

6-1-1976

Physicians and Surgeons -- Sullivan v. O'Connor: A Liberal View of the Contractual Liability of Physicians and Surgeons

Thomas Meares Woodbury

Follow this and additional works at: <http://scholarship.law.unc.edu/nclr>Part of the [Law Commons](#)

Recommended Citation

Thomas M. Woodbury, *Physicians and Surgeons -- Sullivan v. O'Connor: A Liberal View of the Contractual Liability of Physicians and Surgeons*, 54 N.C. L. REV. 885 (1976).

Available at: <http://scholarship.law.unc.edu/nclr/vol54/iss5/6>

This Comments is brought to you for free and open access by Carolina Law Scholarship Repository. It has been accepted for inclusion in North Carolina Law Review by an authorized editor of Carolina Law Scholarship Repository. For more information, please contact law_repository@unc.edu.

Physicians and Surgeons—*Sullivan v. O'Connor*: A Liberal View of the Contractual Liability of Physicians and Surgeons

I. INTRODUCTION

"Malpractice" has become a shibboleth of the lawyer's trade, but its legal siblings,¹ especially breach of contract, have received less attention—partly because there are fewer cases on point and in part because lawyers have been reluctant to bring actions in contract against doctors. This reluctance may be attributed to a variety of reasons, including the attitude of courts, statutes of limitation, burdens of proof and damages recoverable.

Attorneys' timidity in using actions for breach of contract against physicians may wane, however, once the profession gets wind of cases like *Sullivan v. O'Connor*,² recently decided by the Supreme Judicial Court of Massachusetts. Plaintiff, Alice Sullivan, brought an action against James O'Connor for negligence and breach of contract. The parties had entered into an agreement whereby defendant promised to perform two operations to correct plaintiff's long and prominent nose. In fact, three operations were necessary, and plaintiff's nose, instead of being enhanced, became concave at midpoint, as well as flattened, bulbous, and asymmetrical at the tip. Nor could its present condition be corrected by further surgery.³ The Massachusetts court, speaking through Judge Kaplan, upheld a lower court decision dismissing the negligence claim and awarding 13,500 dollars on the claim for breach of contract. Damages included out-of-pocket expenses, damages "flowing directly, naturally, proximately, and foreseeably" from the breach (the jury was permitted to take into account the mental effects on plaintiff, with consideration given to her occupation as an entertainer), as well as pain and suffering for the third operation, but not the first two. Since plaintiff was able to continue her work, no compensation was granted for loss of earnings.⁴

The court found the measure of damages consistent with either an expectancy or reliance theory of recovery.⁵ The former would measure

1. Other theories that plaintiffs may use to recover against defendant-physicians include battery, fraud, misrepresentation and deceit.

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

3. *Id.* at 580, 296 N.E.2d at 184-85.

4. *Id.* at 579-81, 296 N.E.2d at 185.

5. *Id.* at 588-89, 296 N.E.2d at 189.

the value of expectancy which the promise created, *i.e.*, the difference between the present and promised condition of plaintiff's nose; the latter the extent to which plaintiff had changed her previous position in reliance on the defendant's promise, *i.e.*, restoration of the *status quo ante*.⁶ As to the reliance interest, the court contended:

Suffering or distress resulting from the breach going beyond that which was envisioned by the treatment as agreed, should be compensable on the same ground as the worsening of the patient's condition because of the breach. Indeed it can be argued that the very suffering "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 [reliance measure of damages]. For the suffering is "wasted" if the treatment fails⁷

Since neither damages for pain and suffering for the first two operations nor the difference between the promised and present condition of the nose was asked, the court was not forced to choose between the two theories of recovery.⁸

In compensating plaintiff for pain and suffering during the third operation, the Massachusetts court went beyond a restitution measure of damages (restoring to plaintiff any value conferred on defendant, or, more simply stated, out-of-pocket expenses⁹), and introduced an element of loss traditionally restricted to tort liability.¹⁰

II. IMPLIED CONTRACTS

As the problem of damages illustrates, the line between torts and contracts is often obscure. There are some delineations, however, and certain general patterns can be discerned. To begin with, in the absence of an express contract, the physician or surgeon is neither a warrantor of cures nor an insurer of results.¹¹ There is ample authority

6. For a full discussion of contract theories of recovery, see the now classic article by L. Fuller & W. Perdue on *Reliance Interests in Contract Damages* (pts. 1-2), 46 *YALE L.J.* 52, 373 (1936).

7. 363 Mass. at 588, 296 N.E.2d at 189.

8. *Id.* at 589, 296 N.E.2d at 189-90.

9. L. Fuller & W. Perdue, *supra* note 6, at 53-54.

10. The authorities are in conflict over permitting recovery for pain and suffering in actions for breach of contract. Against recovery: *Carpenter v. Walker*, 170 Ala. 659, 54 So. 60 (1910); *Robins v. Finestone*, 308 N.Y. 543, 127 N.E.2d 330 (1955). Allowing recovery: *Stewart v. Rudner*, 349 Mich. 459, 84 N.W.2d 816 (1957); *Hood v. Moffett*, 109 Miss. 757, 69 So. 664 (1915); 5A *PERSONAL INJURY* § 1.03, at 69 (L. Frumer ed. Supp. 1975).

11. *Alexandridis v. Jewett*, 388 F.2d 829 (1st Cir. 1968); *Thompson v. Lillehei*, 273 F.2d 376 (8th Cir. 1959); *Perin v. Hayne*, 210 N.W.2d 609 (Iowa 1973);

to this effect, including the eminent torts authority William Prosser. According to Professor Prosser:

A physician may, although he seldom does, contract to cure his patient, or to accomplish a particular result, in which case he may be liable for breach of contract when he does not succeed. In the absence of such an express agreement, he does not warrant or insure the outcome of his treatment, and he will not be liable for an honest mistake of judgment, where the proper course is open to reasonable doubt.¹²

An equally celebrated authority in the field of contracts, Samuel Williston, is in agreement: "In the absence of an express agreement, there is no guaranty that a course of treatment or an operation will be successful."¹³

Although a physician is not an insurer of results in the absence of an express contract, the law implies a contract that he will employ the learning, skill and experience ordinarily possessed by others of his profession.¹⁴ But in *Steel v. Aetna Life and Casualty*¹⁵ the Court of Appeal of Louisiana overturned previous state decisions and held that a medical malpractice claim could not be brought under contract theory unless the physician promised a particular result. In *Steel* plaintiff merely alleged that defendant physician had breached an implied contract to use a high degree of skill and care.

Indeed, one may pause and wonder why actions for breach of implied contracts are ever brought at all, since torts damages are generally greater. Actions on implied contracts have persisted for two reasons:¹⁶ statutes of limitation for contract actions are, with few exceptions, longer than those for tort actions; and there are rare cases in which the contract measure of damages (putting plaintiff in as good a position as he would have been had the contract been performed¹⁷)

Alexander v. Alton Ochsner Medical Foundation, 276 So. 2d 794 (La. App.), cert. denied, 414 U.S. 1068 (1973); Hestback v. Hennepin County, 297 Minn. 419, 212 N.W.2d 361 (1973); Leighton v. Sargent, 27 N.H. 460 (1853); Dickens v. Everhart, 284 N.C. 85, 199 S.E.2d 440 (1973).

12. W. PROSSER, HANDBOOK OF THE LAW OF TORTS 162 (4th ed. 1971).

13. 10 S. WILLISTON, CONTRACTS § 1286, at 946 (3d ed. 1967).

14. Norton v. Hamilton, 92 Ga. App. 727, 89 S.E.2d 809 (1955); Champion v. Keith, 17 Okla. 204, 87 P. 845 (1906); 61 AM. JUR. 2d Physicians, Surgeons, and Other Healers § 99 (1972).

15. 304 So. 2d 861 (La. App. 1974).

16. 1 D. LOUISELL & H. WILLIAMS, MEDICAL MALPRACTICE ¶ 8.03, at 197-98 (1973).

17. 5 A. CORBIN, CONTRACTS § 1002 (1964); RESTATEMENT OF CONTRACTS § 329, comment a (1932).

may exceed the tort measure (allowing for pain and suffering, impaired earning capacity, loss of time and consequential damages¹⁸).

III. EXPRESS CONTRACTS

Physicians, like every legitimate heir of Anglo-Saxon jurisprudence, have the freedom to contract. And when physicians enter into an express agreement to achieve a particular result or to adhere to specific standards and procedures, an action will lie for its breach—an action distinct from malpractice and dissimilar in theory, proof and damages recoverable.¹⁹ Whether an express promise was made, orally or otherwise, is a question for the trier of fact.²⁰

What constitutes an express agreement in medicine, however, is somewhat of a legal thicket, and more than one court has found itself lured by attorneys into a briar patch of ambiguous evidence. In *Hackworth v. Hart*,²¹ for example, a Kentucky court found defendant physician's assurance that an operation was a "fool-proof thing 100%" to be evidence of an express agreement to achieve particular results. In *Maercklein v. Smith*,²² on the other hand, a patient contracted with defendant physician to perform a circumcision; the physician arranged for another doctor to handle the surgery, and a vasectomy was performed instead. The Colorado court found no contract.²³ Yet in *Johnston v. Rodis*²⁴ a federal court found a psychiatrist's unqualified remark that shock treatments were "perfectly safe" might be construed as a warranty.

Most courts have held that whether a contract was made depends not only on what was said but also under what circumstances it was

18. Miller, *The Contractual Liability of Physicians and Surgeons*, 1953 WASH. U.L.Q. 413, 424 [hereinafter cited as Miller].

19. *Custodio v. Bauer*, 251 Cal. App. 2d 303, 59 Cal. Rptr. 463 (1st Dist. 1967); *Noel v. Proud*, 189 Kan. 6, 367 P.2d 61 (1961); *Cloutier v. Kasheta*, 105 N.H. 262, 197 A.2d 627 (1964); *Lakeman v. LaFrance*, 102 N.H. 300, 156 A.2d 123 (1959); *Robins v. Finestone*, 308 N.Y. 543, 127 N.E.2d 330 (1955).

20. *Crawford v. Duncan*, 61 Cal. App. 647, 215 P. 573 (1923); *Marchlewicz v. Stanton*, 50 Mich. App. 344, 213 N.W.2d 317 (1973).

21. 474 S.W.2d 377, 380 (Ky. Ct. App. 1971).

22. 129 Colo. 72, 266 P.2d 1095 (1954).

23. Other cases finding evidence insufficient to constitute a contract include: *Marvin v. Talbott*, 216 Cal. App. 2d 383, 30 Cal. Rptr. 893 (4th Dist. 1963); *Bria v. St. Joseph's Hosp.*, 153 Conn. 626, 220 A.2d 29 (1966); *Perin v. Hayne*, 210 N.W.2d 609 (Iowa 1973); *Miller v. Dore*, 154 Me. 363, 148 A.2d 692 (1959); *Carney v. Lydon*, 36 Wash. 2d 878, 220 P.2d 894 (1950).

24. 251 F.2d 917, 918 (D.C. Cir. 1958).

said.²⁵ A rather remarkable case is that of *Nicholson v. Han*,²⁶ in which plaintiff alleged that defendant physician offered to resolve plaintiff's marital problems, guaranteeing that the situation would improve and noting his success in similar cases with other patients. Plaintiff contended that defendant breached the contract by seducing his wife and encouraging her to seek a divorce. The court held the cuckolded petitioner had no action in contract, and, in fact, no cause of action at all, since criminal offenses for alienation of affections and criminal conversations had been abolished in Michigan!²⁷

In addition to proof of warranty, some courts have required that a contract to cure be supported by separate consideration.²⁸ In *Wilson v. Blair*,²⁹ for instance, the Supreme Court of Montana ruled that a physician's guarantee to make plaintiff's hand "100 per cent efficient" was unenforceable for want of consideration since the warranty was made after the agreement to pay. This holding is contrary to the general rule of contract law that a single consideration may support several promises;³⁰ moreover separate consideration need not be proved if the plaintiff has relied to his detriment on the defendant's promise.³¹

In determining what constitutes a contract, courts have been walking an evidentiary tightrope between words of agreement and expressions of opinion. In so doing, they have tried to balance the legitimate need to give patients "therapeutic reassurance" against the right of individuals to enter into contracts and have those contracts enforced. Needless to say, their performance has drawn less than unanimous applause from scholars, practitioners, and the bench.

It is clear that something less than the words "guarantee" or "warranty" and something more than the mere expression of medical opinion will establish an express contract. Drawing the line will not be easy, but if caution is the better part of wisdom in these cases, the

25. *E.g.*, *Guilmet v. Campbell*, 385 Mich. 57, 188 N.W.2d 601 (1971).

26. 12 Mich. App. 35, 162 N.W.2d 313 (1968).

27. *Id.* at 39-40, 162 N.W.2d at 315.

28. *E.g.*, *Gault v. Sideman*, 42 Ill. App. 2d 96, 106-07, 191 N.E.2d 436, 441 (1963); 61 AM. JUR. 2d *Physicians, Surgeons, and Other Healers* § 149 (1972). *But cf.* *Doerr v. Villate*, 74 Ill. App. 2d 332, 220 N.E.2d 767 (1966); *Guilmet v. Campbell*, 385 Mich. 57, 66-67, 188 N.W.2d 601, 605-06 (1971).

29. 65 Mont. 155, 157-58, 211 P. 289, 291 (1922).

30. 1 A. CORBIN, CONTRACTS § 125, at 183 (1963).

31. 1 A. CORBIN, CONTRACTS § 194, at 280 (1963); RESTATEMENT (SECOND) OF CONTRACTS § 90 (Tent. Draft No. 2, 1965); Note, *Torts—Medical Malpractice—Express Warranty of Particular Results of an Operation*, 41 TENN. L.R. 964, 971 (1974). *But cf.* *Kirksey v. Kirksey*, 8 Ala. 131 (1845).

plaintiff should be required to sustain a strict burden of proof, a burden stricter than that required by the Massachusetts court in *Sullivan*.

IV. PLEADINGS: TORT OR CONTRACT?

Most states today, with few exceptions, proscribe the bringing of malpractice actions on an implied contract theory,³² even though some courts have held that the existence of a contract furnishes the basis for tort liability; that is, the duty arises from a contract of employment.³³ Other courts have discovered that the duty of physicians to use skill and care arises not only out of an implied contract, but also out of public considerations predicated on the consensual transaction between patient and physician.³⁴ Judge John Minor Wisdom has stated this view with particular clarity:

It is the nature of the duty breached that should determine whether the action is in tort or contract. To determine the duty one must examine the patient-physician relationship. It is true that usually a consensual relationship exists and the physician agrees impliedly to treat the patient in a proper manner. Thus, a malpractice suit is inextricably bound up with the idea of breach of implied contract. However, the patient-physician relationship, and the corresponding duty that is owed, is not one that is completely dependent upon a contract theory The duty of due care is imposed by law and is something over and above any contractual duty. . . . The duty is owed in all cases, and a breach of this duty constitutes a tort. On principle then, we consider a malpractice action as tortious in nature whether the duty grows out of a contractual relation or has no origin in contract. . . .³⁵

32. Comment, *The Implied Contract Theory of Malpractice Recovery*, 6 WILLAMETTE L.J. 275 (1970). The minority states, which allow plaintiffs to bring a malpractice action on a theory of implied contract, are: Alabama, Florida, Georgia, Illinois, Louisiana. *Id.* at 275 n.3. In addition, twenty-five state legislatures have ruled that malpractice actions must be brought in tort and not contract; they are: Arkansas, California, Colorado, Connecticut, Delaware, Hawaii, Idaho, Indiana, Kansas, Kentucky, Maryland, Massachusetts, Minnesota, Missouri, Montana, New Hampshire, New Mexico, New York, Ohio, Oklahoma, Oregon, South Dakota, Tennessee, Washington and West Virginia. *Id.* at 278 n.22.

Some early cases denying recovery on an implied contract theory include: *Brown v. Moore*, 247 F.2d 711 (3d Cir.), *cert. denied*, 355 U.S. 882 (1957); *Carpenter v. Walker*, 170 Ala. 659, 54 So. 60 (1910); *Staley v. Jameson*, 46 Ind. 159 (1847); *Whittaker v. Collins*, 34 Minn. 299, 25 N.W. 632 (1885). *Contra*, *Kuhn v. Brownfield*, 34 W. Va. 252, 12 S.E. 519 (1890).

33. *E.g.*, *Daily v. Somberg*, 49 N.J. Super. 469, 140 A.2d 429, 434 (Law Div.), *rev'd on other grounds*, 28 N.J. 372, 146 A.2d 676 (1958).

34. *E.g.*, *Norton v. Hamilton*, 92 Ga. App. 727, 89 S.E.2d 809 (1955).

35. *Kozan v. Comstock*, 270 F.2d 839, 844-45 (5th Cir. 1959). *Contra*, *Creighton v. Karlin*, 225 So. 2d 288 (La. Ct. App. 1969); *Brooks v. Robinson*, 163 So. 2d 186 (La. Ct. App. 1964).

Nonetheless, an action for breach of an express contract may lie which is entirely separate from one for malpractice, even though both result from the same transaction:³⁶ the former is derived from a contract of employment, the latter from a contract to use the professional standard of due care. Whether an action is in tort or contract depends on the construction given the pleadings and the gravamen of the action.³⁷

Because courts determine the cause of action not by the form, but by the substance of pleadings, attorneys must be careful when drafting a complaint to establish an express promise and its breach.³⁸ In *Breaux v. Aetna Casualty and Surety Co.*,³⁹ for example, plaintiff brought suit against a physician for negligence in administering a drug known as Kantrex which caused an impairment of plaintiff's hearing. A federal court found that in the absence of a guarantee by the doctor, the claim was one in tort. Similar results have been reached by courts in other cases: in *Loudon v. Scott*⁴⁰ the patient died when the doctor administered an anesthetic while the patient was intoxicated; in *Liebler v. Our Lady of Victory Hospital*⁴¹ an action for breach of contract was brought against defendant hospital and three physicians for injuries resulting from a delivery. In both cases the actions were deemed to be ones for negligence rather than for breach of contract.⁴²

When there is evidence of a special agreement and the plaintiff has relied on the agreement to his detriment, courts have upheld an action in contract. In *Stitt v. Gold*⁴³ a New York court found a contract action

36. 61 AM. JUR. 2d *Physicians, Surgeons, and Other Healers* § 176 (2d ed. 1972). In an often quoted decision, a New York court has said: "Malpractice is predicated upon the failure to exercise requisite medical skills and is tortious in nature. The action in contract is based upon a failure to perform a special agreement. Negligence, the basis of one, is foreign to the other." *Colvin v. Smith*, 276 App. Div. 9, 92 N.Y.S.2d 794, 795 (1949).

37. *Noel v. Proud*, 189 Kan. 6, 367 P.2d 61 (1961); *Nicholson v. Han*, 12 Mich. App. 35, 162 N.W.2d 313 (1968); *Burnhoff v. Aldridge*, 327 Mo. 767, 38 S.W.2d 1029 (1931); 70 C.J.S. *Physicians and Surgeons* § 57 (1951).

38. Annot., 43 A.L.R.3d 1221, 1227 (1972). For an example of an attorney's failure properly to amend his pleadings, see *Gault v. Sideman*, 42 Ill. App. 2d 96, 191 N.E.2d 436 (1963).

39. 272 F. Supp. 668 (E.D. La. 1967).

40. 58 Mont. 645, 194 P. 488 (1920).

41. 43 App. Div. 2d 898, 351 N.Y.S.2d 480 (1974).

42. *Accord*, *Carpenter v. Walker*, 170 Ala. 659, 54 So. 60 (1910); *Brown v. Wood*, 202 So. 2d 125 (Fla. Ct. App. 1967); *Barnhoff v. Aldridge*, 327 Mo. 767, 38 S.W.2d 1029 (1931); *Pearl v. Lesnick*, 20 App. Div. 2d 761, 247 N.Y.S.2d 561 (1964) (assault and battery); *Frankel v. Wolper*, 181 App. Div. 845, 169 N.Y.S. 15 (1918); *Darby v. Union Planters Nat'l Bank*, 436 S.W.2d 439 (Tenn. 1969). *Contra*, *Hays v. Hall*, 477 S.W.2d 402 (Tex. Civ. App.), *rev'd on other grounds*, 488 S.W.2d 412 (1972).

43. 33 Misc. 2d 273, 225 N.Y.S.2d 536 (Sup. Ct.), *aff'd*, 17 App. Div. 2d 631, 230 N.Y.S.2d 677 (1962).

when the defendant physician breached an agreement to perform certain tests and operations assuring the plaintiff that he would be cured within three weeks. In *Greenwald v. Grayson*⁴⁴ an action was brought against a physician for failure to recognize a congenital disease in a child and advise the plaintiffs of the fitness of the child for adoption. The District Court of Appeals of Florida found no physician-patient relationship and held that plaintiff could recover only in contract.⁴⁵

It is noteworthy that some courts have held that when the doctor does not perform at all, *i.e.* a case of nonfeasance, the action may be brought in contract rather than tort.⁴⁶ This view of tort liability seems to be erroneous. The better solution would be to find liability for a negligent omission in the commission of a larger act, that of treating the patient. An analogy exists in the field of products liability where a failure to inspect an automobile is viewed not as a case of nonfeasance but as a case of misfeasance in the manufacture of the car.⁴⁷

In an action which sounds in both tort and contract the plaintiff need not elect his remedy. In *Bell v. Sigal*⁴⁸ a Georgia court held that "A plaintiff may pursue any number of consistent or inconsistent remedies against the same person or different persons until he shall obtain a satisfaction from some of them."⁴⁹ In accord is rule 8(e)(2) of the Federal Rules of Civil Procedure governing the consistency of pleadings.⁵⁰

To determine whether an action sounds in contract or tort, courts have looked beyond the words of the complaint to the nature of the action. The type of damages asked and the specific phrases used in alleging a contract are significant factors, to be sure, but singular

44. 189 So. 2d 204, 205 (Fla. App. 1966).

45. See also *Lane v. Boicourt*, 128 Ind. 420, 27 N.E. 1111 (1891) (unskillful treatment of plaintiff's wife during childbirth); *Noel v. Proud*, 189 Kan. 6, 367 P.2d 61 (1961) (special contract that surgery would not worsen plaintiff's condition). According to one commentator: "[T]his decision [*Noel v. Proud*], interpreting the doctor's alleged statement as a warranty, has taken something essentially in the nature of advice and opinion and transmuted it into a statement of fact." 37 NOTRE DAME LAW. 725, 728 (1962).

46. *E.g.*, *Brooks v. Robinson*, 163 So. 2d 186 (La. Ct. App. 1964).

47. See *MacPherson v. Buick Motor Co.*, 217 N.Y. 382, 111 N.E. 1050 (1916).

48. 129 Ga. App. 249, 199 S.E.2d 355 (1973).

49. *Id.* at 249, 199 S.E.2d at 356, quoting GA. CODE ANN. § 3-114 (1975).

50. "A party may set forth two or more statements of a claim or defense alternately or hypothetically, either in one count or defense or in separate counts or defenses. . . . A party may also state as many separate claims or defenses as he has regardless of consistency. . . ." FED. R. CIV. P. 8(e)(2).

attention to the wording of a complaint has gone the way of the common law writ.⁵¹

V. STATUTE OF LIMITATIONS

The nature of the cause of action is crucial in medical malpractice cases since it determines the applicable statute of limitations.⁵² In only one state is the statute of limitations period longer for malpractice (torts) than for contracts;⁵³ in five states and the District of Columbia, the periods are identical;⁵⁴ in eleven other states, there are statutes that refer to all malpractice actions, whether brought in contract or tort;⁵⁵ in the remaining thirty-three states the prescribed period for bringing suit is longer for contracts than torts.⁵⁶

51. Baatz v. Smith, 361 Mich. 68, 76, 104 N.W.2d 787, 791 (1960).

52. For an analysis of attempts to circumvent the statute of limitations for tort by using an action for breach of contract, see Lillich, *The Malpractice Statute of Limitations in New York and Other Jurisdictions*, 47 CORNELL L.Q. 339, 347-52, 361-63 (1962).

53. MISS. CODE ANN. § 15-1-49 (1972) (other actions including malpractice, six years), *Id.* § 15-1-29 (contracts, three years).

54. D.C. CODE ANN. § 12-301(8) (1973) (other actions including malpractice, three years), *Id.* § 12-301(7) (contracts, three years); MD. CODE ANN. COURTS & JUDICIAL PROCEEDINGS § 5-101 (civil actions, three years); N.C. GEN. STAT. § 1-52(5) (Cum. Supp. 1975) (personal injuries, three years), *Id.* § 1-52(1) (contracts, three years); S.C. CODE ANN. § 10-143(1) (1962) (contracts, six years), *Id.* § 10-143(5) (personal injuries, six years); TEX. REV. CIV. STAT. ANN. art. 5526(6) (1958) (torts, two years), *Id.* art. 5526(4) (unwritten contracts, two years); WASH. REV. CODE ANN. § 4.16.080(2) (1962) (personal injuries, three years), *Id.* § 4.16.080(3) (unwritten contracts, three years).

55. ALA. CODE tit. 7, § 25(1) (Cum. Supp. 1973); ARK. STAT. ANN. § 37-205 (1962); COLO. REV. STAT. ANN. § 13-80-105 (1973); FLA. STAT. ANN. § 95.11(4)(b) (Supp. 1975); IDAHO CODE § 5-219(4) (1947), *as amended* IDAHO CODE § 5-219(4) (Cum. Supp. 1975); IND. ANN. STAT. § 34-4-19-1 (Burns 1973); MASS. ANN. LAWS ch. 260, § 4 (1968); MINN. STAT. ANN. § 541.07(1) (1945); N.H. REV. STAT. ANN. § 508:4 (Supp. 1975), *amending* N.H. REV. STAT. ANN. § 508:4 (1968); OHIO REV. CODE ANN. § 2305.11(D)(3) (Supp. 1975); S.D. COMPILED LAWS ANN. § 15-2-15.1 (Supp. 1975), *amending* S.D. COMPILED LAWS ANN. § 15-2-15(3) (1967).

56. ALASKA STAT. § 09.10.070 (1973) (personal injuries, two years), *Id.* § 09.10.050(1) (contracts, six years); ARI. REV. STAT. ANN. § 12-542(B) (Supp. 1975), *amending* ARI. REV. STAT. ANN. § 12-542 (1956) (malpractice torts, two years after discovery, maximum of six years after date of injury), *Id.* § 12-543(1) (1956) (unwritten contracts, three years); CAL. CIV. PROC. CODE § 340(3) (1954) (negligence, one year), *Id.* § 339(1) (unwritten contracts, two years); CONN. GEN. STAT. ANN. § 52-584 (Supp. 1975) (malpractice, two years after discovery, maximum 3 years after date of injury), *amending* CONN. GEN. STAT. ANN. § 52-584 (1958), *Id.* § 52-576 (contracts, three years), *amending* CONN. GEN. STAT. ANN. § 52-576 (1958); DEL. CODE ANN. tit. 10, § 8119 (1974) (personal injuries, two years), *Id.* § 8106 (contracts, three years); GA. CODE ANN. § 3-1004 (1975) (personal injuries, two years), *Id.* § 3-706 (contracts, four years); HAWAII REV. STAT. § 657-7.3 (Supp. 1975) (medical torts, two years after discovery, maximum six years), *Id.* § 657-1(1) (contracts, six years); ILL. ANN. STAT. ch. 83, § 15 (Smith-Hurd 1966) (personal injuries, two years), *Id.* § 16 (oral contracts, five years); IOWA CODE ANN. § 614.1(9) (Supp. 1976) (malpractice, two years after

When the action is based on implied contract, there are currently three views on choosing the appropriate statute of limitations: that the statute for tort actions applies notwithstanding evidence showing a contract;⁵⁷ that the statute for contracts applies when the action purports to be in contract;⁵⁸ that malpractice gives rise to two causes of action, contract and tort, and the controlling factor is not the form but the

discovery, maximum of six years after negligent act), *amending* IOWA CODE ANN § 614.1 (1950), *Id.* § 614.1(4) (unwritten contracts, five years); KAN. GEN. STAT. ANN. § 60-513(4) (Supp. 1975) (personal injury, two years after discovery, maximum of ten years after date of negligent act), *Id.* § 60-512(1) (1964) (contracts, three years); KY. REV. STAT. ANN. § 413.140(e) (Cum. Supp. 1974) (negligence actions against physicians, one year), *Id.* § 413.120(1) (1972) (unwritten contracts, five years); LA. STAT. ANN. CIV. CODE art. 3536 (1973) (offenses or quasi offenses, one year), *Id.* art. 3544 (all personal actions, ten years); ME. REV. STAT. ANN. tit. 14, § 753 (1964) (malpractice, two years), *Id.* § 752 (civil actions, six years); MICH. STAT. ANN. § 27A-5805(3) (1962) (malpractice, two years), *Id.* § 27A-5807(8) (contracts, five years); MO. ANN. STAT. § 516.140 (Vernon 1949) (medical malpractice, two years after negligent act), *Id.* § 516.120 (contracts, five years); MONT. REV. CODES ANN. § 93-2624 (Supp. 1975) (medical malpractice, three years after accrual of action or discovery, maximum of five years from date of injury), *Id.* § 93-2604(1) (unwritten contracts, five years); NEB. REV. STAT. § 25-208 (1964) (malpractice, two years), *Id.* § 25-206 (1964) (unwritten contracts, four years), NEV. REV. STAT. § 11.400 (1975) (medical malpractice, two years after discovery, maximum of four years after date of injury), *Id.* § 11.190(2)(c) (1973) (unwritten contract, four years); N.J. STAT. ANN. § 2A:14-2 (1952) (personal injuries, two years), *Id.* § 2A:14-1 (contracts, six years); N.M. STAT. ANN. § 23-1-8 (1953) (personal injuries, three years), *Id.* § 23-1-4 (unwritten contracts, four years); N.Y. CIV. PRAC. § 214-a (1975) (medical malpractice, two and one-half years), *amending* N.Y. CIV. PRAC. § 214 (1972), *Id.* § 213(2) (1972) (contracts, six years); N.D. CENT. CODE § 28-01-18(3) (Supp. 1975) (malpractice, two years from accrual of action, maximum of six years from date of injury), *amending* N.D. CENT. CODE § 28-01-18(3) (1974), *Id.* § 28-01-16(1) (1974) (contracts, six years); OKLA. STAT. ANN. tit. 12, § 95(3) (1960) (personal injuries not on contract, two years), *Id.* § 95(2) (unwritten contracts, three years); ORE. REV. STAT. § 12.110(4) (1975) (injuries resulting from medical treatment, two years after discovery, maximum of five years after date of treatment), *Id.* § 12.080(1) (contracts, five years); PA. STAT. ANN. tit. 12, § 34 (1953) (personal injuries, two years), *Id.* § 31 (contracts, six years); R.I. GEN. LAWS ANN. § 9-1-14 (Supp. 1975) (personal injuries, three years), *Id.* § 9-1-13 (1969) (civil actions, six years); TENN. CODE ANN. § 28-304 (Supp. 1975) (personal torts, one year), *Id.* § 28-309 (1955) (contracts, six years); UTAH CODE ANN. § 78-12-28(3) (Supp. 1975) (medical malpractice, two years after discovery, maximum of ten years after date of injury), *amending* UTAH CODE ANN. § 78-12-25 (1953), *Id.* § 78-12-25 (1953) (unwritten contracts, four years); VT. STAT. ANN. tit. 12, § 512(4) (1973) (personal injuries, three years), *Id.* § 511 (civil actions, six years); VA. CODE ANN. § 8-24 (Cum. Supp. 1975), *amending* VA. CODE ANN. § 8-24 (1950) (personal injuries, two years), *Id.* § 8-13 (contracts, three years); W. VA. CODE ANN. § 55-2-12 (1966) (personal injuries, three years), *Id.* (unwritten contracts, five years); WISC. STAT. ANN. § 893.205 (1966) (personal injuries, three years), *Id.* § 893.19(3) (contracts, six years); WYO. STAT. ANN. § 1-18 (1957) (torts, four years), *Id.* § 1-17 (unwritten contracts, eight years). For a further discussion of the statutes in the various states, see D. LOUISELL & H. WILLIAMS, *MEDICAL MALPRACTICE* ¶ 13.13-64 (1973).

57. *E.g.*, *Lewis v. Owen*, 395 F.2d 537 (10th Cir. 1968).

58. *E.g.*, *Cherry v. Falvey*, 188 Ark. 827, 68 S.W.2d 98 (1934).

substance of the action.⁵⁹ Generally the tort statute will be applied unless there is an express agreement to cure;⁶⁰ the prevailing view, and the modern trend, is to determine which statute governs by looking to the substance rather than the form of the action.⁶¹

A few cases have held that the prescriptive period for torts or a special statute for personal injury actions governs whether the form of action is one for negligence or for breach of contract.⁶² Similarly, actions for wrongful death are limited by a special statutory period, rather than the generally shorter period for malpractice.⁶³ In the case of an express contract, however, courts may apply the statute of limitations for contract actions,⁶⁴ with the statute running from the date of breach rather than the date damages are incurred.⁶⁵

The recent trend in determining which statute of limitations governs is sound: in the case of express agreements to cure, the contracts

59. *E.g.*, *Conklin v. Draper*, 229 App. Div. 227, 241 N.Y.S. 529, *aff'd mem.*, 254 N.Y. 620, 173 N.E. 892 (1930). See Annot., 80 A.L.R.2d 320, 325 (1961).

60. *Huysman v. Kirsch*, 6 Cal. 2d 302, 306, 57 P.2d 908, 910 (1936); *Hundt v. Burhans*, 13 Ill. App. 3d 415, 300 N.E.2d 318 (1973); *Kauchick v. Williams*, 435 S.W.2d 342 (Mo. 1968); *Cloutier v. Kasheta*, 105 N.H. 262, 197 A.2d 627 (1964); *Lakeman v. LaFrance*, 102 N.H. 300, 156 A.2d 123 (1959); *Mamunes v. Williamsburgh Gen. Hosp.*, 28 App. Div. 2d 998, 283 N.Y.S.2d 457 (1967); 5A PERSONAL INJURY, *supra* note 10, at 80-81. See 1 D. LOUISELL & H. WILLIAMS, MEDICAL MALPRACTICE ¶ 13.03, at 366-67 (1973).

61. Annot., 80 A.L.R.2d 320, 326 (1961); 5A PERSONAL INJURY, *supra* note 10, at 80-81.

62. *Greeson v. Sherman*, 265 F. Supp. 340 (W.D. Va. 1967); *Maercklein v. Smith*, 129 Colo. 72, 266 P.2d 1095 (1954); *Patterson v. Vincent*, 44 Del. 442, 61 A.2d 416 (Super. Ct. 1948); *Trimming v. Howard*, 52 Idaho 412, 16 P.2d 661 (1932); *Hackworth v. Hart*, 474 S.W.2d 377 (Ky. Ct. App. 1971); *Calhoun v. Gales*, 29 App. Div. 2d 766, 287 N.Y.S.2d 710 (1968); *Hertgen v. Weintraub*, 29 Misc. 2d 396, 215 N.Y.S.2d 379 (Sup. Ct. 1961); *Griffin v. Woodhead*, 30 R.I. 204, 74 A. 417 (1909); *Bodne v. Austin*, 156 Tenn. 353, 2 S.W.2d 100 (1928); *Suskey v. Davidoff*, 2 Wisc. 2d 503, 87 N.W.2d 306 (1958).

These courts reason that if the legislature has created a prescriptive period in which "malpractice" or "personal injury" actions must be brought, then to allow the plaintiff to recover on a contract theory would be contrary to legislative intent. This argument is less persuasive when one considers the current trend to allow plaintiffs in tort actions more time in which to bring suit by running the statute from the time of discovery (compare with running of statute for contracts from time of breach instead of time damages are received, note 65 *infra* and accompanying text). Nevertheless, once discovery is made, it is the shorter statute of limitations that applies. Comment, *The Implied Contract Theory of Malpractice Recovery*, 6 WILLAMETTE L.J. 275, 282 (1970).

At least one court has construed the shorter "malpractice" statute as applying only to actions against physicians, surgeons, dentists, or those practicing Christian Science, while the longer "negligence" or tort statute was applied to hospitals. *Blastos v. Elliot Community Hosp.*, 105 N.H. 9, 200 A.2d 854 (1964).

63. *Klema v. St. Elizabeth's Hosp.*, 170 Ohio St. 519, 166 N.E.2d 765 (1960).

64. *Camposano v. Claiborn*, 2 Conn. Cir. 135, 196 A.2d 129 (2d Dist. 1963); *Robins v. Finestone*, 308 N.Y. 543, 127 N.E.2d 330 (1955).

65. *Crawford v. Duncan*, 61 Cal. App. 647, 215 P. 573 (2d Dist. 1923).

statute applies; in the case of malpractice actions or an implied contract to use a requisite standard of due care, the torts statute controls. This trend corresponds with the preference for treating actions on implied contract as actions sounding in tort. Both practices reflect a laudable recognition on the part of courts that the nature of an action on implied contract is not breach of contract but negligence. Likewise, whether a cause of action is based on an implied contract to use ordinary skill and care or an express agreement to cure is a matter of substance, not form.

VI. DAMAGES

Brief mention has been made of the problem of damages in *Sullivan v. O'Connor*,⁶⁶ but the problem is complex and deserving of greater attention, since, as every first year law student knows, a right rises no higher than its remedy. Remedies for negligence rise considerably higher than those for breach of contract: the former allowing recovery for personal injury and pain and suffering, the latter for payments made and medical expenses incurred, as well as other damages incidental to the breach.⁶⁷ As previously pointed out, however, courts have disagreed over allowing recovery of pain and suffering damages in contract actions.⁶⁸

In actions for breach of contract the law attempts to put the injured party in as good a position as he would have been had the contract been performed. The only real limit to recovery is that the party should not be placed in a better position than he would have been had the contract been properly executed.⁶⁹ And though most courts allow recovery of out-of-pocket expenses,⁷⁰ other courts have adopted more liberal formulations for recovery.

In *Hawkins v. McGee*,⁷¹ the most famous American case on breach of medical contract, the New Hampshire Supreme Court applied an expectancy measure of damages to compensate the plaintiff. In that case the defendant physician promised to perform plastic surgery on

66. See text accompanying notes 2-10 *supra*.

67. *Colvin v. Smith*, 276 App. Div. 9, 92 N.Y.S.2d 794 (1949); *Miller*, *supra* note 18, at 424.

68. Note 10, *supra*.

69. *Fuller & Perdue, Reliance Interest in Contract Damages*, 46 *YALE L.J.* 52, 79 (1936).

70. *Anclote Manor Foundation v. Wilkinson*, 263 So. 2d 256 (Fla. Ct. App. 1972); *Lake v. Baccus*, 59 Ga. App. 656, 2 S.E.2d 121 (1939); *Frankel v. Wolper*, 181 App. Div. 485, 169 N.Y.S. 15 (1918), *aff'd*, 228 N.Y. 583, 127 N.E. 913 (1920) (per curiam).

71. 84 N.H. 114, 146 A. 641 (1929).

plaintiff's burned hand and assured plaintiff that the result would be a "100% perfect hand."⁷² In fact, the result was far from perfect, and the skin grafted onto plaintiff's hand from his chest caused hair to grow on his palm. Plaintiff brought suit for breach of contract, and the court found the proper measure to be the difference between the value of a perfect hand and the value of the hand in its deteriorated condition. The court awarded no damages for pain and suffering, finding it part of the legal detriment for the operation.⁷³

The New Hampshire court's adoption of an expectancy measure of damages in *Hawkins* has been criticized by one writer as creating the possibility of an inordinate financial burden on the physician.⁷⁴ For example, damages would clearly be excessive in a case in which the physician promised to cure the patient of a disease and the disease proved incurable: the measure of damages would be the difference between the condition of a healthy patient as promised and the patient in a dying condition.⁷⁵ Furthermore, the defendant would be barred from raising the defenses of mistake or impossibility: in the first instance the mistake would be unilateral;⁷⁶ in the second, the defendant would have reason to know of the impossible nature of the contract.⁷⁷

Yet the New Hampshire court followed the precedent set in *Hawkins* in another case of breach of contract just three years later.⁷⁸ This time plaintiff had contracted with a physician for a series of five shots which were to be administered at one week intervals. The effect of the injections was so deleterious, however, that plaintiff could take only three of them, thus leaving the treatment uncompleted and unsuccessful. Plaintiff was compensated for the difference between the value of the condition promised and the actual condition "including incidental consequences fairly subject to contemplation by the parties when the contract is made."⁷⁹ The court conceded that any undue suffering as a

72. *Id.* at 115, 146 A. at 643.

73. *Id.* at 118, 146 A. at 644.

74. Miller, *supra* note 18, at 426.

75. See 2 D. LOISELL & H. WILLIAMS, *MEDICAL MALPRACTICE*, ¶ 18.14, at 562 (Supp. 1975). The possibility of an excessive award being made under an expectancy measure of damages was pointed out by the Massachusetts court in *Sullivan v. O'Connor*, 363 Mass. 579, 585-86, 296 N.E.2d 183, 187-88 (1973).

76. See *RESTATEMENT OF CONTRACTS* § 503 (1932).

77. 6 S. WILLISTON, *CONTRACTS* § 1933 (2d ed. 1957); *RESTATEMENT OF CONTRACTS* § 456, comment c at 847-48 (1932). On the defenses of impossibility and mistake see *McQuaid v. Michou*, 85 N.H. 299, 157 A. 881 (1932). It should be noted that if both parties know that the performance of the contract is impossible, the contract is void. *McQuaid v. Michou*, *supra* at 306, 157 A. at 885.

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

79. *Id.* at 303, 157 A. at 883.

result of the three shots could be received in evidence to show the patient's actual condition, but denied recovery for pain and suffering, reasoning that it was "a part of the price the plaintiff is ready to pay for the agreed result."⁸⁰

In *Stewart v. Rudner*⁸¹ the Supreme Court of Michigan ruled otherwise. The action was brought in contract against defendants for failure to perform a Caesarian section on the plaintiff and for performance of an unauthorized episiotomy. As a result, plaintiff's child was stillborn. The Michigan court affirmed a lower court award of damages for pain and suffering as well as loss of wages.⁸² In discussing the history of tort and contract damages, the court adverted to the recent trend to allow recovery for mental suffering in actions *ex contractu*: breach of promise to marry, the use of abusive language by railroad employees, breach of contract of hotel lodgings, and breach of contract for burial.⁸³ In each of these cases, it is the nature of the injury rather than the form of the action that determines the measure of damages.

The judge might have added, as have some commentators, that to use a different measure of damages, depending on whether the action sounds in tort or contract, is "wholly irrational, and even the historical excuse for it is gone with abolition of the various common law forms of action."⁸⁴ One scholar has proposed the adoption of a measure of damages similar to that employed in actions for deceit: using a tort measure when the harm is essentially needless suffering, and a contract measure when there has been a failure to perform and no physical harm has resulted.⁸⁵ Another advocates an expectancy measure including damages for pain and suffering when they are a foreseeable consequence of the physician's breach; moreover, when the public interest calls for limiting physicians' liability, courts should feel free to do so.⁸⁶ While both suggestions have the virtue of flexibility, there remains the balancing interest of certainty and evenness of application in the law, which is yet to be met.

It is suggested that the proper resolution of these problems is to measure the damages by the nature of the injury rather than by the form

80. *Id.* at 303, 157 A. at 883; *accord*, *Lakeman v. LaFrance*, 102 N.H. 300, 305, 156 A.2d 123, 127 (1959).

81. 349 Mich. 459, 84 N.W.2d 816 (1957).

82. *Id.* at 475-76, 84 N.W.2d at 826-27.

83. *Id.* at 465-72, 84 N.W.2d at 821-25.

84. 1 D. LOUISELL & H. WILLIAMS, *MEDICAL MALPRACTICE* ¶ 8.03, at 198 (1973).

85. Miller, *supra* note 18, at 428.

86. Note, *Express Contracts to Cure: The Nature of Contractual Malpractice*, 50 IND. L.J. 361, 387 (1975).

of the action. As in the case of pleadings, it is the substance rather than the form that should govern, and it makes little sense to deny compensation for pain and suffering simply because a plaintiff's action sounds in contract rather than tort.⁸⁷

VII. ARGUMENTS FOR AND AGAINST ALLOWING ACTIONS FOR BREACH OF MEDICAL CONTRACTS

As in every aspect of law, contractual liability for physicians and surgeons is laden with policy—the balancing of competing interests in society. The broad considerations in cases such as *Sullivan v. O'Connor* are clearly defined: the right to contract versus the need to protect an often vulnerable profession.

There are persuasive arguments against allowing recovery under contract theory including the uncertainties of medical practice: to enforce such contracts would discourage physicians from giving the dis-

87. The case of breach of contract to sterilize poses a peculiar problem in awarding damages: should the liability extend to the rearing of the child? And is being "blessed with a child" a mitigating consideration? See generally Annot., 43 A.L.R.3d 1221 (1972); Note, *Remedy for the Reluctant Parent: Physician's Liability for the Post-Sterilization Conception and Birth of Unplanned Children*, 27 U. FLA. L. REV. 158 (1974).

In *Shaheen v. Knight*, 11 Pa. D. & C.2d 41 (C.P. 1957), an action was brought for failure to perform a vasectomy as promised. Damages for the expense of rearing and educating the child were disallowed. The Pennsylvania Court of Common Pleas felt that "[t]o allow damages in a suit such as this would mean that the physician would have to pay for the fun, joy and affection which plaintiff Shaheen will have in the rearing and educating of this, defendant's [sic] fifth child." *Id.* at 45-46. A similar result was reached in *Christensen v. Thornby*, 192 Minn. 123, 255 N.W. 620 (1934), in which the court found that the purpose of an operation to sterilize the husband was to save his wife from the hazards of childbirth, rather than the expense incident to delivery and pregnancy. *Christensen* is not authority, however, for denying recovery on the contract for expenses of birth or rearing and educating the child when the purpose of the operation is to limit the family's size. Under such circumstances, the court might have found the injury to be a foreseeable consequence of the breach. Note, 27 U. FLA. L. REV., *supra* at 167-68.

With the current concern about overpopulation, it can be expected that courts' attitudes toward these cases will change. There is already evidence of a shift in the judicial wind: in *Troppi v. Scarf*, 31 Mich. App. 240, 187 N.W.2d 511 (1971), a Michigan court ruled that the benefits of an unplanned child may be weighed against all elements of claimed damages. This holding does not, however, prevent recovery for expenses incident to the birth of an unwanted child, including recovery for the mother's lost wages, medical and hospital expenses, pain and anxiety of pregnancy, and the economic cost of rearing a child. Nor is the plaintiff required to mitigate damages by aborting the pregnancy or offering the child for adoption. But see *Ziemba v. Sternberg*, 45 App. Div. 2d 230, 357 N.Y.S.2d 265 (1974), in which the court found that the right to an abortion did not coincide with an obligation to have one in order to mitigate damages. Instead, the obligation may depend on several factors: the stage to which the pregnancy has progressed, the health and condition of the expectant mother, and the professional judgment and counsel received.

traught and fearful patient needed reassurance, retard the advancement of medical science, foster the practice of "defensive" medicine, and perhaps punish the doctor who is not at "fault."⁸⁸ In addition, contractual liability is normally excluded from medical malpractice insurance, thus placing a potentially large financial burden on the physician.⁸⁹ Observers have also emphasized the distinction between contracts made by physicians and patients and those made in commercial settings, the former being characterized by strong public policy and the lack of a profit motive (the lack of profit motive is debatable, especially in contracts supported by separate consideration, or in the "no cure, no pay" contract).⁹⁰ Moreover, those arguing against contractual liability point out that an adequate remedy for negligence is available if physicians incorrectly diagnose or recommend.⁹¹

Policy arguments favoring the enforcement of medical contracts are equally persuasive: physicians and their patients should have the freedom to contract, and if these contracts are not enforced, the public may be enticed by charlatans to enter into warranties to cure, thus shaking confidence in the medical profession.⁹² Furthermore, a suit in contract may be the easiest action for plaintiff to litigate and, in many instances, may be the only remedy available.⁹³

A possible solution to this dilemma is to enforce only particular types of medical contracts. One commentator has separated these contracts into two types: the "primary case" in which the physician employed, the time and place of treatment, the cost of specific guarantees, and any agreement to administer prescribed treatments are variables; and the "secondary case" in which there is an emergency and the bargaining atmosphere of the "primary case" is lacking.⁹⁴ The "primary case" seems much like a typical commercial transaction, while the "secondary case" resembles a contract of adhesion. In the first case,

88. *Sullivan v. O'Connor*, 363 Mass. 579, 582-83, 296 N.E.2d 183, 185-86 (1973); *Guilmet v. Campbell*, 385 Mich. 57, 188 N.W.2d 601 (1971) (dissenting opinion); Note, *Express Contract to Cure: The Nature of Contractual Malpractice*, 50 IND. L.J. 361, 366-67 (1975).

89. Hirsh, *Insuring Against Medical Professional Liability*, 12 VAND. L. REV. 667, 669 (1959); see *McGee v. United States Fidelity & Guar. Co.*, 53 F.2d 953 (1st Cir. 1931); 10 BROOKLYN L. REV. 411 (1941).

90. *Gault v. Sideman*, 42 Ill. App. 2d 96, 109-10, 191 N.E.2d 436, 443 (1963); Comment, *Establishing the Contractual Liability of Physicians*, 7 U.C.D.L. REV. 84, 90 (1974); Miller, *supra* note 18, at 434.

91. Comment, 7 U.C.D.L. REV., *supra* note 90, at 90-91 (1974).

92. *Sullivan v. O'Connor*, 363 Mass. 579, 583, 296 N.E.2d 183, 186 (1973).

93. Comment, 7 U.C.D.L. REV., *supra* note 90, at 93 (1974).

94. Note, 50 IND. L.J., *supra* note 88, at 371-75 (1975).

the article writer concludes that there is no reason why the contract should not be enforced if the jury finds the existence of a contract. In the second case, there may be a need to guarantee good results in order to prepare the patient psychologically for surgery, therefore, the guarantee should not be upheld.⁹⁵

Such a distinction does indeed add spice to the problem. But the solution is only half-baked: it is a matter of deciding not only what kinds of contracts should be enforced, but also what burden of proof plaintiff should be required to shoulder. Most courts understandably prefer the more palatable, albeit blander formula: allowing recovery in both cases, but only on clear proof of contract. Instructions to the jury may include tests of truth and consideration of the complexity of the operation as bearing on the probability that a result was promised.⁹⁶

IX. CONCLUSION

Given these policy considerations, *Sullivan v. O'Connor* has set an important precedent: it has extended the contractual liability of physicians and surgeons by interpreting the physicians' illustration of the proposed operation as a guarantee of results, and it has awarded damages for pain and suffering when the contract to cure has been breached.⁹⁷ One critic has viewed the *Sullivan* case with considerable alarm, finding that 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."⁹⁸ One solution to the problem created in *Sullivan*, then, is to eliminate damages for pain and suffering.⁹⁹

But to condition damages for pain and suffering based on the form of the action rather than the nature of the injury is specious. The problem created by *Sullivan* is one not of damages but of proof. In compensating Alice Sullivan for pain and suffering resulting from an operation not contracted for, the Massachusetts court made an award that is not only just but which also follows recent trends in damages in both contract and tort law.¹⁰⁰ Yet on the problem of proof, the court

95. *Id.*

96. *Sullivan v. O'Connor*, 363 Mass. 579, 583, 296 N.E.2d 183, 186 (1973).

97. Note, *Contractual Liability in Medical Malpractice—Sullivan v. O'Connor*, 24 DEPAUL L. REV. 212, 213 (1974).

98. *Id.* at 225.

99. *Id.*

100. See part VI, Damages, *supra*.

failed to set sufficiently rigid standards for determining the existence of a contract. The plaintiff's burden of proof is considerably lighter in actions for contract than in actions for tort: there is no burden of proving negligence, and there is no hindrance by a "conspiracy of silence" within the medical community since the case may be presented as a jury question without obtaining expert medical testimony.¹⁰¹

Responding to this problem of proof, some states have recently enacted statutes of frauds requiring enforceable medical contracts to be in writing.¹⁰² For states that have no such statutes, it is suggested that a corroborative evidence rule be adopted.¹⁰³ This would place a heavier burden on the plaintiff to prove the existence of a contract, requiring corroborative evidence such as a written instrument, separate consideration, or the testimony of witnesses.¹⁰⁴ Even though adoption of such a rule would sacrifice plaintiff's reliance interest (since under present law, if defendant has made a promise that plaintiff relies on to his detriment, defendant is estopped from denying enforceability of the promise),¹⁰⁵ the patient's interest must be balanced against the physician's. A combination of adopting a stricter burden of proof and a liberal measure of damages including compensation for pain and suffering will provide protection for physicians as well as an adequate remedy in contract for plaintiffs who can show an agreement to cure. Those suing on an implied agreement to use due care, like those suing for negligence, will have the traditional remedy in tort.

For the present, attorneys should take notice of the ruling in *Sullivan*. For the attorney representing the patient it may provide a remedy for which there is a lighter burden of proof and, generally, a longer statutory period in which to bring suit; those presently grazing exclusively in the realm of torts may find greener pastures in the field of contracts.

THOMAS MEARES WOODBURY

101. Annot., 43 A.L.R.3d 1221, 1227 (1972); Miller, *supra* note 18, at 417.

102. E.g., MICH. STAT. ANN. § 26.922(g) (Stat. Release No. 1, 1974), *amending* MICH. STAT. ANN. § 26.922 (1970); OHIO REV. CODE ANN. § 1335.05 (Page, Supp. 1975), *amending* OHIO REV. CODE ANN. § 1335.05 (1962); 2 PURDON'S PA. LEGIS. SERV., Act No. 111 § 606 (1975).

103. This proposal has been made by at least two other commentators: Note, 50 IND. L.J., *supra* note 88, at 376-79; Note, *Torts—Medical Malpractice—Express Warranty of Particular Results of an Operation*, 41 TENN. L. REV. 964, 973-74 (1974).

104. Note, 50 IND. L.J., *supra* note 88, at 376-79.

105. *Id.*