* 289 Mass. 20. *Forman* v. *Wolfson,* 327 Mass. 341. These causes of action are, however, considered a little suspect, and thus we find courts straining sometimes to read the pleadings as sounding only in tort for negligence, and not in contract for breach of promise, despite sedulous efforts by the pleaders to pursue the latter theory. See *Gault* v. *Sideman,* 42 Ill. App. 2d 96; annotation, *supra,* at 1225, 1238-1244.

It is not hard to see why the courts should be unenthusiastic or skeptical about the contract theory. Considering the uncertainities of medical science and the variations in the physical and psychological conditions of individual patients, doctors can seldom in good faith promise specific results. Therefore it is unlikely that physicians of even average integrity will in fact make such promises. Statements of opinion by the physician with some optimistic coloring are a different thing, and may indeed have therapeutic value. But patients may transform such statements into firm promises in their own minds, especially when they have been disappointed in the event, and testify in that sense to sympathetic juries.[2] If actions for breach of promise can be readily maintained, doctors, *583 so it is said, will be frightened into practising "defensive medicine." On the other hand, if these actions were outlawed, leaving only the possibility of suits for malpractice, there is fear that the public might be exposed to the enticements of charlatans, and confidence in the profession might ultimately be shaken. See Miller, The Contractual Liability of Physicians and Surgeons, 1953 Wash. L.Q. 413, 416-423. The law has taken the middle of the road position of allowing actions based on alleged contract, but insisting on clear proof. Instructions to the jury may well stress this requirement and point to tests of truth, such as the complexity or difficulty of an operation as bearing on the

probability that a given result was promised. See annotation, 43 A.L.R. 3d 1225, 1225-1227.

If an action on the basis of contract is allowed, we have next the question of the measure of damages to be applied where liability is found. Some cases have taken the simple view that the promise by the physician is to be treated like an ordinary commercial promise, and accordingly that the successful plaintiff is entitled to a standard measure of recovery for breach of contract —"compensatory" ("expectancy") damages, an amount intended to put the plaintiff in the position he would be in if the contract had been performed, or, presumably, at the plaintiff's election, "restitution" damages, an amount corresponding to any benefit conferred by the plaintiff upon the defendant in the performance of the contract disrupted by the defendant's breach. See Restatement: Contracts § 329 and comment a, §§ 347, 384 (1). Thus in *Hawkins* v. *McGee,* 84 N.H. 114, the defendant doctor was taken to have promised the plaintiff to convert his damaged hand by means of an operation into a good or perfect hand, but the doctor so operated as to damage the hand still further. The court, following the usual expectancy formula, would have asked the jury to estimate and award to the plaintiff the difference between the value of a good or perfect hand, as promised, and the value of the hand after the operation. (The same formula *584 would apply, although the dollar result would be less, if the operation had neither worsened nor improved the condition of the hand.) If the plaintiff had not yet paid the doctor his fee, that amount would be deducted from the recovery. There could be no recovery for the pain and suffering of the operation, since that detriment would have been incurred even if the operation had been successful; one can say that this detriment was not "caused" by the breach. But where the plaintiff by reason of the operation was put to more pain than he would have had to endure, had the doctor performed as promised, he should be compensated for that difference as a proper part of his expectancy recovery. It may be noted that on an alternative court for malpractice the plaintiff in the *Hawkins* case had been nonsuited; but on ordinary principles this could not affect the contract claim, for it is hardly a defence to a breach of contract that the promiser acted innocently and without negligence. The New Hampshire court further refined the *Hawkins* analysis in *McQuaid* v. *Michou,* 85 N.H. 299, all in the direction of treating the patient-physician cases on the ordinary footing of expectancy. See *McGee* v. *United States Fid. & Guar. Co.* 53 F.2d 953 (1st Cir.) (later development in the *Hawkins* case); *Cloutier* v. *Kasheta,*105 N.H. 262; *Lakeman* v. *LaFrance,* 102 N.H. 300, 305.

Other cases, including a number in New York, without distinctly repudiating the *Hawkins* type of analysis, have indicated that a different and generally more lenient measure of damages is to be applied in patient-physician actions based on breach of alleged special agreements to effect a cure, attain a stated result, or employ a given medical method. This measure is expressed in somewhat variant ways, but the substance is that the plaintiff is to recover any expenditures made by him and for other detriment (usually not specifically described in the opinions) following proximately and foreseeably upon the defendant's failure to carry out his promise. *Robins* v. *Finestone,* 308 N.Y. 543, 546. *Frankel* v. *Wolper,* 181 App. Div. (N.Y.) 485, 488, affd. 228 N.Y. 582. *585 *Frank* v. *Maliniak,* 232 App. Div. (N.Y.) 278, 280. *Colvin* v. *Smith,* 276 App. Div. (N.Y.) 9, 10.[3]*Stewart* v. *Rudner,* 349 Mich. 459, 465-473. Cf. *Carpenter* v. *Moore,* 51 Wash.2d 795. This, be it noted, is not a "restitution" measure, for it is not limited to restoration of the benefit conferred on the defendant (the fee paid) but includes other expenditures, for example, amounts paid for medicine and nurses; so also it would seem according to its logic to take in damages for any worsening of the plaintiff's

condition due to the breach. Nor is it an "expectancy" measure, for it does not appear to contemplate recovery of the whole difference in value between the condition as promised and the condition actually resulting from the treatment. Rather the tendency of the formulation is to put the plaintiff back in the position he occupied just before the parties entered upon the agreement, to compensate him for the detriments he suffered in reliance upon the agreement. This kind of intermediate pattern of recovery for breach of contract is discussed in the suggestive article by Fuller and Perdue, The Reliance Interest in Contract Damages, 46 Yale L.J. 52, 373, where the authors show that, although not attaining the currency of the standard measures, a "reliance" measure has for special reasons been applied by the courts in a variety of settlings, including noncommercial settings. See 46 Yale L.J. at 396-401.[4]

For breach of the patient-physician agreements under consideration, a recovery limited to restitution seems plainly to meager, if the agreements are to be enforced at all. On the other hand, an expectancy recovery may well be excessive. The factors, already mentioned, which have made the cause of action somewhat suspect, also suggest moderation as to the breadth of the recovery that *586 should be permitted. Where, as in the case at bar and in a number of the reported cases, the doctor has been absolved of negligence by the trier, an expectancy measure may be thought harsh. We should recall here that the fee paid by the patient to the doctor for the alleged promise would usually be quite disproportionate to the putative expectancy recovery. To attempt, moreover, to put a value on the condition that would or might have resulted, had the treatment succeeded as promised, may sometimes put an exceptional strain on the imagination of the fact finder. As a general consideration, Fuller and Perdue argue that the reasons for granting damages for broken promises to the extent of the expectancy are at their strongest when the promises are made in a business context, when they have to do with the production or distribution of goods or the allocation of functions in the market place; they become weaker as the context shifts from a commercial to a noncommercial field. 46 Yale L.J. at 60-63.

There is much to be said, then, for applying a reliance measure to the present facts, and we have only to add that our cases are not unreceptive to the use of that formula in special situations. We have, however, had no previous occasion to apply it to patient-physician cases.[5]

*587 The question of recovery on a reliance basis for pain and suffering or mental distress requires further attention. We find expressions in the decisions that pain and suffering (or the like) are simply not compensable in actions for breach of contract. The defendant seemingly espouses this proposition in the present case. True, if the buyer under a contract for the purchase of a lot of merchandise, in suing for the seller's breach, should claim damages for mental anguish caused by his disappointment in the transaction, he would not succeed; he would be told, perhaps, that the asserted psychological injury was not fairly foreseeable by the defendant as a probable consequence of the breach of such a business contract. See Restatement: Contracts, § 341 and comment a. But there is no general rule barring such items of damage in actions for breach of contract. It is all a question of the subject matter and background of the contract, and when the contract calls for an operation on the person of the plaintiff, psychological as well as physical injury may be expected to figure somewhere in the recovery, depending on the particular circumstances. The point is explained in *Stewart* v. *Rudner,* 349 Mich. 459, 469. Cf. *Frewen* v. *Page,*238 Mass. 499; *McClean* v. *University Club,* 327 Mass. 68. Again, it is said in a few of the New York cases, concerned with the classification of

actions for statute of limitations purposes, that the absence of allegations demanding recovery for pain and suffering is characteristic of a contract claim by a patient against a physician, that such allegations rather belong in a claim for malpractice. See *Robins* v. *Finestone*, 308 N.Y. 543, *588 547; *Budoff* v. *Kessler*, 2 App. Div.2d (N.Y.) 760. These remarks seem unduly sweeping. Suffering or distress resulting from the breach going beyond that which was envisaged by the treatment as agreed, should be compensable on the same ground as the worsening of the patient's conditions because of the breach. Indeed it can be argued that the very suffering or distress "contracted for" — that which would have been incurred if the treatment achieved the promised result — should also be compensable on the theory underlying the New York cases. For that suffering is "wasted" if the treatment fails. Otherwise stated, compensation for this waste is arguably required in order to complete the restoration of the status quo ante.[6]

In the light of the foregoing discussion, all the defendant's exceptions fail: the plaintiff was not confined to the recovery of her out-of-pocket expenditures; she was entitled to recover also for the worsening of her condition,[7] and for the pain and suffering and mental distress involved in the third operation. These items were compensable *589 on either an expectancy or a reliance view. We might have been required to elect between the two views if the pain and suffering connected with the first two operations contemplated by the agreement, or the whole difference in value between the present and the promised conditions, were being claimed as elements of damage. But the plaintiff waives her possible claim to the former element, and to so much of the latter as represents the difference in value between the promised condition and the condition before the operations.

Plaintiff's exceptions waived.

Defendant's exceptions overruled.

NOTES

[1] The defendant also excepted to the judge's refusal to direct a verdict in his favor, but this exception is not pressed and could not be sustained.

[2] Judicial skepticism about whether a promise was in fact made derives also from the possibility that the truth has been tortured to give the plaintiff the advantage of the longer period of limitations sometimes available for actions on contract as distinguished from those in tort or for malpractice. See Lillich, The Malpractice Statute of Limitations in New York and Other Jurisdictions, 47 Cornell L.Q. 339; annotation, 80 A.L.R. 2d 368.

[3] See *Horowitz* v. *Bogart*, 218 App. Div. (N.Y.) 158, 160; *Monahan* v. *Devinny*, 223 App. Div. (N.Y.) 547, 548; *Keating* v. *Perkins*, 250 App. Div. (N.Y.) 9, 10, and comment in 5 U. of Chicago L. Rev. 156.

[4] Some of the exceptional situations mentioned where reliance may be preferred to expectancy are those in which the latter measure would be hard to apply or would impose too great a burden; performance was interfered with by external circumstances; the contract was indefinite. See 46 Yale L.J. at 373-386; 394-396.

[5] In *Mt. Pleasant Stable Co.* v. *Steinberg*, 238 Mass. 567, the plaintiff company agreed to supply teams of horses at agreed rates as required from day to day by the defendant for his business. To prepare itself to fulfil the contract and in reliance on it, the plaintiff bought two "Cliest" horses at a certain price. When the defendant repudiated the contract, the plaintiff sold the horses at a loss and in its action for breach claimed the loss as an element of damages. The court properly held

that the plaintiff was not entitled to this item as it was also claiming (and recovering) its lost profits (expectancy) on the contract as a whole. Cf. *Noble* v. *Ames Mfg. Co.* 112 Mass. 492. (The loss on sale of the horses is analogous to the pain and suffering for which the patient would be disallowed a recovery in *Hawkins* v. *McGee,* 84 N.H. 114, because he was claiming and recovering expectancy damages.) The court in the *Mt. Pleasant* case referred, however, to *Pond* v. *Harris,* 113 Mass. 114, as a contrasting situation where the expectancy could not be fairly determined. There the defendant had wrongfully revoked an agreement to arbitrate a dispute with the plaintiff (this was before such agreements were made specifically enforceable). In an action for the breach, the plaintiff was held entitled to recover for his preparations for the arbitration which had been rendered useless and a waste, including the plaintiff's time and trouble and his expenditures for counsel and witness. The context apparently was commercial but reliance elements were held compensable when there was no fair way of estimating an expectancy. See, generally, annotation, 17 A.L.R. 2d 1300. A noncommercial example is *Smith* v. *Sherman,*4 Cush. 408, 413-414, suggesting that a conventional recovery for breach of promise of marriage included a recompense for various efforts and expenditures by the plaintiff preparatory to the promised wedding. See *Garfield & Proctor Coal Co.* v. *Pennsylvania Coal & Coke Co.* 199 Mass. 22, 43; *Narragansett Amusement Co.* v. *Riverside Park Amusement Co.* 260 Mass. 265, 279-281. Cf. *Johnson* v. *Arnold,* 2 Cush. 46, 47; *Greany* v. *McCormick,*273 Mass. 250, 253. But cf. *Irwin* v. *Worcester Paper Box Co.* 246 Mass. 453.

[6] Recovery on a reliance basis for breach of the physician's promise tends to equate with the usual recovery for malpractice, since the latter also looks in general to restoration of the condition before the injury. But this is not paradoxical, especially when it is noted that the origins of contract lie in tort. See Farnsworth, The Past of Promise: An Historical Introduction to Contract, 69 Col. L. Rev. 576, 594-596; Breitel, J. in *Stella Flour & Feed Corp.* v. *National City Bank,* 285 App. Div. (N.Y.) 182, 189 (dissenting opinion). A few cases have considered possible recovery for breach by a physician of a promise to sterilize a patient, resulting in birth of a child to the patient and spouse. If such an action is held maintainable, the reliance and expectancy measures would, we think, tend to equate, because the promised condition was preservation of the family status quo. See *Custodio* v. *Bauer,* 251 Cal. App. 2d 303; *Jackson* v. *Anderson,* 230 So. 2d 503 (Fla. App.). Cf. *Troppi* v. *Scarf,* 31 Mich. App. 240. But cf. *Ball* v. *Mudge,* 64 Wash.2d 247; *Doerr* v. *Villate,*74 Ill. App. 2d 332; *Shaheen* v. *Knight,* 11 Dall. & C.2d (Pa.) 41. See also annotation, 27 A.L.R. 3d 906.

It would, however, be a mistake to think in terms of strict "formulas." For example, a jurisdiction which would apply a reliance measure to the present facts might impose a more severe damage sanction for the wilful use by the physician of a method of operation that he undertook not to employ.

[7] That condition involves a mental element and appraisal of it properly called for consideration of the fact that the plaintiff was an entertainer. Cf. *McQuaid* v. *Michou,* 85 N.H. 299, 303-304 (discussion of continuing condition resulting from physician's breach).