

# Annual Survey of Massachusetts Law

---

Volume 1973

Article 7

---

1-1-1973

## Chapter 4: Contracts

William T. Sherry Jr.

Follow this and additional works at: <http://lawdigitalcommons.bc.edu/asml>

 Part of the [Contracts Commons](#)

---

### Recommended Citation

Sherry, William T. Jr. (1973) "Chapter 4: Contracts," *Annual Survey of Massachusetts Law*: Vol. 1973, Article 7.

## CHAPTER 4

# Contracts

WILLIAM T. SHERRY, JR.\*

**§4.1. Non-competition covenants: Covenants ancillary to the sale of a business.** The courts have tended to classify non-competition agreements on the basis of the type of transaction engendering the covenant. The legal consequences of such covenants in turn depend greatly on their classification. Two cases decided during the 1973 Survey year clearly point out the need to classify such a covenant properly before attempting to determine its legal effect.

The courts of the Commonwealth have long concurred in the general view that an express non-competition agreement ancillary to the sale of a business may be enforced if reasonably limited in time and space.<sup>1</sup> If the restriction is too broad as to time or territory, it nevertheless may be enforced to the extent necessary to protect the plaintiff.<sup>2</sup> Additionally, where no express agreement exists, the courts—on the theory that the seller of a business normally sells the entire business, including good will—will often imply a non-competition promise by a seller so as to “give to the purchaser what is sold to him.”<sup>3</sup> This rationale was summarized in the fairly recent case of *Tobin v. Cody*:<sup>4</sup>

Where, therefore, the sellers of the stock have been active participants in the business and are in a position to control or affect its good will, we think not only that they may validly bind themselves by an express promise not to derogate from the good will reflected in the value of the stock sold by competing with the buyers remaining in the business, but also that in appropriate circumstances such a promise can be implied in the sale of the stock itself.

---

\* WILLIAM T. SHERRY, JR. is an associate in the law firm of Nutter, McClennen & Fish, Boston.

§4.1. <sup>1</sup> *Cedric G. Chase Photographic Laboratories, Inc. v. Hennessey*, 327 Mass. 137, 97 N.E.2d 397 (1951); *Becker College v. Gross*, 281 Mass. 355, 183 N.E. 765 (1933).

<sup>2</sup> *Metropolitan Ice Co. v. Ducas*, 291 Mass. 403, 196 N.E. 856 (1935); *Whiting Milk Co. v. O'Connell*, 277 Mass. 570, 179 N.E. 169 (1931).

<sup>3</sup> *Marshall Engine Co. v. New Marshall Engine Co.*, 203 Mass. 410, 424, 89 N.E. 548, 552 (1909).

<sup>4</sup> 343 Mass. 716, 720, 180 N.E.2d 652, 656 (1962). See also *Lynn Tucker Sales, Inc. v. LeBlanc*, 323 Mass. 721, 724, 84 N.E.2d 127, 129 (1949).

In *Certified Pest Control Co. v. Kuiper*,<sup>5</sup> decided during the Survey year, the Appeals Court relied on *Tobin v. Cody* as authority for enjoining the seller of a ten percent interest in a business from soliciting customers of that business for a period of five years.

In this case, the owners of Certified Pest Control Company obtained a decree in superior court enjoining Abraham Kuiper and Bram Pest Control, a corporation organized by Kuiper, from soliciting certain of Certified's customers for a period of five years, and ordering Kuiper to pay Certified a sum of \$4,200.<sup>6</sup> The Appeals Court upheld the superior court's finding of an implied covenant that Kuiper would not solicit those of Certified's customers who were serviced by Certified on the date the defendant terminated his employment. The decision of the superior court was based on subsidiary findings of a master that defendant had been a ten percent stockholder, as well as an officer, director and service manager of Certified until he resigned and sold his stock back to the company.<sup>7</sup>

The court enunciated the basis for its decision:

We think that the instant case is governed by the rationale of [*Tobin*]. The facts in that case are similar in many respects to those under consideration. There, as here, good will was not mentioned in the sale. The sellers, who were *substantial* shareholders, sold all of the stock held by them, they relinquished their offices in the corporation . . . . In each case the buyers reasonably expected that they were purchasing all of the seller's interest in the corporation.<sup>8</sup>

It is submitted that the court's reliance on *Tobin v. Cody* is misplaced. For one thing, Tobin and Cody had each owned one-half of the shares of a corporation engaged in the scrap metal business until, pursuant to a written agreement, Tobin purchased the entire Cody interest. As in the present case, the good will of the business was mentioned neither during the negotiations nor in any agreement. Some four years later, Cody proceeded to establish a scrap metal business a short distance from and in the same city as the original enterprise, then conducted by Tobin. The Supreme Judicial Court implied a non-competition agreement and enjoined Cody from competing against Tobin. In *Certified*, on the other hand, only a ten percent interest was sold. Clearly, such an interest in a closely held corporation does not resemble the "substantial ownership" transferred in Tobin.<sup>9</sup>

<sup>5</sup> 1973 Mass. App. Ct. Adv. Sh. 217, 294 N.E.2d 548.

<sup>6</sup> *Id.*, 294 N.E.2d at 549.

<sup>7</sup> *Id.* at 220-21, 294 N.E.2d at 551.

<sup>8</sup> *Id.* (emphasis added).

<sup>9</sup> The court's reliance on *Cap's Auto Parts, Inc. v. Caproni*, 347 Mass. 211, 196 N.E.2d 874 (1964), seems similarly misplaced. In *Cap's*, the defendant sold a one-third interest in a corporation, and the circumstances of the sale clearly indicate that a non-competition agreement was implied.

Furthermore, a non-competition agreement should not have been implied in *Certified* because Kuiper had expressly refused to sign one.<sup>10</sup> In *Tobin*, the Supreme Judicial Court based its finding of a non-competition agreement on the theory that “any reasonable person in the Tobins’ position would have believed unequivocally that the Tobins were buying out any competition from the Codys.” Kuiper, on the other hand, had considered himself unduly constrained by the terms of a non-competition agreement required as a condition of his employment by the father of the plaintiffs, the Fleischers, prior to the formation of *Certified*. Consequently, he made clear to the Fleischers that he would never again hobble himself in the pursuit of his trade by signing such an agreement.<sup>11</sup> In light of this fact, it is doubtful that a reasonable person would have believed “unequivocally” that Kuiper had agreed not to compete with *Certified*.

In summary, it is submitted that the court’s finding in the *Certified* case of a non-competition agreement ancillary to the sale of a business was not warranted under *Tobin v. Cody*. Arguably, the court’s implication of a non-competition agreement could have been based on the theory that Kuiper, as a former officer, director and key employee of *Certified*, breached a fiduciary duty by using to his own advantage and to the detriment of his former employer confidential information gained in the course of his employment.<sup>12</sup> However, this theory was not considered by the court.

**§4.2. Non-competition covenants: post employment covenants.** The Massachusetts courts have long followed the basic doctrine announced in *Sherman v. Pfefferkorn*<sup>1</sup> with regard to post employment contracts not

<sup>10</sup> 1973 Mass. App. Ct. Adv. Sh. at 218, 294 N.E.2d at 549.

<sup>11</sup> *Id.*

<sup>12</sup> *Aronson v. Orlov*, 228 Mass. 1, 4-5, 116 N.E. 951, 952 (1917); cf. *Woolley’s Laundry, Inc. v. Silva*, 23 N.E.2d 899 (Mass. 1930), where the court held that where names and address were furnished to a laundry driver in expectation—not expressed to the driver—that he would not disclose or use this information for his personal gain, the laundry driver did not breach any duty owing to the employer, nor did he use any confidential information, when upon the termination of his employment he solicited the business of the employer’s customers. *Id.* at 903. However, it would seem that this case is distinguishable from *Certified* on the fact that the driver in *Woolley’s* had not been an officer or director of the company.

§4.2. 1 241 Mass. 468, 135 N.E. 568 (1922). In *Sherman*, the Supreme Judicial Court, quoting from Lord M’Naughten’s decision in *Nordenfelt v. Maxim Nordenfelt Guns & Ammunition Co.*, [1894] A.C. 535, summarized the basis of this rule:

“The public have an interest in every person’s carrying on his trade freely: so has the individual. All interference with individual liberty of action in trading, and all restraints of trade of themselves, if there is nothing more, are contrary to public policy, and therefore void. That is the general rule. But there are exemptions: restraints of trade and interference with individual liberty of action may be justified by the special circumstances of a particular case. It is a sufficient justification, . . . if the restriction is reasonable—reasonable, that is, . . . in reference to the in-

to compete: such covenants may be enforced by injunction "if the interest to be protected is consonant with public policy and if the restraint is limited reasonably in time and space."<sup>2</sup> As in the case of non-competition covenants ancillary to the sale of a business, the court will enforce an overly broad covenant to the extent necessary to protect the plaintiff.<sup>3</sup>

As a general rule, however, a covenant restricting competition by an employee after termination of his employment will not be implied by the courts of the Commonwealth.<sup>4</sup> As a result, employment contracts of key employees frequently contain detailed non-competition clauses. Usually, these clauses are extremely broad in their scope and for that reason often become the subject of litigation. In Massachusetts, there is neither a prima facie rule nor a presumption of law that any particular extent of time or limitation with respect to territory is reasonable in the context of a non-competition agreement. The courts have instead decided to handle the question of the enforceability of such covenants on a case-by-case basis.<sup>5</sup>

During the Survey year, the Court of Appeals for the First Circuit had occasion in *Wilson v. Clarke*<sup>6</sup> to review the law of the Commonwealth with respect to the question of the enforceability of a covenant restricting

terests of the public, so framed and so guarded as to afford adequate protection to the party in whose favor it is imposed, while at the same time it is in no way injurious to the public. That, I think, is the fair result of all the authorities."

<sup>2</sup> *Cedric G. Chase Photographic Laboratories, Inc. v. Hennessey*, 327 Mass. 137, 139, 97 N.E.2d 397, 398 (1951) (citations omitted).

<sup>3</sup> *Metropolitan Ice Co. v. Ducas*, 291 Mass. 403, 196 N.E. 856 (1935).

<sup>4</sup> While a covenant restricting competition after termination of employment has never been implied by the Massachusetts courts, it is well established that if in the course of his employment an employee gains knowledge of confidential information in the form of trade and business secrets, an injunction will normally be granted to prevent disclosure and use of such confidential information. *Aronson v. Orlov*, 228 Mass. 1, 116 N.E. 951 (1917); *Junker v. Plummer*, 320 Mass. 76, 67 N.E.2d 667 (1946). It is equally well established, however, that on termination of employment, a person may use general skill and knowledge acquired during the course of his employment. *Padover v. Axelson*, 268 Mass. 148, 167 N.E. 301 (1929); *DiAngeles v. Scauzillo*, 287 Mass. 291, 191 N.E. 426 (1934).

<sup>5</sup> *Novelty Bias Binding Co. v. Shevrin*, 342 Mass. 714, 175 N.E.2d 374 (1961) (defendant/sales manager embezzled \$130,000 from plaintiff); *Wrentham Co. v. Cann*, 345 Mass. 737, 189 N.E.2d 559 (1963) (defendant solicited plaintiff's customers four days after the termination of his employment). But see *Loranger Const. Co. v. C. Franklin Corp.*, 355 Mass. 727, 247 N.E.2d 391 (1969), where the court enforced a three-year contract between two corporations and the chief executive officer of the defendant corporation. However, this case is distinguishable from the normal restraint in an employment contract since a sale of business was involved. Notwithstanding this lack of a categorical rule, a review of the Massachusetts cases indicates that the court will probably not enforce a covenant restricting competition after termination of employment for more than a three year period. In fact, since 1943, in only two cases falling within this category has the court enforced such a covenant for a period more than two years (in both cases, for three years) and, in both, the defendant blatantly acted in bad faith.

<sup>6</sup> 470 F.2d 1218 (1st Cir. 1972).

competition after termination of employment. In *Wilson*, Mr. Clarke, a former employee of a partnership of psychologists who served as professional consultants to businesses and other organizations, promised to pay certain fees to the partnership if he left its employ and provided any of its clients or prospective clients with similar services.<sup>7</sup> In 1966, Clarke left the partnership and began working for International Telephone & Telegraph (ITT), a client of the partnership. The partnership subsequently sued Clarke on the basis that it was entitled to fifteen percent of Clarke's salary pursuant to the parties' agreement.<sup>8</sup>

The district court found that Clarke spent less than one percent of his time working with ITT on professional psychological matters and therefore denied the plaintiff's claim.<sup>9</sup> On appeal, the partnership argued that the amount of time spent by Clarke performing professional psychological services for ITT was irrelevant because the critical inquiry under the applicable section of the parties' agreement was whether he had furnished professional psychological services "of any sort" to a former client of theirs.<sup>10</sup>

The Court of Appeals for the First Circuit affirmed the district court's decision, holding that regardless of whether or not Clarke had violated the parties' agreement, no recovery was warranted under the rule first set forth in *Sherman v. Pfefferkorn*:<sup>11</sup>

In cases of agreements forbidding an employee to engage in the same business or line of activity as the employer, attention is often given to whether the agreement is reasonably limited as to area and duration. But such considerations are merely aspects of the rule [derived from *Sherman*] that the agreement must be no wider than is necessary to afford reasonable protection to the employer. A further, and here more relevant, aspect of the rule is that an employer

<sup>7</sup> Section 4 of the agreement between Clarke and the partnership provided in part that:

[I]f, at any time during a five (5) year period commencing on the day following the termination of your employment, any clients . . . of the firm shall, directly, or indirectly, receive professional psychological services of any sort from you, or from any . . . corporation of which you shall become an . . . employee; then, you shall pay to the firm for said five (5) year period or such shorter period as you . . . shall be, directly or indirectly, performing professional psychological services of any sort for said client or clients, the greater of either (A) an amount equal to fifteen percent (15%) of the gross billings received from said client or clients . . . by any said corporation, or (B) an amount equal to fifteen percent (15%) of the total remuneration received by you by way of income, salary, wages, commissions or otherwise from said . . . corporation.

*Id.*, at 1219-20, n.1.

<sup>8</sup> *Id.* at 1220.

<sup>9</sup> *Id.* at 1221.

<sup>10</sup> *Id.*

<sup>11</sup> *Id.*

may not enforce limitations on an ex-employee's engaging in activities which do no damage to the employer.<sup>12</sup>

It is clear that Clarke's employment at ITT did not damage the partnership. As the court noted, Clarke's duties at ITT neither diminished nor dispensed with the need for the partnership's services, nor was the partnership a candidate for Clarke's position. Accordingly, the court held that no recovery was warranted because the alleged breach did not cause any damage to the partnership.<sup>13</sup>

With respect to the partnership's claim that it was entitled to recover under the terms of the agreement because of the specialized training they had provided Clarke, the court, after noting that a man's aptitudes, skill and mental ability are his own and not his employer's, reasoned as follows:

Doubtless an employer who has provided specialized training to an employee—as by a course of studies or the like—might reasonably contract with the employee for reimbursement if the employee should quit before the employer achieves any benefit. However, the employer may not require its ex-employee to make payments to it unrelated to the employer's damage, simply as a penalty to discourage or punish a job change. At most, the employer, in appropriate circumstances, might require the employee to reimburse it for a sum, or under a formula, reasonably related to what it cost the employer to train him, or to retrain a replacement, or the like.<sup>14</sup>

In applying this reasoning to the terms of the parties' agreement, the court found that the partnership had not shown that the clause in the agreement providing for damages in the event of even minimal interference with clients of the partnership was a reasonable forecast of damages resulting from Clarke's alleged breach.<sup>15</sup>

§4.3. Rules for the construction of contract terms. Recently, the Massachusetts Court of Appeals in *Lembo v. Waters*<sup>1</sup> had occasion to summarize and apply certain basic rules of contract construction. In that case, the plaintiff, an attorney with substantial real estate expertise,<sup>2</sup> was the owner of a parcel of land in Natick, Massachusetts. The defendant, who desired to construct a nursing home, learned that the plaintiff was looking for a purchaser for his property. After examination of and negotiation over the property, the plaintiff and the defendant executed

---

<sup>12</sup> Id. at 1221-22.

<sup>13</sup> Id. at 1222.

<sup>14</sup> Id. at 1223.

<sup>15</sup> Id.

§4.3. 1 1973 Mass. App. Ct. Adv. Sh. 263, 294 N.E.2d 566.

2 Id. at 264, 294 N.E.2d at 567.

on August 9, 1966 a purchase and sale agreement for the parcel.<sup>3</sup> The agreement provided in part as follows:

6. **PURCHASE PRICE:** The agreed purchase price for said premises is \$46,800.00 dollars [sic], of which \$2,000.00 have been paid as a deposit this day and \$8,000.00 are to be paid at the time of delivery of the deed in cash, and a note for \$36,800.00 without interest and secured by a real estate mortgage or mortgages payable in or within fifteen months from the date of final state approval.

7. **TIME FOR PERFORMANCE; DELIVERY OF DEED:** Such deed is to be delivered within sixty days of the date of this agreement provided nevertheless that all necessary extensions shall be granted for purposes of obtaining necessary state permits, and approvals. . . .

25. **ADDITIONAL PROVISIONS:** The performance of this Agreement is conditioned on the buyer obtaining all necessary state permits and approvals for the construction and operation of a nursing home with a minimum of eighty beds and the buyer agrees to exert every diligent effort to obtain said permits.<sup>4</sup>

The plaintiff was familiar with the rules and regulations pertaining to the construction and operation of nursing homes. The defendant was in the real estate business, and had previously operated two nursing homes.<sup>5</sup>

On October 17, 1966, the plaintiff notified the defendant that he was in violation of the seventh clause of the parties' agreement, and that he was expected to purchase the property in accordance with the terms of that agreement. On December 21, 1966, the defendant told the plaintiff that he had received a copy of the site plan approval from the Department of Public Health, and that nothing stood in the way of the completion of the agreement. The defendant asked the plaintiff to contact his attorney; the plaintiff did so, and suggested that papers be passed in January.<sup>6</sup> The defendant failed to respond to this suggestion and subsequently told the plaintiff that he was no longer interested in purchasing the property because it was not a good site for a nursing home. Additionally, the defendant contended that the provisions of the twenty-fifth clause of the purchase and sale agreement conditioning his performance on his obtaining "all necessary state permits and approvals for the construction and operation of a nursing home"<sup>7</sup> had not been fulfilled. In particular, he argued that one of the necessary permits, a permit for occupancy, could not have been obtained until after the construction

---

<sup>3</sup> Id.

<sup>4</sup> Id. at n.1.

<sup>5</sup> Id.

<sup>6</sup> Id. at 264-65, 294 N.E.2d at 567-68.

<sup>7</sup> Id. at 264, n.1, 294 N.E.2d at 567, n.1.



of the nursing home had been completed. Thereafter, the plaintiff brought suit to obtain specific performance of the parties' purchase and sale agreement. After the institution of the suit, the property was sold to others, and the plaintiff filed a substitute bill of complaint seeking to recover damages for the defendant's alleged breach. The superior court judge entered a decree in favor of the plaintiff, and the defendant appealed.<sup>8</sup>

In effect, the defendant urged the Appeals Court to interpret the twenty-fifth clause to mean that the nursing home had to be fully erected, equipped, and operational before the conditions stated in such clause would be fulfilled. While a literal reading of that clause is consistent with the defendant's contention, the Appeals Court correctly held that the clause was not entitled to special emphasis, "but . . . must be given such effect as a fair construction of the entire contract shows the parties intended [it] should have."<sup>9</sup> The court then went on to point out that the defendant's construction of the clause was inconsistent with the sixth and seventh clauses.<sup>10</sup> There can be no doubt that the construction of the twenty-fifth clause as urged by the defendant at least conflicts with the seventh clause.<sup>11</sup> The language of the seventh clause establishes the time for performance as the delivery of the deed, which delivery was to take place "within sixty days of the date of the . . . agreement . . . ." Clearly, as the court noted, the parties could not have contemplated that the nursing home would be constructed and fully operational within a sixty day period.<sup>12</sup> However, judicial resolution of this inconsistency did not resolve the key issue, namely, the determination of exactly what state permits were contemplated by the language of the twenty-fifth clause. In order to resolve this question, the court looked to the conduct of the parties.<sup>13</sup> In so doing, it was noted that the defendant's statement of December 21, 1967, to the effect that nothing stood in the way of the completion of the agreement, indicated that a literal interpretation of

<sup>8</sup> Id. at 263, 294 N.E.2d at 567.

<sup>9</sup> Id. at 267, 294 N.E.2d at 569, citing *Central Trust Co. v. Rudnick*, 310 Mass. 239, 244, 37 N.E.2d 469, 472 (1941).

<sup>10</sup> The basis of the inconsistency found by the court between clause 25 and clause 6 is not clear. An analysis of these two clauses indicates that they compound, rather than resolve, the issue of contract construction. Both of these clauses make reference to state permits and state approvals, and it is the determination of the precise extent to which state permits and approvals were needed before the remaining terms of the purchase and sale agreement had to be complied with that is the critical inquiry in *Lembo*.

<sup>11</sup> 1973 Mass. App. Ct. Adv. Sh. at 264, n.1, 294 N.E.2d at 567, n.1.

<sup>12</sup> Id. at 267, 294 N.E.2d at 569.

<sup>13</sup> Id. See, e.g., *Rizzo v. Cunningham*, 303 Mass. 16, 21, 20 N.E.2d 471, 474 (1939), where the court held that the conduct of the parties after execution of a contract is relevant and admissible in evidence as an aid in interpreting ambiguous language. It should be noted that such evidence is not admitted to vary or enlarge the agreement, but rather to define the meaning of the terms used by the parties. See *Bachinsky v. Rogers*, 273 Mass. 381, 173 N.E. 549 (1930).

the condition precedent to performance in the twenty-fifth clause was unwarranted.<sup>14</sup> The court accordingly affirmed the lower court's decision.

The construction accorded the parties' agreement by the court in *Lembo* constituted a rejection of a technical rule of construction in favor of one designed to determine the intention of the parties. In so construing, the court—correctly, it is submitted—rejected an interpretation based, in all probability, on the defendant's strained reading of the law subsequent to his breach, rather than on his intention at the time the contract was made.

One caveat may possibly be in order. Although the court consistently spoke in terms of conventional contract law and general canons of interpretation, the fact nevertheless remains that a striking amount of special expertise permeates the fact situation in *Lembo*. Not only the plaintiff and the defendant, but even the prospective purchaser of the property, were familiar with the law of real estate and had, moreover, particular experience with nursing homes. It is submitted that, despite the lack of emphasis upon these peculiar characteristics of the parties involved, the court might well have been less than impervious to their existence.

§4.4. **Commission contract with a real estate broker.** It is hornbook law that an owner of real property who engages a broker is liable for the broker's commission, absent special circumstances, if the broker produces a customer ready, willing and able to buy upon the terms for the price given the broker by the owner.<sup>1</sup> Nonetheless, the proliferation of litigation involving exactly this question continues unabated. During the Survey year, the Supreme Judicial Court was again presented the issue in *Gaynor v. Laverdure*.<sup>2</sup> In its decision, the court succinctly summarized the law in this area,<sup>3</sup> and left no doubt as to its disinclination to deviate from existing precedent.

In *Gaynor*, Laverdure, the defendant, a licensed real estate broker, engaged Gaynor, the plaintiff, also a licensed real estate broker, to assist him in selling certain property which he himself owned. The parties agreed that plaintiff would receive a ten percent commission from the defendant "[o]n whatever price she could get a ready, willing and able buyer to agree to pay for it."<sup>4</sup>

The plaintiff subsequently submitted an unconditional offer by one Callahan, who desired to purchase the land for \$99,000. On January 24, 1968, the defendant, after consultation with his attorney, signed an agreement with Callahan whereby the defendant agreed to sell and convey the land to Callahan for \$99,000, of which \$1,000 was paid on the

<sup>14</sup> 1973 Mass. App. Ct. Adv. Sh. at 268, 294 N.E.2d at 569.

§4.4. <sup>1</sup> *Henderson & Beal, Inc. v. Glen*, 329 Mass. 748, 110 N.E.2d 373 (1953).

<sup>2</sup> 1973 Mass. Adv. Sh. 111, 291 N.E.2d 617.

<sup>3</sup> *Id.* at 115-16, 291 N.E.2d at 621.

<sup>4</sup> *Id.* at 112, 291 N.E.2d at 619.

date of the signing, with the balance to be paid on August 11, 1968 at the conveyance.<sup>5</sup>

On August 11, 1968, Callahan did not pay the balance of the purchase price and did not take title as required by the agreement. Thereafter, the plaintiff demanded payment of her commission from the defendant, who refused to pay her.<sup>6</sup> The plaintiff subsequently brought suit. At the trial in superior court, before Judge Mitchell, the plaintiff requested that the jury, in effect, be instructed that the defendant owed plaintiff the agreed commission of \$9,000. Instead, the judge charged the jury that it was within their province to determine whether or not the plaintiff had produced a ready, willing and able buyer, and, if so, to determine what amount of money was a fair and reasonable compensation for her services.<sup>7</sup>

The jury found for the plaintiff in the amount of \$1,000, and defendant appealed. The Supreme Judicial Court held erroneous both the judge's refusal to instruct the jury as requested by the plaintiff, and the giving of the instruction described above. In the course of its opinion, the court thoroughly reviewed the law of the Commonwealth on the subject of brokers' commissions.<sup>8</sup> These rules can be summarized as follows:

1. When the broker has produced a customer ready, willing, and able to buy upon the terms and for the price given by the owner, the broker's commission is earned. It is immaterial whether or not a contract is made, or, if made, whether or not it is performed.<sup>9</sup>

2. While a broker who has procured a customer is not obliged to see that the owner and the customer enter into a binding contract, if no such contract is made, the broker suing for his commission has the burden of proving that his customer was ready, willing, and able to buy on the terms set by the owner.<sup>10</sup> If, however, the seller and the buyer produced by the broker do enter into a valid and binding agreement, the broker is entitled to the commission even if the customer lacks the ability to pay.<sup>11</sup>

---

<sup>5</sup> Id.

<sup>6</sup> The defendant had no question in his mind about the good faith of either the plaintiff or Callahan, and no such issue was presented in the case.

<sup>7</sup> 1973 Mass. Adv. Sh. at 113, 291 N.E.2d at 619-20.

<sup>8</sup> Id. at 113-23, 291 N.E.2d at 620-25.

<sup>9</sup> *Talanian v. Phippen*, 357 Mass. 765, 256 N.E.2d 445 (1970); *Green v. Levenson*, 241 Mass. 223, 135 N.E. 114 (1922); *Fitzpatrick v. Gilson*, 176 Mass. 477, 57 N.E. 1000 (1900).

<sup>10</sup> *Lacombe v. Martin*, 319 Mass. 116, 64 N.E.2d 622 (1946); *Barsky v. Hansen*, 311 Mass. 14, 40 N.E.2d 12 (1942).

<sup>11</sup> The rationale underlying this rule is that the act of the seller in entering into a valid contract with the customer works as an acceptance of that customer as one ready, able and willing to buy the land and pay for it. See *Richards v. Gilbert*, 336 Mass. 617, 146 N.E.2d 921 (1958); *Menton v. Melvin*, 330 Mass. 355, 113 N.E.2d 447 (1953). See also

The rationale underlying this latter rule is that the act of the seller in entering into a valid contract with the customer works as an acceptance of that customer as one ready, willing, and able to buy the land and to pay for it. In the 1953 case of *Menton v. Melvin*,<sup>12</sup> for instance, the plaintiff was a registered real estate broker, with whom the defendant listed her residence for sale. Defendant, who was asking \$10,500 for the house, agreed upon enlisting plaintiff's services that plaintiff would receive a five percent commission. Subsequently, plaintiff produced as prospective buyers the O'Clairs, who entered into a written agreement with defendant to purchase the house at the asking price, but who eventually were unable to secure a mortgage suitable to their means and were thus unable to consummate the purchase.<sup>13</sup> Defendant returned to the O'Clairs the one hundred dollar deposit which they had made.

The Supreme Judicial Court, upholding the district court's finding for the plaintiff broker in the amount of \$525, found both the O'Clairs' default and the defendant's return of the O'Clairs' deposit irrelevant as regarded what was conceptualized as the plaintiff's already vested right to her commission. The very act of listing the house with the plaintiff, the court reasoned, was an employment of the plaintiff to find a customer ready, willing and able to buy the defendant's property, and included an inherent understanding by both parties that the terms of the employment would be fulfilled, and the broker's commission earned, upon production of such customers. The execution of the agreement between the defendant and the O'Clairs worked as an acceptance by the defendant of the O'Clairs as precisely such customers; no subsequent occurrences, including the falling through of the purchase, could divest the plaintiff of her right to her fee.<sup>14</sup>

The Supreme Judicial Court went even further in the 1958 case of *Spence v. Lawrence*.<sup>15</sup> There, a prospective seller of a house was found bound to pay a broker's commission subsequent to the production by that broker of a purportedly ready, willing and able customer—notwithstanding the facts that the customer in question was eventually rejected by the seller, and that no written agreement was entered into between the seller and this particular customer. Even oral negotiations for the purchase of a property, it would seem, constitute an acceptance of the customer by the seller for the purposes of vesting the broker's right to a commission.<sup>16</sup>

---

*Spence v. Lawrence*, 337 Mass. 355, 149 N.E.2d 379 (1958), where it is indicated that an oral or implied acceptance of the purchaser or the seller may have the same effect as the execution of a formal contract insofar as the question of ability to pay is concerned.

<sup>12</sup> 330 Mass. 355, 113 N.E.2d 447 (1953).

<sup>13</sup> *Id.* at 356, 113 N.E.2d at 447.

<sup>14</sup> *Id.*, 113 N.E.2d at 447-48. See also *Richards v. Gilbert*, 336 Mass. 617, 146 N.E.2d 921 (1958).

<sup>15</sup> 337 Mass. 355, 149 N.E.2d 379 (1958).

<sup>16</sup> *Id.* at 358-59, 149 N.E.2d at 381.

There is little doubt that the law in the Commonwealth with respect to the payment of brokerage commissions is extremely harsh on sellers of property.<sup>17</sup> However, as the court noted in the *Gaynor* case, a seller has ample means to ameliorate harsh consequences. For example, by use of appropriate language he may condition his liability for a brokerage commission upon the actual payment of the full purchase price by the customer whom the broker procures.<sup>18</sup>

It may be argued that the rule of law reiterated by the court in *Gaynor* is unrealistic. When an owner of property lists that property with a broker, his expectation is that the money for the payment of the commission will come out of the proceeds of the sale. As a practical matter, most owners, because they lack the time, money and sophistication, do not investigate the financial status of the customer. Accordingly, the Massachusetts rule permitting a broker to satisfy his obligation to the owner by tendering a person who is in some way "accepted" by the seller, seems in conflict with the realities of the broker-vendor relationship. From a pragmatic viewpoint, a buyer's willingness and ability to pay is demonstrated at the time of closing of title, not when he signs the purchase and sale agreement.

In conclusion, it is submitted that the court's decision in *Gaynor* puts the burden of determining the financial ability of a customer on the wrong shoulders. If Laverdure, a licensed real estate broker who acted with the counsel of an attorney, could become liable for a \$9,000 commission to a broker who did not in fact produce a ready, willing and able buyer, one can imagine the vulnerability of the average layman/homeowner to the broker who readily offers his services.

#### STUDENT COMMENT

**§4.5. Recovery for breach of a physician-patient contract: Reliance vs. expectancy damages: *Sullivan v. O'Connor*.**<sup>1</sup> The decision in this case is a significant development in Massachusetts medical litigation because it allows the recovery of comprehensive damages based on the plaintiff-

---

<sup>17</sup> See, e.g., *Ellsworth Dobbs, Inc. v. Johnson*, 50 N.J. 528, 236 A.2d 843 (1967), wherein the court changed the law in New Jersey (which was similar to the law in Massachusetts) to a rule providing that a broker earns his commission only when (a) he produces a purchaser ready, willing, and able to buy on the terms fixed by the owner, (b) the purchaser enters into a binding contract with the owner, and (c) the purchaser completes the transaction, unless the failure results from the wrongful act or interference of the seller. *Id.* at 551-52, 236 A.2d at 855.

The rationale in *Johnson* was specifically rejected by the court in *Gaynor*. 1973 Mass. Adv. Sh. at 121, 291 N.E.2d at 624.

<sup>18</sup> Such a limitation must be clear and unambiguous. See, e.g., *Maher v. Haycock*, 301 Mass. 594, 18 N.E.2d 348 (1938); *Alvord v. Cook*, 174 Mass. 120, 54 N.E. 499 (1899).

§4.5. 1 1973 Mass. Adv. Sh. 753, 296 N.E.2d 183.

patient's reliances, including her pain, suffering, and mental distress, for the breach of an express physician-patient contract. The plaintiff, an entertainer, had asked the defendant plastic surgeon to perform cosmetic surgery changing the shape and size of her nose. She alleged that the defendant had agreed and promised to enhance her beauty and improve her appearance by performing two operations. In fact, three operations were required, and the appearance of her nose was substantially worsened. At the trial there was expert testimony to the effect that her nose could not be improved by any further surgery.

The plaintiff's action consisted of two counts. The first count alleged a contract between the plaintiff and defendant which the defendant had breached by failing to improve plaintiff's nasal appearance. The breach allegedly resulted in disfigurement of plaintiff's nose, worsening of her appearance, pain and suffering in body and mind, great medical expense, and deprivation of earning capacity.<sup>2</sup> The second count alleged malpractice based upon the defendant's negligence performance of nasal surgery.<sup>3</sup> The defendant answered these counts with a general denial.

The case was tried before a jury, which, in response to special questions on the issues of liability,<sup>4</sup> returned a verdict for the plaintiff on the contract count and for the defendant on the negligence count. On the issue of damages, the trial court judge instructed the jury that the plaintiff was entitled to recover her out-of-pocket expenses incident to the operations as well as all other damages flowing directly, naturally, proximately and foreseeably from the defendant's breach of promise.<sup>5</sup> The jury was further instructed that the damages awarded should comprehend damages for disfigurement, including the effects of the consciousness of such disfigurement on the plaintiff's mind; in this connection, the jury was permitted to consider the plaintiff's profession. The trial court also instructed that the pain and suffering attendant to the third operation were compensable.<sup>6</sup> Based upon these instructions, the jury awarded the plaintiff \$13,500.

The defendant physician did not appeal the issue of contract formation. However, he excepted to the instructions given to the jury regarding damages on the ground that the jury should have been allowed to consider only the plaintiff's out-of-pocket expenses, and more specifically, on the ground that the plaintiff should not have been allowed to recover for disfigurement, pain and suffering or mental distress. The defendant based his exceptions on the contention that damages for pain, suffering and mental distress are characteristic of tort actions and are not compen-

---

<sup>2</sup> *Id.* at 753-55, 296 N.E.2d at 184-85.

<sup>3</sup> *Id.* at 753, 296 N.E.2d at 184.

<sup>4</sup> See Record, Lobby Conference and Charge to the Jury, 6, *Sullivan v. O'Connor*, 1973 Mass. Adv. Sh. 753, 296 N.E.2d 183.

<sup>5</sup> 1973 Mass. Adv. Sh. at 754, 296 N.E.2d at 185.

<sup>6</sup> *Id.*

sable in an action alleging breach of contract.<sup>7</sup> Contending that she was entitled to recover fully for her unfulfilled expectations, the plaintiff excepted to the trial court's refusal to charge that she could recover expectancy damages, that is, damages based upon the entire difference between the nose as promised and the nose as it appeared after the operation. The plaintiff, however, expressly agreed to waive her exception in the event that the Supreme Judicial Court overruled the defendant's exceptions.<sup>8</sup>

The Supreme Judicial Court overruled all of the defendant's exceptions and HELD: the plaintiff was entitled to collect damages for all the items enumerated in the charge to the jury under either an expectancy theory or a reliance theory of damages.<sup>9</sup> The court did not have to reach the issue of whether damages for a plaintiff's full expectations could be awarded for the breach of a physician-patient contract because Alice Sullivan did not seek to recover such damages. However, the opinion indicated that the court favored the more limited reliance measure of damages. This tendency is evidenced by the conclusion that, "there is much to be said, then, for applying a reliance measure to the present facts . . . ."<sup>10</sup>

The holding of the *Sullivan* case is limited since, as the court noted, the parties did not make claims which would have forced the court to reach all of the issues involved in physician-patient contracts and the damages recoverable from breaches thereof.<sup>11</sup> The court treated some of these issues in dicta in order to clarify common law policy in this area. For instance, although the issue of contract formation was not appealed, the court discussed the issue of the burden of proof in actions alleging breach of an express physician-patient contract.<sup>12</sup> The court also discussed the relative applicability of the reliance and expectancy measures of damages to recovery for breaches of physician-patient contracts, although the plaintiff expressly waived her claim for a recovery based on her expectations.<sup>13</sup> In reality, then, the court utilized this case as a means of presenting its prospective intentions in the field of physician-patient contract litigation. While the dicta in the decision does not rise to the level of binding precedent, it does articulate a judicial attitude which may significantly influence the common law of the Commonwealth with respect to medical litigation.

---

<sup>7</sup> Id. at 755, 296 N.E.2d at 185.

<sup>8</sup> Id. The plaintiff apparently excepted in order to secure a new trial if the favorable trial verdict were reversed on the defendant's appeal. Since the plaintiff was satisfied with the trial court verdict, a waiver of her exceptions was appropriate if that verdict was preserved.

<sup>9</sup> Id. at 762, 296 N.E.2d at 189.

<sup>10</sup> Id. at 759, 296 N.E.2d at 188.

<sup>11</sup> Id.

<sup>12</sup> Id. at 756, 296 N.E.2d at 186.

<sup>13</sup> Id. at 756-60, 296 N.E.2d at 186-88.

The extensive discussion and analysis of the *Sullivan* case by the court was permeated with indications that the court believed the express physician-patient contract to be a special situation in terms of both contract formation and damages recoverable for breach. The court stated that actions would be allowed on alleged physician-patient contracts but that "clear proof" would be required to establish the existence of such contracts.<sup>14</sup> In addition, the court suggested that the reliance measure of damages is the most just to all parties concerned in such cases. Essentially the court appears to be splitting the risks of contract between the physician and patient on grounds of public policy. The medical profession is somewhat shielded from fraudulent, frivolous, and extremely tenuous claims by the "clear proof" requirement, which will at least require fact finders to carefully scrutinize the evidence in such cases, and may require a plaintiff to prove contract formation by more than a preponderance of the evidence.<sup>15</sup> The application of the reliance measure of damages also protects the physician from the greater financial liability which would usually result from the application of the expectancy measure of damages. The patient, on the other hand, is protected through judicial recognition of the physician's ability to contract and his liability in case of breach.

While *Sullivan* is neither a case of first impression in Massachusetts in the area of express physician-patient contracts,<sup>16</sup> nor the first Massachusetts case in which damages were awarded for pain and suffering<sup>17</sup> or mental anguish<sup>18</sup> in a contract action, it is, however, the first Massachusetts decision involving a breach of an express physician-patient contract which resulted in damages for pain, suffering, and mental distress. It is therefore important to analyze the judicial policy judgments expressed in *Sullivan* in terms of traditional legal theory in order to discover whether the court has indeed forged a new area of contract law or merely elected to adhere to traditional contract concepts in light of the public policy aspects of the medico-legal field. This note will examine the characteristics of physician-patient agreements and attempt to clarify the relationship of such agreements to the group of compacts which society has, through the judicial process, elected to enforce as legally binding contracts.

The process of determining whether an agreement is, or should be,

<sup>14</sup> *Id.* at 756, 296 N.E.2d at 186.

<sup>15</sup> C. McCormick, *Evidence* §340 at 796, (2d ed. 1972).

<sup>16</sup> See *Sherlag v. Kelley*, 200 Mass. 232, 86 N.E. 293 (1908), where the plaintiff recovered damages from the defendant physician for the latter's breach of an express contract to perform specified medical services.

<sup>17</sup> See *McClellan v. University Club*, 327 Mass. 68, 97 N.E.2d 194 (1951), where the plaintiff guest recovered damages for mental harm resulting from the breach of an innkeeper-guest contract.

<sup>18</sup> See *Frewen v. Page*, 238 Mass. 499, 131 N.E. 475 (1921), and *McClellan v. University Club*, 327 Mass. 68, 97 N.E.2d 174 (1951), where damages for breaches of innkeeper-guest contracts included compensation for mental anguish.



a legally binding contract is best begun by examining the formation of the compact. Many jurisdictions recognize that a physician may contract to bring about a given result and will be held liable for a breach of such an express contract.<sup>18a</sup> However, at least one jurisdiction requires a strict evidentiary test, as a means of establishing the formation of the physician-patient contract.<sup>19</sup> Courts in other jurisdictions have declined to establish such elevated burdens of proof but have noted the potential for mistake and fraud by plaintiffs in the area and have consequently warned that fact finders should carefully scrutinize all evidence of an alleged physician-patient contract.<sup>20</sup> It is unclear which of these evidentiary weighing processes the Supreme Judicial Court meant to endorse when it noted that “[t]he law has taken the middle of the road position of allowing actions based on alleged contract, but insisting on clear proof.”<sup>21</sup> The court referred to clear proof as a “requirement”<sup>22</sup>—which would seem to indicate a definite standard of proof—but then stated only that jury instructions “may”<sup>23</sup> stress such a requirement. Perhaps the court meant that jury instructions may *stress* the requirement instead of simply reciting it. None of this really determines whether the court meant to imply that physician-patient contract formation should be proved by more than a preponderance of the evidence, or merely suggested that fact finders be certain that contract formation is clearly proved. However, it would seem, in light of the general reluctance of Massachusetts courts to require proof by more than a preponderance of the evidence in civil cases,<sup>24</sup> and the lack of a precedent for requiring “clear proof,” that the court did not intend to imply that it would establish a specific new burden of proof should the issue arise again in the Commonwealth. However, whether they intended to establish an elevated proof requirement or not, the court certainly notified the Massachusetts judiciary and public that all fact finders would at least be expected carefully and cautiously to examine and weigh the evidence in all physician-patient contract actions. Such a requirement is not necessarily an aberration of contract law created to protect physicians and medical progress. Instead, it represents a judicial endeavor to define the set of enforceable promises, or contracts, within the universe of all promises.

Contractual theory has evolved so that some promises merit societal

---

<sup>18a</sup> See, e.g., *Stewart v. Rudner*, 349 Mich. 459, 84 N.W.2d 816 (1957); *Hood v. Moffett*, 109 Miss. 757, 69 So. 664 (1915); *Hawkins v. McGee*, 84 N.H. 114, 146 A. 641 (1929); *Robins v. Finestone*, 308 N.Y. 543, 127 N.E.2d 330 (1955).

<sup>19</sup> *Gault v. Sideman*, 52 Ill. App.2d 96, 191 N.E.2d 436 (1963).

<sup>20</sup> *Guilmet v. Campbell*, 385 Mich. 57, 188 N.W.2d 601 (1971).

<sup>21</sup> 1973 Mass. Adv. Sh. at 756, 296 N.E.2d at 186.

<sup>22</sup> *Id.*

<sup>23</sup> *Id.*

<sup>24</sup> See, e.g., *in re Mayberry*, 295 Mass. 155, 3 N.E.2d 248 (1936).

enforcement while others do not. Although a clean division might have been preferable in the *Sullivan* case, it is clear that there will be types of promises which straddle the dividing line. Such are physician-patient contracts which, in the overall pattern, fall somewhere between the commercial promises which merit judicial enforcement and the personal and social agreements in which the law has refused to intervene.<sup>25</sup> Certainly some physician-patient agreements are not as commercial in nature as others. For example, agreements by physicians to perform highly complex, lifesaving operations involving newly developed techniques bear little resemblance to common commercial agreements to provide services. Such surgery usually occurs in a context which is highly personal, both for the patient and the physician, and which is virtually devoid of bargaining. The court in *Sullivan* recognized that physicians often make statements which are meant only to reassure the patient and not intended to be binding promises of medical success.<sup>26</sup> It was further noted that patients often rely unreasonably upon such statements or may claim to have so relied upon them after being disappointed by the medical outcome.<sup>27</sup>

At the other end of the spectrum are physician-patient agreements which have commercial characteristics. Promises by physicians to perform routine elective surgery, like the cosmetic surgery involved in the *Sullivan* case, closely resemble commercial contracts for services. The position of the physician approaches the status of a vendor, and bargaining is possible since the surgery is elective, routine and presumably deliverable by many physicians. Since elective cosmetic surgery does not involve medical necessity, a physician's reassurances in such a context approach the commercial practice of "puffing." When such reassurances include promises and serve as an inducement to accept an elective medical service, there is little justification for treating them differently from promises made in non-medical settings.

A similar group of physician-patient agreements which is generally considered enforceable is that in which a physician promises to employ or not to employ a certain procedure which is completely within his control.<sup>28</sup> Exemplifying this group of contracts is the contract dealt with in *Frank v. Maliniak*,<sup>29</sup> a case in which the physician performing a rhinoplasty promised to keep all incisions inside the mouth and failed to do so. The enforcement of this type of agreement reflects the judicial recog-

<sup>25</sup> A. Corbin, *Corbin on Contracts* §34, at 53-54 (1 vol. ed. 1952).

<sup>26</sup> 1973 Mass. Adv. Sh. at 756, 296 N.E.2d at 186.

<sup>27</sup> *Id.*

<sup>28</sup> *Frank v. Maliniak*, 232 App. Div. 278, 249 N.Y.S. 514 (1931); *Steward v. Rudner*, 349 Mich. 459, 84 N.W.2d 816 (1957) (plaintiff contracted with defendant physician to receive a caesarian section and the defendant failed to perform the procedure).

<sup>29</sup> 232 App. Div. 278, 249 N.Y.S. 514 (1931).

nition that once the impediment of scientific uncertainty is completely removed, a physician must perform as promised, like any vendor of services.

Continuing the process of determining whether physician-patient contracts should be held to be legally binding contracts, the court in *Sullivan* compared the practical disadvantages of non-enforcement and ready enforcement. It observed that a rule permitting easy maintenance of actions for breaches of promises allegedly made by physicians might result in a tremendous expansion in the practice of "defensive medicine." On the other hand, a rule disallowing all such actions would leave the public "exposed to the enticements of charlatans, and confidence in the profession might ultimately be shaken."<sup>30</sup> Fearful of the practical consequences of either of these extremes, the court espoused, in dicta, the cautious "middle of the road" position of allowing contract actions but insisting on clear proof of contract formation.<sup>31</sup> However, the same cautious approach of the court can be described more precisely as the creation of a means to give careful scrutiny to each physician-patient agreement and determine on a case-by-case basis whether the alleged agreement belongs within the set of legally enforceable promises.

On the issue of damages, the *Sullivan* court discussed the relative propriety of the reliance and the expectancy measures of damages. Although no choice between these two measures had to be made due to the fact the plaintiff did not seek to recover for her full expectations, the dicta of the opinion seemed to indicate a judicial preference for the reliance measure of damages. The court defined the reliance measure of damages as that measure which would produce a recovery sufficient to "put the plaintiff back in the position he occupied just before the parties entered the agreement, to compensate him for the detriments he suffered in reliance upon the agreement."<sup>32</sup> The expectancy measure was defined by the court as that measure which would produce a recovery "intended to put the plaintiff in the position he would be in if the contract had been performed."<sup>33</sup> Simply put, this measure, as applied to the *Sullivan* case, would have been the difference between the nose promised and the nose after the operations. Commentators Fuller and Perdue contend that the expectancy measure is just "the reflection of a normative order . . . an unstated *ought*."<sup>34</sup> In contrast, the reliance measure reflects an actual detriment or act on the part of a party to a contract. Fuller and Perdue maintain that there are certain situations which require enforcement of the "ought" and other situations which merely require a restoration of the status quo

---

<sup>30</sup> 1973 Mass. Adv. Sh. at 756, 296 N.E.2d at 186.

<sup>31</sup> Id.

<sup>32</sup> Id. at 758, 296 N.E.2d at 187.

<sup>33</sup> Id. at 757, 296 N.E.2d at 186.

<sup>34</sup> Fuller & Perdue, *The Reliance Interest in Contract Damages: I*, 46 Yale L.J. 52, 53 (1936), cited in *Sullivan*, 1973 Mass. Adv. Sh. at 759, 296 N.E.2d at 187.

which existed before the contract was made.<sup>35</sup> The former situations are those where the expectancy measure of damages is properly applied and the latter require damages based on the reliance theory.<sup>36</sup> Professor Farnsworth assesses the difference between the two theories in a different light: the reliance measure may be characterized as an encouragement to promisees to rely while the expectancy measure may be characterized as punishment of the promisor.<sup>37</sup>

Other distinctions between the two measures are based upon commercial and economic considerations. In most marketplace transactions the expectancy measure of damages is simple and readily ascertainable, while the reliance measure may include many uncertain factors such as lost opportunities.<sup>38</sup> Strong and stable commerce depends upon a willingness of those in the marketplace to contract. Any enforcement of contracts, whether damages are based on a theory of restitution, reliance, or expectancy, encourages good faith agreements. However, the expectancy measure of damages theoretically assures a non-breacher of the benefit of his bargain, while the restitution and reliance measures merely attempt to restore the non-breacher to his position prior to the agreement. Clearly, then, a general willingness to contract is usually best encouraged by the availability of a recovery of damages based on the non-breacher's full expectations. These social and economic distinctions between the reliance and expectancy measures of damages are relevant to most judicial determinations of contract damage issues. This relevance has been discussed by several courts, including the *Sullivan* court.

As was noted in the opinion in *Sullivan*,<sup>39</sup> at least one jurisdiction has awarded full expectancy damages for the breach of a physician-patient contract,<sup>40</sup> while others have awarded only damages based on reliance.<sup>41</sup> The classic example of an award based on the expectancy theory of damages is the New Hampshire case of *Hawkins v. McGee*.<sup>42</sup> In that case the physician promised the patient that he could surgically make the

<sup>35</sup> *Id.* at 56.

<sup>36</sup> *Id.* at 54.

<sup>37</sup> Farnsworth, *Legal Remedies for Breach of Contract*, 70 *Colum. L. Rev.* 1145, 1147 (1970).

<sup>38</sup> 5 A. Corbin, *Corbin on Contracts* §1035 at 209 (1964).

<sup>39</sup> 1973 *Mass. Adv. Sh.* at 757-58, 296 N.E.2d at 186.

<sup>40</sup> *Cloutier v. Kasheta*, 105 N.H. 262, 197 A.2d 627 (1964); *Lakeman v. LaFrance*, 102 N.H. 300, 156 A.2d 123 (1959); *McQuaid v. Michou*, 85 N.H. 299, 157 A. 881 (1932); *Hawkins v. McGee*, 84 N.H. 114, 146 A. 641 (1929).

<sup>41</sup> *Stewart v. Rudner*, 349 Mich. 459, 84 N.W.2d 816 (1957); *Robins v. Finestone*, 308 N.Y. 543, 127 N.E.2d 330 (1955); *Colvin v. Smith*, 276 App. Div. 9, 92 N.Y.S.2d 794 (1949); *Hirsch v. Safian*, 257 App. Div. 212, 12 N.Y.S.2d 568 (1939); *Frank v. Maliniak*, 232 App. Div. 278, 249 N.Y.S. 514 (1931); *Frankel v. Wolper*, 181 App. Div. 485, 169 N.Y.S. 15 (1918), *aff'd*, 228 N.Y. 582, 169 N.Y.S. 1094, 127 913 (1918).

<sup>42</sup> 84 N.H. 114, 146 A. 641 (1929). Later cases have refined the rule in the direction of applying the expectancy theory of damages in actions on physician-patient contracts. See the cases other than *Hawkins* listed in note 40 *supra*.

patient's badly deformed hand a perfect hand. The Supreme Court of New Hampshire held that the plaintiff was entitled to damages measured by the expectancy theory, that is, he was entitled to recover the difference between the value to him of a perfect hand as promised and the value of the hand in its resultant condition. No other jurisdiction has developed a coherent and identifiable policy concerning damages recoverable for breaches of physician-patient contracts. The New York courts have indicated in dicta that a reliance type measure of damages is appropriate; however, they have not specifically confronted a claim for damages based on the expectancy theory and therefore have not actually decided the issue.<sup>48</sup>

Although the last paragraph of *Sullivan* contains the court's assertion that it did not decide between the damage theories of expectancy and reliance,<sup>44</sup> the court nevertheless expresses its preference for the reliance theory in dicta when it concludes: "There is much to be said, then, for applying a reliance measure to the present facts, and we have only to add that our cases are not unresponsive to the use of that formula in special situations."<sup>45</sup> By favoring the reliance measure, the court again appears to split contract risks on public policy grounds. The court states that a recovery based on simple restitution would be "too meager" while "an expectancy recovery might well be excessive."<sup>46</sup> The court lists several factors which suggest "moderation as to the breadth of the recovery that should be permitted": the fact that the defendant in *Sullivan* was absolved of negligence, the lack of a willful breach, the disproportion of the physician's fee to the expectancy value, and the difficulty of putting a value on the condition that would have resulted.<sup>47</sup> The selection of these factors as important to a contract action reflects the court's decision that express physician-patient contracts are unique, since it is well established that willfulness, negligence, amount of consideration, and difficulty in assessing value are not normally issues in contract actions. Just as the court adopts a middle of the road position by suggesting a clear proof requirement for contract formation, the court's espousal of the reliance measure of damages indicates its desire that there be some judicial balancing involved in any determination of the breadth of damages recoverable for the breach of an express physician-patient contract. By favoring the application of the reliance measure of damages, the court expresses a policy of assuring the non-breaching patient reasonable recovery for his actual losses

<sup>48</sup> *Robins v. Finestone*, 308 N.Y. 543, 127 N.E.2d 330 (1955); *Colvin v. Smith*, 276 App. Div. 9, 92 N.Y.S.2d 794 (1949); *Hirsch v. Safian*, 257 App. Div. 212, 12 N.Y.S.2d 568 (1939); *Frank v. Maliniak*, 232 App. Div. 278, 249 N.Y.S. 514 (1931); *Frankel v. Wolper*, 181 App. Div. 485, 169 N.Y.S. 15, aff'd 228 N.Y. 582, 127 N.E. 913, 169 N.Y.S. 1094 (1918).

<sup>44</sup> 1973 Mass. Adv. Sh. at 762, 296 N.E.2d at 189.

<sup>45</sup> *Id.* at 759-60, 296 N.E.2d at 188.

<sup>46</sup> *Id.* at 759, 296 N.E.2d at 187.

<sup>47</sup> *Id.* at 759, 296 N.E.2d at 187-88.

while protecting the non-willful breaching physician from the excessive liability which might result from the application of the expectancy measure of damages. Perhaps the court feared harsh expectancy judgments would in effect penalize the physician, induce him to practice conservatively, unjustly enrich certain plaintiffs, and raise the overall costs of medical service. On the other hand, it is possible that the court felt that recoveries based on the restitution measure would be unjust to patients, who would normally incur many incidental expenses and frequently suffer physical injuries resulting in losses far greater than the amount of the physician's fee.

Again, it is important to examine the action for breach of an express physician-patient contract to determine whether there is a further rational basis for awarding a recovery based on reliance rather than the usual expectancy measure of damages. Fuller and Perdue describe the set of contracts for which recovery based on reliance is appropriate as those contracts which stand on the threshold of commerce: too social in nature to merit expectancy damages, but close enough to bargains to require judicial intervention.<sup>48</sup> Earlier in this article it was suggested that physician-patient contracts stand on this threshold for purposes of determining whether a contract has been formed. The same analysis applies to damage recovery; that is, physician-patient contracts straddle the border between enforceable and non-enforceable promises and are consequently quite different from those commercial contracts which form the core of the set of enforceable promises. Therefore, it is appropriate to consider a theory of recovery based on this peripheral position which differs from the usual theory of recovery in commercial contexts. The basic inquiry, then, is whether the elements which generally demand an expectancy award for a breach of promise are present in the context of physician-patient contracts.

The quasi-commercial context of physician-patient agreements appears to be devoid of the commercial and economic elements which generally support an award based on expectation. Clearly there is no basic social policy to encourage medicine as a "business" based on willingness to contract. The economic factors which require a commercial marketplace based on promises to pay, deliver, employ, or serve are absent in the medical marketplace. The physician-patient contract is a relatively isolated agreement which is not usually interdependent with other sectors of the economy. Therefore, commerce in general is not benefited by the willingness of a physician and patient to contract. In fact, there is a distinct policy to discourage a medical marketplace which might be full of charlatans and ultimately detract from the scientific and ethical aspects of the medical profession.<sup>49</sup> Furthermore, the agreement to treat is generally

<sup>48</sup> Fuller & Perdue, *The Reliance Interest in Contract Damages*: 2, 46 *Yale L.J.* 373, 397 (1937).

<sup>49</sup> 1973 *Mass. Adv. Sh.* at 756, 296 *N.E.2d* at 186.

based upon the patient's reliance upon the physician to conform to a high standard of medical practice and not necessarily to guarantee a specific cure or result. The patient hopes for, rather than expects, complete success, which is often a result beyond the physician's control. It thus appears that there is little justification for utilizing expectancy damages as a means to encourage physician-patient contracts.

The patient's expectations, unlike those of many parties to purely commercial contracts, cannot be measured more simply than his reliances, and consequently, application of the expectancy measure of damages for the breach of a physician-patient contract cannot be justified as the most convenient and equitable measure of damages. It is much easier in a business context to award lost profits than to attempt to assess all of the reliances which a business places upon a contract. Conversely, it is easier to assess a patient's reliances—medical expenses, pain and suffering, mental distress, loss of income—than it is to assess his lost profit or gain. There is no readily ascertainable market value of a re-shaped nose, a successful caesarian section, or the cure of a disease. As the *Sullivan* court notes, an attempt to put a value on such an expected condition often strains the imagination of the fact finder.<sup>50</sup>

In a purely commercial context there is an assumption that the reliance and expectancy measures will yield damages which are somewhat similar in amount because business reliances will reflect the profits anticipated.<sup>51</sup> Coupled with this assumption is the further assumption that most parties to commercial contracts have the knowledge and bargaining power which makes it unlikely that a party to a commercial contract will make extremely high profits from a bargain in comparison to its reliances on that bargain.<sup>52</sup> These assumptions cannot be made in the physician-patient context. The reliances of a patient reflect the medical character of a procedure, not the potential gain. Certainly, pain, suffering, and loss of income are virtually unrelated to the gain anticipated from a medical procedure. Similarly, cost is not always related to the benefit a patient receives. Nor is there a bargaining process in the formation of a physician-patient contract which would tend to equalize reliance and gain.

Finally, the function of the expectancy measure as a penalty and deterrent must be examined in the physician-patient contract context. An award based on the expectancy measure might deter the formation of physician-patient contracts, but probably not breaches thereof. It is improbable that a physician would willfully breach a contract with one patient in order to take advantage of another bargain, as might be the case in a more commercial context. Such willful breaches would frequently constitute negligence and be actionable under the tort theory of malpractice.<sup>53</sup> Therefore,

---

<sup>50</sup> *Id.* at 759, 296 N.E.2d at 188.

<sup>51</sup> 5 A. Corbin, Corbin on Contracts §996, at 17 (1964).

<sup>52</sup> *Id.*

<sup>53</sup> W. Prosser, Handbook of the Law of Torts §32, at 161-66 (4th ed. 1971).

it is improbable that the increased damages available under the expectancy measure would be effective as a deterrent to breach.

Since the traditional reasons, discussed above, for allowing a non-breacher to recover damages for his full expectations do not appear to be applicable to the physician-patient contract, it is rational for the courts to restrict the application of the expectancy measure of damages in suits on such contracts. Therefore, what appears to be a policy decision in *Sullivan* to protect physicians by allowing patients to recover only damages for their reliances, may actually be a decision not to apply the "ought" of the expectancy measure of damages to contracts which are on the periphery of the set of enforceable promises. The court in *Sullivan* noted, and thus appeared to accept, the Fuller and Perdue argument that "the reasons for granting damages for broken promises to the extent of the expectancy are at their strongest when the promises are made in a business context, . . . they become weaker as the context shifts from a commercial to a noncommercial field."<sup>54</sup>

Traditionally damages awarded for the breach of a contract do not encompass compensation for pain and suffering.<sup>55</sup> There have been a few exceptions to this principle; common carrier-passenger contracts,<sup>56</sup> innkeeper-guest contracts,<sup>57</sup> and physician-patient contracts in some jurisdictions.<sup>58</sup> In the Massachusetts case of *McClellan v. University Club*,<sup>59</sup> the Supreme Judicial Court held that, on the facts, pain and suffering could be alleged as elements of damage since they flowed directly, naturally and proximately from the breach of the contract involved.<sup>60</sup> In that case an innkeeper breached the implied terms of the contractual relation between the plaintiff-guest and himself. One of these terms was that the defendant would not interfere with the convenience and comfort of the plaintiff, its guest, nor abuse nor insult him, nor engage in any conduct which would subject him to mental distress or personal injury. The defendant breached this term by forcibly removing the seriously ill defendant from his room and evicting him in an unreasonable manner which resulted in serious physical injury to the plaintiff. The plaintiff recovered damages for pain, suffering, and mental anguish. Other jurisdictions have also awarded damages for pain and suffering for the breach of a contract<sup>61</sup> as in the Mississippi case of *Hood v. Moffett*,<sup>62</sup> where a physician con-

<sup>54</sup> 1973 Mass. Adv. Sh. at 759, 296 N.E.2d at 188.

<sup>55</sup> A. Corbin, Corbin on Contracts §1076, at 426-27 (1964).

<sup>56</sup> See, e.g., *Leatherman v. Gateway Trans. Co.*, 331 F.2d 241 (7th Cir. 1964).

<sup>57</sup> See, e.g., *McClellan v. University Club*, 327 Mass. 68, 97 N.E.2d 174 (1951).

<sup>58</sup> See, e.g., *Hood v. Moffett*, 109 Miss. 757, 69 So. 664 (1915).

<sup>59</sup> 327 Mass. 68, 97 N.E.2d 174 (1951).

<sup>60</sup> *Id.* at 76, 97 N.E.2d at 180.

<sup>61</sup> See, e.g., *McQuaid v. Michou*, 85 N.H. 299, 157 A. 881 (1932); *Coffey v. Northwestern Hosp. Assoc.*, 96 Ore. 100, 183 P. 762 (1919); *Galveston, H. and S.A. Ry. Co. v. Rubio*, 65 S.W. 1126 (Tex. 1901).

<sup>62</sup> 109 Miss. 757, 69 So. 664 (1915).



tracted to provide prenatal care and breached this promise. The court there held that damages could be recovered for physical pain and suffering resulting from the breach.<sup>63</sup> A general statement covering these principles is given by Sutherland in his treatise on damages:

[W]here a contract is made to secure relief from a particular inconvenience or annoyance, or to confer a particular enjoyment, the breach, so far as it disappoints in respect of that purpose, may give a right to damages appropriate to the objects of the contract.<sup>64</sup>

*Sullivan* is the first Massachusetts case based on the breach of an express physician-patient contract in which the courts have applied the above principle and awarded damages for a plaintiff's pain and suffering.<sup>65</sup> The court in *Sullivan* specifically rejected the tenet, espoused by several New York courts,<sup>66</sup> that demands for compensation for pain, suffering, and mental distress are uncharacteristic of a contract claim.<sup>67</sup> Developing its own standards, the court then stated that the "subject matter and background"<sup>68</sup> of the contract are controlling and accordingly found that the physician-patient contract before it had as its subject and essence the pain, suffering, and mental distress of the plaintiff. This analysis resulted in the holding that "[s]uffering or distress resulting from the breach going beyond that which was envisaged by the treatment as agreed, should be compensable on the same ground as the worsening of the patient's condition because of the breach."<sup>69</sup>

Like pain and suffering, mental distress has traditionally been uncompensable in contract actions with a few exceptions: actions for breaches of innkeeper-guest contracts,<sup>70</sup> carrier-passenger contracts,<sup>71</sup> and physician-patient contracts in some jurisdictions.<sup>72</sup> The Massachusetts case of *Frewen v. Page*<sup>73</sup> is precedent for allowing a recovery for mental anguish in a contract action. An innkeeper illegally entered his guest's room and publicly insulted the guest. The guest recovered for the resulting mental distress in an action for the breach of the innkeeper's promise to protect the privacy of the guest and treat him with consideration.<sup>74</sup> In *McClellan v.*

<sup>63</sup> Id. at 766-67, 69 So. at 666.

<sup>64</sup> A. Sutherland, *Law of Damages* §92, at 330 (1916).

<sup>65</sup> 1973 Mass. Adv. Sh. at 762, 296 N.E.2d at 189.

<sup>66</sup> *Robins v. Finestone*, 308 N.Y. 543, 127 N.E.2d 330 (1955); *Colvin v. Smith*, 276 App. Div. 9, 92 N.Y.S.2d 794 (1949); *Frankel v. Wolper*, 181 App. Div. 485, 169 N.Y.S. 15 (1918).

<sup>67</sup> 1973 Mass. Adv. Sh. at 761, 296 N.E.2d at 189.

<sup>68</sup> Id. at 760, 296 N.E.2d at 189.

<sup>69</sup> Id. at 761, 296 N.E.2d 189.

<sup>70</sup> See, e.g., *Frewen v. Page*, 238 Mass. 499, 131 N.E. 475 (1921).

<sup>71</sup> See, e.g., *Leatherman v. Gateway Trans. Co.*, 331 F.2d 241 (7th Cir. 1964).

<sup>72</sup> See, e.g., *Hood v. Moffett*, 109 Miss. 757, 69 So. 664 (1915).

<sup>73</sup> 238 Mass. 499, 131 N.E. 475 (1921).

<sup>74</sup> Id. at 503-06, 131 N.E. at 477.

*University Club*<sup>75</sup> the Supreme Judicial Court again allowed recovery for mental distress and quoted from the New York case of *Boyce v. Greeley Square Hotel Co.*:<sup>76</sup>

“As a general rule, mental suffering resulting from a breach of contract is not a subject of compensation. The rule does not obtain, however, as between a common carrier or an innkeeper and an insulted and abused passenger or guest, or the proprietor of a public resort and a patron publicly ejected.”<sup>77</sup>

The trial court in *Sullivan* allowed the jury to include in their assessment of damages the effect of the awareness of disfigurement on the mind of the plaintiff.<sup>78</sup> Their evaluation of such an effect could include consideration of the plaintiff's profession, but only as to the effect on her mental state and not with regard to lost earnings.<sup>79</sup> The court held that “when the contract calls for an operation on the person of the plaintiff, psychological as well as physical injury may be expected to figure somewhere in the recovery, depending on the particular circumstances.”<sup>80</sup> The court found that the subject and background of the contract for nasal surgery involved the mental state of the plaintiff, that is, the awareness of her appearance, and therefore allowed the recovery of damages for harm to the plaintiff's mental state.<sup>81</sup> Since the nose as it originally appeared admittedly caused the plaintiff some unhappiness, it was foreseeable that a worsening of the nasal appearance would cause the plaintiff further distress. If a disfigurement causes no functional impairment, then its only impact is upon the patient's mental awareness of disfigurement. Certainly the physical injury is no less deserving of compensation simply because its only impact is mental.

It is necessary to examine this instruction given by the trial court, that the jury should take into consideration in its assessment of damages for mental distress the fact that the plaintiff was a professional entertainer.<sup>82</sup> Apparently the court believed the defendant could be held liable for the excess mental distress that the plaintiff might suffer due to her disfigured nose because her profession involved public appearances. The court noted that the defendant was aware of the plaintiff's profession<sup>83</sup> and held that the excess distress was foreseeable. This excess did not represent loss of earning capacity, but rather represented a relatively subjective loss of enjoyment. That is, the court seemed to acknowledge the fact that al-

---

<sup>75</sup> 327 Mass. 68, 97 N.E.2d 174 (1951). This case is discussed in text at note 59 supra.

<sup>76</sup> 228 N.Y. 106, 126 N.E. 647 (1920).

<sup>77</sup> *Id.* at 111, 126 N.E. at 649.

<sup>78</sup> 1973 Mass. Adv. Sh. at 754, 296 N.E.2d at 185.

<sup>79</sup> *Id.* at 755, 296 N.E.2d at 185.

<sup>80</sup> *Id.* at 760-61, 296 N.E.2d at 189.

<sup>81</sup> *Id.* at 762, 296 N.E.2d at 189.

<sup>82</sup> *Id.* at 754, 296 N.E.2d at 185.

<sup>83</sup> *Id.* at 754, 296 N.E.2d at 184-85.

though the plaintiff might not lose any income from the disfigurement, she would not enjoy her profession as much as she did prior to the disfigurement. The jurisdictions which have considered the issue of loss of enjoyment are divided on the question of whether compensation for such loss should be allowed.<sup>84</sup> Massachusetts courts have not specifically addressed this issue. The court in *Sullivan* did not discuss its decision that the plaintiff could be compensated for this loss and apparently did not conceive of itself as establishing a common law damage rule. Perhaps they believed that this particular mental distress was inseparable from the general mental distress which the plaintiff suffered.

In conclusion, the *Sullivan* case represents the first action brought for the breach of an express physician-patient contract in Massachusetts in which a plaintiff-patient has recovered as fully in a contract action as she would have under a tort theory. Although the issue of contract formation was handled in dicta, the court formulated a cautious judicial policy for dealing with actions alleging breaches of express physician-patient contracts. Basically, the court stated that in the proper situation such a contract can be formed and will be legally binding. By suggesting that there must be "clear proof" of contract formation, the court indicated its intention to carefully scrutinize all claims alleging breaches of express physician-patient contracts. Future Massachusetts courts will have to decide whether to apply the clear proof requirement suggested in the case and, if they do adopt it, they will have to determine what amounts to "clear proof." Conceivably the standard could be construed to require rigorous proof which would severely restrict the viability of the contract cause of action since, as discussed earlier, most physician-patient agreements are not obvious contracts. In addition, an elevated proof requirement might allow appellate courts to review the factual holdings of lower courts more freely. If, on the other hand, the clear proof standard is construed to require little or no more than a preponderance of the evidence, it is unlikely that physician-patient contract actions will be significantly affected by the imposition of the clear proof burden.

The damages which the court held recoverable in *Sullivan* included compensation for pain, suffering, and mental distress—items traditionally noncompensable in contract actions. This holding was the result of the judicial determination that the "subject matter and background" of the *Sullivan* physician-patient contract made such damages appropriate. The availability of such broad tort-like damages for the breach of a physician-patient contract will probably have significant impact on future medical litigation in Massachusetts. Freed from the traditional damage limitations, the contract cause of action could become a viable alternative to the usual

---

<sup>84</sup> See, e.g., *McAlister v. Carl*, 233 Md. 446, 197 A.2d 140 (1964) (loss of enjoyment held a proper element of damages); but see *Hogan v. Santa Fe Trial Trans. Co.*, 148 Kan. 720, 85 P.2d 28 (1938).

negligence cause of action alleged by patients against physicians. Once a contract claim surmounts the “clear proof” hurdle, it enjoys two important advantages over a malpractice claim. One advantage results from the fact that negligence is not an issue in contract actions. The often difficult proofs of causation and harm required to establish negligence are unnecessary to prove contract formation and subsequent breach. Secondly, unlike the proof of negligence, the proof of a contract and its breach does not involve the establishment of duties of care or community standards; therefore, expert medical testimony is unnecessary and the plaintiff is not hampered by the notorious “conspiracy of silence” among potential medical witnesses. Since contract actions enjoy these advantages, and since a Massachusetts plaintiff can now recover as fully in contract as in tort, a significant increase in the number of actions alleging a breach of an express physician-patient contract is probable in Massachusetts.

The *Sullivan* decision reflects a judicial determination that physician-patient agreements can be legally binding contracts. However, the decision also clearly indicates a judicial policy of caution with respect to such contracts since they often fall on the boundary between the group of commonly enforced compacts which are commercial in character and those agreements which society has decided are too “social” in nature to be legally enforced. The Supreme Judicial Court has suggested, through *Sullivan*, that this caution will probably be evidenced through the application of an elevated proof requirement, either explicitly or implicitly, and through a judicial policy of allowing damage recoveries based only on the patient’s reliances rather than on the usually more extensive measure based on the patient’s expectations.

SHELLEY MCINTYRE DRAPER