

Reliance Damages

The default framework for measuring damages is expectancy – giving the promisee the value of the benefit of her bargain. The expectation interest places the promisee in the position she would have occupied had the contract been performed. But for reasons explained in the cases that follow, sometimes courts instead measure the costs incurred by the plaintiff in reliance on the contract. This reliance measure restores the promisee to the position she would have occupied had no contract been made. Although restoring an aggrieved party to a pre-contract position might sound a little like a tort remedy, what sort of contract situations do you think might make this remedy preferable? Do you remember why the court in *Hawkins v. McGee* found such a remedy inappropriate?

Chicago Coliseum Club v. Dempsey

265 Ill. App. 542 (Appellate Court of Illinois 1932)

WILSON, Justice

Chicago Coliseum Club, a corporation, as plaintiff, brought its action against William Harrison Dempsey, known as Jack Dempsey, to recover damages for breach of a written contract executed March 13, 1926, but bearing date of March 6 of that year.

Plaintiff was incorporated as an Illinois corporation for the promotion of general pleasure and athletic purposes and to conduct boxing, sparring and wrestling matches and exhibitions for prizes or purses. The defendant William Harrison Dempsey was well known in the pugilistic world and, at the time of the making and execution of the contract in question, held the title of world's Champion Heavy Weight Boxer.

Under the terms of the written agreement, the plaintiff was to promote a public boxing exhibition in Chicago, or some suitable place to be selected by the promoter, and had engaged the services of one Harry Wills, another well known boxer and pugilist, to engage in a boxing match with the defendant Dempsey for the championship of the world. By the terms of the agreement Dempsey was to receive \$10, receipt of which was acknowledged, and the plaintiff further agreed to pay to Dempsey the sum of \$300,000 on the 5th day of August 1926, – \$500,000 in cash at least 10 days before the date fixed for the contest, and a sum equal to 50 per cent of the net profits over and above the sum of \$2,000,000 in the event the gate receipts should exceed that amount. In addition the defendant was to receive 50 per cent of the net revenue derived from moving picture concessions or royalties received by the plaintiff, and defendant agreed to have his life and health insured in favor of the plaintiff in a manner and

at a place to be designated by the plaintiff. Defendant further agreed not to engage in any boxing match after the date of the agreement and prior to the date on which the contest was to be held....

March 6, 1926, the plaintiff entered into an agreement with Harry Wills, in which Wills agreed to engage in a boxing match with the Jack Dempsey named in the agreement hereinbefore referred to. Under this agreement the plaintiff, Chicago Coliseum Club was to deposit \$50,000 in escrow in the National City Bank of New York City, New York, to be paid over to Wills on the 10th day prior to the date fixed for the holding of the boxing contest. Further conditions were provided in said contract with Wills, which, however, are not necessary to set out in detail. There is no evidence in the record showing that the \$50,000 was deposited nor that it has ever been paid, nor is there any evidence in the record showing the financial standing of the Chicago Coliseum Club, a corporation, plaintiff in this suit. This contract between the plaintiff and Wills appears to have been entered into several days before the contract with Dempsey.

March 8, 1926, the plaintiff entered into a contract with one Andrew C. Weisberg, under which it appears that it was necessary for the plaintiff to have the services of an experienced person skilled in promoting boxing exhibitions and that the said Weisberg was possessed of such qualifications and that it was necessary for the plaintiff to procure his help in the promoting of the exhibition. It appears further from the agreement that it was necessary to incur expenditures in the way of traveling expenses, legal services and other costs in and about the promotion of the boxing match, and Weisberg agreed to investigate, canvass and organize the various hotel associations and other business organizations for the purpose of securing accommodations for spectators and to procure subscriptions and contributions from such hotels and associations and others for the erection of an arena and other necessary expense in order to carry out the enterprise and to promote the boxing match in question. Under these agreements Weisberg was to furnish the funds for such purposes and was to be reimbursed out of the receipts from the sale of tickets for the expenses incurred by him, together with a certain amount for his services.

Both the Wills contract and the Weisberg contract are referred to at some length, inasmuch as claims for damages by plaintiff are predicated upon these two agreements. Under the terms of the contract between the plaintiff and Dempsey and the plaintiff and Wills, the contest was to be held during the month of September, 1926.

July 10, 1926, plaintiff wired Dempsey at Colorado Springs, Colorado, stating that representatives of life and accident insurance companies would call on him for the purpose of

examining him for insurance in favor of the Chicago Coliseum Club, in accordance with the terms of his contract, and also requesting the defendant to begin training for the contest not later than August 1, 1926. In answer to this communication plaintiff received a telegram from Dempsey, as follows:

“BM Colorado Springs Colo

July 10th 1926

B. E. Clements

President Chicago Coliseum Club Chgo Entirely too busy training for my coming Tunney match to waste time on insurance representatives stop as you have no contract suggest you stop kidding yourself and me also

Jack Dempsey.”

We are unable to conceive upon what theory the defendant could contend that there was no contract, as it appears to be admitted in the proceeding here and bears his signature and the amounts involved are sufficiently large to have created a rather lasting impression on the mind of anyone signing such an agreement. It amounts, however, to a repudiation of the agreement and from that time on Dempsey refused to take any steps to carry out his undertaking. It appears that Dempsey at this time was engaged in preparing himself for a contest with Tunney to be held at Philadelphia, Pennsylvania, sometime in September, and on August 3, 1926, plaintiff, as complainant, filed a bill in the superior court of Marion county, Indiana, asking to have Dempsey restrained and enjoined from engaging in the contest with Tunney, which complainant was informed and believed was to be held on the 16th day of September, and which contest would be in violation of the terms of the agreement entered into between the plaintiff and defendant at Los Angeles, March 13, 1926.

[CCC sought an injunction in Indiana, and the court granted an order preventing Dempsey from fighting Tunney or anyone else other than Wills.]

[T]his court is asked to consider the various items of expense claimed to have been incurred and various offers of proof made to establish damages for breach of the agreement. Under the proof offered, the question of damages naturally divides itself into the four following propositions:

1st. Loss of profits which would have been derived by the plaintiff in the event of the holding of the contest in question;

2nd. Expenses incurred by the plaintiff prior to the signing of the agreement between the plaintiff and Dempsey;

3rd. Expenses incurred in attempting to restrain the defendant from engaging in other contests and to force him into a compliance with the terms of his agreement with the plaintiff; and

4th. Expenses incurred after the signing of the agreement and before the breach of July 10, 1926.

Proposition 1. Plaintiff offered to prove by one Mullins that a boxing exhibition between Dempsey and Wills held in the City of Chicago on September 22, 1926, would bring a gross receipt of \$3,000,000, and that the expense incurred would be \$1,400,000, leaving a net profit to the promoter of \$1,600,000. The court properly sustained an objection to this testimony. The character of the undertaking was such that it would be impossible to produce evidence of a probative character sufficient to establish any amount which could be reasonably ascertainable by reason of the character of the undertaking. The profits from a boxing contest of this character, open to the public, is dependent upon so many different circumstances that they are not susceptible of definite legal determination. The success or failure of such an undertaking depends largely upon the ability of the promoters, the reputation of the contestants and the conditions of the weather at and prior to the holding of the contest, the accessibility of the place, the extent of the publicity, the possibility of other and counter attractions and many other questions which would enter into consideration. Such an entertainment lacks utterly the element of stability which exists in regular organized business. This fact was practically admitted by the plaintiff by the allegation of its bill filed in the Marion county court of Indiana asking for an injunction against Dempsey. Plaintiff in its bill in that proceeding charged, as follows:

“That by virtue of the premises aforesaid, the plaintiff will, unless it secures the injunctive relief herein prayed for, suffer great and irreparable injury and damages, not compensable by any action at law in damages, the damages being incapable of commensuration, and plaintiff, therefore, has no adequate remedy at law.”

Compensation for damages for a breach of contract must be established by evidence from which a court or jury are able to ascertain the extent of such damages by the usual rules of evidence and to a reasonable degree of certainty. We are of the opinion that the performance in question is not susceptible of proof sufficient to satisfy the requirements and that the damages, if any, are purely speculative....

Proposition 2: Expenses incurred by the plaintiff prior to the signing of the agreement between the plaintiff and Dempsey.

The general rule is that in an action for a breach of contract a party can recover only on damages which naturally flow from and are the result of the act complained of. *O'Conner v. Nolan*, 64 Ill. App. 357. The Wills contract was entered into prior to the contract with the defendant and was not made contingent upon the plaintiff's obtaining a similar agreement with the defendant Dempsey. Under the circumstances the plaintiff speculated as to the result of his efforts to procure the Dempsey contract. It may be argued that there had been negotiations pending between plaintiff and Dempsey which clearly indicated an agreement between them, but the agreement in fact was never consummated until sometime later. The action is based upon the written agreement which was entered into in Los Angeles. Any obligations assumed by the plaintiff prior to that time are not chargeable to the defendant. Moreover, an examination of the record discloses that the \$50,000 named in the contract with Wills, which was to be payable upon a signing of the agreement, was not and never has been paid. There is no evidence in the record showing that the plaintiff is responsible financially, and, even though there were, we consider that it is not an element of damage which can be recovered for breach of the contract in question.

Proposition 3: Expenses incurred in attempting to restrain the defendant from engaging in other contests and to force him into a compliance with the terms of his agreement with the plaintiff.

After the repudiation of the agreement by the defendant, plaintiff was advised of defendant's match with Tunney which, from the evidence, it appears, was to take place in Philadelphia in the month of September and was in direct conflict with the terms of the agreement entered into between plaintiff and defendant. Plaintiff's bill, filed in the superior court of Marion county, Indiana, was an effort on the part of the plaintiff to compel defendant to live up to the terms of his agreement. The chancellor in the Indiana court entered his decree, which apparently is in full force and effect, and the defendant in violating the terms of that decree, after personal service, is answerable to that court for a violation of the injunctive order entered in said proceeding. The expenses incurred, however, by the plaintiff in procuring that decree are not collectible in an action for damages in this proceeding; neither are such similar expenses as were incurred in the trips to Colorado and Philadelphia, nor the attorney's fees and other expenses thereby incurred. *Cnyler Realty Co. v. Teneo Co., Inc.*, 188 N. Y. S. 340. The plaintiff having been informed that the defendant intended to proceed no further under his agreement, took such steps at its own financial risk. There was nothing in the agreement regarding attorney's fees and there was nothing in the contract in regard to the services of the defendant from which it would appear that the action for specific performance would lie. After

the clear breach of contract by the defendant, the plaintiff proceeded with this character of litigation at its own risk. We are of the opinion that the trial court properly held that this was an element of damages which was not recoverable.

Proposition 4: Expenses incurred after the signing of the agreement and before the breach of July 10, 1926.

After the signing of the agreement plaintiff attempted to show expenses incurred by one Weisberg in and about the furtherance of the project. Weisberg testified that he had taken an active part in promoting sports for a number of years and was in the employ of the Chicago Coliseum Club under a written contract during all of the time that his services were rendered in furtherance of this proposition. This contract was introduced in evidence and bore the date of March 8, 1926. Under its terms Weisberg was to be reimbursed out of the gate receipts and profits derived from the performance. His compensation depended entirely upon the success of the exhibition. Under his agreement with the plaintiff there was nothing to charge the plaintiff unconditionally with the costs and expenses of Weisberg's services. The court properly ruled against the admissibility of the evidence.

We find in the record, however, certain evidence which should have been submitted to the jury on the question of damages sustained by the plaintiff. The contract on which the breach of the action is predicated shows a payment of \$10 by the plaintiff to the defendant and the receipt acknowledged. It appears that the stadium located in the South Park District, known as Soldier's Field, was considered as a site for the holding of the contest and plaintiff testified that it paid \$300 to an architect for plans in the event the stadium was to be used for the performance. This item of damage might have been made more specific and may not have been the best evidence in the case but, standing alone, it was sufficient to go to the jury. There were certain elements in regard to wages paid assistant secretaries which may be substantiated by evidence showing that they were necessary in furtherance of the undertaking. If these expenses were incurred they are recoverable if in furtherance of the general scheme. The defendant should not be required to answer in damages for salaries paid regular officials of the corporation who were presumed to be receiving such salaries by reason of their position, but special expenses incurred are recoverable. The expenses of Hoffman in going to Colorado for the purpose of having Dempsey take his physical examination for insurance, if before the breach and reasonable, are recoverable. The railroad fares for those who went to Los Angeles for the purpose of procuring the signing of the agreement are not recoverable as they were incurred in a furtherance of the procuring of the contract and not after the agreement was entered into. The services of Shank in looking after railroad facilities and making arrangements with the railroad for publicity and special trains and accommodations were items which should

be considered and if it develops that they were incurred in a furtherance of the general plan and properly proven, are items for which the plaintiff should be reimbursed.

The items recoverable are such items of expense as were incurred between the date of the signing of the agreement and the breach of July 10, 1926, by the defendant and such as were incurred as a necessary expense in furtherance of the performance. Proof of such items should be made subject to the usual rules of evidence.

For the reasons stated in this opinion the judgment of the circuit court is reversed and the cause remanded for a new trial.

Judgment reversed and cause remanded.

HEBEL, P. J., and FRIEND, J., concur.

Notes and Questions

1. Reliance is a tricky term because courts use it in two different ways in contract disputes. Money spent by the promisee in reliance on a contract is one way to measure the harm suffered when the promisor breaches. That provides a *reliance measure* of contract damages. But as Restatement (Second) of Contracts § 90 explains, in some cases a promise is enforceable as a contract because the promisor reasonably relied on it. Such a promise is enforceable because the promisor is *estopped* from arguing that the contract was not properly formed. Pay attention to whether reliance is used as a measure of contractual damages, or as a basis for the enforceability of a promise.
2. As noted in the introduction to this module, the general rule for breach of contract recovery is that the wronged party should receive the benefit of their bargain, i.e., be placed in the same position as if the contract had been performed. This expectation damages measure may not be calculable to the satisfaction of the court in every case. Courts recognize reliance damages as an alternative to expectation damages. The reliance measure will seek to restore the promisee's expenditures made in reliance upon the breached contractual obligation. See Restatement (Second) of Contracts § 349 (1981).
3. Unlike the court in *Dempsey*, some courts have recognized that expenditures incurred prior to contract formation are in fact expenditures made in reliance on the contract,

or at least are expenditures that are foreseeably wasted on breach. *See, e.g., Anglia Television Ltd. v. Reed*, 3 All E.R. 690 (C.A. 1971). The Reed in question was Robert Reed, the actor who portrayed the father of *The Brady Bunch*. Reed breached a contract to appear in a British television movie, and the breach occurred late enough in the process that the entire production was scrapped.

But why should one presume that Dempsey was any less on notice than Reed that expenditures made in trying to secure the deal would be lost on the breach? As one commentator notes, “[t]here is no reason why in both cases it should not have been presumed that profits would have been at least equal to all expenditures in an attempt to make those profits, including precontractual expenses.” Russell J. Weintraub, *A Survey of Contract Practice and Policy*, 1992 WIS. L. REV. 1, 37 n.125 (1992). *See also* Restatement (Second) of Contracts § 349 (including “expenditures made in preparation for performance” as part of the reliance calculation).

4. By the time the court decided this case, Dempsey fought Tunney twice, once in Philadelphia in September, 1926, and again in Chicago in September, 1927, losing both fights. The Philadelphia fight brought in gross gate receipts of nearly \$1.9 million, and the Chicago fight grossed over \$2.6 million.

Could evidence of the gate receipts from those fights resolve the court’s concern about the certainty of the anticipated profits from *Dempsey v. Wills*? Why or why not?

For example, if *Dempsey v. Wills* had grossed \$1.9 million, with expenses of \$1.4 million (\$800k to Dempsey, \$50k to Wills, \$190k to Weisberg [10%] and \$360k to Soldier Field), the fight would have netted profits of \$500k.

5. CCC sought an injunction to prevent Dempsey from fighting anyone other than Wills. A court in Indiana granted the injunction, but as the first *Dempsey v. Tunney* fight occurred in Philadelphia, PA, the order ended up providing no relief. The section on specific performance walks through when, if ever, a court might grant an injunction to prevent a breach.

L. Albert & Son v. Armstrong Rubber Co.

178 F.2d 182 (2d Cir. 1949)

L. HAND, Chief Judge

Both sides appeal from the judgment in an action brought by the Albert Company, in which we shall speak of as the Seller, against the Armstrong Company, which we shall call the Buyer. The action was to recover the agreed price of four 'Refiners,' machines designed to recondition old rubber; the contract of sale was by an exchange of letters in December, 1942, and the Seller delivered two of the four 'Refiners' in August, 1943, and the other two on either August 31st or September 8th, 1945. Because of the delay in delivery of the second two, the Buyer refused to accept all four in October, 1945 - the exact day not being fixed - and it counterclaimed for the Seller's breach. The judge dismissed both the complaint and the counterclaim; but he gave judgment to the Seller for the value without interest on a part of the equipment delivered - a 300 horse-power motor and accessories - which the Buyer put into use on February 20th, 1946. On the appeal the Seller's position is that its delay was not too long; that in any event the Buyer accepted delivery of the four 'Refiners'; and that they were in accordance with the specifications. As an alternative it insists that the Buyer is liable, not only for the value of the motor, but for interest upon it; and, as to the counterclaim, that the Buyer proved no damages, assuming that there was a breach. The judge found that all four 'Refiners' conformed to the specifications, or could have been made to do so with slight trouble and expense; that the contract was inseparable and called for four not two and two; that the delivery of the second two was too late; and that, as the Buyer rejected all four, it was not liable on the contract at all. On the other hand, as we have said, he found that the Buyer's use for its own purposes of the motor, although not an acceptance of the 'Refiners,' made it liable for the value of the motor in quasi contract, but without interest. He dismissed the Buyer's counterclaim because it had failed to prove any damages.

The first issue is whether the Seller's delivery of the second two 'Refiners' was too late, and justified the Buyer's rejection of all four in October of that year. The Seller does not - at least on this appeal- seek to recover the purchase price of the first two 'Refiners' on the ground that the parties had at any time severed the contract into two separate ones, each for two. It follows that the Buyer was entitled in October, 1945, to reject the four, if the delivery of the second two was too late.

...We agree that the delivery was too late.

[The Court held that the Seller should have been awarded interest on the value of the motor the Buyer used and its accessories from the date of the Buyer's appropriation - February 20th, 1946.]

Coming next to the Buyer's appeal, it does not claim any loss of profit, but it does claim the expenses which it incurred in reliance upon the Seller's promise. These were of three kinds: its whole investment in its 'reclaim department,' \$118,478; the cost of its 'rubber scrap,' \$27,555.63; the cost of the foundation which it laid for the 'Refiners,' \$3,000. The judge in his opinion held that the Buyer had not proved that 'the lack of production' of the reclaim department 'was caused by the delay in delivery of plaintiffs' refiners'; but that that was 'only one of several possible causes. Such a possibility is not sufficient proof of causation to impose liability on the plaintiffs for the cost of all machinery and supplies for the reclaim department.' The record certainly would not warrant our holding that this holding was 'clearly erroneous'; indeed, the evidence preponderates in its favor. The Buyer disposed of all its 'scrap rubber' in April and May, 1945; and, so far as appears, until it filed its counterclaim in May, 1947, it never suggested that the failure to deliver two of the four 'Refiners' was the cause of the collapse of its 'reclaim department.' The counterclaim for these items has every appearance of being an afterthought, which can scarcely have been put forward with any hope of success.

The claim for the cost of the foundation which the Buyer built for the 'Refiners,' stands upon a different footing. Normally a promisee's damages for breach of contract are the value of the promised performance, less his outlay, which includes, not only what he must pay to the promisor, but any expenses necessary to prepare for the performance; and in the case at bar the cost of the foundation was such an expense. The sum which would restore the Buyer to the position it would have been in, had the Seller performed, would therefore be the prospective net earnings of the 'Refiners' while they were used (together with any value they might have as scrap after they were discarded), less their price - \$25,500 - together with \$3,000, the cost of installing them. The Buyer did not indeed prove the net earnings of the 'Refiners' or their scrap value; but it asserts that it is nonetheless entitled to recover the cost of the foundation upon the theory that what it expended in reliance upon the Seller's performance was a recoverable loss. In cases where the venture would have proved profitable to the promisee, there is no reason why he should not recover his expenses. On the other hand, on those occasions in which the performance would not have covered the promisee's outlay, such a result imposes the risk of the promisee's contract upon the promisor. We cannot agree that the promisor's default in performance should under this guise make him an insurer of the promisee's venture; yet it does not follow that the breach should not throw upon him the duty

of showing that the value of the performance would in fact have been less than the promisee's outlay. It is often very hard to learn what the value of the performance would have been; and it is a common expedient, and a just one, in such situations to put the peril of the answer upon that party who by his wrong has made the issue relevant to the rights of the other. On principle therefore the proper solution would seem to be that the promisee may recover his outlay in preparation for the performance, subject to the privilege of the promisor to reduce it by as much as he can show that the promisee would have lost, if the contract had been performed.

... [W]e are here concerned only with Connecticut law; and the decisions in that state do not seem to be in entire accord. In the early case of *Bush v. Canfield* the buyer sued to recover a payment of \$5,000 made in advance for the purchase of 2,000 barrels of flour at \$7.00 a barrel. Although at the time set for delivery the value of the flour had fallen to \$5.50, the seller for some undisclosed reason failed to perform. The action was on the case for the bench, not in indebitatus assumpsit, and the court, Hosmer, J., dissenting, allowed the buyer to recover the full amount of his payment over the seller's objection that recovery should be reduced by the buyer's loss. The chief justice gave the following reason for his decision which we take to be that of the court, 2 Conn. page 488: 'The defendant has violated his contract; and it is not for him to say that if he had fulfilled it, the plaintiffs would have sustained a great loss, and that this ought to be deducted from the money advanced.' If there is no difference between the recovery of money received by a promisor who later defaults, and a promisee's outlay preparatory to performance, this decision is in the Buyer's favor. However, when the promisor has received any benefit, the promisee's recovery always depends upon whether the promisor has been 'unjustly enriched'; and, judged by that nebulous standard, there may be a distinction between imposing the promisee's loss on the promisor by compelling him to disgorge what he has received and compelling him to pay what he never has received. It is quite true that the only difference is between allowing the promisee to recover what he has paid to the promisor and what he has paid to others; but many persons would probably think that difference vital.

... [I]t appears to us that *Santoro v. Mack* must be read as taking the opposite view. The plaintiff, the vendee under a contract for the sale of land, had paid an electrician and an architect whom he had employed in reliance upon the promised conveyance. These payments he sought to recover, and was unsuccessful on the ground that they had not benefited the vendor, and that they had been incurred without the vendor's knowledge or consent. Yet it would seem that such expenses were as much in reasonable preparation for the use of the land, as the cost of the foundation was for the use of the 'Refiners.' The point now before us was apparently not raised, but the decision, as it stands, seems to deny any recovery whatever. Three other

Connecticut decisions - the only ones which at all approach the question - do not throw any light upon the point.

The result is equally inconclusive if we consider the few decisions in other jurisdictions.... It appears to us therefore that the reported decisions leave it open to us to adopt the rule we have stated. Moreover, there is support for this result in the writings of scholars. The Restatement of Contracts allows recovery of the promisee's outlay 'in necessary preparation' for the performance, subject to several limitations, of which one is that the promisor may deduct whatever he can prove the promisee would have lost, if the contract had been fully performed. Professor McCormick thinks that 'the jury should be instructed not to go beyond the probable yield' of the performance to the promisee, but he does not consider the burden of proof [McCormick on Damages, § 142, eds]. Much the fullest discussion of the whole subject is Professor Fuller's in the Yale Law Journal [with William R. Perdue, Jr., 46 YALE L.J. 52, 75-80, eds]. The situation at bar was among those which he calls cases of 'essential reliance,' and for which he favors the rule we are adopting. It is one instance of his 'very simple formula: We will not in a suit for reimbursement of losses incurred in reliance on a contract knowingly put the plaintiff in a better position than he would have occupied, had the contract been fully performed.'

The judgment will therefore be affirmed with the following modification. To the allowance for the motor and accessories will be added interest from February 20th, 1946. The Buyer will be allowed to set off \$3,000 against the Seller's recovery with interest from October, 1945, subject to the Seller's privilege to deduct from that amount any sum which upon a further hearing it can prove would have been the Buyer's loss upon the contract, had the 'Refiners' been delivered on or before May 1st, 1945.

Judgment modified as above, and affirmed as so modified.

Notes and Questions

1. Article 2 of the Uniform Commercial Code has no express provision providing for reliance damages, and courts applying the UCC in sales of goods cases overwhelmingly award expectation damages. See Michael T. Gibson, *Reliance Damages in the Law of Sales under Article 2 of the Uniform Commercial Code*, 29 ARIZ. ST. L. REV. 909, 913-15 (1997) (reporting that courts awarded reliance damages in less than 15% of reviewed cases, selected because they were cases where reliance damages would likely be awarded). But some parties have negotiated for a reliance measure in sales of goods contexts. See Victor P. Goldberg, *Protecting Reliance*, 114 COLUM. L. REV. 1033, 1055 (2014)

(describing automaker GM's purchase contract with parts suppliers that provided GM flexibility to cut back orders and obligated GM to pay suppliers for completed and work-in-progress items, less resale value of part, but preventing recovery for overhead and lost profits). Do you think it would violate the spirit of § 1-305 for a court to award reliance damages in a case controlled by the UCC? Are there other provisions in the UCC that seem like they might furnish some reliance damages to aggrieved parties?

2. Expectation damages give the promisee the benefit of the bargain, with the aim to put the promisee "in as good a position as he would have occupied had the defendant performed his promise." Fuller & Perdue, *The Reliance Interest in Contract Damages* (pt. 1), 46 YALE L.J. 52, 56–57 (1936). One might wonder whether there is something problematically punitive about expectation damages. If the law seeks to right wrongs, the promisee who has received a promise but not yet relied on it has suffered no harm. Why should the promisee be entitled to a remedy that doesn't compensate the promisee so much as it gives the promisee "something he never had" while "penaliz[ing] breach of promise by the promisor"? *Id.* at 52, 61. A reliance remedy might better reflect the harm suffered by the promisee. If he spends money in reliance on the promise, we can more readily see a wrong to right.

Why then is expectation damages the preferred regime? Fuller & Perdue argue that reliance is often difficult to prove and when proved, difficult to measure. Even a promisee ostensibly entitled to the benefit of the doubt like the buyer in *L. Albert & Son* may find the judge skeptical about some expenses ostensibly incurred in reliance on the promise. If courts will undercount the reliance damages that the promisee offers in evidence, perhaps expectation damages provide a more reliable measure of reliance harms because they better compensate the promisee for his lost opportunity costs. As Fuller & Perdue propose:

[If] we take into account 'gains prevented' by reliance, that is, losses involved in foregoing the opportunity to enter other contracts, the notion that the rule protecting the expectancy is adopted as the most effective means of compensating for detrimental reliance seems not at all far-fetched.

Id. at 60. See also Malcolm P. Sharp, *Promissory Liability* (pt. 1), 7 U. CHI. L. REV. 1, 20-21 (1939).

3. The court in *L. Albert & Son* presumes that, absent contrary evidence from defendant, plaintiff will break even, and is thus entitled to recover costs made in preparation for defendant's performance, including pouring foundations where defendant's undelivered machines would have been installed. Michael B. Kelly, *The Phantom Reliance Interest in Contract Damages*, 1992 WIS. L. REV. 1755, embraces an approach that mirrors that of Judge Hand. Kelly argues that courts should not turn to reliance damages in cases of uncertainty, but instead to an *expectancy of zero profits*. The court would assume that the promisee will break even, and thus that it is entitled to recover those expenses. If the promisee can prove lost profits, those would be added to the expenses. If the promisor can prove the promisee would have lost money on the contract, damages would be reduced by that amount.
4. Judge Hand in *Albert* provided a second critical intervention. Allowing the promisor to prove that the promisee would have lost money on the contract caps reliance damages to the amount of expectancy. From an economic perspective, that limit is critical. If reliance damages are not limited to expectancy, the promisee may be rewarded for overreliance on the contract. See Steven Shavell, *Damage Measures for Breach of Contract*, 11 BELL J. ECON. 466 (1980). Indeed, Shavell argues that the reliance measure provides an incentive for the promisee to rely on a contract to a greater extent than is efficient because the promisee can act as if performance is assured, even though there is always a chance the promisor will breach.

Consider the following example: Miller plans to open a music store renting band and orchestra instruments to high school students. He contracts with Goodman to build a building from which Miller will conduct his business. Under the terms of the contract, Goodman will complete the building no later than June 1. Miller knows that construction contracts sometimes don't work out in timely fashion. He's sure Goodman will be done by August 1, which means he can rent to students for the school year. Thus, he plans to have instruments delivered on August 1.

Calloway wants to contract with Miller to provide instruments to Calloway's summer school students, beginning June 1. Miller was initially planning to take delivery of instruments on August 1. If he orders them for earlier delivery, but they arrive before Goodman finishes the building, Miller cannot store or care for them, and will be forced to refuse delivery. But if Goodman meets his construction deadline, Miller will have a place for the instruments and can take on Calloway's lucrative contract.

If Miller were building the building himself, he would have to take the risk of not completing construction by June 1. In that case, he would be unlikely to enter a contract with Calloway. But because Goodman made a binding promise to finish by June 1, Miller has a backstop for the risk.

This is true whether the court would grant expectation or reliance damages. Miller's expectation damages measure would be the profits he expects to make from supplying Calloway with instruments for summer school. Miller's reliance measure will depend on what he spends in advance of Goodman's potential breach. Calloway believes, but cannot guarantee, that Miller will net \$5,000 in rental fees. And purchasing instruments early enough for Calloway's students to rent them will require Miller to finance the purchase of the instruments early, leading to \$2,000 in loan service charges he wouldn't pay if he waited to acquire the instruments until August. Miller thus stands to earn profits of \$3,000, if things work out as he hopes. If Goodman is late in providing the storefront (and assuming the loss is a reasonably certain and reasonably foreseeable result of the breach), Goodman can be called on to cover those lost profits. That provides Miller with some risk relief in moving forward on the rental.

If, however, the damages are uncertain, Miller will be limited to reliance damages. Note that a reliance remedy does not prevent overreliance. Indeed, it may exacerbate it. In a reliance regime, Miller's best bet to insure himself against risk is to incur costs in reliance on Goodman's promise as early as possible. And if a court is only counting expenditures made in reliance on the promise, Miller might find it advantageous to spend where he otherwise would not. Indeed, he might order more instruments for early delivery than those intended for the summer school students, because he will need to show reliance in order to recover.

5. Robin Kar argues instead that expectation damages are superior to reliance damages because the former measure empowers the promisor to control the level of inducement generated by the promise. Consider the following example. Baker is a brilliant but obscure writer who has largely unplugged from society. The market for his poems is not robust. He could sell a new poem for \$100 but that price is not enough to entice him to write more poems. With his modest lifestyle and a trust from the sale of earlier poems, Baker is self-sufficient.

Tatum is a millionaire who loves Baker's writing and wants to persuade Baker to write him a poem. Tatum has learned Baker yearns to take a trip to Tibet that he could never afford. Tatum promises to send Baker to Tibet at a cost of \$10,000 if Baker writes the

commissioned poem. Although the cost of the trip is easily one hundred times the market value for Baker's poems, Tatum is happy to pay it because he values Baker's work that highly and because his wealth makes him relatively indifferent to the cost.

Kar argues that in a world limited to reliance damages, if Tatum breaches, Baker can only collect for the harms he suffered in reasonable reliance on Tatum's promise. As stipulated, Tatum has promised an amount one hundred times greater than the opportunity costs Baker incurred in writing the poem. He's not working elsewhere, and no one else would pay him more than \$100 for that labor. If Tatum cannot be held to an expectation damages measure, he cannot induce Baker to write the poem. But if Baker can count on an expectation damages measure that would give him the benefit of his bargain (the \$10,000 trip to Tibet), he will rely on the promise and write the poem. Robin Kar, *Contract as Empowerment*, 83 U. CHI. L. REV. 759, 785-87 (2016).

Sullivan v. O'Connor

363 Mass. 579 (Supreme Judicial Court of Massachusetts 1973)

KAPLAN, Justice.

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

The declaration was in two counts. In the first count, the plaintiff alleged that she, as patient, entered into a contract with the defendant, a surgeon, wherein the defendant promised to perform plastic surgery on her nose and thereby to enhance her beauty and improve her appearance; that he performed the surgery but failed to achieve the promised result; rather the result of the surgery was to disfigure and deform her nose, to cause her pain in body and mind, and to subject her to other damage and expense. [The jury found for the defendant on a negligence count. Eds.]

The jury returned a verdict for the plaintiff on the contract count. . . . The judge then instructed the jury on the issue of damages.

As background to the instructions and the parties' exceptions, we mention certain facts as the jury could find them. The plaintiff was a professional entertainer, and this was known to the defendant. The agreement was as alleged in the declaration. More particularly, judging from exhibits, the plaintiff's nose had been straight, but long and prominent; the defendant

undertook by two operations to reduce its prominence and somewhat to shorten it, thus making it more pleasing in relation to the plaintiff's other features. Actually the plaintiff was obliged to undergo three operations, and her appearance was worsened. Her nose now had a concave line to about the midpoint, at which it became bulbous; viewed frontally, the nose from bridge to midpoint was flattened and broadened, and the two sides of the tip had lost symmetry. This configuration evidently could not be improved by further surgery. The plaintiff did not demonstrate, however, that her change of appearance had resulted in loss of employment. Payments by the plaintiff covering the defendant's fee and hospital expenses were stipulated at \$622.65.

The judge instructed the jury, first, that the plaintiff was entitled to recover her out-of-pocket expenses incident to the operations. Second, she could recover the damages flowing directly, naturally, proximately, and foreseeably from the defendant's breach of promise. These would comprehend damages for any disfigurement of the plaintiff's nose—that is, any change of appearance for the worse—including the effects of the consciousness of such disfigurement on the plaintiff's mind, and in this connection the jury should consider the nature of the plaintiff's profession. Also consequent upon the defendant's breach, and compensable, were the pain and suffering involved in the third operation, but not in the first two. As there was no proof that any loss of earnings by the plaintiff resulted from the breach, that element should not enter into the calculation of damages.

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

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

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

It has been suggested on occasion that agreements between patients and physicians by which the physician undertakes to effect a cure or to bring about a given result should be declared

unenforceable on grounds of public policy. *See Guilmet v. Campbell*, 385 Mich. 57, 76 (dissenting opinion). But there are many decisions recognizing and enforcing such contracts, see annotation, 43 A.L.R.3d 1221, 1225, 1229-1233, and the law of Massachusetts has treated them as valid, although we have had no decision meeting head on the contention that they should be denied legal sanction....

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

If an action on the basis of contract is allowed, we have next the question of the measure of damages to be applied where liability is found. Some cases have taken the simple view that the promise by the physician is to be treated like an ordinary commercial promise, and accordingly that the successful plaintiff is entitled to a standard measure of recovery for breach of contract – 'compensatory' ('expectancy') damages, an amount intended to put the plaintiff in the position he would be in if the contract had been performed, or, presumably, at the plaintiff's election, 'restitution' damages, an amount corresponding to any benefit conferred by the plaintiff upon the defendant in the performance of the contract disrupted by the defendant's breach. See RESTATEMENT [FIRST] CONTRACTS s 329 and comment a, ss 347, 384(1). Thus in *Hawkins v. McGee*, 84 N.H. 114, the defendant doctor was taken to have promised the plaintiff to convert his damaged hand by means of an operation into a good or perfect hand, but the doctor so operated as to damage the hand still further. The court, following the usual

expectancy formula, would have asked the jury to estimate and award to the plaintiff the difference between the value of a good or perfect hand, as promised, and the value of the hand after the operation. (The same formula would apply, although the dollar result would be less, if the operation had neither worsened nor improved the condition of the hand.) If the plaintiff had not yet paid the doctor his fee, that amount would be deducted from the recovery. There could be no recovery for the pain and suffering of the operation, since that detriment would have been incurred even if the operation had been successful; one can say that this detriment was not 'caused' by the breach. But where the plaintiff by reason of the operation was put to more pain than he would have had to endure, had the doctor performed as promised, he should be compensated for that difference as a proper part of his expectancy recovery....

Other cases, including a number in New York, without distinctly repudiating the *Hawkins* type of analysis, have indicated that a different and generally more lenient measure of damages is to be applied in patient-physician actions based on breach of alleged special agreements to effect a cure, attain a stated result, or employ a given medical method. This measure is expressed in somewhat variant ways, but the substance is that the plaintiff is to recover any expenditures made by him and for other detriment (usually not specifically described in the opinions) following proximately and foreseeably upon the defendant's failure to carry out his promise (citations omitted). This, be it noted, is not a 'restitution' measure, for it is not limited to restoration of the benefit conferred on the defendant (the fee paid) but includes other expenditures, for example, amounts paid for medicine and nurses; so also it would seem according to its logic to take in damages for any worsening of the plaintiff's condition due to the breach. Nor is it an 'expectancy' measure, for it does not appear to contemplate recovery of the whole difference in value between the condition as promised and the condition actually resulting from the treatment. Rather the tendency of the formulation is to put the plaintiff back in the position he occupied just before the parties entered upon the agreement, to compensate him for the detriments he suffered in reliance upon the agreement. This kind of intermediate pattern of recovery for breach of contract is discussed in the suggestive article by Fuller and Perdue, *The Reliance Interest in Contract Damages*, 46 YALE L.J. 52, 373, where the authors show that, although not attaining the currency of the standard measures, a 'reliance' measure has for special reasons been applied by the courts in a variety of settings, including noncommercial settings. See 46 YALE L.J. at 396-401.⁴

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

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

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

The question of recovery on a reliance basis for pain and suffering or mental distress requires further attention. We find expressions in the decisions that pain and suffering (or the like) are simply not compensable in actions for breach of contract. The defendant seemingly espouses this proposition in the present case. True, if the buyer under a contract for the purchase of a lot of merchandise, in suing for the seller's breach, should claim damages for mental anguish caused by his disappointment in the transaction, he would not succeed; he would be told, perhaps, that the asserted psychological injury was not fairly foreseeable by the defendant as a probable consequence of the breach of such a business contract. See RESTATEMENT: [FIRST] CONTRACTS, s 341, and comment a. But there is no general rule barring such items of damage in actions for breach of contract. It is all a question of the subject matter and background of the contract, and when the contract calls for an operation on the person of the plaintiff, psychological as well as physical injury may be expected to figure somewhere in the recovery, depending on the particular circumstances.... Suffering or distress resulting from the breach going beyond that which was envisaged by the treatment as agreed, should be compensable on the same ground as the worsening of the patient's condition because of the breach. Indeed it can be argued that the very suffering or distress 'contracted for'-that which would have been

incurred if the treatment achieved the promised result-should also be compensable on the theory underlying the New York cases. For that suffering is 'wasted' if the treatment fails. Otherwise stated, compensation for this waste is arguably required in order to complete the restoration of the status quo ante.

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

Notes and Questions

1. In *Sullivan*, the trial court instructed the jury to calculate the following damages remedy, subdivided as follows: 1) out-of-pocket expenses incident to the operation; 2) damages flowing from the breach, including disfigurement; and 3) pain and suffering from the third operation, but not the first two operations. Is that an expectation damages remedy, a reliance remedy, or something different? How does this remedy differ from the remedy in *Hawkins v. McGee*?
2. The court in *Sullivan* notes that the reliance measure is not a restitution measure. A restitution measure would be limited to restoring to the promisee those benefits conferred on the promisor. Thus, if Sullivan had paid Dr. O'Connor \$300, a restitution measure would be limited to that \$300. Restitution damages are further covered in a separate section.
3. The court in *Sullivan* opines that in a case like this, where the jury absolved the doctor of negligence, "an expectancy measure may be thought harsh." Why is this so? The jury also concluded that the doctor promised via surgery to enhance Sullivan's beauty and improve her appearance. Why not provide an expectation damages measure between the more beautiful nose and the disfigured and deformed nose that resulted? Is the problem in this case the harshness of remedy, or the difficulty of calculation putting "an exceptional strain on the imagination of the fact finder"?

4. Consider the following hypothetical, and how you would categorize the following potential measures of the promisee's damages. A stable enters a two-year contract with a Boston store in the early 20th century to delivery furniture for the store using a team of horses and wagon. The stable purchases a new team of horses at a cost of \$625 to run the route. The store breaches the contract with 450 days left on the contract term. Under the contract, the stable committed to run 9 trips every two days at \$1 per trip, averaging \$4.5 per day. Upon breach, the stable sells the team for \$485. The stable establishes breach and claims a total of \$2,025 for lost profits from the route, and \$140 for the loss on the team of horses. Can the stable recover both amounts? Why or why not? *See Mount Pleasant Stable Co. v. Steinberg*, 238 Mass. 567 (1921).