

MEDICAL MALPRACTICE, CONTRACT OR TORT: THE VERMONT STATUTE OF FRAUDS

The most recent, and quite possibly the most important, development in the promissory estoppel or §90 cases has been the suggestion that such contract-based defenses as the Statute of Frauds are not applicable when the estoppel (or reliance) doctrine is invoked as the ground for decision. This line, if it continues to be followed, may ultimately provide the doctrinal justification for the fusing of contract and tort in a unified theory of civil obligation. . . . By passing through the magic gate of §90, it seems, we can rid ourselves of all the technical limitations of contract theory.¹

INTRODUCTION

The mid-1970's were years of apparent crisis for the nation's medical practitioners. Malpractice suits escalated in number and damage awards increased in size. Malpractice insurers responded by increasing premiums by as much as 300%; in some cases insurers simply fled the market.² Vermont was not immune to the problem, with insurance premiums for some practitioners rising as much as 200%.³ Nationwide, legislatures reacted sharply, passing crisis legislation aimed at burdening the alleged malpractice victim with a yoke of laws designed to make litigation and recovery more difficult.⁴ The Vermont legislature followed this trend, introducing legislation designed to attack the problem on several fronts.⁵ Yet, "[l]ess than a decade after states took emergency steps to solve the medical practice insurance crisis, insurers and physicians say the problem is as bad as ever."⁶ Because the crisis has not diminished, the time is ripe to assess the Vermont legislation in light of its stated purposes and its effect on medical malpractice litigation.

One Vermont law addressing the medical malpractice problem was a provision amending the general statute of frauds to include

1. G. GILMORE, *THE DEATH OF CONTRACT* 90 (1974). Professor Gilmore was referring to *RESTATEMENT (SECOND) OF CONTRACTS* § 90 (1979).

2. *The Wall Street Journal*, Sept. 21, 1983 at 35, col. 4.

3. See *Hearings on J.R.S. 29, S. 169, S. 170, S. 171 and S. 172, Before the Senate Health and Welfare Committee*. Adj. Sess., [hereinafter cited as *Jan. 1976 Hearings*].

4. Seidel, III., *Malpractice Reform in Michigan*, 1976 *DET. C.L. REV.* 235, 250-55 (1976).

5. *Jan. 1976 Hearings*, *supra* note 3, at 6-7, 32-33.

6. *The Wall Street Journal*, Sept. 21, 1983 at 35, col. 4.

agreements, promises, contracts, and warranties to cure.⁷ Thus, to be actionable, contracts to cure must now be in writing and signed by the party charged with breach.⁸ The amendment's author argued in favor of the amendment from a consumer perspective: He believed "doctors must be relieved of unwarranted suits if the soaring costs of insurance, . . . legal expense and litigation are going to be contained."⁹ Otherwise the exorbitant costs will be passed on to the consumer. The amendment was intended to defeat the actionability of "controversial malpractice claims . . . based on an alleged promise of a physician to effect a certain cure or result . . . unless the alleged promise is in writing."¹⁰ This legislation was wholly anticipatory; no such "controversial claims" had ever reached the Vermont Supreme Court.¹¹ Moreover, no case concern-

7. VT. STAT. ANN. tit. 12, § 181 (1973 & Supp. 1984). This section states:

An action at law shall not be brought in the following cases unless the promise, contract or agreement upon which such action is brought or some memorandum or note thereof is in writing, signed by the party to be charged therewith or by some person thereunto by him lawfully authorized:

. . .

(6) An agreement to cure, a promise to cure, a contract to cure or warranty of cure relating to medical care or treatment or the results of a service rendered by a health care professional which shall mean a person or corporation licensed by this state to provide health care or professional services as a physician, dentist, registered or licensed practical nurse, optometrist, podiatrist, chiropractor, physical therapist or psychologist, or an officer, employee or agent thereof acting in the course and scope of his employment;

(7) An agreement to cure, a promise to cure, a contract to cure or warranty of cure relating to medical care or treatment rendered by a health provider, which shall mean a corporation, facility or institution licensed to provide health care as a hospital.

Id.

8. *Id.*

9. *Jan. 1976 Hearings, supra* note 3, at 2.

10. *Id.* at 6.

11. The impetus for this legislation was probably information provided to Senator Howland by the American Mutual Insurance Alliance. See Rowling, F.D. Statement before the Medical Malpractice Subcommittee of the Executive Committee Conference of Insurance Legislatures. Chicago, July 25, 1976 at 7-8. Mr. Rowling said:

Cases in which recovery has been based on lack of informed consent or the promise to cure, have led to abuse by their very nature. The opportunity for abuse in such cases is obvious. Recovery is not based on any wrong doing by the doctor, but upon some analysis some years after the fact that the patient was not told of all the consequences of the medical treatment he was to receive, or that the doctor made a statement which the patient might possibly construe to mean that his recovery would be guaranteed if he underwent the prescribed treatment. The Alliance feels that to be valid, promises of cure should be in writing. And, standard for informed consent should be that of the local community in which the doctor practices.

Id.

ing contracts to cure and the Vermont statute of frauds has yet been considered by the Vermont Supreme Court.

Through this anticipatory legislation the Vermont legislature established a policy that, in effect, favors dealing with medical malpractice claims in a tort (negligence) cause of action rather than a breach-of-contract cause of action. Traditionally, contractual agreements between physician and patient have not been reduced to writing. By placing the statute of frauds hurdle in the path of the breach-of-contract action the legislature attempted to eliminate it, thus removing the more easily proved¹² and longer lived cause of action.¹³

This Note analyzes the nature and relationship of tort and contract causes of action in medical malpractice litigation, and relevance of the statute of frauds in a modern medical malpractice context, and the potential effects of the statute of frauds on medical malpractice litigation and plaintiffs' awards. This Note also shows that contracts to cure do not belong within the statute of frauds. The Vermont amendment was enacted without considering the effect of contemporary equitable doctrines. As a result, it added unnecessary complexity to litigation without reducing the volume of actions that may be brought or the size of potential damage awards.

I. NATURE OF MALPRACTICE: TORT AND CONTRACT

A. *Liability-Incurring Behavior: Tort*

Tort and contract differ in the nature of the interest each protects. Tort law protects a person's interest in freedom from various types of harm. The legal rules of conduct intended to protect that freedom are imposed primarily for reasons of social policy.¹⁴ Contract law protects a person's interest in the performance of promises. "[L]iability . . . is . . . imposed on a defendant who has voluntarily undertaken some obligation which, without excuse, he has failed to perform, his unexcused failure having caused loss to (or prevented gain by) the person in whose favor the obligation

12. Miller, *The Contractual Liability of Physicians and Surgeons*, 1953 WASH. L. Q. 413, 417 (1953).

13. Compare VT. STAT. ANN. tit. 12, § 511 (1973) and VT. STAT. ANN. tit. 12, § 512 (1973 & Supp. 1984).

14. W. PROSSER, LAW OF TORTS 613 (4th ed. 1971).

runs."¹⁵ Stated differently, contract law governs obligations voluntarily assumed, which are beyond the minimum obligations of conduct governed by tort law.

The tort-contract distinction loses clarity when applied to physician-patient relationships. A physician is under no legal duty to attend to the sick and injured.¹⁶ Thus, a duty is imposed upon a physician only when he voluntarily assumes it,¹⁷ an act suspiciously similar to the voluntary undertaking that leads to contract liability.¹⁸

In fact, courts decided the nascent malpractice cases on the basis of implied contract.¹⁹ "The physician or surgeon was spoken of as impliedly holding himself out as possessing the degree of learning, skill, and experience ordinarily possessed by the profession in similar localities. When he failed to exercise such usual knowledge and skill, he was regarded as having breached his contractual duty to his patient."²⁰ Those courts, however, recognizing that negligent conduct pervaded the cases before them, allowed complaints to sound in tort or contract.²¹ Gradually, a new view arose "that the consensual relation of physician to patient forms the basis of a duty and it is [that] duty, when violated by the neg-

15. G. GILMORE, *AGES OF AMERICAN LAW* 44 (1977). This is a general definition of contract formation. It does not include warranties which are implied by law. Moreover, under the objective theory of contract a person may burden himself, by his acts and words, with contract liability, yet not have proceeded from a subjective intent to contract. E. FARNSWORTH, *CONTRACTS* § 3.10 (1982).

16. W. PROSSER, *supra* note 13, at 340-41.

17. *Id.* at 343. *But see* VT. STAT. ANN. tit. 12, § 519 (1973). The statute requires:

(a) A person who knows that another is exposed to grave physical harm shall, to the extent that the same can be rendered without danger or peril to himself or without interference with important duties owed to others, give reasonable assistance to the exposed person unless that assistance or care is being provided by others.

(b) A person who provides reasonable assistance in compliance with subsection (a) of this section shall not be liable in civil damages unless his acts constitute gross negligence or unless he will receive or expects to receive remuneration. Nothing contained in this subsection shall alter existing law with respect to tort liability of a practitioner of the healing arts for acts committed in the ordinary course of practice.

(c) A person who willfully violates subsection (a) of this section shall be fined not more than \$100.00.

Id.

18. *See supra* note 14 and accompanying text.

19. Miller, *supra* note 11, at 413.

20. *Id.* at 413-14.

21. *Id.* at 414.

ligent conduct of the physician, which gives rise to tort liability."²²

The modern view has become well defined in practice, if not in theory. A physician does not, by undertaking treatment of a patient, impliedly warrant a cure or guarantee a result.²³ When rendering medical services he only holds himself out as having standard professional skill and knowledge.²⁴ If, absent an express contract to cure, a physician fails to live up to his standard, an action against him lies in tort (negligence), but not in contract (implied warranty).²⁵

B. *Liability-Incurring Behavior: Contract*

Courts have generally held that physicians and their patients are free to enter into contracts concerning the nature and result of treatment.²⁶ To be enforceable, such agreements must be express. Furthermore, a court's determination that a contract exists depends on the content of the physician's statements as well as the context in which they were expressed.²⁷ The importance of context arises out of the nature of the physician-patient relationship. Courts "have tried to balance the legitimate need to give patients 'therapeutic reassurance' against the right of individuals to enter contracts"²⁸ This tension is inherent in divining the difference between a physician's words of agreement and his statements of opinion and reassurance.

Vermont has not established a clear position on the common law of physician-patient contracts. The Vermont Supreme Court has never reviewed a medical malpractice suit based on breach of an express contract to cure. Courts in other jurisdictions, however, have reviewed such cases and have described conduct that has es-

22. *Id.* at 415.

23. *Coleman v. Garrison*, 349 A.2d 8 (Del. Super. 1975); *Miller v. Kennedy*, 11 Wash. App. 272, 522 P.2d 852 (1974); *Karriman v. Orthopedic Clinic*, 516 P.2d 534 (Okla. 1973); *Perin v. Hayne*, 210 N.W.2d 609 (1973); *Hackworth v. Hart*, 474 S.W.2d 377 (Ky. 1971); *Piper v. Halford*, 247 Ala. 530, 25 So. 2d 264 (1946).

24. *W. PROSSER*, *supra* note 13, at 162.

25. *Id.*

26. *Sullivan v. O'Connor*, 363 Mass. 579, 296 N.E.2d 183 (1973); *Guilmet v. Campbell*, 385 Mich. 57, 188 N.W.2d 601 (1971); *Robins v. Finestone*, 308 N.Y. 543, 129 N.E.2d 330 (1955); *McQuaid v. Michou*, 85 N.H. 299, 157 A. 881 (1932); *Hawkins v. McGee*, 84 N.H. 114, 146 A. 641 (1929).

27. *Note, Physicians and Surgeons—Sullivan v. O'Connor: A Liberal View of the Contractual Liability of Physicians and Surgeons*, 54 N.C.L. Rev. 885, 888-89 (1976).

28. *Id.* at 889.

established an express contract to cure.

The New Hampshire Supreme Court in *Hawkins v. McGee*²⁹ stated that a physician's mere prediction and opinions were not sufficient to form an express contract to cure.³⁰ The court ruled that the defendant's answer to the plaintiff's inquiry about recovery time, in which the defendant assured the plaintiff that he could go back to work within a few days with a "perfect hand," was not sufficient evidence of an expression of warranty.³¹ But the defendant's statement, "I will *guarantee* to make the hand a hundred per cent perfect hand," did establish an express warranty that was actionable,³² particularly considering that the surgeon solicited the opportunity to operate and used the expressions of warranty as an inducement.

The *Hawkins* decision is very restrictive. It does not impose a contractual duty upon a physician unless he articulates his assent with unequivocal language that clearly conveys his intent. Moreover, the circumstances in which the physician makes his statements are relevant to an interpretation of those statements. The court found that a contractual duty exists only when the physician's statements are not mere assurance, but words of inducement. Thus, the warranty of cure becomes a basis for the bargain.

Not all courts have been so restrictive in finding that a warranty of cure was part of the bargain in an agreement to perform surgery. In *Guilmet v. Campbell*,³³ the Michigan Supreme Court did not demand that a physician use unequivocal language. In *Guilmet*, the defendant surgeon assured the plaintiff, who inquired about an elective surgical procedure, that the operation "would take care of all troubles."³⁴ The trial judge sent the case to the jury, which found that an express contract to cure had been made and that the defendant had breached it. The defendant moved for judgement N.O.V., in effect asking that the court rule as a matter of law that "statements by defendant *before the parties had contracted for the operation* as to the danger, convalescence, and result [should] *not* be regarded as a term of a contract between a

29. 84 N.H. 114, 146 A. 641 (1929).

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

31. *Id.*

32. *Id.* (emphasis added).

33. 385 Mich. 57, 188 N.W.2d 601 (1971).

34. *Id.* at _____, 188 N.W.2d at 605.

physician and his patient."³⁵ The court concluded that where the terms of a negotiation are left to oral proofs, what the parties said and did, as well as what they intended by their actions, are questions of fact for jury determination. The terms of the contract must be disputed, but the meaning of the words used is a question of fact for the jury.³⁶

The court thus held that when statements by a physician may give rise to definitive expectations on behalf of his patient, a prima facie case of contractual duty has been established; words such as guarantee or warranty are unnecessary. Considering the physician's words, the jury determines if the plaintiff had reason to believe that the physician promised a certain result.

The Vermont Supreme Court has not addressed what form expressions of guarantee must take before a jury may determine if a plaintiff had reason to believe that the defendant physician guaranteed a result. The court, however, has addressed the jury's role in determining the meaning of a written contract. It has held that "[w]hen the contract is ambiguous, the function of the jury is invoked to determine its meaning as an issue of fact."³⁷ Furthermore, the court has held that the jury's role does not change when extrinsic evidence is introduced as an aid in interpreting an ambiguous written contract.³⁸ The role of the jury in interpreting oral contracts is not clear. However, a reasonable inference can be drawn that when a dispute arises about a physician's intent to guarantee a result or cure, the jury will determine whether the patient had reason to believe that the physician warranted a specific result.

C. Damages

Once a breach of a contract to cure or medical negligence has been established, determination of damages becomes the focus of the action. Tort and contract damages differ concerning the extent and timing of the foreseeability requirement. Negligence damages, to be recoverable, must be reasonably foreseeable by the ordinary prudent person,³⁹ but the negligent party does not have to antici-

35. *Id.*

36. *Id.*

37. *Rich v. Chadwick*, 139 Vt. 508, 510, 430 A.2d 1280, 1282 (1981).

38. *Gardner v. West-Col, Inc.*, 136 Vt. 381, 385, 392 A.2d 383, 386 (1978).

39. *Palsgraf v. Long Island R.R. Co.*, 248 N.Y. 339, 162 N.E. 99 (1928).

pate the specific injury incurred.⁴⁰ To be liable for contract damages, the contractor must have reason to foresee the damages as a *probable* result of his breach.⁴¹ Furthermore, tort damages must be foreseeable at the time the negligence was committed,⁴² while contract damages must be foreseeable at the time the contract was made.⁴³

The general form of negligence damages, compensatory damages, is applied to medical malpractice. Compensatory damages are monetary awards which attempt to place an injured party "as nearly as possible in the condition he would have occupied if the wrong had not occurred . . ." ⁴⁴ "This recovery is not confined to direct pecuniary loss, but includes monetary compensation for such items as pain and suffering, actual injuries sustained, length of confinement, actual amounts paid for care and treatment, and lost earnings."⁴⁵ Regardless of the nature of the injuries suffered, the jury's award is limited to compensation for those natural and probable consequences of the physician's negligence.⁴⁶

When contracts are breached, courts award monetary relief on the basis of one of three separate interests of the injured party: expectation, restitution, and reliance.⁴⁷ The measure awarded is based on the nature of the contract and the circumstances surrounding the breach.

In contrast to tort damages, where the injured party is returned to his pre-tort condition, contract damages put the injured party in as good a position as he would have been had the contract been performed.⁴⁸ This expectation interest was the basis upon which damages were calculated in *Hawkins v. McGee*.⁴⁹ The court awarded the difference in value of the promised condition of the plaintiff's hand and its actual post-operative condition. The court did not allow the plaintiff to recover for pain and suffering because, it reasoned, the pain and suffering constituted part of the

40. *Id.*

41. E. FARNSWORTH, *CONTRACTS* § 12.14, at 873 (1982).

42. *Palsgraf v. Long Island R.R. Co.*, 248 N.Y. 339, 162 N.E. 99 (1928).

43. E. FARNSWORTH, *supra* note 41, at § 12.14.

44. C. MCCORMICK, *HANDBOOK ON THE LAW OF DAMAGES* § 137 (1935).

45. J. MIRABEL & H. LEVY, *THE LAW OF NEGLIGENCE* 286 (1962).

46. *Id.*

47. E. FARNSWORTH, *supra* note 41, at § 2.1.

48. *Id.* at 812.

49. 84 N.H. 114, 146 A. 641 (1929).

plaintiff's consideration.⁵⁰ The plaintiff had agreed to the pain and suffering accompanying the operation, and therefore it could not enter the expectancy calculus which only includes the lost value of the bargain and other losses caused by the breach.⁵¹

Restitution damages are awarded to eliminate unjust enrichment of the breaching party. They return to the injured party any benefit the breaching party has gained through his breach. In this manner, the breaching party is returned to his pre-contract status, although the injured party is not.⁵² The injured party does not recover for ancillary expenditures; he only recovers the money, property and services rendered the breaching party.⁵³ Thus, the potential size of the restitution award is generally smaller than either the expectancy measure or, as will be demonstrated, the reliance measure.⁵⁴ Therefore, it is not a likely choice of plaintiffs in contractual medical malpractice suits.

Reliance damages put the injured party back in the position he would have been in had the contract not been made.⁵⁵ Reliance may be divided into two types:⁵⁶ essential reliance, which consists of a party's preparation and performance under the contract; and incidental reliance, which consists of "preparations for collateral transactions that a party plans to carry out when the contract in question is performed."⁵⁷

The reliance measure of damages is very similar to the tort compensatory damage measure. Both measures compensate a party for direct and indirect injuries resulting from harmful acts. By applying these measures, courts seek to return the injured party to his pre-injury status. Therefore, if a single injury resulted from both a breach of a contract to cure and a physician's negligence, a reliance award for the breach should be substantially the same as

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

51. E. FARNSWORTH, *supra* note 41, at § 12.9.

52. *Id.* at § 12.1.

53. *Id.*

54. *Id.* The injured party's lost profit and reliance expenditures are not restored. Restitution is usually selected in losing contract situations. Generally, such contracts are performance contracts; for example, construction contracts which become obviously unprofitable prior to completion. *See id.* at § 12.20.

55. *Id.* at § 12.1.

56. *Id.*

57. *Id.*; *see also* Fuller & Perdue, *The Reliance Interest in Contract Damages*, (pts. 1, 2) 46 *YALE L. J.* 52, 373 (1936, 1937) (for a discussion of cases where reliance damages were awarded); *RESTATEMENT (SECOND) OF CONTRACTS* § 344 (1979).

compensatory damages for the negligence.

In *Sullivan v. O'Connor*,⁵⁸ the court awarded a reliance-like damage award for a doctor's breach of a contract to cure. The plaintiff brought a contract action against a plastic surgeon for not only failing to improve her nose as promised, but for actually worsening its appearance. The plaintiff was awarded out-of-pocket expenses; damages flowing directly, naturally, proximately, and foreseeably from the breach; and damages for pain and suffering resulting from a third operation.⁵⁹ The third operation was an attempt to rectify the damage resulting from the previous two bargained for operations.

The *Sullivan* court thought an award of the expectancy measure of damages would be too harsh. It reasoned that the fee paid by a typical patient would be disproportionate to the potential recovery,⁶⁰ particularly since the doctor had been absolved of negligence. Moreover, because the value of a beautiful nose was indeterminable, the court thought that the amount of the award would strain the imagination of the fact finder.⁶¹ The court, by declining to use the expectancy measure of *Hawkins*, in effect, applied the special circumstances rationale developed in *Lamkins v. International Harvester Co.*⁶² Had the doctor agreed to accept the risk

58. 363 Mass. 579, 296 N.E.2d 183 (1973).

59. *Id.* at 588, 296 N.E.2d at 189.

60. *Id.* at 586, 296 N.E.2d at 188.

61. *Id.*

62. 207 Ark. 637, —, 182 S.W.2d 203, 205 (1944).

In *Lamkins* the plaintiff sought the value of a 25 acre plot of soybeans as the proper measure of damages for the defendant tractor dealer's failure to deliver a \$20 lighting accessory. The court stated:

Where the damages arise from special circumstances, and are so large as to be out of proportion to the consideration agreed to be paid for the services to be rendered under the contract, it raises a doubt at once as to whether the party would have assented to such a liability, had it been called to his attention at the making of the contract, unless the consideration to be paid was also raised so as to correspond in some respect to the liability assumed.

Id. at —, 182 S.W.2d at 205 (citing *Hooks Smelting Co. v. Planters' Compress Co.*, 72 Ark. 275, 79 S.W. 1056 (1904)). The court went on to explain:

[T]here is nothing in the testimony showing circumstances surrounding and connected with the transaction which were calculated to bring home to the dealer knowledge that appellant expected him to assume liability for a crop loss, which might amount to several hundreds of dollars, if he should fail to deliver a \$20 lighting accessory. There was, of course, no such express contract on the dealer's part, and the facts and circumstances are not such as to make it reasonable for the trier of facts to believe that the dealer at the time tacitly consented to be bound for more than ordinary damages in case of

attached to a contract for a beautiful nose, his fee would have risen proportionately. Moreover, the court's refusal to award expectancy damages because of the indeterminate value of a beautiful nose amounted to an application of the rule that "[d]amages are not recoverable for loss beyond an amount that the evidence permits to be established with reasonable certainty."⁶³

A major development in *Sullivan* was Justice Kaplan's conclusion that the portion of a patient's pain and suffering resulting from a breach of a contract to cure was compensable.⁶⁴ Justice Kaplan reasoned that pain and suffering is generally not awarded for breach of business contracts because the injury is not fairly foreseeable as a probable consequence of the breach. Pain and suffering, however, are foreseeable as a consequence of a surgical procedure. Moreover, two kinds of pain and suffering exist in this case: pain and suffering envisaged as part of a successful treatment, and pain and suffering resulting from the breach.⁶⁵ Justice Kaplan concluded that pain beyond that envisaged as attendant to successful performance of the contract should be compensable.⁶⁶

Justice Kaplan's failure to include pain and suffering resulting from the bargained for operations produced a less than true reliance award. He simply does not explain why pain and suffering

default on his part.

Id. at ____, 182 S.W.2d at 206.

Comparing the court's analysis in *Lamkins* with Justice Kaplan's analysis in *Sullivan*, a problem in Justice Kaplan's approach to restricting expectancy damages becomes manifest. Because a contract to cure is so extraordinary, it is difficult to see how a doctor would not know he was promising a cure and not believe he was accepting the concomitant liability when making the promise. Yet, Justice Kaplan concluded that these extraordinary contracts can be formed even though the doctor did not intend to promise a cure, and in that case, extraordinary liability would not result from a breach. To argue that a mere lack of an exceptionally high fee indicated that a doctor did not intend to assume the extraordinary liability that accompanies an extraordinary contract is far-fetched. Justice Kaplan could have avoided this difficulty had he denied expectancy damages on the singular basis that they could not be determined with reasonable certainty.

63. RESTATEMENT (SECOND) OF CONTRACTS § 352 (1979); see also 5 A. CORBIN, CORBIN ON CONTRACTS §§ 1020-1021 (1964).

64. 363 Mass. at 587-88, 296 N.E.2d at 189. In contrast, the court in *Stewart v. Rudner* did not differentiate, for purposes of compensation, pain and suffering which attend a successfully performed contract from that which results from breach. 349 Mich. 459, 84 N.W.2d 816 (1957).

65. 363 Mass. at 587-88, 296 N.E.2d at 189.

66. *Id.* The court also admitted that it could be argued that even suffering and distress which was part of the bargain should also be compensable. This suffering is wasted if treatment fails and as a result compensation is required to restore the patient to the *status quo ante*.

endured from the first two operations is not equivalent to essential reliance.⁶⁷ Such pain and suffering is inextricably bound to the patient's performance. The patient endures the pain in furtherance of the successful completion of the contract.

The Vermont Supreme Court has not addressed the issue of compensation for pain and suffering resulting from breach of a physician's contract to cure. In *Albright v. Fish*,⁶⁸ however, the court reiterated its rule of contract damages. The court stated that a party aggrieved by a breach can recover general damages which usually and naturally flow from it. The party can also recover special or consequential damages subject to the limitations of causation, certainty, and foreseeability.⁶⁹ The consequential damages must be reasonably foreseeable as a *probable* result of the breach, and they must be reasonably within the contemplation of the parties at the moment they made the contract.⁷⁰ Vermont's rules of contract damages are essentially the same as those set forth in *Sullivan*. In keeping with its prior decisions, the Vermont Supreme Court would probably allow damages for pain and suffering, at least, beyond that endured as part of the bargain of a contract to cure.⁷¹

The *Hadley v. Baxendale*⁷² rule, as applied to expectation damages, was an important limitation on the scope of recovery for breach of contract. It is far more restrictive than the proximate cause test for actions in tort.⁷³ Pain and suffering, the potentially largest component of a medical malpractice award, will be recovered only rarely under the *Baxendale* limitation.⁷⁴ Some degree of pain and suffering, however, should constitute a portion of a reliance award. The reliance award is generally smaller than the ex-

67. E. FARNSWORTH, *supra* note 41, at § 12.1.

68. 138 Vt. 585, 422 A.2d 250 (1980). See also *Norton & Lamphere Construction Co. v. Blow and Cote, Inc.*, 123 Vt. 130, 183 A.2d 230 (1962); *Berlin Development Corp. v. Vermont Structural Steel Corp.*, 127 Vt. 367, 250 A.2d 189 (1968).

69. 138 Vt. at 590, 422 A.2d at 254.

70. *Id.* (citing *Norton & Lamphere Construction Co.* quoting *Hadley v. Baxendale*, 9 Ex. 341, 156 Eng. Rep. 145 (1854)).

71. Pain and suffering endured as part of the bargain is within the contemplation of the parties, fully foreseeable and certain, but it is not caused by the breach.

72. 9 Ex. 341, Eng. Rep. 145. The rule is the foreseeability test for recovery of consequential damages resulting from a breach of contract.

73. W. PROSSER, *supra* note 13, at 251.

74. Only pain and suffering caused by the breach are compensable as consequential damages. Thus, pain and suffering that would have been endured even if the treatment had been successful is not compensable, because it does not meet the requirement of causation.

pectancy award, but when pain and suffering is a component of reliance damages the reliance measure may be far greater than the expectancy measure. Proponents of including contracts to cure within the statute of frauds may have recognized that the court in *Sullivan*, by including pain and suffering, was actually enlarging the scope of damages for breaches of contracts to cure. Now that Vermont has included contracts to cure in its statute of frauds, the potential effect on medical malpractice litigation and damage awards invites analysis.

II. THE STATUTE OF FRAUDS: A PERSPECTIVE

On April 16, 1677, Charles II put his seal on An Act for the Prevention of Frauds and Perjuries.⁷⁵ It was enacted to prevent frauds resulting from perjury and subornation of perjury.⁷⁶ The law and the courts in the seventeenth century were vastly different from the law and courts of today. Contract law had just begun to develop within the action of assumpsit.⁷⁷ Trial by jury was in a crude state: There were no meaningful rules of evidence and "parties to the suit were not allowed to testify on their own behalf."⁷⁸ Under the prevailing conditions, written evidence of contract was necessary. A plaintiff could suborn a friend's testimony and the defendant could not testify to rebut the perjury.⁷⁹ Written evidence often was an honest defendant's only defense. Moreover, a general fear of the jury's uncontrolled power existed. Such conditions no longer prevail.

In its contemporary setting, the statute of frauds primarily serves two functions: evidentiary and cautionary.⁸⁰ A written contract is direct evidence of an agreement, and the act of writing and signing the contract impresses upon the parties the seriousness of their undertaking.⁸¹ Some commentators believe that, notwithstanding these functions, the statute perpetuates more injustice

75. Summers, *The Doctrine of Estoppel Applied to the Statute of Frauds*, 79 U. PA. L. REV. 440 (1931).

76. Note, *Statute of Frauds—The Doctrine of Equitable Estoppel and the Statute of Frauds*, 66 MICH. L. REV. 170 (1976).

77. 2 A. CORBIN, *supra* note 63, at § 275.

78. Summers, *supra* note 75, at 441.

79. *Id.*

80. Note, *Equitable Estoppel and the Statute of Frauds in California*, 53 CALIF. L. REV. 590, 591 (1965).

81. *Id.* at 591.

than it prevents.⁸² They maintain that the rules pertaining to the competency of witnesses and to the admissibility of testimony make perjured testimony far less common than during preceding periods.⁸³ Thus, any gain in the prevention of fraud can no longer support the loss suffered by "permitting the persons who have in fact made oral promises to break those promises with impunity"⁸⁴

Professor Corbin, the statute's most notable critic, lamented the statute's inclusion in article 2 of the Uniform Commercial Code.⁸⁵ Essentially, Professor Corbin argued that the statute is at odds with established human habits, that circumstances have changed since the statute was adopted, and that it fosters negative results.⁸⁶ In spite of such forceful, long established criticism, the Vermont legislature, and the legislatures of other states as well, brought contracts to cure within the statute, almost 300 years after it was first enacted.

As presently interpreted by the Vermont Supreme Court, the statute of frauds may not produce its intended effects.⁸⁷ Although it may limit *contractual* medical malpractice liability, an *extra-contractual* reliance-like liability may still be imposed. Damage awards may not subside because in most cases the reliance-like measure fits the "as justice requires" paradigm of the Restatement (Second) of Contracts⁸⁸ which closely parallels the tort measure of damages.

III. HOW THE VERMONT STATUTE OF FRAUDS OPERATES

Prior to the enactment of title 12, section 1024 of Vermont Statutes Annotated (which has been superseded by Rule 8(c) of the Vermont Rules of Civil Procedure),⁸⁹ the Vermont statute of frauds was a rule of evidence and was available upon a seasonable objection to oral testimony.⁹⁰ Pleading the statute was not re-

82. 2 A. CORBIN, *supra* note 63, at § 275.

83. *Id.*

84. *Id.*

85. Corbin, *The Uniform Commercial Code—Sales; Should it be Enacted?*, 59 YALE L. J. 821 (1950).

86. *Id.* at 829.

87. *Jan. 1976 Hearings, supra* note 3.

88. *See, e.g.*, § 90.

89. *Frigon v. Whipple*, 134 Vt. 376, 378, 360 A.2d 69, 70 (1976).

90. *Taplin & Hinckley Fibre Co.*, 97 Vt. 184, 187, 122 A. 427, 427 (1923).

quired.⁹¹ Under Rule 8(c) (which was modeled after Rule 8(c) of the Federal Rules of Civil Procedure),⁹² the statute of frauds became an affirmative defense.⁹³

In order to avail himself of the statute of frauds, a defendant must assert the defense in his pleadings.⁹⁴ If a defendant pleads the statute of frauds as a defense and the alleged contract does not meet all of its requirements, the contract fails.⁹⁵ Thus, oral contracts to cure are not enforceable because they are not in conformity with the statute of frauds.⁹⁶ The court, however, has not had an opportunity to address the statute of frauds as applied to contracts to cure. Insight into the statute's probable application to contracts to cure might be gleaned from another jurisdiction's application of a statute of frauds similar to Vermont's.

Michigan has enacted such a statute⁹⁷ and its courts have had an opportunity to address the statute's general operative effects. In *R.G. Mueller Co. v. Van Kampen Construction Co.*⁹⁸ the Michigan Court of Appeals held that the statute of frauds is an affirmative defense. The defense must be specially pleaded; if not, it is

91. *Id.*

92. *Couture v. Lowery*, 122 Vt. 239, 242, 168 A.2d 295, 299 (1961).

93. *Id.*

94. *Id.*

95. *Id.*

96. *See id.*; see also *supra* note 7.

97. MICH. STAT. ANN. § 26.922 (Callaghan 1982). The statute states in full:

SEC. 2. In the following cases [an] agreement, contract [or] promise shall be void, unless [that] agreement, contract, or promise, or [a] note or memorandum thereof [is] in writing and signed by the party to be charged therewith, or by [a] person [authorized] by him:

[(a) An] agreement that, by its terms, is not to be performed [within] 1 year from the making thereof. [(b) A] special promise to answer for the debt, default, or misdoings of another person.

[(c) An] agreement, promise, or undertaking, made upon consideration of marriage, except mutual promises to marry.

[(d) A] special promise made by an executor or administrator, to answer damages out of his own estate.

[(e) An] agreement, promise, or contract to pay [a] commission for or upon the sale of [an] interest in real estate.

[(f) An] assignment of things in action, whether intended as a transfer for sale, for security, or otherwise.

[(g) An] agreement, promise, contract, or warranty of cure relating to medical care or treatment. Nothing in this paragraph shall affect the right to sue for malpractice or negligence.]

Id.

98. 57 Mich. App. 308, —, 225 N.W.2d 742, 744 (1975).

waived.⁹⁹

Contracts to cure fall within the ambit of the Michigan statute of frauds,¹⁰⁰ and the Michigan Court of Appeals has addressed the effect of the statute of frauds on such contracts.¹⁰¹ In *Gilmore v. O'Sullivan*,¹⁰² a Michigan appellate court found that documents adduced by the plaintiff were consistent with plaintiff's claim that the parties contemplated a Caesarean section. The court, however, found that the plaintiff's evidence of a contract did not satisfy the statute of frauds. It stated that the memoranda were not sufficient because the obligations of each party could not be determined from them.¹⁰³ Evidence that the defendant had obligated himself to perform a Caesarean section delivery could not be found in the documents. The court concluded that they were "impelled to this conclusion in spite of a definite conviction that Mr. and Mrs. Gilmore, under all the facts and circumstances revealed in this record, had a reasonable expectation of a Caesarean section delivery."¹⁰⁴

Gilmore demonstrates that under the Michigan statute, if the plaintiff *restricts* his pleadings to contract and the statute of frauds is pleaded as an affirmative defense, it will bar recovery absent a sufficient written contract to cure. This result is consistent with the Vermont interpretation when applied to nonmedical contracts.¹⁰⁵ But alternative pleadings may be available which will allow for either some or all the recovery sought. Equitable doctrines have been developed to provide relief to parties as justice requires.¹⁰⁶ If properly pleaded, such doctrines may allow a plaintiff to circumvent the statute of frauds and to secure relief for breach of an express oral contract to cure.

IV. EQUITABLE DOCTRINES: LIABILITY DESPITE THE STATUTE OF FRAUDS

The physician-patient relationship is generally voluntary. The

99. *Trisch v. Fairman*, 334 Mich. 432, 54 N.W.2d 621 (1952).

100. MICH. STAT. ANN. § 26.922 (Callaghan 1982).

101. *Gilmore v. O'Sullivan*, 106 Mich. App. 35, 307 N.W.2d 695 (1981).

102. *Id.*

103. *Id.* at ____, 307 N.W.2d at 698.

104. *Id.* Under the objective theory of assent and in light of the parties' oral communications, an express contract probably would have been found. See E. FARNSWORTH, *supra* note 40, at § 3.6.

105. *Couture v. Lowery*, 122 Vt. 239, 168 A.2d 295 (1961).

106. RESTATEMENT (SECOND) OF CONTRACTS §§ 90, 139 (1979).

patient seeks a physician to quest of medical advice and cure; the patient's goal is improvement or cure of an undesirable or deteriorating physical condition. His decision turns on a balance of risks and benefits, particularly if the treatment is elective. In medical negligence actions courts have developed the doctrine of informed consent:¹⁰⁷ "It is the duty of a physician or surgeon to inform the patient of the risk which may be involved in treatment or surgery."¹⁰⁸ Promises and warranties are conclusory statements that inform the patient about the physician's assessment of the risk. Such statements not only fall under the ambit of informed consent, but they may also give rise to express contracts to effect a certain cure. Because declarative statements, either in the form of a guarantee or merely in the form of an appraisal of risk, may lead to misinformed consent by the patient, liability incurred by the doctor, whether in contract or tort, should be roughly equivalent. Any legal doctrine, therefore, that allows a plaintiff to avoid the statute of frauds in an action for breach of a contract to cure and that prescribes a reliance measure of damages¹⁰⁹ will provide the plaintiff an avenue to acquire a remedy similar to that acquired under the tort doctrine of informed consent.

In the following section, the Note demonstrates that estoppel may effectively be used to circumvent the statute of frauds and to award damages, as justice requires, for oral promises to cure. In addition, it demonstrates that because the behavior that induces detrimental reliance or gives rise to misinformed consent is similar and the harms caused by that behavior are similar, damage awards under the two causes of action should be similar.

A. *Equitable Estoppel*

[A] party may, in reliance on the validity of the oral contract, so far change his position that he will suffer great loss if the contract is not enforced against the other contractor. In such cases, the invocation of the statute [of frauds] would allow the perpetration of a moral fraud.¹¹⁰

In such cases, courts have granted relief under the doctrine of equitable estoppel; they estop a defendant from denying the validity

107. W. PROSSER, *supra* note 13, at 165.

108. *Id.*

109. *See supra* text accompanying note 55.

110. Summers, *supra* note 75, at 440.

of a contract enforceable under the statute of frauds. This attitude is justified by established principles of equity. The doctrine may be an aid to the function of the statute of frauds by furthering its primary purpose: to prevent fraud. Moreover, "courts of equity have always protected a person from the harsh operation of statutes,"¹¹¹ and the statute of frauds can often cause harsh effects.¹¹²

The Vermont Supreme Court has commented on the policy justifications of the doctrine of equitable estoppel. The doctrine of estoppel is rooted in "fair dealing, good faith, and justice, and its purpose is to forbid one to speak against his own acts, representations or commitments to the injury of one to whom they were directed and who reasonably relied thereon."¹¹³ Thus, equitable estoppel should be applied to circumvent the harsh effects of the statute of frauds whenever its underlying policies can be advanced. This view is shared by most jurisdictions: "[P]resent-day courts are practically unanimous in applying estoppel to validate contracts unenforceable under the Statute of Frauds."¹¹⁴

In the recent past, a substantial number of states have relaxed the prerequisites for the application of equitable estoppel in the statute of frauds context.¹¹⁵

Thus, in these jurisdictions equitable estoppel in Statute of Frauds cases now rests on the broad principle that the law should not refuse to enforce an oral contract falling within the Statute when such refusal would cause "unconscionable injury" to a party who has justifiably relied on the other parties contractual promise.¹¹⁶

Although the Vermont Supreme Court has never applied equitable estoppel to the statute of frauds, the court may be willing to apply the doctrine in reliance situations.¹¹⁷

111. *Id.* at 447.

112. See *Gilmore v. O'Sullivan*, 106 Mich. App. 35, 307 N.W.2d 695 (1981).

113. *Dutch Hill Inn, Inc. v. Patten*, 131 Vt. 187, 193, 303 A.2d 811, 815 (1973).

114. *Summers*, *supra* note 75, at 448.

115. Note, *supra* note 76, at 173.

116. *Id.* at 174.

117. In *Town of Bennington v. Hanson—Walbridge Funeral Home, Inc.*, 139 Vt. 288, 293-94, 427 A.2d 365, 369 (1981), the court listed the four elements of equitable estoppel.

- (1) [t]he party to be estopped must know the facts;
- (2) he must intend that his conduct shall be acted on or must so act that the party asserting the estoppel has a right to believe it is so intended;
- (3) the latter must be ignorant of the true facts; and
- (4) he must rely on the former's conduct to his injury.

Whether the Vermont legislature considered equitable estoppel doctrine when it included contracts to cure in the statute of frauds is unimportant. The intent of the legislature may still be advanced even though equitable estoppel circumvents the statute of frauds in particular cases. When the Vermont legislature included contracts to cure in the statute of frauds it was stating, though probably not consciously, that malpractice actions belong in tort. It considered most contract actions to be frivolous and sought to protect the consumer from the increasing medical costs caused by such suits.¹¹⁸ It did not pass the act to work hardships upon innocent patients; it sought only to limit recovery to the negligently harmed patient. The equitable estoppel doctrine restricts recovery to proven damages approximating the reliance measure,¹¹⁹ and allows recovery only in those cases where an unconscionable injury would otherwise result.¹²⁰ Thus, if the court used equitable estoppel to circumvent the statute of frauds on an action for breach of a medical contract to cure, it would still be carrying out the intent of the legislature to restrict frivolous suits and to limit recovery to the truly harmed. The equitable estoppel doctrine, however, may not be the best means for recovery when a patient detrimentally relies on a physician's promise. The promissory estoppel doctrine,¹²¹ because it eliminates the requirement of misrepresentation, may be more appropriate.

B. *Promissory Estoppel*

When an injured party needs to avoid the statute of frauds to effect an acceptable remedy, pleading the doctrine of promissory estoppel¹²² may be his most effective means. The Vermont Supreme Court considers promissory estoppel an extra-contractual doctrine.¹²³ In *Overlock v. Central Vermont Public Service Corp.* the court declared:

There are circumstances where insistence on consideration on exchange of promises may reduce the law to ritual, producing injustice and unconscionable advantage . . . [I]n certain sit-

118. *Jan. 1976 Hearings, supra* note 3.

119. E. FARNSWORTH, *supra* note 41, at § 6.12.

120. Note, *supra* note 76, at 174.

121. RESTATEMENT (SECOND) OF CONTRACTS § 90 (1979).

122. *Id.*

123. *Overlock v. Central Vermont Public Service Corp.*, 126 Vt. 549, 553, 237 A.2d 356, 358 (1967).

uations, the inducing of an unbargained-for reliance [has] left the position of the parties such that the statement or representation inducing such reliance ought to be enforced.¹²⁴

The inference may be drawn from the court's statements that promissory estoppel is not affected by the statute of frauds.

The view that Vermont's interpretation of promissory estoppel is unaffected by the statute of frauds was recently discussed by the Second Circuit Court of Appeals in *MacEdward v. Northern Elec. Co., Ltd.*,¹²⁵ a diversity action. The plaintiff, trying to circumvent the defense of the statute of frauds, argued that his agreement with the defendant should be enforced on the basis of promissory estoppel. The court ruled that there was insufficient reliance to use the doctrine. The court, however, citing *Overlock*, noted that no Vermont case had assessed the effect of promissory estoppel on the statute of frauds, but that the Vermont Supreme Court would likely follow the Restatement position.¹²⁶

The Restatement (Second) of Contracts states in three separate sections that reliance may avoid the statute of frauds.¹²⁷ Of the three sections, only section 139 is relevant to enforcement of contracts to cure. It provides:

(1) A promise which the promisor should reasonably expect to induce action or forbearance on the part of the promisee or a third person and which does induce the action of forbearance is enforceable notwithstanding the Statute of Frauds if injustice can be avoided only by enforcement of the promise. The remedy granted for breach is to be limited as justice requires.
(2) In determining whether injustice can be avoided only by enforcement of the promise, the following circumstances are significant:

(a) the availability and adequacy of other remedies, particularly cancellation and restitution;

(b) the definite and substantial character of the action or forbearance in relation to the remedy sought;

(c) the extent to which the action or forbearance corroborates evidence of the making and terms of the promise, or

124. *Id.* at 552, 237 A.2d at 358.

125. 595 F.2d 105 (2d Cir. 1979).

126. *Id.* at 108 n. 4. The court was referring to the then RESTATEMENT (SECOND) OF CONTRACTS § 217A (Tent. Draft Nos. 1-7, 1973).

127. RESTATEMENT (SECOND) OF CONTRACTS §§ 129, 139, 150 (1979).

the making and terms are otherwise established by clear and convincing evidence;

(d) the reasonableness of the action or forbearance;

(e) the extent to which the action or forbearance was foreseeable by the promisor.¹²⁸

The significance of section 139 is twofold. First, section 139 explicitly provides that the statute of frauds does not prevent the enforcement of an agreement if injustice would result. Moreover, "[section 139] also applies to promises supported by consideration."¹²⁹ Section 90 dispenses with the requirement of consideration, that is, that a contract be proved, but section 139 functions even when promises are supported by consideration.¹³⁰ Thus, section 90 allows the courts to avoid the issue of whether a contract had been formed when a party reasonably relies to his detriment. Section 139, on the other hand, allows the courts to avoid the issue of whether enforcement of the contract is barred by the statute of frauds when a party relies to his detriment based on an express oral contract. Each section allows a plaintiff to leap over a formalistic hurdle, but the hurdles are of a different order.

Two state appellate courts have addressed the interplay of section 139 and the statute of frauds. In *Wachovia Bank & Trust Co., N.A. v. Rubish*,¹³¹ the plaintiff attempted to evict the defendant, alleging that the defendant failed to give timely notice of his decision to exercise his option to extend a lease. The defendant alleged that he had given oral notice and that plaintiff's failure to notify him of a written notice requirement estopped the plaintiff from asserting the requirement of a written notice.¹³² The Supreme Court of North Carolina held that there was evidence from which one could reasonably infer that the plaintiff had accepted oral no-

128. *Id.* § 139. Section 139 is only one of many specific revisions in the Restatement (Second) of Contracts that applies the promissory estoppel doctrine. The Restatement of Contracts included such language only in section 90; variants of that theme are now included in sections 84, 86, 87, 89, 90, 94, 129, 139, 150 and 332. This remarkable shift of policy illustrates Professor Corbin's ultimate influence on the law of contract. See G. GILMORE, *DEATH OF CONTRACT* (1974); see also Harvey, *Discretionary Justice Under the Restatement (Second) of Contracts*, 67 *CORNELL L. REV.* 666 (1982). The author discusses the expanded use of the requirements "to avoid injustice" or "as justice requires" in Restatement (Second) of Contracts.

129. *RESTATEMENT (SECOND) OF CONTRACTS* § 139 comment a (1979).

130. *Id.*

131. 306 N.C. 417, —, 293 S.E.2d 749, 751 (1982).

132. *Id.*

tice. Discussing sections 90 and 139 of the Restatement (Second) of Contracts, the court stated that, the statute of frauds notwithstanding, an implied promise to forego a written notice requirement is enforceable if it induced detrimental reliance or forbearance.¹³³

In *St. Germain v. Boshouwers*,¹³⁴ the Colorado Court of Appeals also addressed the effect of section 139. The plaintiff entered into an oral agreement with the defendant which guaranteed the plaintiff a salary of \$1500 a month and allowed him to purchase 49 percent of the issued stock of the corporation. The trial court found ample evidence that an agreement had been made and awarded damages for lost wages and attorney's fees on a promissory estoppel theory. The court did not award lost profits for the breach of the stock purchase agreement, concluding that the statute of frauds provision in Colorado's version of the Uniform Commercial Code¹³⁵ barred the use of promissory estoppel theory.¹³⁶ The Court of Appeals, however, held that in certain circumstances promissory estoppel may prevail over the statute of frauds defense. The court approved the theory behind section 139 of the Restatement (Second) of Contracts. It stated: "This formulation avoids the imposition of an arbitrary rule and allows the courts to determine the appropriate circumstances for promissory estoppel to prevail over a statute of frauds defense."¹³⁷

Courts have demonstrated a willingness to apply sections 90 and 139¹³⁸ to uphold promises otherwise invalid because they fail to satisfy the statute of frauds. No court, however, has applied these doctrines to an action for breach of an oral promise to cure which was barred by the statute of frauds. Because of the unique nature of the physician-patient relationship, applicability of a statute of frauds to a breach of oral promises to cure will depend on the context in which the promises were expressed.

Both sections 90 and 139 require that a physician's promise be such that the physician should reasonably expect the promise to induce action or forbearance on the part of the patient. In order for a physician's promise to induce a patient to undergo therapy,

133. *Id.* at _____, 293 S.E.2d at 759.

134. 58 Colo. App. 117, 646 P.2d 952 (1982).

135. COLO. REV. STAT. § 4-8-319 (1973).

136. 58 Colo. App. at _____, 646 P.2d at 953 (1982).

137. *Id.* at _____, 646 P.2d at 954.

138. See *supra* notes 133, 136 and accompanying text.

the patient must have a realistic choice to do otherwise. Thus, if a patient must undergo a nonelective therapy to preserve or regain his health, a physician's promise could not be said to induce reliance. Reliance implies a legitimate choice of action. Where no choice exists, the physician's promise does not influence the patient's decision. Under no-choice circumstances, a physician's promise may more likely be a psychological ploy—an assurance calculated to assuage the patient's anxiety and build his confidence in the chances of success.

Thus, application of promissory estoppel requires either a legitimate choice to forego treatment or a choice among alternatives with varying degrees of potential risks and benefits. Cosmetic surgery, alternative drug therapies, and alternative physical therapy all pose situations which offer definite choices for the patient. A physician acting in his advisory role should reasonably expect his promise to induce action or forbearance by the patient.

Once the patient-plaintiff has established that under the circumstances a legitimate choice existed, he must show that the physician's promise induced his choice of therapy. The patient's action or forbearance is amply demonstrated by the existence of a choice. Given the information gap generally present between physician and patient, and given the physician's advisory role, proving that the promise induced the patient's action or forbearance should not be a great obstacle.

Injuries resulting from medical therapy often cannot be corrected, and even if correctable, produce further loss on the part of the patient. Damaged bodies and pain and suffering simply cannot be undone. Thus, in almost every case, an award of money damages is the only way to avoid injustice.

Under the legitimate choice of therapy paradigm, if a physician makes a promise, the other section 90 elements generally are present. Liability under section 139 can be established under the same circumstances as liability under section 90. Section 139, however, appears to require a stricter standard of proof and a more searching inquiry into the alternatives available to avoid injustice. A court faced with an action on an oral promise to cure and also faced with a legislative mandate to limit liability with a statute of frauds, will gravitate to the apparently narrower section 139 approach.

Subsection 2 of section 139 lists several factors which should

be considered "[i]n determining whether injustice can be avoided only by enforcement of the promise"¹³⁹ Subsection 139(2)(c) requires consideration of the probative force of certain actions or forbearance as evidence of a promise or terms of a contract. This requirement may be the most difficult hurdle for a plaintiff bringing a breach of contract-to-cure action founded on section 139. Thus, in considering how the section 139 factors apply to such causes of action, subsection (2)(c) will be analyzed first.

Section 139(2)(c) essentially states that the degree of certainty of the existence of an alleged promise influences whether courts will grant relief. If the plaintiff's acts corroborate evidence of the promise, and if that evidence is convincing, courts should enforce the promise. As the strength of such evidence diminishes so should the likelihood of relief.¹⁴⁰ A physician's promise to effect a cure or specific result is an extraordinary gesture. Hence, the mere act of undergoing therapy, generally, will not act to corroborate evidence of a promise. Cosmetic surgery or other procedures that plainly are not required to insure good physical health are the most corroborative of any evidence of a promise to effect a certain result. Certainty of results would have to outweigh the risk before a person would accept surgery. Moreover, since a patient would seek a physician's appraisal before deciding to undergo elective surgery, some prior negotiation could be inferred. Thus, whenever a patient has a legitimate choice, a physician's input into the decision-making process is readily inferred. However, absent other corroborative evidence, the patient's mere assertion of the nature of the physician's statements may not be sufficiently convincing to warrant relief.

Subsections (2)(a) and (2)(b) focus the court's attention toward the nature of the plaintiff's injury and the remedies available which achieve the minimum threshold of avoiding injustice. Subsection (2)(a) directs the court's attention toward considering the adequacy of cancellation or restitution remedies. A patient will not bring a contract-to-cure action until it is evident that the physician's performance was inadequate and that any pain, suffering and bodily damage cannot be undone. Therefore cancellation, which refers to the ending of a contract still capable of performance, will not apply, while restitution, which merely requires a doctor to return his fee, may never be adequate. Subsection (2)(b) fo-

139. RESTATEMENT (SECOND) OF CONTRACTS § 139(3) (1979).

140. See *supra* text accompanying note 130.

cuses the court's attention on the substantialness of the injury, a consideration which would generally apply to the size of the damage award.

Subsections (2)(d) and (2)(e) inject a consideration of the reasonableness and foreseeability of the patient's acts into the remedy calculus. The reasonableness of a patient's act seems indisputable. Given the information gap and advisor-advisee character inherent in the physician-patient relationship, action by a patient based on a physician's promise generally will be very reasonable. Moreover, if a patient asks a physician to suggest a course of action, the physician's statements have a foreseeable effect on the patient's decision. If his promise is gratuitous, foreseeability will vary with the circumstances.¹⁴¹ Thus, section 139 will tend to promote award of reliance damages: The losses due to the reasonable and foreseeable actions of the patient induced by the physician's promise will be compensated by returning the party to his pre-injury status.

Together, sections 90 and 139 demonstrate a growing attitude that the statute of frauds, a formal limitation, should not stand in the way of compensating injuries if such a bar would promote injustice. These sections, as applied to the physician-patient relationship, support the principle that patients should be able to rely on the promises, assurances and professional judgments of physicians when deciding whether to accept the risks involved in elective medical procedures. The sections reflect Professor Corbin's thesis that "the requirement of a signed writing has been at odds with the established habits of men, a habit of reliance upon the spoken word"¹⁴²

Moreover, sections 90 and 139, if applied in a medical malpractice context, would complement informed consent doctrine¹⁴³

141. E. FARNSWORTH, *supra* note 41, at § 8.15 n. 2. This is where the nature of the physician's promise can be assessed. If it is a rather innocuous confidence boosting statement, the patient's action in reliance on it may not be foreseeable. If the promise strongly promotes action by the patient, the patient's response will be foreseeable.

142. Corbin, *supra* note 88, at 821.

143. The Vermont Supreme Court set forth its approach to the informed consent doctrine in *Small v. Gifford Memorial Hospital*, 133 Vt. 552, 349 A.2d 703 (1975):

It is the view of this Court that it is the duty of the physician, in terms of informed consent, to give to a patient whose situation otherwise permits it all information material to the decision to undergo the proposed treatment. *This is particularly true in cases of elective surgery, such as we have here.* The burden would be on the patient to show, as was done in this case, that such material information was *not* furnished. In defense, the physician should be

and recognize the role of physician promises in the patient decision-making process. Sections 90 and 139 acknowledge that if those injuries would have been avoided but for the physician's promise to effect a certain cure, liability should attach to the extent justice requires. This formulation is similar to the classic tort inquiry, and particularly resembles the informed consent doctrine.¹⁴⁴ As a result, the remedies acquired under this contract-like formulation should be similar to remedies acquired in tort.

C. *The Effect on Remedies*

Assuming that the outright bar to an action by the statute of frauds can be avoided by either section 90 or 139 or both, the statute of frauds will still have an effect on the nature and extent of breach of contract-to-cure damage awards. Restitution, if it is not inadequate, will be awarded under both sections 90 and 139 and will be limited to the fee paid. However, as stated previously, restitution as a remedy for breach in medical malpractice will almost always be inadequate. If restitution is inadequate, reliance damages will be awarded. These measures, however, do not achieve the standard remedy for breach of contract, which is the expectancy measure. The "as justice requires" remedy provision contemplates compensation reaching no farther than the actual reliance losses.¹⁴⁵

permitted to show that adequate and justifiable grounds existed for nondisclosure. Examples of that might be the youth or mental condition of the patient, the emergency nature of the situation, or the fact that the *risk was literally unknown to the profession at the time.*

Id. at 557, 349 A.2d at 706 (emphasis added). The informed consent doctrine applies to a physician's nondisclosure of risks to a patient. The doctrine recognizes the patient's need to be fully informed when making a decision. Promissory estoppel recognizes that promises of a specific result are just as important in the decision making process. As promissory estoppel relates to the statute of frauds, promissory estoppel recognized that in certain situations formal barriers may, but should not, cause injustice. Thus, the two doctrines, in the medical malpractice area, are somewhat complementary; informed consent imposes liability when statements should have been made, while promissory estoppel imposes liability for extraordinary statements that *have* been made.

144. Even foreseeability standards are similar. The "reasonably expect to induce" standard of section 90 approximates the *Hadley* "reasonably foresee as a probable result" standard. In *Small v. Gifford Memorial Hospital*, 133 Vt. 552, 349 A.2d 703 (1975), the court stated that undisclosed information is material to the issue of cause if the physician "should have understood" that a reasonable person, under the patient's circumstances, would have attached significance to that information. *Id.* at 557, 349 A.2d at 706. "Should have" is similar to "expect" and is much narrower than the *Palsgraf* reasonably foreseeable standard commonly applied in negligence.

145. *But see* Fuller & Perdue, *The Reliance Interest in Contract Damages* (pt. 1), 46 *YALE L. J.* 52, 73-75 (1936). The authors present three cases in which the reliance measure

Thus, as in *Hawkins*, a patient cannot recover for the difference in value of the unattained promised post-operative result and the actual post-operative condition. That measure is compensation for the benefit of the bargain, not merely compensation for reliance losses as justice requires.¹⁴⁶ The statute of frauds, therefore, if properly pleaded, changes the nature of the damage award; it removes the classic contract remedy. By barring actions on oral contracts to cure, it forces the plaintiff to seek a remedy through promissory estoppel—an action based on detrimental reliance. Thus, the benefit of the bargain, the expectancy measure, is not recoverable.

The value of the statute of frauds as a legislative remedy for excessive physician liability can be assessed by its effect on the size of damage awards. The effect is illustrated by comparing the cost of pain and suffering with the benefit of the bargain element of contract damages. The statute generally eliminates the benefit of the bargain, a remedy which does not include pain and suffering¹⁴⁷ as a basis for damages for breached oral contracts to cure. A promissory estoppel action, which avoids the statute of frauds, awards a reliance-like measure. Generally, this measure includes pain and suffering in its calculus. Thus, the large pain and suffering awards currently awarded in tort will not be eliminated by the statute of frauds. In fact, by negating a contractual remedy for oral contracts to cure, the legislature has, in effect, forced a pleading in promissory estoppel which could substantially enhance, rather than limit, the available remedy.

Finally, the illusory nature of the boundary between tort and contract within the physician-patient relationship is manifest. The "as justice requires" limitation on promissory estoppel remedies contemplates compensation only for injustice incurred. That measure approximates the medical negligence award—compensatory damages. Such similarity is not a coincidence. The physician-patient relationship that forms the basis of the legal duties acquired is the same, regardless of the nature of the cause of action. The act

equals the expectation measure. Particularly pertinent to the analysis is the "third case" in which the "loss would not have occurred either if the defendant had not broken his contract, or if the plaintiff had not entered and relied on the contract." *Id.* at 75.

146. *But see id.* at 74. If a patient, based on defendant physician's promise, has foregone treatment by another physician, the court may award the patient his lost opportunity costs. In such cases the reliance measure will equal the expectation measure.

147. *Hawkins v. McGee*, 84 N.H. 114, 146 A. 641 (1929).

causing the injuries, medical therapy, is of similar character, though of different quality. In addition, the injuries themselves both cause bodily harm and are thus similar in character. The injuries lead to similar consequences: pecuniary loss, confinement, care and treatment, lost earnings, and pain and suffering. Thus, the imposition of the statute of frauds as a defense in medical contracts to cure may not only prove ineffective, but may also have helped illustrate that the separation of the medical malpractice action into contract and tort is a strained concept.

CONCLUSION

The classical contract model does not appear to describe the nature or formation of agreements between physicians and their patients. Medical malpractice grew out of breach of implied contract theory, yet an element of negligent conduct pervaded the early cases. The physician-patient relationship was often a wholly voluntary undertaking by both parties, yet the duties and standards of care were not prescribed in agreements. The patient relied on the physician's professional judgment to guide his decision. No hard bargains were hammered out, only agreements to submit to certain forms of treatment based on the physician's representations concerning the balance of risks and benefits. Modern tort law, recognizing the patient's need for information regarding recommended or elective procedures gave birth to the informed consent doctrine. Although the Vermont legislature sought to relieve physicians of liability for breaches of promises to cure by incorporating such promises within the statute of frauds, promissory estoppel doctrine reflects the importance of such promises as essential in the patient's decision-making process and eliminates the harshness of the statute in appropriate cases.

When promissory estoppel is used to circumvent the statute of frauds, an important feature distinguishing such actions from actions in tort is the basis of the duty breached. The estoppel action is based on duty arising from a voluntary promise, not from neglect of a duty of care imposed by public policy. The injuries compensated, however, are essentially the same.

The compartmentalization of medical malpractice actions into tort and contract is a suspect dichotomy, because liability and damages incurred under promissory estoppel doctrine is so similar to liability and damages incurred under informed consent. The

Vermont statute of frauds, therefore, attempts to limit physician liability based on a formalistic fiction—a fiction that can only preclude the loss of the patient's benefit of the bargain from entering into the money damages calculus. Because courts have been unwilling to award such damages, imposing the statute of frauds provisions on contracts to cure, in reality, may have accomplished very little.

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