Establishing the Contractual Liability of Physicians

> The questions involve not only an interpretation of legal history, but a balancing of the legal policies of protecting the public in its dealings with the medical practitioner, and of protecting the practitioner in the pursuit of his highly essential profession from the fraudulent minded.[1]

I. INTRODUCTION

In the past the use of the action for breach of contract against a physician has been relatively slight. Because of court-imposed limitations and the prevalence of the malpractice action,[2] the attorney might overlook a perfectly valid action in contract.[3]

A. PURPOSE OF THE ARTICLE

The purpose of this article is to: 1) discuss and alert attorneys to factual situations which may present an action for breach of contract; 2) isolate the peculiar factors of the physician-patient relationship which will affect the application of contractual principles to this area; 3) analyze the case law on the subject and isolate the factors which have determined liability in the past; 4) present considerations that should be taken into account by the attorney and the courts in determining the issue of the contractual liability of physicians; and 5) discuss problems in the state of the law today.

B. ADVANTAGES AND DISADVANTAGES OF THE CONTRACT ACTION

The action for breach of contract has two basic advantages. First, in many states there are longer statutes of limitations for oral and

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[1]Zostautas v. St. Anthony De Padua Hospital, 23 Ill. 2d 326, 327, 178 N.E.2d 303, 304 (1961).

[2]Regarding California law on malpractice generally, *see* Swan, *The California Law of Malpractice of Physicians, Surgeons, and Dentists*, 33 CALIF. L. REV. 248 (1945).

[3]*See* Miller, *The Contractual Liability of Physicians and Surgeons*, 1953 WASH. L.Q. 413 (1953) [hereinafter cited as Miller] and Annotation, *Recovery Against Physician on Basis of Breach of Contract to Achieve Particular Result or Cure*, 43 A.L.R.3d 1221 (1972).

written contracts which may be available.[4] Second, in an action for breach of contract, negligence need not be proven,[5] thus the scope of liability of the physician is much greater.[6] It is necessary only to prove the making of the contract and its breach. The major disadvantage is that the damages available are more limited[7] than those available if a cause of action in tort for malpractice is established.[8]

C. MAJOR FACTORS TO BE CONSIDERED

Whether or not a contract between a physician and a patient has been made depends to a large extent upon the particular facts of the

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[4]For a general discussion of the statute of limitations as applied to physician-patient disputes, *see* Lillich, *The Malpractice Statute of Limitations in New York and Other Jurisdictions*, 47 CORNELL L.Q. 339 (1962).

In California, in many cases, the advantage of the longer statute of limitations for a breach of contract action may not be available. In Rubino v. Utah Canning Co., 123 Cal. App. 2d 18, 266 P.2d 163 (1954), the court held in interpreting CAL. CODE OF CIV. PROC. § 340(3) (WEST 1954) ("An action for . . . injury to or for the death of one caused by the wrongful act or neglect of another" shall have a one year statute of limitation) that "wrongful act" includes breach of contract, and that any action for personal injury, whether it be for tort or breach of contract, had a one year statute of limitation. *See also* Basler v. Sacramento, 166 Cal. 33, 134 P. 993 (1913). However, this would probably not apply to situations such as where the warranty is made to someone other than the patient. *See* Doerr v. Vilante, 74 Ill. App. 2d 332, 220 N.E.2d 767 (1966). Also, it is important to note that where the warranty relates to a future event, the statute of limitations does not begin until the warranty is breached. Crawford v. Duncan, 61 Cal. App. 647, 215 P. 573 (1923); Budd v. Nixen, 6 Cal. 3d 195, 98 Cal. Rptr. 849, 491 P.2d 433 (1971). However, the difference between an action in tort for undiscovered malpractice and the breach of a future warranty may, in many cases, be practically non-existent. *See* Sacks, *Statutes of Limitations and Undiscovered Malpractice*, 16 CLEVELAND-MARSHALL L. REV. 65 (1967).

[5]Safian v. Aetna Life Ins. Co., 260 App. Div. 765, 24 N.Y.S.2d 92; *aff'd* 286 N.Y. 649, 36 N.E.2d 692 (1940).

[6]This would also eliminate the often encountered problem of obtaining expert testimony in order to prove the defendant's action negligent. *See* Belli, *An Ancient Therapy STILL Applied: The Silent Medical Treatment*, 1 VILL. L. REV. 250 (1956).

[7]However there have been some cases which have allowed recovery for pain and suffering directly traceable to the breach of contract, even though this is normally a tort remedy. McQuaid v. Michou, 85 N.H. 299, 157 A. 881 (1932); Hood v. Moffet, 109 Miss. 757, 69 So. 664 (1915); Stewart v. Rudner, 349 Mich. 459, 84 N.W.2d 816 (1957).

[8]It is important to note that the issue of damages can also be a problem if the wrong type of damages is pleaded in a breach of contract action. In some cases the courts have pointed to the damages asked as a reason for not allowing the action to be in contract, saying instead that it sounded in tort for malpractice. *See especially* Frankel v. Wolper, 181 App. Div. 485, 169 N.Y.S. 15, *aff'd* 228 N.Y. 582, 127 N.E. 913 (1918); and Horowitz v. Bogart, 218 App. Div. 158, 217 N.Y.S. 881 (1926). Whether or not this would be decisive if this were the only defect in the pleading is not clear.

If the gravamen of the action is in tort, the absence of damages not consistent with an action for breach of contract does not, by itself, sustain an action for breach of contract. Hertgen v. Weintraub, 29 Misc. 2d 396, 215 N.Y.S.2d 379 (1961).

case. There are three major factors which influence this determination. The first factor is the actual words that were used by the parties. The second factor concerns the circumstances behind the utterance of those particular words. The third factor deals with the balancing of the principles of contractual law with the peculiar requirements of medical practice.

D. TWO EXAMPLES OF CONTRACT ACTIONS

Two California cases, *Crawford v. Duncan*[9] and *Marvin v. Talbot*,[10] are excellent examples of the parameters of the factual settings.

Crawford v. Duncan is an example of a situation where an express warranty was found to have been made. In 1917, plaintiff went to a doctor (not the defendant) with a small swelling on the side of her neck. That physician told her that an operation would leave a scar on her neck, and referred her to defendant, saying that defendant had been successful in treating such cases without leaving any scars. Plaintiff went to defendant and told him what the other doctor had said. The defendant said:

> "Yes," that he had been very successful in treating glands of that kind without leaving a scar of any kind — that that was what they used radium for, so that there would not be any scars, and in fact that they used radium to eliminate scars. . . .

(testimony of plaintiff). The defendant then showed pictures of former patients illustrating the point. Then (plaintiff testified)

> He said, aside from the little kernel that might be in my neck, that I would never know that my neck had been operated on . . . that after the radium had been applied my neck would get just like a sunburn . . . that I would have to give that time to pass away, and that when it did that my neck would resume its natural shade, and be free of any mark whatever; and he says, "I am going to say that, aside from a little kernel that you will feel for a time, you will never know that your neck has ever been operated on." I said to him at that time, "Well***I know I won't be scarred with radium" and he says, "That I do know; that is why we use radium, so there will be no scar." And I said to him, "Well, I think I might just as well take a chance with radium. Then if it does not work and does not relieve the gland, I can then be relieved by the surgical operation."

The court held that this was not an action in tort for malpractice, rather it was "an action for the breach of an alleged oral agreement whereby defendant warranted that his radium treatments would not leave a permanent scar."[11]

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[9] 61 Cal. App. 647, 215 P. 573 (1923).
[10] 216 Cal. App. 2d 383, 30 Cal. Rptr. 893; 5 A.L.R.2d 908 (1963).
[11] 61 Cal. App. at 651, 215 P. at 577 (1923).

Marvin v. Talbot was a case where a breach of warranty action was not allowed. The only evidence offered by the plaintiff of an express warranty was a single statement made by the defendant after the diagnosis that "I will make a new man out of you." The court held that as a promise it was either impossible of performance or was so "ambiguous, vague and uncertain in meaning as to foreclose reliance thereon,"[12] and that the circumstances negated any intent to warrant the outcome of the operation.[13]

In *Crawford* there are express promises by the physician and there is a clear reliance by the patient on those promises, while in *Marvin* there is only a single, vague comment. However, most cases are not so clear-cut. Often expressions by physicians might be construed either as mere opinions or as promises. It is also often difficult to determine whether or not the patient relied on those expressions.

II. DEVELOPMENT OF THE BREACH OF CONTRACT ACTION AGAINST PHYSICIANS

The major developments concerning the applicability of contract law to physician-patient relationships have been relatively recent. In the last part of the nineteenth century, many jurisdictions held that an action for unskillful or negligent treatment could be brought in contract.[14]

However, most courts subsequently removed much of the contractual liability of physicians by expanding the base of the cause of action of malpractice.[15] An implied term of the contract between

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[12] 216 Cal. App. 2d at 389, 30 Cal. Rptr. at 899; 5 A.L.R.2d at 913 (1963).

[13] In Miller v. Dore, 154 Me. 363, 148 A.2d 692 (1959), the only evidence of a breach of contract to give gas and ether was plaintiff's testimony that "I asked him [defendant] finally if he gave ether or something, is the way I put it" and that the defendant replied, " 'Nowadays they give a mixture of ether and gas.' " The court held that this was not sufficient for a breach of contract action.

[14] Staley v. Jameson, 42 Ind. 159 (1874); Coon v. Vaughn, 64 Ind. 89 (1878); Burns. v. Barnfield, 84 Ind. 43 (1882); Carpenter v. Walker, 170 Ala. 659, 54 So. 60 (1910); Kuhn v. Brownfield, 34 W. Va. 252 (1890); Mallan v. Boynton, 132 Mass. 443 (1882); Hibbard v. Thompson, 109 Mass. 286 (1872); Sherlag v. Kelley, 200 Mass. 232, 86 N.E. 293 (1908).

Holding that actions involving negligence or unskillful treatment will be allowed only as a breach of contract action are Burke v. Mayland, 149 Minn. 481, 184 N.W. 32 (1921); and Finch v. Bursheim, 122 Minn. 152, 142 N.W. 143 (1913).

[15] Harding v. Liberty Hospital Corp., 177 Cal. 520, 171 P. 98 (1918); Krebenios v. Lindauer, 175 Cal. 431, 166 P. 17 (1917); Marty v. Somers, 35 Cal. App. 182, 169 P. 411 (1917); Kershaw v. Tilbury, 214 Cal. 679, 8 P.2d 109 (1932); Mirich v. Balsinger, 53 Cal. App. 2d 103, 127 P.2d 639 (1942); Liebler v. Our Lady of Victory Hospital, 351 N.Y.S.2d 486 (1974). For an early case distinguishing between saying that will cure and saying that will undertake to cure, *see* Hoopingarner v. Levy, 77 Ind. 455 (1881). However, some modern courts have continued to hold that a breach of the implied term of the contract that the physician has the requisite skill and will use due care can be brought both in contract and in tort for malpractice. Clayman v. Bernstein, 38 Pa. D. & C. 543

the physician and the patient is the doctor's duty to use due care. [16] Thus, negligent performance of a contractual undertaking is always a breach of the implied terms of the contract. By using the distinction between *ex contractu* and *ex delictio*, the courts shifted almost all actions[17] based on the breach of implied contractual terms to tort. [18]

(1940); Barrios v. Sara Mayo Hospital, 264 So. 2d 792 (La. App. 1972); Creighton v. Karlin, 225 So. 2d 288 (La. App. 1969).

[16]Wetzel v. Pius, 78 Cal. App. 104, 248 P. 288 (1926); Roberts v. Parker, 121 Cal. App. 264, 8 P.2d 908 (1932); Dorr v. Pike, 177 Ark. 907, 9 S.W.2d 318 (1928); Kuehnemann v. Boyd, 193 Wisc. 588, 214 N.W. 326 (1927); Harding v. Liberty Hospital Corp., 177 Cal. 520, 171 P. 98 (1918); Krebenios v. Lindauer, 175 Cal. 431, 166 P. 17 (1917); Marty v. Somers, 35 Cal. App. 182, 169 P. 411 (1917); Kershaw v. Tilbury, 214 Cal. 679, 8 P.2d 109 (1932); Mirich v. Balsinger, 53 Cal. App. 2d 103, 127 P.2d 639 (1942).

[17]This does not mean that it is not possible to have a legally enforceable implied contractual term between a physician and a patient. Areas of physician-patient relationships which do not involve the aforementioned policy considerations, such as the patient's duty to pay a reasonable fee, can still be the subject of valid implied contractual terms which would be enforceable in a breach of contract action. Hankerson v. Thomas, 148 A.2d 583 (D.C. Mun. Ct. App. 1959) (Duty of patient to pay reasonable fee). Thorpe v. Schoenburn, 202 Pa. Super. 375, 195 A.2d 870 (1963) (Implied term for continuous contract of service); Shapira v. United Medical Service, Inc., 15 N.Y.2d 200, 205 N.E.2d 293 (1965) (Implied duty to compensate for services); Lange v. Baker, 377 S.W.2d 5 (Missouri 1964); Yeargin v. Bramblett, 115 Ga. App. 862, 156 S.E.2d 97 (1967) (Implied severable contract); Horne v. Patton, 286 So. 2d 824 (Ala. 1974) (Implied term that information disclosed to a physician will be held in confidence).

[18]Compare the language in Staley v. Jameson, 42 Ind. 159, 165 (1874):

> We think the action was upon the contract . . . to hold that an action in such a case is for injuries to his person, will be equivalent to holding that no action can be maintained against a surgeon on his contract to treat a broken limb or perform any other professional service, where the damage for the breach of such a contract is a loss of the use of the limb or other injury to his health; that in all such cases the action must be in tort . . .

with Hall v. Steele, 193 Cal. 602, 605, 226 P. 854, 855 (1924):

> From the foregoing averments of the plaintiff's complaint it indubitably appears that the action is one sounding in tort, the gravamen of which is the alleged negligent and unskillful performance of a surgical operation; and that whatever is said therein as to the engagement of the defendant . . . to perform said operation, and as to the representations made by the defendant as to the probable effect of said operation . . . , are to be considered as mere matters of inducement to the main cause of action and not as averments of the breach of a contractual relation forming the basis of the present action . . . In an ordinary action for malpractice the physician or surgeon is not held to be a warrantor of cures or of consequences other than those arising from a breach of his duty to skillfully perform the operation, and if, as the individual cases show, through no unskillfulness on the part of the surgeon, the plaintiff's broken arm was permanently impaired . . . the plaintiff cannot recover in this form of action without being able to show that the specific operation which the surgeon was engaged to perform was negligently and unskillfully performed.

See also Huysman v. Kirsch, 6 Cal. 2d 302, 57 P.2d 908 (1936); Speer v. Brown, 26 Cal. App. 2d 283, 79 P.2d 179 (1938); Wetzel v. Pius, 78 Cal. App. 104, 248 P. 288 (1926); Hales v. Raines, 162 Mo. App. 46, 141 S.W. 917 (1911); Grewe v.

The rule that evolved was that where there is a legal duty implied by law from the contractual relationship, and there is an act that violates that implied duty, then the action is on the breach of that legal duty (usually the duty to use due care), even though that act also prevented the performance of the contract.[19] What was left in the contractual area was recovery on the express provisions[20] of the contractual agreement.[21]

III. GENERAL POLICY CONSIDERATIONS

A. IN FAVOR OF THE PHYSICIAN AND AGAINST ALLOWING THE USE OF THE BREACH OF CONTRACT ACTION

The major factor to be considered in allowing recovery on a breach of contract action is that the liability is absolute. A physician who is liable for a breach is liable even though he exercised the

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Mount Clemens General Hospital, 47 Mich. App. 111, 209 N.W.2d 309 (1973). *See also* cases cited *supra* note 24.

[19] When an act complained of is a breach of specific terms of the contract, without any reference to the legal duties imposed by law upon the relationship created thereby, the action is in contract. But where there is a contract for services which places the parties in such a relationship to each other that, in attempting to perform the promised service, a duty imposed by law as a result of the contractual relationship between the parties is violated through an act which incidentally prevents the performance of the contract, then the gravamen of the action is a breach of the legal duty, and not of the contract itself.

Yeagar v. Dunnavan, 26 Wash. 2d 559, ____, 174 P.2d 755, 757 (1946); quoting from Compton v. Evans, 200 Wash. 125, ____, 93 P.2d 341, 344 (1939).

See also Carpenter v. Walker, 170 Ala. 659, 54 So. 60 (1910); Barnhoff v. Aldridge, 327 Mo. 767, 38 S.W.2d 1029 (1931). By the same reasoning, a doctor cannot plead as a defense that a contract action is also the basis of recovery. Mirich v. Balsinger, 53 Cal. App. 2d 103, 127 P.2d 639 (1942).

[20] Some courts phrase the issue by saying that a "special" contract to cure is required, *i.e.*, an express contract beyond the often implied contract for services. *See* Bonnet v. Foote, 47 Colo. 282, 107 P. 252 (1910). Coombs v. King, 107 Me. 376, 78 A. 468 (1910); Champion v. Keith, 17 Okla. 204, 87 P. 845 (1906).

[21] Since most courts have now refused to allow the plaintiff the election of remedies by drawing a clear distinction between the two causes of action, it would ssem that a plaintiff would be able to litigate a cause of action in contract even though a tort action had already been litigated. The issue was raised and the cause of action in contract was allowed in Colvin v. Smith, 92 N.Y.S.2d 794, 276 App. Div. 9 (1949). The court there stated (92 N.Y.S.2d at 795, 276 App. Div. at ____):

> The two causes of action are dissimilar as to theory, proof, and damages recoverable. Malpractice is predicated upon the failure to exercise requisite medical skill and is tortious in nature. The action in contract is based upon a failure to perform a special agreement. Negligence, the basis of one, is foreign to the other.

See also Stitt v. Gold, 33 Misc. 2d 273, 225 N.Y.S.2d 536; *aff'd* 17 App. Div. 2d 642, 230 N.Y.S.2d 677 (1962); McQuaid v. Michou, 85 N.H. 299, 157 A. 881 (1932). *But see* Stokes v. Wright, 20 Ga. App. 325, 93 S.E. 27 (1917). *See also* Miller, *supra* note 3, at 431-434.

highest possible degree of care,[22] and used the best techniques and equipment available. There are many reasons why applying this form of liability to the medical profession is particularly unappealing.

The underlying consideration is that the medical profession is an extremely vital sector of modern society. The courts must be particularly careful in dealing with issues that will hamper or curtail the effectiveness of this sector's efforts.

The medical profession is not an exact science. A physician can never be one hundred per cent certain that a particular result will occur, for every human organism is unique and reacts in different ways. Statements about results of medical services are at best knowledgeable predictions, at worst experimental opinions.[23] Thus to hold a physician legally accountable for a statement about a particular result is to hold him absolutely liable for what is at all times essentially an educated guess. In this respect, to allow contractual liability is to punish the honest and competent physician for a momentary indiscretion.

Secondly, the contractual relationship between a doctor and his patient is much different from the free marketplace out of which much of contract law evolved. Practically, the medical profession is not subject to the free bargaining and interchange of wills that are characteristic of other sales or service relations. In many instances the patient is faced with a crisis that gives rise to an immediacy that effectively rules out any "shopping around" in order to select the best "deal." Often he depends on the advice of other physicians (such as the family doctor) to direct him to the right person.

Furthermore, a patient often doesn't even know what his needs are. In most situations, the patient goes to a doctor to find out what is wrong and what needs to be done. In almost all situations the patient has no say in what the diagnosis and treatment will be. If a physician is to properly perform his service, the patient cannot be allowed to dictate to the physician as to what is wrong and what should be done.

In this same respect, the patient engages a physician to perform an operation or service on the assumption that the physician has correctly diagnosed his needs and recommended the proper method of meeting those needs. If the physician has incorrectly diagnosed or recommended, there is an adequate remedy already available in negli-

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[22]In Safian v. Aetna Life Ins. Co., 260 App. Div. at 768, 24 N.Y.S.2d at 95 (1940), the court states: "If a doctor makes a contract to effect a cure and fails to do so, he is liable for breach of contract, even though he uses the highest possible professional skill." For a good discussion of general policy considerations in this area, *see* Sullivan v. O'Conner, 296 N.E.2d 183, 185-86 (Mass. 1973).

[23]*See* discussion of Hawkins v. McGee, *infra* p. ____ *et. seq.*

gence for malpractice.[24]

The physician is already legally obligated to perform a certain type of diagnosis and service by the principles of tort law. Neither the patient nor the physician has the ability to bargain about the price, type of service, the needs to be met, or often who is going to perform the service. The only question left in most situations is the competency of the diagnosis and treatment. This is not the province of contracts, and should be left to tort law in the malpractice action.

Third, almost all malpractice insurance policies contain clauses that do not allow recovery if the doctor is found liable in a contract action. This type of provision has been upheld in New York,[25] and there is no reason to suspect that it will not be followed by other courts.[26] Thus to allow damages against a physician that the physician cannot take steps to protect himself against, in an area where damages are high, might have the effect of financially destroying a physician who is faced with one back-breaking claim. In light of the current shortage of medical personnel, this does not seem to be very good policy.

Finally, and the courts' major expressed concern, is the aspect of therapeutic reassurance. The establishment of trust and a healthy attitude is of major importance to successful treatment. The courts have often referred to the need for creating and upholding an optimistic and trusting mood in the patient.[27] In this respect, there is a major problem in holding doctors to their express promises. Since the patient knows little about what is best in this area, the doctor

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[24]*See* Note, *Extension of Warranty Concept to Service-Sales Contracts*, 31 IND. L.J. 367, 375 (1956):

> . . . the expectations of the parties must be considered. A client does not expect his attorney to win all lawsuits; he expects his attorney to do that which a competent attorney would do in an attempt to win. A patient does not expect his doctor to cure him of a disease; he expects the doctor to use reasonable skill and care in treating him for the disease. The expectation of the parties is not that a particular result will be reached, but that the performer will do those acts which will ordinarily reach the result desired. The result is too uncertain and speculative for the parties to expect that it will necessarily be achieved. Negligence is a sufficient remedy for giving effect to the expectations of the parties where the end is not susceptible to reliable prediction.

[25]Safian v. Aetna Life Ins. Co., 260 App. Div. 765, 24 N.Y.S.2d 92, *aff'd* 286 N.Y. 649, 36 N.E.2d 692 (1940).

[26]*See also* McGee v. United States Fidelity and Guarantee Co., 53 F.2d 953 (1st Cir. 1931).

This does not mean that an insurance policy automatically excludes anything other than malpractice. *See* Sutherland v. Fidelity and Co., 103 Wash. 583, 175 P. 187 (1918) ("malpractice, error or mistake" did not limit policy to malpractice alone).

[27]*See especially* Guilmet v. Campbell, 385 Mich. 57, 188 N.W.2d 601; 43 A.L.R.3d 1194 (1971); McQuaid v. Michou, 85 N.H. 299, 157 A. 881 (1932); Stewart v. Rudner, 349 Mich. 459, 84 N.W.2d 816 (1957); Gault v. Sideman, 42 Ill. App. 2d 96, 191 N.E.2d 436 (1963).

must establish a strong feeling of trust and confidence in the doctor's skills so that the patient will do what is best. Because of this, a doctor, with the best of intentions and for very good reasons, might succumb to the temptation of making a specific promise. In that situation, even if the physician uses the highest degree of skill and care, it is possible that he could be sued and held liable if an unforeseen result occurs. Even worse, the physician might not even attempt to therapeutically reassure the patient for fear of contractual liability.[28]

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[28] In medical circles the value of therapeutic reassurance is apparently unquestioned. This author has not been able to find any discussion of the merits and disadvantages of therapeutic reassurance, although there are works that deal with the techniques of reassuring the patient and means of establishing an optimistic outlook in the patient. The only hard scientific evidence that was found (and to be fair, probably the only area in which valid scientific research could be done) are the well-known experiments on the placebo effect. These experiments deal with giving subjects non-effectual pills (such as milk sugar) and comparing the effects on those taking these pills with a control group that actually takes medication. The results have been to show that much of the effect of the taking of medication has to do with the expectations of the patient.

Given the value of therapeutic reassurance, it is clear that the only factor limiting its effectiveness is the patient's experience of the situation. The only limitation on the extent to which assurances have a beneficial effect is that point at which the patient no longer believes the assurances or believes that he is being "put on." Therefore, considering only the benefit to the patient's health, with legal and moral objections aside; reassurances, false assurances, and absolute lies, if the patient believes them and they give him an optimistic and confident outlook, are all conducive to a successful treatment.

However, there are some theoretical objections that can be raised to the use of verbal reassurance.

First, although therapeutic reassurance may be valuable in the case of one isolated treatment, in the long run its effectiveness on a person is canceled out and may even be detrimental. Again, the factor limiting the value of therapeutic reassurance is the point where the patient no longer believes in the assurances or believes that the doctor is "putting him on." Most people see a physician many times in their lives over the course of many separate illnesses. If the patient becomes aware that the physician is always consciously trying to reassure the patient, whether or not the outlook is optimistic, then the worth of the assurance is canceled out by the realization of the patient that he is being "manipulated." In other words, if the patient is aware that the purpose of the assurance is *only* its effect on his mental state, and that it is *not* based on the particular facts of his case, then the assurance cannot be effective. For then the patient will not be optimistic and confident about the outcome of his illness. The typical person, over a long period of contact with different physicians for different illnesses, should come to realize that these assurances are only for his mental benefit. Not only will this cancel out the effectiveness of the assurance, but it may even lead the patient to distrust anything the physician may tell him.

Even if the value of therapeutic reassurance is not canceled out in the above fashion, an assurance of the type that would lead to contractual liability is destructive of the continued effectiveness of the assurances. Express promises are specific events which are easily remembered. If the patient is given an express promise and the treatment is unsuccessful, the patient will realize that the assurance of the physician was worthless, and will tend not to accept such assurances in the future.

Second, theoretically there is a question as to whether *verbal* reassurances are necessary to establish the confident and optimistic expectations in the patient. It

B. IN FAVOR OF ALLOWING A BREACH OF CONTRACT ACTION: THE PROTECTION OF THE PATIENT

The underlying assumption of all the previous discussions was that the physician was honest, knew what he was doing, and was worthy of the trust that was placed in him. If this was true of all physicians, then there would be no problem; however, this is not so. There are quacks, there are charlatans, there are unscrupulous or amoral doctors who have and will take advantage of their position of trust and responsibility. The physician commands tremendous trust and respect. The relationship is often laden with a sense of crisis and immediacy. In almost all situations, the patient has a complete lack of knowledge about medicine. Thus patients are overwhelmingly vulnerable to unfair bargains and dishonest physicians. Patients are often willing to accept unquestioned the assurances of a doctor, especially if those assurances are optimistic. While this is an extremely favorable response when the purpose is therapeutic reassurance, it is disastrous if this trust and confidence is misused. This is probably the single major reason for making physicians liable for breach of contract.[29] For while actions in tort for negligence or fraud and deceit are often possible, recovery on the contract is the easiest action to litigate, and in many instances may be the only remedy available.[30]

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may be that the mere fact that the patient feels that the doctor is an excellent physician is enough to give the necessary feeling of optimism. The patient usually has a profound respect for and faith in the medical profession. All that may be required of the physician is that he appear to be qualified, competent, and able to do all that can be done. The key experience that the patient is to have is the feeling of confidence. The person that gives the patient that feeling is the physician. But the communication of that confidence from the physician to the patient does not necessarily depend on words. It is not established that the verbal assurances of the physician add anything at all to the impressions the patient receives from the physician's actions. It may be that 1) the fact that the person consulted is a physician with years of training, experience, and knowledge in a respected field, 2) that this physician appears confident of his ability and knowledge in the field, and 3) that the physician is doing all that can be done in applying this knowledge may be all that is necessary to establish the beneficial aspects of therapeutic reassurance. For the purpose of establishing a confident and optimistic outlook in the patient, is there a difference between the patient feeling that the physician is able to do, and is doing all that is possible to help the patient, and the patient feeling that a specific cure will result? The feeling that a specific cure will result often depends on verbal communication. However, the feeling that the physician is able to do all that is possible, and is doing all that is possible, does not depend on verbal reassurances. Theoretically one can argue that for the purpose of establishing confidence and optimism the two are essentially the same, and that there is no need for the physician to resort to verbal reassurances to establish therapeutic reassurance.

[29] *See* discussion in Safian v. Aetna Life Ins. Co., 260 App. Div. 765, 24 N.Y.S.2d 92 (1940), and McQuaid v. Michou, 85 N.H. 299, 157 A. 881 (1957).

[30] For an action on breach of warranty to be valid, it is not necessary that the person making the representation be aware that it is false. A warranty may rest on a promise that a specified event will happen in the future or that events which cannot possibly happen will occur. Welchman v. Wood, 10 Utah 2d 325, 353 P.2d 165 (1960). *See also* 46 AM. JUR. 494, Sales § 313; 17 C.J.S. Contracts

IV. THE BREACH OF CONTRACT ACTION — RECOVERY ON THE EXPRESS CONTRACT

In analyzing the cases where contractual recovery is allowed, it is convenient to divide the situations presented into two areas: 1) those contracts which deal with the physicians' actions and specific procedures; and 2) those contracts which deal with the results to be obtained from the actions and procedures. The reason is that the policy factors involved are different.

A. PROVISIONS REGARDING THE PHYSICIAN'S PROCEDURES AND SPECIFIC ACTIONS

1. NON-PERFORMANCE

In some situations the term of the contract that the physician breaches is a term that states what the physician's specific actions will be. This part of the contract merely defines the actual duties that the physician has specifically promised to perform. With this type of contract, concerns such as therapeutic reassurance do not enter into the considerations of contractual liability. Thus where the physician agrees to treat the patient for tuberculosis and takes no action whatsoever;[31] where there is a non-performance of a hysterectomy;[32] where, also promising to cure, the physician promises to give certain tests and an operation, and fails to give the tests,[33] and procures another physician[34] to give the opera-

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§ 329 and § 342, p. 781 and pp. 795-796; and 6 WILLISTON ON CONTRACTS 5416-5418 § 19341 (rev. ed.). For a general discussion *see* Williston, *Liability for Honest Misrepresentation*, 24 HARV. L. REV. 415 (1911), and Bohlen, *Misrepresentation as Deceit, Negligence or Warranty*, 42 HARV. L. REV. 732 (1929).

[31] Brooks v. Robinson, 163 So. 2d 186 (La. 1964).

[32] Foran v. Caranselo, 153 Conn. 356, 216 A.2d 638 (1966).

[33] *But possibly contra* Cloutier v. Kasheta, 105 N.H. 262, 197 A.2d 627 (1964), where the plaintiff alleged that defendant had "contracted to perform certain tests to determine the nature of [her] illness within a reasonable time 'but breached said contract and as a result' did not achieve the promised result." The court stated that assumpsit counts were "fundamentally indistinguishable" from the trespass counts, differing only in damages sought, and that the action was only for what was essentially the defendant's common law duty and was therefore barred by the two year statute of limitations for trespass actions.

[34] This raises an interesting question as to the issue of "ghost surgery," a practice whereby the patient's contracted physician allows someone else to do the surgery instead. This issue was touched upon in Stitt v. Gold, 33 Misc. 2d 273, 225 N.Y.S.2d 536, *aff'd* 17 App. Div. 2d 642, 230 N.Y.S.2d 677 (1962), where the plaintiff alleged that, besides promising to cure, the defendant doctor promised to take certain tests and perform an operation and had failed to take the tests and had procured another to perform the operation. The court held that a cause of action for breach of contract was stated, although it is not clear whether the allegation of ghost surgery alone would have been sufficient. It would seem that a physician would only be liable if the other doctor was negligent, but whether or not the action would be on a breach of contract for non-performance or for

tion;[35] and where there is a failure to perform a Caesarian section,[36] the courts have held that a breach of contract against the physician on a theory of non-performance results.

2. IMPROPER PERFORMANCE

There is an important distinction to be made between "simple" non-performance and improper performance. Once the physician undertakes that which he agreed to do, the cause of action shifts away from breach of contract to negligence. Thus in *Roush v. Wolfe*,[37] where the defendant agreed to remove plaintiff's tonsils, performed an operation but failed to remove (and said that he had), the court held that this was not a case of failure to perform an operation. The court felt that defendant did perform, in that he undertook to carry out his duties, and that the action was rather one for improper performance.[38] Another situation was presented in *Horowitz v. Bogart*,[39] where the defendant agreed to remove an ulcer and instead removed plaintiff's appendix. Again, the court held that the basis of the charge was the improper performance rather than the failure to perform.[40]

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malpractice in procuring a physician who was not qualified to do the job is not clear. It would appear that the doctor would be liable for non-performance only if there was a special contract that stated that only that physician was to perform the operation, since a doctor is not held to be a warrantor of cures and since the practice of allowing another physician, usually as a training device for new doctors, is relatively commonplace. The contract is usually for the performance of the operation, and not for that particular doctor to perform that operation.

[35] Stitt v. Gold, 33 Misc. 2d 273, 225 N.Y.S.2d 536; *aff'd* 17 App. Div. 2d 642, 230 N.Y.S.2d 677 (1962).

[36] 349 Mich. 459, 84 N.W.2d 816 (1957).

[37] 243 Ky. 180, 47 S.W.2d 1021 (1932).

[38] The problem here is what is to be considered as "undertaking performance." It does not seem that there can be any clear dividing line between when a doctor did not perform and when a doctor undertook performance and performed improperly. Clearly *Roush* refers to the operational procedure itself as the dividing point. However, by focusing on merely the procedures of going through the operation, the court is implying that the contract was only for an operation, not a specific operation to remove the tonsils. In other words, according to *Roush*, as long as the physician performed any operation upon the plaintiff, he undertook performance. But the contract was for a tonsillectomy, and not just any operation. It is only if the court implies that legally the enforcible contract is for the physician to show up and go through an operational procedure; and that from that point the physician's common law duty is to do what is reasonable (in *Roush*, if the patient is suffering from infected tonsils, the reasonable physician will remove the tonsils) that there can be a basis for an action. Although practically this is in line with judicial policy, this clearly could raise problems.

[39] 217 N.Y.S. 881 (1926).

[40] *See also* Maercklain v. Smith, 129 Colo. 72, 266 P.2d 1095 (1954); and, on other grounds, Jones v. Furnell, 406 S.W.2d 154 (Ky. 1966) (interpretation of a statute).

3. FAILURE TO FOLLOW A SPECIFIC PROCEDURE

Closely allied with, but to be distinguished from "simple" non-performance are those situations where a doctor contracts to follow, or not to follow, a particular procedure and fails to adhere to that agreement. In *Frank v. Malianiak*[41] (a plastic surgery case) where a doctor expressly promised that all surgical work would be done through the inside of the nose and mouth and that in no event would any incision be made upon plaintiff's face, the court held that a breach of contract action arose when defendant cut through the outer skin.[42]

A physician, by the same token, can limit the extent and scope of his obligation, such as by undertaking to treat the patient only for a certain ailment or injury at a certain place for a specified time.[43]

B. PROVISIONS REGARDING THE RESULTS TO BE OBTAINED FROM THE PHYSICIAN'S SERVICES

It is important to note that in types of contracts that deal with the specific duties of the physician, whether or not the contract is completed is completely within the control of the physician. However, when dealing with express promises concerning the results of the physician's actions, there are many factors which are outside the physician's control.

1. GENERAL CONSIDERATIONS

The cases on this issue do not give many guidelines. It is clear, however, that the major concern is whether or not an express promise was made (the problem of a dividing line between an opinion and a promise). One reason for this lack of authority is that the decision whether a contract was formed is basically one for the fact-finder.[44] Thus the appellate courts' comments are of a general, indicative nature. First, there is a recognition that the circumstances and intent of the parties must be given particular weight,[45] and that

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[41] 232 App. Div. 278, 249 N.Y.S. 514 (1931).

[42] There is authority that where a doctor agrees not to perform an operation or procedure and then does what he said he would not do, legal relief would be in tort for assault and not for breach of contract. Pearl v. Lesnick, 20 App. Div. 2d 761, 247 N.Y.S.2d 561, *appeal dismissed* 16 N.Y.2d 960, 265 N.Y.S.2d 106, 212 N.E.2d 540; *aff'd* 19 N.Y.2d 590, 278 N.Y.S.2d 237, 224 N.E.2d 739 (1964).

[43] McNamera v. Emmons, 36 Cal. App. 199, 97 P.2d 503 (1939). *See also* Urritia v. Patino, 297 S.W. 512 (Tex. Civ. App. 1927); Nash v. Royster, 189 N.C. 408, 127 S.E. 356 (1925); Childers v. Frye, 201 N.C. 42, 158 S.E. 744 (1931).

[44] Guilmet v. Campbell, 385 Mich. 57, 188 N.W.2d 601 (1971); Marchlewicz v. Stanton, 213 N.W.2d 317 (Mich. 1973). For a general discussion *see* 67 A.L.R.2d 619.

[45] Guilmet v. Campbell, 385 Mich. 57, 188 N.W.2d 601 (1971).

because of the peculiar relationship between a doctor and patient the terms of the contract must be clear and specific:[46]

> The application of the ordinary rules dealing with mercantile contracts to a contract entered into between a physician and a patient in our opinion is not justified. The relationship is a peculiar relationship inasmuch as a physician cannot, and should not, so terrify the patient by pointing out to him the manifold dangers which are present at any time the slightest surgical operation is performed. To do so might produce a psychic reaction which would seriously retard the success of the physician's treatment. . . . The courts have insisted that the contract be clear and specific.[47]

The courts are generally very wary of interpreting words against the physician, basically because of the aspect of therapeutic reassurance. To look only at the mere words used by the physician and to ignore the surrounding circumstances behind the utterance is clearly a mistake. Thus in *Marvin v. Talbot*[48] the words "I will make a new man out of you" were held to be insufficient,[49] while in *Bailey v. Harmon*[50] a promise to make the plaintiff "a model of harmonious perfection" was held to be a term of the contract.[51]

2. USE OF SPECIFIC WORDS SUCH AS "CURE" OR "GUARANTEE"

One circumstance that arises is where the defendant expressly states that he will "cure" the patient. The utterance of that one word often is sufficient to get the case to trial,[52] but whether or not it is

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[46] Flowerdew v. Warner, 90 Idaho 164, 409 P.2d 110 (1965); Guilmet v. Campbell, 385 Mich. 57, 188 N.W.2d 601 (1971); Gault v. Sideman, 42 Ill. App. 2d 96, 191 N.E.2d 436 (1963); Vanhoover v. Berghoff, 90 Mo. 487, 3 S.W. 72 (1887).

[47] Gault v. Sideman, 42 Ill. App. 2d 96, ____, 191 N.E. 2d 436, 443 (1963).

[48] 216 Cal. App. 2d 383, 30 Cal. Rptr. 893; 5 A.L.R.2d 908 (1963).

[49] *See also* Bria v. St. Joseph's Hospital, 153 Conn. 626, 220 A.2d 29 (1966), where the physician said that he would see that "whatever necessary was done." The court held that this was not a warranty to personally guarantee that no unexpected or unusual consequences would result.

[50] 74 Colo. 390, 222 P. 393 (1924).

[51] The court stated that the obligation of the jury was "in short, to determine whether or not the defendant, by his operation on plaintiff, made of her, as promised, 'a model of harmonious perfection.' " 74 Colo. at ____, 222 P. at 394 (1924).

[52] Levine v. Carrell, 68 S.W.2d 259 (Tex. Civ. App. 1934); Gill v. Schneider, 48 Colo. 382, 110 P. 62 (1910); Giambozi v. Peters, 127 Conn. 380, 16 A.2d 833 (1940); Burns v. Barnfield, 84 Ind. 43 (1882); Brooks v. Herd, 144 Wash. 173, 257 P. 238 (1927); Robins v. Firestone, 308 N.Y. 543, 127 N.E.2d 330 (1955); Seanor v. Browne, 154 Okla. 222, 7 P.2d 627 (1932). *But see:* Lakeman v. La France, 102 N.H. 300, 156 A.2d 123 (1959); and Marty v. Somers, 35 Cal. App. 182, 169 P. 411 (1917).

In California whether the allegations state a cause of action in tort or for breach of contract is determined by the pleadings as a whole. Thus in Kershaw v. Tilbury, 214 Cal. 679, 8 P.2d 109 (1932), the court held that although there was the allegation that the doctor said he "could and would cure," this, when taken

sufficient to assure liability is not clear. The court in *McQuaid v. Michou*[53] stated that it is not important that the defendant believed or knew that there was no chance to cure. If the physician agreed to cure and the patient took the treatment with reliance and faith upon that promise, the physician is liable.[54] Whether the physician knew he could not cure is irrelevant. The court went on to say:[55]

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with the other allegations charging negligence stated a cause of action in tort and not for breach of contract.

[53]85 N.H. 299, 157 A. 881 (1932).

[54]The patient, however, must first pursue his remedies under the contract. Thus in Madison v. Mangen, 77 Ill. App. 651 (1898), although the defendant warranted a cure, there was a provision that if the disease returned the patient was to be treated free of charge. The court held that no cause of action for breach of contract arose where the patient did not offer to submit to further treatment. *See also* Taylor v. Roberson, 501 S.W.2d 156 (Tex. 1973).

[55]Miller, *supra* note 3, contends that the effect of the court's reasoning in *McQuaid* is to treat a contract between a physician and patient for medical services in the same light as any other commercial contract. He then asks the question whether or not the physician should have the corresponding rights and liabilities. He goes on to state, "should he not then be free to provide for his own protection in advance by the simple expedient, let us say, of having the patient sign a printed form, in consideration of his agreement to treat him, absolving the physician of any and all liability whether based on negligence or purported representation?" Miller at 420. Since there is case law to the effect that the physician will not be allowed to absolve himself from responsibility for lack of due care and skill, *see* Hales v. Raines, 162 Mo. App. 46, 141 S.W. 917 (1911), Miller seems to imply that the application of contract law to the physician leaves him overwhelmingly exposed to liability without any normal contractual protection. Although this author agrees that the courts must be very careful in applying the principles of contract law to the physician-patient relationship, the physician is not so unprotected as Miller implies. First, as to the quote just given, the term of the contract imposing the duty to use due care is not enforceable on the patient's side in a breach of contract action. Secondly, the physician can limit the extent and scope of his obligations under his contract of service (*see supra* note 31). Also, although there is no case law on the subject, it would seem that if the physician makes it a practice to have the patient sign a form disclaiming all warranties and clearly explains what the patient is signing and the effect of that signature, then such a disclaimer would be valid. Although it is clear that society has an interest in not allowing a physician to abrogate his responsibility to use due care and skill, such an interest is not present when the physician clearly explains to the patient what is known to the profession as a whole, that a physician cannot at any time be 100% sure that a certain result will obtain.

However, many physicians and hospitals resort to standardized forms which contain disclaimer clauses. The American Medical Association has published a book, MEDICO — LEGAL FORMS WITH LEGAL ANALYSIS (Law Depart., Amer. Med. Assoc., Chicago, Illinois 1961), which contains suggested forms to be used by physicians and hospitals. Some examples of the language used are: "No guarantee or assurance has been given by anyone as to the results that may be obtained" (Form 16, p. 33); "I know that the practice of medicine and surgery is not an exact science and that therefore reputable physicians cannot guarantee results. No guarantee or assurance has been given by anyone as to the results that may be obtained" (Form 17, p. 33); "I make this request with full knowledge that this attempt to graft tissue may not be successful . . . and with no assurances from anyone as to the results that may be obtained" (Form 19, p. 34); "It has been explained to us that this operation is intended to result in sterility although this result has not been guaranteed" (Form 23, p. 35). Ex-

> Argument is advanced that contracts to cure are against public policy. The reason suggested is that their enforcement tends to dissuade a doctor from encouraging his patients and giving them hope as an important aid to their improvement or recovery, in the fear that his words will be taken as a promise. The line between a promise and an opinion is not so narrow and shadowy that language may not be well chosen to express one in clear distinction from the other, and it is a simple matter for a doctor to make it definite that he guarantees no good results.[56]

It seems that the main issue for the jury, where the defendant uses the word "cure," is whether or not the plaintiff took the treatment

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amples of forms used in actual practice are the following: "I (We) am (are) aware that the practice of medicine and surgery is not an exact science and I acknowledge that no gaurantees have been made to me as to the result of treatments or examinations in the hospital . . . [t]his form has been fully explained to me (us) and I (we) certify that I (we) understand its contents" (Sacramento Medical Center, Sacramento, Calif., Consent upon admission to hospital and medical treatment, Form D3005 21-51-117 (8/73)); and "The nature of the operation has been explained to me and no warranty or guarantee has been made as to the result or cure" (Sacramento Medical Center, Form 21-50-117 (2/70) — Consent to Operation, Administration of Anesthetics & Procedures).

The problem with these printed forms arises in two ways: 1) the way they are used; and 2) with whom they are used. Corbin states that "[i]f a written document, mutually assented to, declares in express terms that it contains the entire agreement of the parties, and that there are no antecedent or extrinsic representations or warranties . . . this declaration is conclusive *as long as it has itself not been set aside by a court on . . . some ground that is sufficient for setting aside other contracts* (3 CORBIN ON CONTRACTS § 578, at 402-403 (1960) emphasis added). However, there are many possible factors that may arise that would lead to the nullification of the declaration. The complete absence of bargaining power on the part of the patient is almost always present. The fact that the patient will not get essential or even life-saving treatment unless he signs the form. The fact that many times the patient may not be in a condition to understand or appreciate what it is that he is signing. The absolute trust and confidence the patient has that the physician will always do what is best for the patient. These and many other possible factors could easily lead to the nullification of these provisions, under a number of legal theories or approaches. Some of the possible approaches (depending on the particular situation) include the adhesiveness of the contract, unreal consent, unconscionability based either on unfair surprise or on oppressiveness, duress, the idea that the courts will carefully scrutinize the fiduciary relationship between the physician and the patient, and undue influence. In any case, it seems clear that these standardized, printed disclaimers will not be an automatic bar to recovery on the breach of an express warranty. The physicians and hospitals must be extremely careful to assure that the patient signs such a form with real consent and with full understanding and knowledge of both the meaning and effect of what he is signing.

For a case on this problem, *see* Karriman v. Orthopedic Clinic, 516 P.2d 534 (Okl. S. Ct. 1973). Although the court there expressed disapproval at the allowance of parol evidence when such a printed disclaimer was present (plaintiff's testimony that he had not read the form before he signed it) it is not clear exactly what legal consequences that court attached to such a printed disclaimer. At one point the court states that only evidence of the plaintiff's incapacity to knowledgeably read and sign the forms or fraud on the part of the physician will waive the disclaimer. But later in the opinion the court indicates that such a printed form only creates a presumption that would be overcome by a proof of a special contract.

[56] 85 N.H. 299, ____, 157 A. 881, 883 (1932).

with reliance and faith on that promise.[57]

3. THE DISTINCTION BETWEEN A PROMISE AND AN OPINION OR PREDICTION

An example of the *McQuaid* distinction is the representation of the physicians in *Gault v. Sideman.*[58] Here the defendants represented that an operation could (rather than would) cure or alleviate a spinal condition. The court held that this was not sufficient to be an express warranty. Another example is *Hawkins v. McGee*[59] where the doctor, in answer to a question as to the length of time the patient would be in the hospital, replied, "Three or four days, not over four; then the boy can go home and it will be just a few days when he will go back to work with a good hand." The court said this could only be construed as an opinion or prediction, and did not give rise to contractual liability for that one statement.[60]

The problem with allowing the possibility of recovery merely for the use of the word "cure," is that it raises the very real possibility of liability on a mere slip of the tongue.[61] In an area where the courts have clearly committed themselves to protecting the interests of medical practitioners and through them society as a whole, this result would be extremely rigid.

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[57]There is, in some cases, the problem of separate consideration for the warranty or special contract. The problem arises since some courts have held that it is necessary to allege and prove a consideration separate from and in addition to the consideration paid for the services normally expected of a physician. Wilson v. Blair, 65 Mont. 155, 211 P. 289 (1922); Gault v. Sideman, 42 Ill. App. 2d 96, 191 N.E.2d 436 (1963).

However, both cases can and should be read to be limited to instances where the physician increases his responsibilities or duties under a present contract. In such a case separate consideration is needed for the assumption of increased responsibility or duties. But if the promise is made prior to acceptance (to induce the patient to engage the physician's services) then separate consideration would not be needed. *See* Guilmet v. Campbell, 385 Mich. 57, _____, 182 N.W.2d 601, 605 (1971) n. 1.

[58]42 Ill. App. 2d 96, 191 N.E.2d 436 (1963).

[59]84 N.H. 114, 146 A. 641 (1929).

[60]Another example is Carney v. Lydon, 220 P.2d 894 (Wash. 1950). Defendant was alleged to have said that his method of treatment was designed to eliminate poison from the body and that this should be followed by relief from the disease. The court held that this was at most an opinion and not a contract to cure. *See also* Perin v. Hayne, 210 N.W.2d 609 (Iowa 1973).

[61]Miller, *supra* note 3, gave an interesting example that he stated was the inspiration for his article: "The claimant, after unsuccessful treatment of his condition by various physicians, sought the services of defendant, who had rather a successful record of treatment of the disease. Unthinkingly and ill-advisedly this physician wrote on a prescription blank the words: 'Complete cure — $200.' The plaintiff thereafter contended that this was a guaranty or promise of cure . . . " Miller, *supra* note 3, at 418. The case was settled out of court, but it seems clear that an allegation based on those facts would at least get past the pleadings in many jurisdictions.

4. INTENT OF THE PHYSICIAN

In the standard warranty action, it is only necessary to show an express promise and the reliance of the plaintiff on that express promise. The subjective intent of the warrantor is not a consideration, either in his intent in making the statement or his intent as to the patient's reliance on that statement. This is the approach used by the court in *McQuaid.*

However, this approach raises a problem in that the court and jury cannot satisfactorily deal with therapeutic reassurance by ignoring the physician's motives. Therapeutic reassurance is an effective tool only when a reasonable patient will believe the substance, express or implied, of what a physician tells him. But the test of whether an express promise is made is what the reasonable man in the patient's position would believe the statement meant. Thus the more effective the reassurance, the more the reasonable patient subjectively would believe that he would be cured, and the more likely contractual liability would result.

In *Hawkins v. McGee,*[62] the physician also stated that "I will guarantee to make the hand one hundred per cent efficient or a one hundred per cent good hand." The jury found for the plaintiff and the defendant appealed. The defendant contended that before the question of the making of the contract should be submitted to the jury, there was a preliminary question of law as to whether the words could possibly have the meaning imputed to them by the party who founds his case upon a certain interpretation. Defendant argued that, based upon the common knowledge of the uncertainty which attends all surgical operations and the improbability that a surgeon would ever contract to make a damaged part of the body one hundred per cent perfect, in the absence of countervailing considerations, as a matter of law there could be no express promise. As will be explained shortly, the court did not have to consider the argument because there were other considerations in plaintiff's favor. However, the argument points to one way in which the rigidity that attaches to allowing a cause of action to be stated by the allegation of the use of the word "cure" can be mitigated, and the concern with therapeutic reassurance can be effectuated.

The court in *Hawkins* noted that the physician had repeatedly solicited the father's consent for the operation, and it was the plaintiff's theory that the defendant had wanted an opportunity to experiment on skin grafting. The court stated, "if the jury accepted this part of the plaintiff's contention, there would be a reasonable basis for further conclusion that, if defendant spoke the words attributed to him, *he did so with the intention that they should be accepted at*

[62] 84 N.H. 114, 146 A. 641 (1929).

their face value, as an inducement for the granting of consent to the operation by plaintiff and his father, and there was ample evidence that they were so accepted by them."[63] (emphasis added) Here this court, unlike the court in *McQuaid*, attached some significance to the intent of the physician in making the express promise. Implying that the mere word "cure" or "guarantee" is by itself not enough, the court indicated that there is an additional requirement that the words were intended by the physician to be an inducement to the formation of the contract, and that they were to be accepted at face value. This appears to be the better rule, for three reasons. First, this rule would discourage those cases where the only reason for the promise was that the physician accidentally made a misstatement. Secondly, this approach will tend to focus the jury's attention more towards the circumstances behind the utterance and its effect upon the patient rather than on just the words alone. Third, the courts and the jury would then be clearly allowed to deal with the aspect of whether or not the physician was attempting to engage in therapeutic reassurance.

5. OTHER CIRCUMSTANCES

The words "cure" or "guarantee" are not absolutely necessary in order to raise the issue of contractual liability. It is enough if the circumstances and the intent of the parties give rise to the conclusion that there was an express promise to effect a particular result.[64] In *Guilmet v. Campbell*,[65] the physicians allegedly represented:

> Once you have an operation it takes care of all your troubles. You can eat as you want to, you can drink as you want to, you can do as you please. Dr. Arena and I are specialists, there is nothing to it at all — it's a very simple operation. You'll be out of work three to four weeks at most. There is no danger at all in this operation. After the operation you can throw away your pillbox. In twenty years if you figure out what you spent for Maalox pills and doctor calls, you could buy an awful lot. Weigh it against an operation.

In holding, over a vigorous dissent, that this constituted an express warranty, the court said:

> As in all contract cases for personal services, in order to find for the plaintiffs here the jury must have found from the evidence that the doctors made a specific, clear and express promise to cure or effect a

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[63] 84 N.H. at _____, 146 A. at 643 (1929).
[64] Guilmet v. Campbell, 385 Mich. 57, 188 N.W.2d 601 (1971); Johnston v. Rodis, 251 F.2d 917 (D.C. Cir. 1958); Noel v. Proud, 189 Kan. 6, 367 P.2d 61 (1961); Camposano v. Clairborn, 2 Conn. Cir. 135, 196 A.2d 129 (1963); Crawford v. Duncan, 61 Cal. App. 647, 215 P. 573 (1923); Bailey v. Harmon, 74 Colo. 390, 222 P. 393 (1924).
[65] 385 Mich. 57, 188 N.W.2d 601 (1971).

> specific result *which was in the reasonable contemplation of both themselves and the plaintiffs* which was relied upon by the plaintiffs[66] (emphasis added).

The court also pointed out that whether or not there was a contract was a question of intent and circumstances.

a. The Need for Medical Attention

In *Guilmet* the majority stressed that the operation was not an emergency, while the dissent argued that it was. This points to an extremely important consideration, the patient's need for medical attention. If the situation is an emergency which necessitates immediate or close to immediate action, it can be argued that the physician is justified in using stronger measures to get the patient to accept the services and to attain the proper mental outlook than when the situation is not an emergency.[67] However, as the situation deviates from an emergency classification, the need for such measures decreases. If the physician uses equivalent measures in a non-emergency situation, there is the appearance of the doctor "making a sale" by taking advantage of his position of trust and respect. The language allegedly used by the physicians in *Guilmet* takes on two entirely different casts if the patient was in imminent danger of dying from a major ulcerous stomach condition, instead of suffering only a minor inconvenience from a small ulcer. In the first instance the language can be seen as justifiable, even necessary in order to get the patient to accept measures that would save his life and to give him an advantageous mental outlook. Obviously, to tell a patient who is suffering from a serious ulcer problem that unless he gets this surgery he is in imminent danger of losing his life, would only increase the anxiety and the problem and would not be in the best interest of the patient. The alternative is to guarantee the operation's success. If this was the situation in *Guilmet*, then it would be extremely difficult to defend a holding of contractual liability.

On the other hand, if the situation were relatively minor, if it were merely a matter of Maalox and milk versus one major operation, then it appears that the court in *Guilmet* would be correct in holding the physicians liable. The physicians were saying that the operation was safe, simple and fairly quick. The patient came out of the operation with a ruptured esophagus (50%-75% mortality rate), and, when

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[66] 385 Mich. at ____, 188 N.W.2d at 607.

[67] An example in a different area of the courts' recognition of the differing circumstances in an emergency situation is the waiver in an emergency of the need for consent of a physician's services. Although it has been said that the consent is implied, PROSSER, TORTS § 18 (3rd ed. 1964), some authorities feel the more accurate approach is to say that the physician is privileged. RESTATEMENT OF TORTS § 62 (1938). Joost, *Consent* 44 CHI.-KENT L. REV. 116 (1967).

given blood, contracted hepatitis. In this instance, a finding of contractual liability would encounter very little opposition. The physicians, in effect, would have sold an operation by pointing out how much money it would save and warranting its safety and quickness. In this type of situation, it would be hard to say that they should not be treated as salesmen, and be held to contractual liability.

The importance of considering the emergency aspects of the treatment can also be seen in *Bailey v. Harmon*,[68] a plastic surgery case. In the normal plastic surgery operation, the situation is not an emergency. The patient is usually physically sound and merely desires to improve his or her physical appearance. In such a situation, the aspect of reassurance and the need for trust is, at best, only slightly comparable to other medical operations. The patient usually comes to the physician of his or her own accord and with a definite result in mind. Another important factor is that this area of medical practice does not have the great social importance of other areas of medicine.[69] Thus when the plastic surgeon asserts that he will:

> "straighten and raise the point of her nose, enlarge her nostrils, . . . fill out her hollows and correct, eradicate, and remove all defects and irregularities in her nose, raise her left eyebrow, remove, eradicate and correct all scars and blemishes, irregularities, defects, lines, circles, marks, and wrinkles in her face, neck and hands, to give her a 'general beauty treatment,' correcting all disfiguring distortions of all kinds, and to make her 'a model of harmonious perfection,' " all "without pain, inflammation, soreness or inconvenience, . . . and without leaving any scars resulting from the operation,"

as the physician in *Bailey* was alleged to have done, then it takes on

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[68] 74 Colo. 390, 222 P. 393 (1924).

[69] This issue was raised by the Supreme Court of California in Hall v. Steele, 193 Cal. 602, 606, 226 P. 854, 856 (1924), where the court stated:

> In the discussion of the legal principles applicable to this, the interesting inquiry is suggested as to whether a mere naturopath or so-called 'beauty doctor' is entitled as such to be placed in the same category or as [*sic*] to claim the same immunity from liability as is applied by law to regular medical practitioners and surgeons whose mission is to minister to those who are ill or injured or afflicted with diseases or physical injuries which medicine or surgery skillfully applied may cure; while a naturopath or 'beauty doctor' does none of these, but merely assumes or undertakes to remove physical or facial deformities not due to disease or injury but existing as natural deficiencies or defects of form or countenance which for the comfort, convenience, or vanity of the individual it is deemed desirable to have removed. The question as to whether the practitioner undertaking to remedy by a surgical operation such deformities or defects and who, while performing with skillfulness the purposed alteration, does not remove the particular physical defect, or, doing so, produces another and perhaps more objectionable deformity, can rely upon the rule which protects the regular practitioners or surgeon from liability for the effect of an operation skillfully performed is, as we have observed, an interesting one; but we do not think it arises in this particular case.

the aspect of a salesman pushing his services and their worth. In this situation, the public policy in favor of the medical profession does not apply. Thus the court in *Bailey* upheld the trial court in finding the physician liable on the express contract.

6. *WARRANTIES CONCERNING A SPECIFIC RESULT VS. THE GENERAL WARRANTY*

Physicians have been found liable where they have expressly asserted that a specific result will or will not occur. In *Crawford v. Duncan*,[70] where the physician repeatedly asserted that no scars would result, and in *Camposano v. Clairborn*,[71] where the physician assured the patient that only hairline scars of a minor nature would result when in fact disfiguring scars of a major nature occurred, the courts held that a breach of contract action was proper. In both instances the assurances or promises were limited to a specific result, and a warranty on that assurance or promise was held to be actionable.[72]

A different situation was presented in *Noel v. Proud*[73] and *Johnston v. Rodis.*[74] In *Noel*[75] the plaintiff alleged that the doctor represented that while the operations might not have any beneficial effect, the plaintiff's hearing would not be worsened as a result of the operations. The majority opinion held that this stated a cause of action as an express warranty that was equivalent to a special contract for a particular result and was not, as advocated by the dissent, merely bad medical advice.

In *Johnston*, the plaintiff claimed that the defendant psychiatrist had represented that an electric shock treatment would be perfectly safe. Plaintiff suffered a broken arm as a result of the treatment. The District Court held that "an expression of opinion on the part of a physician that a particular course of treatment is safe, does not con-

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[70] 61 Cal. App. 647, 215 P. 573 (1923).
[71] 2 Conn. Cir. 135, 196 A.2d 129 (1963).
[72] *See also* Hirsch v. Safian, 257 App. Div. 212, 12 N.Y.S.2d 568 (1939) and Schuster v. Sutherland, 92 Wash. 135, 158 P. 730 (1916) (overruled by Yeager v. Dunnavan, 26 Wash. 2d 559, 174 P.2d 755 (1946)).
[73] 189 Kan. 6, 367 P.2d 61 (1961).
[74] 151 F. Supp. 345 (D.C. 1957), *rev'd.* 251 F.2d 917 (D.C. Cir. 1958).
[75] *See also* Recent Decision, *Patient may sue for Breach of Warranty that Surgery would not worsen Patient's condition*, 37 NOTRE DAME LAWYER 725 (1962), discussing Noel v. Proud.
An earlier decision on this point was Sales v. Tauber, 27 Ohio N.P.R. 372 (1929). The plaintiff alleged that the defendant breached an express warranty that an operation would leave no permanent after-effects. The Common Pleas Court of Hamilton County held that the action was one for malpractice and not breach of contract.

stitute a warranty . . . "[76] However, on appeal, the D.C. Circuit Court of Appeals stated that[77] "The statement attributed to defendant, that shock treatments are 'perfectly safe,' contains less of a prediction and more of present fact. We think this statement, if the defendant made it and did not qualify it in any way, might properly be found to be a warranty."[78]

There is a difference between warranting the safety of an operation and warranting that a particular result will or will not occur. A warranty as to the general safety of an operation covers many aspects and possible occurrences that are completely outside of the doctor's control. Here the physicians' references are not specific and the warranty is not limited, as was the situation in *Crawford* and *Camposano*. The danger of the holdings in *Noel* and *Johnston*, if rigidly applied is that such a general warranty would have to be found on a wide variety of factual situations. An example would be the factual situation in *Yeager v. Dunnavan*,[79] where the plaintiff asked the defendant if there was any danger in an operation to correct plaintiff's child's eyesight, and the defendant "shrugged his shoulders and said none whatsoever." The plaintiff alleged that the defendant had "promised that for $200 he would correct Barbara's eyesight without danger to her health or sight." The child died as a result of an unknown allergy to ether. The court in *Yeager* held that once the operation began, the doctor only had a duty of due care. But under *Johnston* and *Noel*, once the warranty was made, the only issue left is whether or not the warranty was broken. The question of the foreseeability of the event which caused the breach has no application in the determination of whether or not there was a breach, for it is only relevant if the issue were one of negligence in a malpractice action. The criterion for the existence of a warranty is a determination of the circumstances at the time the contract was entered into, not the means by which the contract or warranty was broken. Thus the doctor in *Yeager*, under the logic of *Noel* and *Johnston*, would be held liable. This appears to be an extremely harsh result. The only way to get around this rigidity would be to imply a term in the contract that the operation is safe unless an unforeseeable intervening force causes the warranty to be breached. However, this result would bring an entire body of tort law into the area of contract interpretation, and cause confusion and misunderstanding.

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[76] 151 F. Supp. at 348 (D.D.C. 1957).

[77] The court preceded that statement with "doubltess a physician's statement that he would cure a disease could seldom if ever be regarded as a warranty." 251 F.2d at 918. The court did not give any citations in support of that proposition, but, as has been discussed in this article, doctors have often been held to a statement that they would cure a disease.

[78] 251 F.2d at 918 (D.C. Cir. 1958).

[79] 26 Wash. 2d 559, 174 P.2d 755 (1946).

V. STERILIZATION CASES

A. RECENT DEVELOPMENTS

A recent development in contract law as applied to physician-patient relations is the liability of physicians for the failure of sterilization operations. In *Custodio v. Bauer*,[80] the court was presented with a breach of contract action for the failure of the defendant physician to sterilize the patient-plaintiff. The court held that the complaint permitted the interpretation that they had agreed in writing that the defendant would sterilize the plaintiff by an operative procedure, and that there were sufficient allegations to withstand a general demurrer. The interesting aspect of this case is that there was no allegation of an express promise other than what was essentially a description of the type of operation to be performed. In comparison with other cases concerning contractual liability, the court here seemed to go out of its way to find the defendants potentially liable. For example, the court could easily have said that, in the absence of an express promise of the operation's success, the contract to sterilize was merely an inducement to the duty of the physician to use due care (as did the court in *Bishop v. Byrne*[82]). Similar causes of action for breach of contract to sterilize were allowed in *Jackson v. Anderson*, *Vilord v. Jenkins*, and *Doerr v. Villante*.[85]

However, breach of contract actions were not allowed for sterilization operations in *Bishop v. Byrne* (where the court held that an express warranty or guarantee of success was needed), *Shaheen v. Knight*[87] (where it was held that to award damages for the birth of a healthy child was against public policy[88]), and *Rogala v. Silva*[89] (where the court held that a statement of the physician was

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[80] 251 Cal. App. 2d 303, 59 Cal. Rptr. 463; 27 A.L.R.3d 884 (1971).

[81] [t]hat on or about Nov. 14, 1963, Mrs. Custodio employed each of the defendants to treat her professionally "for the purpose of removing portions of her Fallopian tubes, so as to accomplish a sterilization that would permanently defeat procreation or conception of a fetus in the female organs of the plaintiff . . . "

and that the defendants represented "that the removal of the portion of the Fallopian [*sic*] tubes would accomplish a sterilization."

[82] 265 F. Supp. 460 (D. W. Va. 1967).

[83] 230 So. 2d 503 (Fla. App. 1970).

[84] 226 So. 2d 245 (Fla. App. 1969).

[85] 74 Ill. App. 2d 332, 220 N.E.2d 767 (1966).

[86] 265 F. Supp. 460 (D. W. Va. 1967).

[87] 11 Pa. D & C.2d 41, 6 Lycoming Rev. 19 (1957).

[88] In Ball v. Mudge, 64 Wash. 2d 247, 391 P.2d 201 (1964), a jury verdict in favor of defendant physician in an action for failure to sterilize the plaintiff by vasectomy was sustained. The court said that either the jury determined that no damages were sustained or that there was the possibility that recanalization would occur without negligence (in which case this would be a holding similar to that in Bishop).

[89] 305 N.E.2d 571 (Ill. App. 1973).

only an opinion and not an express warranty[90]).

B. PROBLEMS RAISED BY THE STERILIZATION CASES

The major problem with cases like *Custodio* is that by not requiring an express promise of success in addition to the contract to sterilize, the courts are treading dangerously close to holding doctors as warrantors of cures. A description of an operation is not a promise of the operation's success. The contract in *Custodio* was to remove a portion of the Fallopian tubes, the purpose of which was to sterilize the plaintiff. By not requiring an additional promise, or the existence of a special contract to cure or achieve a particular result, the court in effect is holding the doctor responsible for the success of the operation. If the contract had been to remove a kidney, the purpose of which was to improve the patient's physical state, it is clear that the court would not have found the doctor liable for breach of contract if the operation was a failure.

C. LIMITING THE APPLICABILITY OF THE STERILIZATION CASES

The holdings in the sterilization cases should be limited to that particular area because of the existence of some additional factors.

First, there is the shift in the judicial attitudes toward the value of newborn members to society. The rejection of the idea that no damage results if a healthy child is born (*Shaheen*) is implicit in *Custodio*.[91] It is possible that the courts are beginning to shift to the notion that efforts at limiting the growth of population are in the public interest. If this is a new judicial trend, then breach of contract actions for sterilization operations will be in the forefront of judicial expression of this idea. Thus holdings such as *Custodio* will have to

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[90] There are two interesting points in this case. First, *in dicta*, the court expresses the opinion that a separate consideration is required for the establishment of an express warranty.

Secondly, the court distinguished this case from Doerr v. Villante, *supra* note 85. The court stated that:

> In *Doerr*, the plaintiffs, husband and wife, sought damages both on the ground of breach of an oral promise to produce a specified result and on the ground of breach of an implied promise to perform the treatment in a skillful manner. The court decided that the statute of limitations applicable to actions brought in contract should apply, but did not distinguish the contract to produce a specified result from the contract to use reasonable skill in performing the treatment. 305 N.E.2d at 574 (Ill. App. 1973).

The problem with the court's analysis is that the breach of the implied term of the contract to use reasonable skill and care is almost universally regarded as an action in tort, not in contract (*see* discussion *supra* accompanying notes 14-21). Therefore the holding in *Doerr* deals with the breach of an oral promise to produce a specified result.

[91] *See also* Jackson v. Anderson, 230 So. 2d 503 (Fla. App. 1970).

be viewed in this respect, and should not be confused with other breach of contract actions against physicians which do not involve this issue.

Secondly, the purpose of the operation is to allow the patient to engage in sexual intercourse without fear of conception. It is usually the only reason that the patient engages the physician to perform the operation. In relation to other medical operations in the context of an emergency, it is comparable to the plastic surgeon improving the appearance of his patient.[92] After the operation is completed, it is assumed by the patient, and most probably the physician, that the operation is a success. In implying a term of the contract that the operation will be a success, the courts are merely expressing what both parties assumed when the contract was entered into. If there is any area in which the courts are justified in allowing recovery on the implied term of a contract in the medical field, sterilization operations offer the most compelling justifications. In having sexual intercourse after the operation, the plaintiff is relying completely on the success of the operation, and in balancing the equities of the situation, it would seem that it is incumbent on the physician to warn of any possible failure that can be anticipated. For if the physician does not warn the patient, there is no other way short of conception itself that the patient can be aware of a chance of failure.[93] Therefore, it is apparent that the holdings of the sterilization cases should not be allowed to influence the consideration of other medical contracts. For in these cases the courts are taking special notice of a particular factual situation that is limited to that area, and it is definitely an exception to the normal physician-patient contractual action.

VI. CONCLUSION

The action for breach of contract, although used relatively infrequently in the past, is available in many situations. There are many considerations that must be taken into account in any decision holding physicians liable in contract. These considerations include the vital importance of the medical profession in society; the nature of the relationship between the physician and the patient; the uncertainty concerning results that is present in any medical treatment; and the protection of the use of therapeutic reassurance. Perhaps in response to these considerations, the courts presently will allow recovery only on the express provisions of the contractual agreement.[94]

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[92] *See* discussion *supra* in this article at _____.

[93] Of course post-operative procedures such as sperm counts could operate as a warning if the physician lets the patient know why they are necessary.

[94] *See* text accmpanying notes 22-30.

Within the area of recovery on the express provisions of the contract, there are many factors to be considered. First, a preliminary distinction must be drawn between provisions that deal with the physician's procedures and specific actions and the provisions that deal with the results to be obtained from the physician's services.

Recovery on a breach of contract dealing with the physician's specific actions and procedures is relatively straightforward. Generally, recovery will be either for an action for non-performance of the physician's contracted duties or an action for failure to follow a contracted procedure. Care must be taken to distinguish an action in tort for improper performance from these forms of recovery, since the factual situations will often be closely related.[95]

More difficult for the purposes of analysis and recovery are those provisions that deal with the results to be obtained from the physician's services. In determining liability on these provisions, the courts are not entirely consistent as to what criterion should be used. It is clear that the major focus of the courts' inquiry has been whether to label the physician's representations as promises or opinions. The courts also say that the circumstances and intent of the parties should be given particular weight.[96] But beyond these general guidelines, the courts have not expressed specific factors that may be used to analyze particular factual situations.

It is clear that the use of the specific words "cure" or "guarantee," although often helpful, is not necessary for contractual liability.[97] It is also clear that a doctor can be held liable for a warranty dealing with specific results to be obtained from the physician's services.[98]

The courts have taken the position that the physician, because of the importance of his profession and the requirements of his practice, should be protected. One way that this policy has been effected has been by allowing recovery only on the express terms of the contract.[99] Another indication is the stress laid by the courts on the physician's need to therapeutically reassure the patient, often using this concept to interpret the circumstances and intent of the parties against the complaining patient. The fact that need for medical attention apparently is a major factor in this process of interpretation also points to the courts' decision to recognize that the physician requires special treatment because of the requirements and circumstances of his profession.[100]

However, there are limits to this special treatment, and they can

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[95] *See* text accompanying notes 31-43.
[96] *See* text accompanying notes 44-57.
[97] *See* text accompanying note 64.
[98] *See* text accompanying notes 70-72.
[99] *See* text accompanying notes 14-21.
[100] *See* text accompanying notes 67-69.

be seen in the courts' differing approaches to two problems: 1) what weight should be given to the physician's intent in making the representations; and 2) whether or not the physician should be liable for warranties as to the general results of his services. Some courts have taken the position that the physician's intent in making the representation should be considered in the determination of liability.[101] However, other courts (notably the court in *McQuaid*)[102] take the position that only the effect of the representation on the patient should be considered.[103] Recently two decisions (*Noel*[104] and *Johnston*[105]) have held that a physician may be liable for representing that a patient's condition will not worsen, and for representing that a particular form of treatment is perfectly safe.[106] Usually courts would have held that such general representations could only be construed as opinions or predictions and thus were not promises as to results to be obtained from treatment.[107]

These two differing approaches point to a concern that is opposed to giving the physician preferential treatment in his relations with the patient. This is the concern that the patient is completely at the mercy of the physician in his dealings with the medical profession. The fact that the patient is overwhelmingly vulnerable to unfair bargains and dishonest physicians is of special concern in this area. The courts have a problem when dealing with the fact that the patient has to rely on what the physician tells him, especially when great emphasis is placed in the medical profession on gaining that reliance and trust. Thus the courts have problems when the patient relies on a representation when the physician did not intend that that representation be relied upon, or when the patient relies upon a general representation such as one concerning the safety of the operation. For here the courts cannot protect the physician and the patient at the same time. Either the court recognizes the physician's protected position at the expense of the patient's vulnerability, or the court recognizes the patient's reliance upon the physician (and the need to support such reliance for the beneficial effect on treatment) at the expense of holding the physician liable. In dealing with such problems, the courts must be particularly careful not only in balancing the equities of the situation in regard to each party, but also in balancing the various factors concerning the requirements and importance of the medical profession.

The attorney should be aware that a breach of contract action

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[101] *See* text accompanying notes 62-64.
[102] *See* note 53 *supra.*
[103] *See* text accompanying notes 53-57.
[104] *See* note 73 *supra.*
[105] *See* note 74 *supra.*
[106] *See* text accompanying notes 73-78.
[107] *See* text accompanying note 46.

against physicians is available in many situations. The courts must be aware of the many considerations and peculiarities of this area of the law. The physician-patient relationship is one that is not susceptible to categorizations and simplifications. Each case must be considered in light of its own particular facts, and care must be taken that these unique facts and the larger policy considerations are not overlooked by a blind application of contractual principles.

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