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Expectation Damages, the Objective Theory of Contracts, and the “Hairy Hand” Case: A Proposed Modification to the Effect of Two Classical Contract Law Axioms in Cases Involving Contractual Misunderstandings

*Daniel P. O’Gorman*¹

“Now, Mr. Hart, what sort of damages do you think the doctor should pay?”²

INTRODUCTION

WHEN established legal doctrine is applied to the facts of a case and the result appears unjust, a modification of or exception to the legal doctrine should be considered.³ A review of the facts of contract law’s most famous “expectation damages” case—*Hawkins v. McGee*⁴—shows that the court’s application of established doctrine resulted in an unjust decision.

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² JOHN JAY OSBORN, JR., *THE PAPER CHASE* 7 (Whitson Publ’g Co., spec. anniversary ed. 2003) (1971) [hereinafter *THE PAPER CHASE BOOK*] (internal quotation marks omitted). The question is asked by fictional Harvard law professor Charles W. Kingsfield to student James Hart on the first day of contracts class. *Id.* The case under discussion was *Hawkins v. McGee*. *Id.* (discussing *Hawkins v. McGee*, 146 A. 641 (N.H. 1929)).

³ See Melvin A. Eisenberg, *The Theory of Contracts*, in *THE THEORY OF CONTRACT LAW: NEW ESSAYS* 206, 211 (Peter Benson ed., 2001) (“A doctrine, even if normatively justified, may serve as a prima facie premise in legal reasoning, but cannot serve as a conclusive premise of legal reasoning, because all doctrines are always subject to as-yet-unarticulated exceptions based on social propositions. Such an exception may be made because the social propositions that support the doctrine do not extend to a new fact-pattern that is within the doctrine’s stated scope. Alternatively, such an exception may be made because a new fact-pattern that is within the doctrine’s stated scope brings into play other social propositions that require the formulation of a special rule for the fact-pattern.”).

⁴ *Hawkins*, 146 A. 641.

Accordingly, a modification of or exception to the general rule of contract damages should be considered, and this Article maintains that such a modification or exception should in fact be established.

In *Hawkins*, Dr. Edward McGee allegedly promised George Hawkins that he would fix his burned hand and given him a one hundred percent perfect or good hand,⁵ but the operation left him with a hairy hand.⁶ The New Hampshire Supreme Court, in an opinion by Justice Oliver Winslow Branch, held that any promise by McGee to Hawkins had to be interpreted objectively and not based on what McGee might have intended.⁷ The court further held that even when the breach of a contract is based on the promised outcome of a medical operation, the general rule of contract damages—protecting the so-called expectation interest—applies, just like any other breach of contract case.⁸ The effect of these two holdings was that Hawkins was entitled to damages that would put him in the position he would have been in had McGee kept his alleged promise, with that promise being interpreted objectively.

Justice Branch's opinion (applying the expectation damages rule and the objective theory of contracts) was hardly surprising. It was written in 1929 during the era of so-called classical contract law (which believed certain legal doctrines were "axiomatic," including that contracts should be "interpreted objectively" and that the remedy for any breach of contract should be "expectation damages"),⁹ by a judge trained at Harvard

⁵ *Id.* at 643.

⁶ *McGee v. U.S. Fid. & Guar. Co.*, 53 F.2d 953, 954 (1st Cir. 1931).

⁷ *See Hawkins*, 146 A. at 644 ("If the defendant said that he would guarantee a perfect result and the plaintiff relied upon that promise, any mental reservations which he may have had are immaterial. The standard by which his conduct is to be judged is not internal but external." (citations omitted)).

⁸ *See id.* ("The rule thus applied is well settled in this state. 'As a general rule, the measure of the vendee's damages is the difference between the value of the goods as they would have been if the warranty as to quality had been true, and the actual value at the time of the sale, including gains prevented and losses sustained, and such other damages as could be reasonably anticipated by the parties as likely to be caused by the vendor's failure to keep his agreement, and could not by reasonable care on the part of the vendee have been avoided.' We, therefore, conclude that the true measure of the plaintiff's damage in the present case is the difference between the value to him of a perfect hand or a good hand, such as the jury found the defendant promised him, and the value of his hand in its present condition, including any incidental consequences fairly within the contemplation of the parties when they made their contract.") (citations omitted) (quoting *Union Bank v. Blanchard*, 18 A. 90, 91 (N.H. 1889)). The trial judge had directed the jury to award tort-like damages based on the damage to the hand and Hawkins's pain and suffering. *Id.* at 643; *see also* Christopher W. Frost, *Teaching Important Contracts Concepts: Reconsidering the Reliance Interest*, 44 ST. LOUIS U. L.J. 1361, 1363 (2000) ("The trial court's charge to the jury called for a tort-like measure of recovery, permitting the jury to award damages for Hawkins' pain and suffering and for the damage to the hand." (citation omitted)). The trial court's measure of damages is similar to protecting the promisee's so-called reliance interest, discussed *infra* Part I.A.

⁹ Eisenberg, *supra* note 3, at 208.

Law School¹⁰ (where the leading classical contract law scholar—Samuel Williston—taught).¹¹

But as the notion that legal doctrines are axiomatic has been effectively discredited,¹² the question arises whether the law applied in *Hawkins* was correct, at least with respect to its particular facts. My review of the trial transcript in *Hawkins* has uncovered that the facts were likely different from those commonly portrayed, and the case likely involved a misunderstanding between McGee and Hawkins with respect to what McGee was promising. This raises the question whether the general rule of basing expectation damages on an objective interpretation of the breached promise should be modified in such a situation.

This Article takes the position that such an exception should be created. Part I of this Article discusses expectation damages, which is the standard remedy for a breach of contract; and the “objective theory of contracts,” under which contract terms are interpreted objectively and not based on the parties’ subjective intentions. Part II demonstrates that in a situation in which the parties attach materially different meanings to the terms of a contract, the appropriate measure of damages for breach should be either an amount designed to put the injured party in the position he or she would have been in had the promise been kept, based on the *breaching party’s* intended meaning of the promise, or an amount to protect the injured party’s reliance interest (whichever is greater). Part III demonstrates that contrary to popular perception, *Hawkins* likely involved a misunderstanding between Hawkins and McGee regarding what had been promised, and the appropriate remedy, therefore, should have been based on what McGee thought he had promised (or Hawkins’s reliance interest).

I. TWO AXIOMS OF CLASSICAL CONTRACT LAW—EXPECTATION DAMAGES AND THE OBJECTIVE THEORY OF CONTRACT INTERPRETATION

A. *Expectation Damages*

When a party breaches an enforceable contract, the injured party has a right to damages.¹³ There are three interests of the injured party that contract law can seek to protect by such an award: (1) the injured party’s

¹⁰ For a brief biographical sketch of Oliver Winslow Branch, see Russell Bastedo, *Publications—Descriptions of Portraits of Justices and Others at the New Hampshire Supreme Court Building Concord, New Hampshire*, NH.GOV (1998) (citation omitted), <http://www.nh.gov/nhdhr/publications/justices/branch.html>.

¹¹ See 3 E. ALLAN FARNSWORTH, *FARNSWORTH ON CONTRACTS* 390 app. (3d ed. 2004) (providing brief biographical sketch of Williston and noting that he taught at Harvard Law School from 1890 to 1938).

¹² See Melvin A. Eisenberg, *The Revocation of Offers*, 2004 WIS. L. REV. 271, 281.

¹³ RESTATEMENT (SECOND) OF CONTRACTS § 346(1) (1981).

“expectation interest,” which is his or her interest in being put in the position he or she would have been in had the promise been kept;¹⁴ (2) the injured party’s “reliance interest,” which is his or her interest in being put in the position he or she would have been in had the promise not been made;¹⁵ and (3) the injured party’s “restitution interest,” which is his or her interest in having restored any benefit conferred on the other party as a result of the promise.¹⁶ The traditional remedy for the breach of a “bargained-for exchange contract”¹⁷ is an award of damages¹⁸ designed

14 *Id.* § 344(a); *see, e.g.*, *Hawkins v. McGee*, 146 A. 641, 644 (N.H. 1929) (holding that when the defendant doctor breached his promise to provide the plaintiff patient with a perfect hand, the proper measure of damages was an amount representing the difference in value between the hand plaintiff was left with after the operation and the promised hand).

15 RESTATEMENT (SECOND) OF CONTRACTS § 344(b) (1981); *see, e.g.*, *Chi. Coliseum Club v. Dempsey*, 265 Ill. App. 542, 552–54 (Ill. App. Ct. 1932) (holding that plaintiff was entitled to recover for out-of-pocket expenses incurred prior to the defendant’s breach and in reliance on the contract).

16 RESTATEMENT (SECOND) OF CONTRACTS § 344(c) (1981); *see, e.g.*, *United States ex rel. Coastal Steel Erectors, Inc. v. Algernon Blair, Inc.*, 479 F.2d 638, 641 (4th Cir. 1973) (holding that plaintiff was entitled to recover the reasonable value of the work it provided to the defendant under the contract). This division of interests (expectation, reliance, and restitution) was suggested by George Gardner, *see* George K. Gardner, *An Inquiry into the Principles of the Law of Contracts*, 46 HARV. L. REV. 1, 15–19 (1932), and made famous by Lon Fuller, *see* L. L. Fuller & William R. Perdue, Jr., *The Reliance Interest in Contract Damages* (pt. 1), 46 YALE L.J. 52, 53–54 (1936). Although Fuller’s article was co-authored by William Perdue, Jr., Fuller’s research assistant, I assume that Fuller was the author and originator of its theoretical portions. *See* Peter Benson, *Introduction to THE THEORY OF CONTRACT LAW: NEW ESSAYS*, *supra* note 3, at 1 n.1 (noting that Fuller is considered “to be the writer of the article and certainly of its theoretical parts”). Professor Richard Craswell has argued that Fuller’s distinction between the three interests “is not very helpful in understanding contract remedies,” but he acknowledges that Fuller’s “article still dominates so much of the modern analysis of remedies for breach,” and “most analyses of monetary remedies still begin with Fuller and Perdue’s distinction between the expectation, reliance, and restitution interests.” Richard Craswell, *Against Fuller and Perdue*, 67 U. CHI. L. REV. 99, 99–100 (2000) (citation omitted).

17 A “contract” is defined by the American Law Institute (ALI) as “a promise or a set of promises for the breach of which the law gives a remedy, or the performance of which the law in some way recognizes as a duty.” RESTATEMENT (SECOND) OF CONTRACTS § 1 (1981). Accordingly, at least based on the ALI’s definition, a “contract” is any enforceable promise, not just a promise that is enforceable because it is supported by consideration. Thus, a promise that is enforceable because of the promisee’s reliance (traditionally called “promissory estoppel”) or because it was given in recognition of a benefit previously received would be a “contract” under the ALI definition. *See id.* § 90 (providing that a promise is binding if “the promisor should reasonably expect [it] to induce action or forbearance on the part of the promisee or a third person and which does induce such action or forbearance . . . if injustice can be avoided only by enforcement of the promise”); *id.* § 86 (providing that a promise is binding to the “extent necessary to prevent injustice” if “made in recognition of a benefit previously received by the promisor from the promisee.”). Accordingly, I have used the term “bargained-for exchange contract” to differentiate a contract that is binding because it is supported by consideration from contracts that are binding for other reasons.

18 Specific performance will only be ordered if an award of damages would not be “adequate to protect the expectation interest of the injured party.” *Id.* § 359. *But see* Alan Schwartz,

to protect the injured party's expectation interest.¹⁹ In other words, the award is designed to give the injured party the "benefit of the bargain."²⁰ Recovery for the failure to keep an enforceable promise "was from the beginning measured by the value of the promised performance"²¹ and the connection between contract law and expectation damages was "taken as canonical for some hundred years."²²

The Case for Specific Performance, 89 YALE L.J. 271 (1979) (arguing that specific performance should be routinely available as a remedy for breach of contract).

19 See RESTATEMENT OF CONTRACTS § 329 (1932) ("Where a right of action for breach exists, compensatory damages will be given for the net amount of the losses caused and gains prevented by the defendant's breach, in excess of savings made possible . . ."); *id.* § 329 cmt. a ("In awarding compensatory damages, the effort is made to put the injured party in as good a position as that in which he would have been put by full performance of the contract . . ."); RESTATEMENT (SECOND) OF CONTRACTS § 347 (1981) ("[T]he injured party has a right to damages based on his expectation interest . . ."); *id.* § 347 cmt. a ("Contract damages are ordinarily based on the injured party's expectation interest and are intended to give him the benefit of his bargain by awarding him a sum of money that will, to the extent possible, put him in as good a position as he would have been in had the contract been performed."); *id.* § 344 cmt. a ("Ordinarily, when a court concludes that there has been a breach of contract, it enforces the broken promise by protecting the expectation that the injured party had when he made the contract. It does this by attempting to put him in as good a position as he would have been in had the contract been performed, that is, had there been no breach. The interest protected in this way is called the 'expectation interest.'"); RICHARD CRASWELL & ALAN SCHWARTZ, FOUNDATIONS OF CONTRACT LAW 41 (1994) ("Anglo-American law ordinarily awards expectation damages as the remedy for breach of contract."). *But see* Robert A. Hillman, *Contract Lore*, 27 J. CORP. L. 505, 512 (2002) ("[E]xpectancy damages virtually never make an injured party whole, so it would be difficult to maintain that the general rule is that they do except when an exception applies.").

20 RESTATEMENT (SECOND) OF CONTRACTS § 344 cmt. a (1981) (internal quotation marks omitted) (noting that awarding expectation damages "is sometimes said to give the injured party the 'benefit of the bargain'").

21 Fuller & Perdue, *supra* note 16, at 60.

22 CHARLES FRIED, CONTRACT AS PROMISE: A THEORY OF CONTRACTUAL OBLIGATIONS 18 (1981); *see also* Fuller & Perdue, *supra* note 16, at 67 ("[T]he measure of recovery was, as we know, from the very beginning the promised price, the expectancy."). A.W.B. Simpson has asserted that even under English common law in the fifteenth and sixteenth centuries, "the principle of compensation as opposed to restitution or recuperation was always grasped," and "the courts consistently treated the breach of promise as the deceitful wrong, with the result that the proper measure of damage was a substitute for performance," though juries were given the discretion to award less "if they thought fit." A.W.B. SIMPSON, A HISTORY OF THE COMMON LAW OF CONTRACT: THE RISE OF THE ACTION OF ASSUMPSIT 583, 587 (1975) (citation omitted). *But see* P.S. ATIYAH, THE RISE AND FALL OF FREEDOM OF CONTRACT 142 (1979) ("[A] respect in which the eighteenth-century model of contract differed from that of the present day concerned the nature of the remedy which a plaintiff was given for a breach of contract. . . . The notion that a promisee was entitled to have his *expectations* protected, purely and simply as such, as a result of a promise and nothing else, was not generally accepted in eighteenth-century law."); *see also id.* at 148–49 ("In 1770 the jury still retained a considerable measure of discretion over the application of legal rules, and judges were not unwilling to connive at, or even encourage, the doing of substantial justice by juries in many civil (as well as criminal) cases. In contract matters, this meant, among other things, that the damages were almost en-

The significance of an award of damages designed to protect the injured party's expectation interest is that he or she will generally receive a larger recovery than if provided with an award protecting the reliance or restitution interests.²³ Also, protecting the expectation interest means that a breach of contract action can be maintained in the absence of reliance by the injured party or the unjust enrichment of the other party.²⁴ Thus, the expectation interest rule is arguably contract law's "most basic" principle.²⁵

Although the reliance interest and the restitution interest are sometimes protected when a bargained-for exchange contract is breached, the reliance interest is usually used only when the injured party cannot prove his or her lost profits with the required certainty.²⁶ Furthermore, it has been argued that the use of the reliance interest when lost profits cannot be proven with reasonable certainty is in fact the protection of the expectation interest with an assumption that the injured party would have at least broken even had the contract been performed.²⁷ And efforts by an injured party

tirely at the jury's discretion.").

23 See RESTATEMENT (SECOND) OF CONTRACTS § 344 cmt. a (1981).

Although [the reliance interest] may be equal to the expectation interest, it is ordinarily smaller because it does not include the injured party's lost profit.

...

... Although [the restitution interest] may be equal to the expectation or reliance interest, it is ordinarily smaller because it includes neither the injured party's lost profit nor that part of his expenditures in reliance that resulted in no benefit to the other party.

Id. Craswell, *supra* note 16, at 102 ("[T]he expectation measure restores to the nonbreacher not only everything he gave up in reliance on the contract, but also any net profits he would have made if the contract had been performed. Thus, the expectation measure should usually exceed the reliance measure (and also the restitution measure), at least in the typical case in which the nonbreacher's profits would have been positive." (citation omitted)).

24 See W. David Slawson, *Why Expectation Damages for Breach of Contract Must Be the Norm: A Refutation of the Fuller and Perdue "Three Interests" Thesis*, 81 NEB. L. REV. 839, 846 (2003) (arguing in favor of expectation damages because it provides a remedy for all breaches, including breaches when there has been no reliance).

25 Benson, *supra* note 16, at 2; *see also id.* at 3 ("[I]t is precisely the availability of the expectation remedy for breach of a wholly executory contract that is the distinctive hallmark of contract law.").

26 See RESTATEMENT (SECOND) OF CONTRACTS § 349 cmt. a (1981) (noting that the reliance interest can be used as the measure of damages "if [the plaintiff] cannot prove his profit with reasonable certainty"); Slawson, *supra* note 24, at 856 ("Injured parties who cannot prove their lost profits often use the reliance measure to recover their costs." (citation omitted)).

27 David W. Barnes, *The Net Expectation Interest in Contract Damages*, 48 EMORY L.J. 1137, 1153 (1999). This theory encounters difficulties with cases that refuse to treat pre-contract expenditures as part of the reliance interest. *See* Chi. Coliseum Club v. Dempsey, 265 Ill. App. 542 (Ill. App. Ct. 1932) (holding that expenses incurred prior to entering into the contract

to recover based on its reliance interest in the case of a losing contract are subject to deduction for “any loss that the party in breach can prove with reasonable certainty the injured party would have suffered had the contract been performed.”²⁸ If the defendant carries this burden, the injured party’s recovery would be the same as a recovery that protects the expectation interest.²⁹

The restitution interest is usually used only when the contract (from the injured party’s standpoint) turns out to be a losing contract.³⁰ Furthermore, when the restitution interest is used as the measure of damages in such a situation, the injured party does not seek to enforce the contract, but instead sues in quasi-contract.³¹ Thus, the entire purpose of the remedy when the injured party seeks to enforce a bargained-for exchange contract is to protect the party’s expectation interest.³²

Until the 1930s, an award of damages based on the expectation interest (commonly referred to as “expectation damages” or “expectancy damages”) was simply accepted as the appropriate remedy for the breach of a contract, and the rationale for protecting the expectation interest went unquestioned.³³ One of the axioms of classical contract law, which dominated from the mid-nineteenth century to the early twentieth century,³⁴ was “that the measure of damages for breach of contract is expectation damages,” and “no room [was] allowed for justifying doctrinal propositions on the basis of moral and policy propositions.”³⁵

could not be recovered as reliance damages); FARNSWORTH, *supra* note 11, § 12.16 (stating that an award of damages designed to protect the non-breaching party’s reliance interest “will [not] allow a party to recover costs incurred *before* the contract was made” (citation omitted)). *But see* *Sec. Stove & Mfg. Co. v. Am. Ry. Express Co.*, 51 S.W.2d 572, 577 (Mo. Ct. App. 1932) (permitting the recovery of pre-contract expenditures); *Anglia Television Ltd. v. Reed*, [1972] 1 Q.B. 60 (Ct. App.) at 64 (Eng.) (also permitting the recovery of pre-contract expenditures).

28 RESTATEMENT (SECOND) OF CONTRACTS § 349 (1981); *see* Gregory S. Crespi, *Recovering Pre-Contractual Expenditures as an Element of Reliance Damages*, 49 SMU L. REV. 43, Parts III(C), V(B) (1995).

29 RESTATEMENT (SECOND) OF CONTRACTS § 349 cmt. a (1981).

30 *See* Slawson, *supra* note 24, at 853 (“[T]here is one situation in which the restitution measure provides a larger recovery than the expectation (or reliance) measure would. This is the case in which a material breach by one party entitles the other to cease performing a contract on which he is losing money — the ‘losing contract’ case.”).

31 *See* RESTATEMENT (SECOND) OF CONTRACTS ch. 16, topic 4, intro. note (1981) (noting that when the non-breaching party seeks a recovery based on his or her restitution interest, the party “has chosen it as an alternative to the enforcement of the contract between them” (citation omitted)).

32 *See* RESTATEMENT (SECOND) OF CONTRACTS § 344 (1981); *see also id.* cmt. a.

33 Benson, *supra* note 16, at 2.

34 Melvin Aron Eisenberg, *The Emergence of Dynamic Contract Law*, 2 THEORETICAL INQUIRIES L. 1, 7 (2001).

35 Eisenberg, *supra* note 3, at 208; *see also* Craswell, *supra* note 16, at 132 (“[E]xpectation damages were the standard remedy of classical contract doctrine . . .”). The un-theoretical

Prior to this time, contracts scholars endeavored “to bring order and internal consistency to the law of contract,” and “[t]hey simply presuppose[d] the premise that the expectation remedy is a form of compensation without exploring its normative basis and they stipulate[d] the existence of a deep connection between the expectation principle and the basic doctrines of contract formation without explaining its necessity.”³⁶ Samuel Williston, in his classic 1920 contracts treatise, simply stated that “[i]n fixing the amount of [contract] damages, the general purpose of the law is, and should be, to give compensation: that is, to put the plaintiff in as good a position as he would have been in had the defendant kept his contract.”³⁷ The *Restatement of Contracts*, published in 1932, adopted expectation damages as the standard remedy (without using the term “expectation damages”), but provided no support for the rule.³⁸ The apparent lack of interest in the expectation damages rule (and its theoretical underpinnings) is demonstrated by the failure to discuss the issue of expectation damages in Christopher Columbus Langdell’s *A Selection of Cases on the Law of Contracts*

nature of the work of classical contracts scholars should not, however, detract from their monumental effort to bring order to the law of contracts. *See* Benson, *supra* note 16, at 2 (“Williston’s *A Treatise on the Law of Contracts* represents the most systematically and carefully worked-out presentation of the legal point of view that culminates several decades of intensive and highly sophisticated efforts by such masters of the common law as Pollock, Holmes, Langdell, Ames, Holdsworth, Salmond, and Leake, to bring order and internal consistency to the law of contract. These writers, and Williston in particular, were remarkably successful in achieving this aim.” (citation omitted)); *see also id.* at 2 n.4 (“[T]heir work still represents to date the most sophisticated and successful effort to present the legal point of view in one integrated compass.”). The culmination of their efforts was the *Restatement of Contracts*. RESTATEMENT (SECOND) OF CONTRACTS, at vii (1981) (noting that “the work was a legendary success, exercising enormous influence as an authoritative exposition of the subject”; *see also* GRANT GILMORE, *THE DEATH OF CONTRACT* 59 (1974) (“[T]he *Restatement of Contracts* is not only the best of the Restatements, it is one of the great legal accomplishments of all time.”)).

³⁶ Benson, *supra* note 16, at 2.

³⁷ 3 SAMUEL WILLISTON, *THE LAW OF CONTRACTS* § 1338 (1920). The current version of *Williston on Contracts* is not any more illuminating on the theory underlying the protection of the expectation interest. *See* 24 SAMUEL WILLISTON & RICHARD A. LORD, *A TREATISE ON THE LAW OF CONTRACTS* § 64:2, at 23–24 (4th ed. 2002) (“The theory underlying [the expectation damages rule] is as simple as it is significant: A promisee enters into a particular contract because he or she wants a particular outcome and believes that the best possible outcome, under the circumstances, will be achieved by contracting with this particular promisor. When the promisor fails to perform as promised, the promisee becomes entitled to damages designed to compensate him or her for the harm caused by the breach. That harm, in turn, is the loss suffered by the promisee when the promisor failed to perform his or her promise—in other words, the value to the promisee of the promise that was broken.” (citation omitted)).

³⁸ *See* RESTATEMENT OF CONTRACTS § 329 (1932) (“Where a right of action for breach exists, compensatory damages will be given for the net amount of the losses caused and gains prevented by the defendant’s breach, in excess of savings made possible”); *id.* cmt. a (“In awarding compensatory damages, the effort is made to put the injured party in as good a position as that in which he would have been put by full performance of the contract”).

(1871),³⁹ his *A Summary of the Law of Contracts* (1880),⁴⁰ or Oliver Wendell Holmes, Jr.'s *The Common Law* (1881).⁴¹

But in 1936, Lon Fuller, in his famous *Yale Law Journal* article titled *The Reliance Interest in Contract Damages*, questioned why the protection of the expectation interest should be the standard remedy for the breach of a contract.⁴² Because the remedy provided for the breach of a legal duty often sheds light on the purpose for the law creating the duty, Fuller's question raised the even more fundamental issue of why the law enforces contracts⁴³ (though Fuller acknowledged that there might be a "divergence of measure [of damages] and motive" for enforcing a particular promise, particularly if the adopted measure was "a simpler and more easily administered measure").⁴⁴

Fuller argued that damages based on protecting the expectation interest is a "queer kind of 'compensation'" because it gives the injured party something he or she never had,⁴⁵ and it therefore must be a form of distributive justice with a lesser claim to protection than the reliance and restitution interests.⁴⁶ Fuller rejected the so-called will theory of contract law (which was based on the notion that contracts were enforceable

39 C. C. LANGDELL, *A SELECTION OF CASES ON THE LAW OF CONTRACTS* (Legal Classics Library 1983) (1871).

40 C. C. LANGDELL, *A SUMMARY OF THE LAW OF CONTRACTS* (TGC Publishers 2004) (1880) [hereinafter LANGDELL, SUMMARY].

41 OLIVER WENDELL HOLMES, JR., *THE COMMON LAW* (Mark DeWolfe Howe ed., The Belknap Press of Harvard Univ. Press 1963) (1881).

42 Fuller & Perdue, *supra* note 16, at 53. Fuller's article has been described as a "towering classic." Craswell, *supra* note 16, at 99 ("In the history of contract law, and of American legal thought in general, this article stands as a towering classic."); *see also* Frost, *supra* note 8, at 1361 ("Perhaps no single article in any legal discipline has had the pervasive impact on the way the law is taught.").

43 *See* Fuller & Perdue, *supra* note 16, at 53 ("[I]t is impossible to separate the law of contract damages from the larger body of motives and policies which constitutes the general law of contracts.").

44 *Id.* at 68 (citation omitted).

45 *Id.* at 53.

46 *Id.* at 56. "Distributive justice" has been defined as

the principles that guide the distribution of goods or burdens among a group of recipients. This is in contrast to claims of justice arising from the correction of dealings between two parties ('corrective justice'), just punishment of wrong actions ('retribution'), and the proper following of rules laid down earlier ('formal' or 'legal' justice).

BRIAN H. BIX, *A DICTIONARY OF LEGAL THEORY* 55 (2004); *see also* ARISTOTLE, *THE NICOMACHEAN ETHICS* 118 (J. A. K. Thomson trans., Penguin Books 2004) (1953) ("One kind of particular justice . . . is that which is shown in the distribution of honour or money or such other assets as are divisible among the members of the community (for in these cases it is possible for one person to have either an equal or an unequal share with another); and another kind which rectifies the conditions of a transaction.").

because the parties had voluntarily assumed the responsibility to perform as promised)⁴⁷ as providing the basis for the expectation damages rule:

[The “will theory” of contract law] cannot be regarded as dictating in all cases a recovery of the expectancy. If a contract represents a kind of private law, it is a law which usually says nothing at all about what shall be done when it is violated. A contract is in this respect like an imperfect statute which provides no penalties, and which leaves it to the courts to find a way to effectuate its purposes. There would, therefore, be no necessary contradiction between the will theory and a rule which limited damages to the reliance interest.⁴⁸

Rather, Fuller speculated that the expectation interest was protected for several other reasons. First, to compensate for reliance losses, which Fuller maintained were often “very difficult to prove,” if one considered foregone opportunities for gain (i.e., foregone opportunities to enter into other contracts) a reliance loss.⁴⁹ Fuller maintained that most contracts result in the parties foregoing the opportunity to enter into similarly beneficial contracts, and thus, when a party breaches, the injured party’s reliance loss usually equals the loss in value of the promised performance (because the injured party forewent the opportunity to secure similar performance from a third party).⁵⁰ Fuller concluded that:

This foregoing of other opportunities is involved to some extent in entering most contracts, and the impossibility of subjecting this type of reliance to any kind of measurement may justify a categorical rule granting the value of

47 See James W. Fox Jr., *The Law of Many Faces: Antebellum Contract Law Background of Reconstruction—Era Freedom of Contract*, 49 AM. J. LEGAL HIST. 61, 62 (2007) (“According to this classical, will theory view, ‘contract law’ describes the legal rules by which courts would enforce private agreements as stated by the parties; such agreements were seen as expressing the will of each party, and by enforcing the agreements courts would foster individual freedom and autonomy.”).

48 Fuller & Perdue, *supra* note 16, at 58.

49 *Id.* at 60; see also Craswell, *supra* note 16, at 103 (“In [Fuller and Perdue’s] view, the strongest argument for awarding expectation damages justifies that remedy as an indirect way of protecting the reliance interest, when the nonbreacher’s reliance losses would be difficult to prove directly.” (citation omitted)); Hillman, *supra* note 19, at 508 (“[C]ontract law’s actual remedial goal may be to protect an injured party from reliance losses, which are often more difficult to prove than expectancy damages.”). Out-of-pocket expenditures, as opposed to losses based on foregone opportunities, are likely to be easier to prove than expectation damages. See RESTATEMENT (SECOND) OF CONTRACTS § 352 cmt. a (1981) (“[T]here is usually little difficulty in proving the amount that the injured party has actually spent in reliance on the contract, even if it is impossible to prove the amount of profit that he would have made.”). Courts generally have not permitted a recovery for lost opportunities as part of the reliance interest. FARNSWORTH, *supra* note 11, § 12.1.

50 Fuller & Perdue, *supra* note 16, at 60; see also RICHARD A. POSNER, ECONOMIC ANALYSIS OF LAW 122 (6th ed. 2003) (“If the victim ‘relied’ by forgoing an equally profitable contract, the two measures merge.”).

the expectancy as the most effective way of compensating for such losses.⁵¹

Fuller noted that this explanation for protecting the expectation interest “would be most forceful in a hypothetical society in which all values were available on the market and where all markets were ‘perfect’ in the economic sense.”⁵² If such conditions existed, the expectation interest and the reliance interest would be identical because “[t]he plaintiff’s loss in foregoing to enter another contract would be identical with the expectation value of the contract he did make.”⁵³ Fuller recognized, however, that this argument “loses force to the extent that actual conditions depart from [an economy where all values are available on the market].”⁵⁴

Second, Fuller argued that the purpose of awarding expectation damages instead of reliance damages might be to deter breaches of contract, which is beneficial because breaches of contract cause reliance losses.⁵⁵ Fuller asserted that “[w]hatever tends to discourage breach of contract tends to prevent the losses occasioned through reliance,” and an award of expectation damages, being “a more easily administered measure of recovery than the reliance interest . . . will in practice offer a more effective sanction against contract breach.”⁵⁶

Third, Fuller contended that in contrast to the negative point of view of curing and preventing reliance losses, a rationale supporting the protection of the expectation interest was promoting value-enhancing exchanges and stimulating economic activity.⁵⁷ Protecting the expectation interest accomplishes this because contractual arrangements are more productive

51 Fuller & Perdue, *supra* note 16, at 60; *see also* POSNER, *supra* note 50, at 122 (“[R]eliance costs incurred during the executory period are difficult to compute. Having signed a contract, a party will immediately begin to make plans both for performing the contract and for making whatever adjustments in the rest of his business are necessary to accommodate the new obligation. The costs of this planning, and the costs resulting from the change of plans when he finds out that the contract will not be performed, will be hard to estimate.”). If this is true, it would perhaps be an exception to the general rule that “[contract] [d]amages, [including reliance damages], are not recoverable for loss beyond an amount that the evidence permits to be established with reasonable certainty.” RESTATEMENT (SECOND) OF CONTRACTS § 352 (1981); *see also id.* cmt. a (“[T]he requirement applies to damages based on the reliance as well as the expectation interest . . .”). It could, however, be argued that the expectation interest is sufficient evidence of the foregone opportunities such that the certainty requirement would not preclude recovery. Fuller’s idea that courts use one of the three interests to cure losses based on another interest has seemingly been applied when courts award damages based on the defendant’s gain from breach as a proxy for the expectation interest. *See, e.g.,* Laurin v. DeCarolis Constr. Co., 363 N.E.2d 675, 693 (Mass. 1977) (Braucher, J.) (awarding amount equal to defendant’s profit from breach).

52 Fuller & Perdue, *supra* note 16, at 62.

53 *Id.*

54 *Id.*

55 *Id.* at 61.

56 *Id.* (citation omitted).

57 *Id.*

when the parties are able to rely on them and take resulting action.⁵⁸ A party who knows that it will be able to recover damages for breach based on the larger expectation recovery, as opposed to the usually smaller reliance recovery, will be more likely to rely on the contract.⁵⁹ As Fuller stated, “[t]o encourage reliance we must therefore dispense with its proof.”⁶⁰ Therefore, Fuller believed that protecting the expectation interest might have the effect of “promoting and facilitating reliance on business agreements.”⁶¹ Thus, according to Fuller, expectation damages likely were awarded not to protect the expectation interest, but to protect the reliance interest.⁶²

Theorizing about the proper measure of damages arose again in the late 1970s and early 1980s.⁶³ During this time, Patrick Atiyah argued that protecting the expectation interest could not rank equally with protecting the restitution or reliance interests,⁶⁴ and Robert Hillman noted that protecting the expectation interest was somewhat inconsistent with the objective theory of contract formation and interpretation because the latter is premised on protecting and encouraging reliance.⁶⁵ But most scholars defended the award of expectation damages. Following Fuller’s lead, “[m]ost analysts explain[ed] the expectancy approach as the best method of creating incentives for parties to contract and to rely on their contracts.”⁶⁶

The two leading approaches to contract theory—one emphasizing the “moral value of autonomy” (a deontological approach derived from Kantianism and liberalism)⁶⁷ and the other emphasizing economic analysis (a consequentialist approach that is in some sense a variation of utilitarianism)⁶⁸—also defended the expectation interest as the proper

58 *Id.*

59 *Id.*

60 *Id.* at 62.

61 *Id.* at 61. It has been argued, however, that expectation damages can result in inefficient over-reliance by the promisee. A. MITCHELL POLINSKY, *AN INTRODUCTION TO LAW AND ECONOMICS* 39 (3d ed. 2003).

62 See Slawson, *supra* note 24, at 841 (“[Fuller and Perdue] eventually concluded that although there were *no* good reasons for protecting the expectation *interest*, there was a good reason for using the expectation *measure of damages* as the norm . . .”) (emphasis added) (citations omitted).

63 Benson, *supra* note 16, at 4.

64 ATIYAH, *supra* note 22, at 4.

65 Hillman, *supra* note 19, at 511–12.

66 *Id.* at 506.

67 Eisenberg, *supra* note 3, at 223; see also Bix, *supra* note 46, at 51 (“Deontological theories of morality or ethics focus exclusively, or primarily, on the intrinsic moral status of actions, as contrasted with theories (such as utilitarianism) that focus on consequences. Deontological theories often derive from, or are otherwise connected to, the work of Immanuel Kant (1724–1804).”). “[L]iberalism” is “the belief that it is the aim of politics to preserve individual rights and to maximize freedom of choice.” *THE CONCISE OXFORD DICTIONARY OF POLITICS* 306 (Iain McClean & Alistair McMillan eds., 3d ed. 2009). “Kantianism” is discussed *infra* note 68.

68 See Bix, *supra* note 46, at 42 (“Contemporary discussions about the philosophi-

measure of damages. Charles Fried was the principal defender of a contract theory based on a deontological approach, and he saw the foundations of contract law as the moral obligation to keep a promise and Kantian-based notions of individual autonomy.⁶⁹ Fried felt that protecting the expectation interest was consistent with those bases, stating:

If I make a promise to you, I should do as I promise; and if I fail to keep my promise, it is fair that I should be made to hand over the equivalent of the promised performance. In contract doctrine this proposition appears as the expectation measure of damages for breach.⁷⁰

Law and economics scholars argued that the expectation interest discourages inefficient breaches.⁷¹ “Setting damages any lower than expectancy would create an incentive for the promisor to breach even where the surplus from breaching would be insufficient to make the injured promisee whole.”⁷²

Although expectation damages are the norm, and defended by the

cal foundations of contract law usually divide . . . according to whether the analysis should be approached from traditional moral philosophy or from economic analysis.”); *id.* at 214 (“Economic analysis—and its legal analogue, law and economics—can be seen to be grounded on a variation of utilitarianism . . .”). These two leading theories of contract law thus align roughly with two of the leading theories of moral philosophy—utilitarianism and Kantianism. “Utilitarianism is, very generally, the view that the rational choice in morality is always the choice that will maximize human happiness or well-being.” JEFFRIE G. MURPHY & JULES L. COLEMAN, *PHILOSOPHY OF LAW: AN INTRODUCTION TO JURISPRUDENCE* 71 (rev. ed. 1990). On the other hand, “Kantianism, again very generally, is the view that the rational choice in ethics is always the choice that respects the rights of autonomous persons freely to determine their own destinies, even if this respect is bought at the cost of a loss of happiness or well-being.” *Id.*

69 FRIED, *supra* note 22, at 6; *see also* Eisenberg, *supra* note 3, at 224 (“Fried’s book is the leading exemplar of an autonomy theory of contracts . . .”). The other leading autonomy theory was proposed by Randy Barnett. *See generally* Randy E. Barnett, *A Consent Theory of Contract*, 86 *COLUM. L. REV.* 269 (1986).

70 FRIED, *supra* note 22, at 17; *see also* Eisenberg, *supra* note 3, at 225 (“One of Fried’s central claims is that the autonomy theory of contract explains the remedy of expectation damages, which Fried sees as a crucial element that distinguishes contract law from other branches of law, such as *torts*. Under autonomy theory, he says, promises should be enforced ‘as such’—that is, simply because the promise was made, not because enforcement of promises will enhance social welfare.”). Fried’s book has been referred to as “[a]rguably the most important, and certainly the most discussed single work of this first wave of contract theorizing.” Benson, *supra* note 16, at 5 (citation omitted). The weakness in Professor Fried’s argument is, of course, the objective theory of contract formation and interpretation. Professor Hillman has stated that “professors have written books and articles revealing that the ‘key’ to contract law is promise or consent or something else that requires lots of explaining away of the objective theory of contract formation and interpretation.” Hillman, *supra* note 19, at 513 n.59.

71 POSNER, *supra* note 50, at 121.

72 Hillman, *supra* note 19, at 507 (citation omitted); *see also* POLINSKY, *supra* note 61, at 33–36 (discussing efficient–breach theory). Professor Polinsky has argued, however, that expectation damages can result in inefficient over–reliance by the promisee. *Id.* at 39.

leading theories of contract law, it is important to recognize that such damages “virtually never put the injured party in as good a position as if the contract were performed.”⁷³ This is because the law generally precludes the recovery of certain losses, such as those that the non-breaching party “could have avoided without undue risk, burden or humiliation;”⁷⁴ damages that the breaching party “did not have reason to foresee as a probable result of the breach when the contract was made;”⁷⁵ damages that cannot be proven with “reasonable certainty;”⁷⁶ “emotional disturbance” damages;⁷⁷ and attorney’s fees incurred enforcing the contract.⁷⁸ In fact, the American Law Institute (ALI) takes the position that a court may limit damages “if it concludes that in the circumstances justice so requires in order to avoid disproportionate compensation.”⁷⁹ Also, even though black letter law states that expectation damages are to be determined based on the injured party’s subjective valuation of the lost performance,⁸⁰ “courts typically compute damages objectively, thereby ignoring a party’s special circumstances”⁸¹

It is also important to recognize that although an award of expectation damages is the standard remedy for the breach of a bargained-for exchange contract, the remedy for the breach of a promise that is enforceable solely because of the promisee’s reliance “may be limited as justice requires.”⁸² Thus, “relief may sometimes be limited to restitution or to damages or specific relief measured by the extent of the promisee’s reliance rather than by the terms of the promise.”⁸³ Also, a promise that is enforceable solely because it was made in recognition of a benefit previously received by the promisor is not binding “to the extent that its value is disproportionate to the benefit.”⁸⁴

73 Hillman, *supra* note 19, at 506.

74 RESTATEMENT (SECOND) OF CONTRACTS § 350(1) (1981).

75 *Id.* § 351(1).

76 *Id.* § 352.

77 *Id.* § 353.

78 *See* Hillman, *supra* note 19, at 507–08.

79 RESTATEMENT (SECOND) OF CONTRACTS § 351(3) (1981).

80 *See id.* § 347 cmt. b (noting that expectation damages should be measured by the loss in value to the “injured party” and not “some hypothetical reasonable person”).

81 Hillman, *supra* note 19, at 508 (citation omitted). This could be caused by the limitations based on certainty and foreseeability.

82 RESTATEMENT (SECOND) OF CONTRACTS § 90(1) (1981).

83 *Id.* § 90(1) cmt. d. The ALI notes that “[i]f it is reliance that is the basis for the enforcement of a promise, a court may enforce the promise but limit the promisee to recovery of his reliance interest.” *Id.* § 344 cmt. c. It has been argued, however, that “even in the situations for which the contracts restatements have explicitly suggested a flexible approach to damages, the courts continue to use the expectation measure almost exclusively of the other two.” Slawson, *supra* note 24, at 842 (citation omitted).

84 RESTATEMENT (SECOND) OF CONTRACTS § 86(2)(b) (1981); *see also* Mary E. Becker,

The ALI's acceptance that the remedy for the breach of a binding promise should in some situations be aligned with the interest that renders the promise binding was an important one, and one that had previously led to a debate between Samuel Williston and Frederick Coudert (a New York attorney) during the drafting of the *Restatement*.⁸⁵ Williston maintained that if a promise is enforceable, expectation damages were appropriate regardless of the basis for enforcing the promise.⁸⁶ In Williston's view (which appears similar to Fried's view of the rationale for expectation damages), to say that a promise is enforceable is to say that the injured party is entitled to compensation equal to the lost performance.⁸⁷ Coudert, in contrast, believed the remedy should be aligned with the interest supporting enforcement.⁸⁸ The issue went unanswered in the *Restatement*, but the *Restatement (Second)* took the flexible approach discussed above.

Accordingly, whatever the purpose of protecting the expectation interest might be, that purpose is outweighed, in certain circumstances, by competing policies.⁸⁹ For example, attorney's fees are not awarded to the prevailing party because we do not want to discourage a party from seeking to vindicate his or her rights.⁹⁰ Damages must be proven with reasonable certainty out of a concern courts will award "baseless recoveries."⁹¹ Unforeseeable damages are not recoverable because of a concern that persons will be reluctant to enter into contracts if they could face excessive liability and also to encourage them to disclose special circumstances to the other party during the negotiation process.⁹² Damages can also be limited in certain situations when "justice requires"⁹³ or when the result would lead to "disproportionate" compensation.⁹⁴

Promissory Estoppel Damages, 16 HOFSTRA L. REV. 131, 163 (1987) (concluding that expectation damages are generally available in promissory estoppel cases); Daniel A. Farber & John H. Matheson, *Beyond Promissory Estoppel: Contract Law and the "Invisible Handshake"*, 52 U. CHI. L. REV. 903, 909–10 (1985) (same); Edward Yorio & Steve Thel, *The Promissory Basis of Section 90*, 101 YALE L.J. 111, 130–132 (1991) (same).

⁸⁵ *Proceedings at the Fourth Annual Meeting April 29 – May 1, 1926*, 4 A.L.I. PROC. app. at 98–100 (1926).

⁸⁶ *See id.* at 99.

⁸⁷ *See id.*

⁸⁸ *See id.*

⁸⁹ *See* Hillman, *supra* note 19, at 508.

⁹⁰ *Id.* (citation omitted).

⁹¹ *Id.* (citation omitted).

⁹² *Id.* (citations omitted); *see* Richard Danzig, *Hadley v. Baxendale: A Study in the Industrialization of the Law*, in *CONTRACTS STORIES* 1, 12 (Douglas G. Baird ed., 2007) (discussing the excessive liability entrepreneurs faced in the nineteenth century).

⁹³ RESTATEMENT (SECOND) OF CONTRACTS §§ 90(1), 351(3) (1981).

⁹⁴ *Id.* §§ 86(2)(b), 351(3).

B. *The Objective Theory of Contract Interpretation*

Another basic principle of contract law, and an axiom of classical contract law,⁹⁵ is that the meaning of an enforceable promise, i.e., the scope of the contractual obligation, is determined objectively.⁹⁶ Contract law “adopts an external or objective standard for interpreting conduct; it means the external expression of intention as distinguished from undisclosed intention.”⁹⁷

95 Eisenberg, *supra* note 3, at 208; *see also* LANGDELL, SUMMARY, *supra* note 40, at 244 (“As to the rule that the wills of the contracting parties must concur, it only means that they must concur in legal contemplation In truth, mental acts or acts of the will are not the materials out of which promises are made”); Clare Dalton, *An Essay in the Deconstruction of Contract Doctrine*, 94 YALE L.J. 997, 1012 (1985) (citation omitted) (“The idea that contractual obligation has its *source* in the individual will persisted into the latter part of the nineteenth century, consistent with the pervasive individualism of that time and the general incorporation into law of notions of liberal political theory. Late nineteenth-century theorists like Holmes and Williston, however, began to make clear that the proper *measure* of contractual obligation was the formal expression of the will, the will objectified. Obligation should attach, they reasoned, not according to the subjective intention of the parties, but according to a reasonable interpretation of the parties’ language and conduct.”). Holmes maintained that

[j]ust as the external standard has come to control criminal liability and responsibility in tort, so, despite conventional pretensions to the contrary, it has come to govern the field of contract. Men are held liable for breach of their contractual undertakings not because there had been a meeting of the minds of the contracting parties—a true synthesis of wills—but because words of assurance have been so uttered as to lead the other party to the bargain reasonably to suppose that the promisor means business.

Mark DeWolfe Howe, *Introduction to HOLMES*, *supra* note 41, at x, xxi; 1 WILLISTON, *supra* note 37, § 21, at 22 (citation omitted) (“In regard to both torts and contracts, the law, not the parties, fixes the requirements of a legal obligation.”); 2 *id.* § 602, at 1160 (“The only inquiry which is generally pertinent is the meaning of the language used when judged by the standard adopted by the law.”); RESTATEMENT OF CONTRACTS § 226 cmt. b (1932) (“The meaning that shall be given to manifestations of intention is not necessarily that which the party from whom the manifestation proceeds, expects or understands.”).

96 RESTATEMENT (SECOND) OF CONTRACTS § 2(1) (1981) (“A promise is a manifestation of intention to act or refrain from acting in a specified way, so made as to justify a promisee in understanding that a commitment has been made.”); *id.* § 200 cmt. b (“[T]he meaning of the words or other conduct of a party is not necessarily the meaning he expects or understands.”); *see also* Hotchkiss v. Nat’l City Bank of N.Y., 200 F. 287, 293 (S.D.N.Y. 1911) (Hand, J.) (“A contract has, strictly speaking, nothing to do with the personal, or individual, intent of the parties. . . . If . . . it were proved by twenty bishops that either party, when he used the words, intended something else than the usual meaning which the law imposes upon them, he would still be held, unless there were some mutual mistake, or something else of the sort.”), *aff’d sub nom.* Ernst v. Mechs.’ & Metals Nat’l Bank of N.Y., 201 F. 664 (2d Cir. 1912), *aff’d*, Nat’l City Bank of N.Y. v. Hotchkiss, 231 U.S. 50 (1913); Hillman, *supra* note 19, at 511 (“[A]ctual intentions and agreements hardly matter in cases that get to court. Instead, courts apply an objective theory of formation and interpretation, under which courts enforce contracts based on apparent, not real intentions.” (citations omitted)).

97 RESTATEMENT (SECOND) OF CONTRACTS § 2 cmt. b (1981).

Thus, when the parties to a contract interpret its terms differently, an interpretation will be given based on how a reasonable person, acting within the context of the agreement, would have interpreted the terms.⁹⁸ “[T]he intentions of the parties to a contract . . . are to be ascertained from their words and conduct rather than their unexpressed intentions.”⁹⁹ As stated by Lawrence Friedman, “[t]he so-called objective theory of contracts . . . insisted that the law enforce only objective manifestations of agreement and rejected the notion that the essence of an enforceable contract was a subjective ‘meeting of the minds’ of the parties.”¹⁰⁰ Therefore, unless the parties attach the same unreasonable meaning to a contract term,¹⁰¹ the term will be interpreted objectively.¹⁰² In other words, “the question of meaning in cases of misunderstanding depends on an inquiry into what each party knew or had reason to know”¹⁰³

Different theories have been advanced for the origin of the objective theory of contract formation and interpretation. One theory, advanced by scholars such as Lawrence Friedman and Morton Horwitz, asserts that the objective theory originated in the late nineteenth or early twentieth century to promote the needs of the market economy and laissez-faire economics.¹⁰⁴ Under this theory, the rationale for the objective theory is to “protect[] a promisee’s reasonable reliance on the promisor’s manifestation of intent.”¹⁰⁵ As stated by Judge Easterbrook, “if intent were wholly subjective . . . no one could know the effect of a commercial transaction until years after the documents were inked. That would be a devastating blow to business.”¹⁰⁶

98 See *id.* § 20(1) (stating if the parties attach materially different meanings to the contract’s key terms, and the different interpretations are equally reasonable, there is no mutual assent and thus no contract); *id.* § 201(2); Hillman, *supra* note 19, at 511; see, e.g., *Frigalment Importing Co. v. B.N.S. Int’l Sales Corp.*, 190 F. Supp. 116, 121 (S.D.N.Y. 1960) (Friendly, J.) (holding that the meaning of “chicken” in a contract was to be determined objectively); *Raffles v. Wichelhaus*, (1864) 159 Eng. Rep. 375, 377; 2 Hurl. & C. 906, 907–08 (holding that there was no mutual assent when there was a misunderstanding with respect to the ship that would deliver the cotton that was being purchased under the contract).

99 Joseph M. Perillo, *The Origins of the Objective Theory of Contract Formation and Interpretation*, 69 *FORDHAM L. REV.* 427, 427 (2000).

100 LAWRENCE M. FRIEDMAN, *CONTRACT LAW IN AMERICA: A SOCIAL AND ECONOMIC CASE STUDY* 87 (1965) (citation omitted).

101 See *RESTATEMENT (SECOND) OF CONTRACTS* § 201(1) (1981) (“Where the parties have attached the same meaning to a promise or agreement or a term thereof, it is interpreted in accordance with that meaning”). Professor Hillman has noted that “[c]ourts have applied this rule sparingly, however, because the issue rarely arises.” Hillman, *supra* note 19, at 512 n.51.

102 *RESTATEMENT (SECOND) OF CONTRACTS* § 201 (1981).

103 *Id.* § 201 cmt. b.

104 See FRIEDMAN, *supra* note 100; MORTON J. HORWITZ, *THE TRANSFORMATION OF AMERICAN LAW, 1780–1860, 196–98* (1977).

105 Hillman, *supra* note 19, at 511 (citation omitted).

106 *Empro Mfg. Co. v. Ball-Co Mfg., Inc.*, 870 F.2d 423, 425 (7th Cir. 1989) (Easterbrook, J.).

Another theory, advanced by Joseph Perillo, "is that objective approaches have predominated in the common law of contracts since time immemorial," though "there was a brief but almost inconsequential flirtation with subjective approaches in the mid-nineteenth century."¹⁰⁷ In contrast to the economic thesis, Perillo maintains that "[t]he reason for the persistence of objective approaches can be found in the legal profession's distrust of the testimony of parties."¹⁰⁸

II. A PROPOSED RULE FOR MEASURING DAMAGES IN CASES INVOLVING MISUNDERSTANDING

The effect of these two axioms of classical contract law is that an award of damages, in a case where the parties interpreted the breaching party's promise in materially different ways, will put the injured party in the position he or she would have been in based on an objective interpretation of the promise. The question presented in this Article is whether there is sufficient justification for this measure of damages in such a situation. This Article maintains that in such situations, the appropriate measure of damages is expectation damages, but based on the *promisor's* intended meaning of the promise, not how a reasonable person would interpret its meaning. If, however, an award based on the injured party's reliance interest is greater than an award based on the promisor's intended meaning of the promise, the reliance interest should be protected.

When deciding whether a particular state-imposed sanction against a person is advisable, consideration should be given to both deontological and consequential considerations. Thus, consideration should be given to (1) whether the person acted wrongfully (including the degree of wrongful conduct); and (2) whether the sanction will improve society's welfare.¹⁰⁹ Taking into consideration both of these factors, an award of expectation damages based on the objective theory, when there was a contractual misunderstanding, is not warranted.

With respect to a deontological approach, if one accepts Fried's argument that an award of expectation damages is appropriate because it implements the notion that the enforcement of contracts is premised on the will of the promisor,¹¹⁰ an award of expectation damages based on an interpretation of the promisor's promise that differs from the promisor's intent would be illogical. In such a situation, the promisor has chosen only to provide the promisee with what the promisor believes he or she has

¹⁰⁷ Perillo, *supra* note 99, at 428.

¹⁰⁸ *Id.* at 477.

¹⁰⁹ "People want their society to be and look just." ROBERT NOZICK, ANARCHY, STATE, AND UTOPIA 158 (1974). Accordingly, to increase the likelihood that a law "be just" or "look just," consideration should be given to *each* of the leading approaches to moral questions.

¹¹⁰ See FRIED, *supra* note 22, at 17.

promised. Any liability at all in such a situation is more akin to liability based on negligence. Thus, an award protecting the reliance interest would be more appropriate than an award protecting the expectation interest, and an award of expectation damages based on the objective theory would arguably constitute punitive damages, which are usually not awarded for a breach of contract.¹¹¹ Accordingly, those who follow Fried's "contract as promise" theory cannot object to a recovery that is less than an award protecting the expectation interest under an objective theory of contract formation. In fact, an award based on the promisor's intended meaning of the promise is fully consistent with the notion of "contract as promise," and avoids (at least to an extent) the inconsistency between the "contract as promise" theory and the objective theory of contracts.

The rule proposed by this Article should also not offend law and economics adherents. Law and economics scholars, who focus on the consequences of adopting a particular remedy,¹¹² support the expectation damages measure because it forces the promisor to internalize the promisee's losses from failing to receive the performance.¹¹³ Accordingly, the promisor's decision whether to breach will be efficient because the promisor will have an incentive to breach only if non-performance (including providing the promised performance to a third party) is worth more than performance.¹¹⁴ This is known as the "theory of efficient breach."¹¹⁵ Protecting the expectation interest might also provide the promisor with the incentive to take the appropriate amount of precautions to avoid a breach.¹¹⁶

This analysis, however, is not well suited for a contract involving a misunderstanding of the promised performance. In such a situation, there is no reason to believe that the parties have even entered into a "value-maximizing" exchange.¹¹⁷ As Judge Posner has noted, "[t]he 'subjective' theory of contract, which holds that there must be an actual meeting of

111 See RESTATEMENT (SECOND) OF CONTRACTS § 355 (1981) ("Punitive damages are not recoverable for a breach of contract unless the conduct constituting the breach is also a tort for which punitive damages are recoverable.").

112 See Craswell, *supra* note 16, at 107 (noting that economic analysis "asks what consequences will follow from adopting this remedy or that").

113 POLINSKY, *supra* note 61, at 35.

114 *Id.* at 35–36; see John H. Barton, *The Economic Basis of Damages for Breach of Contract*, 1 J. LEGAL STUD. 277, 282 (1972); Robert L. Birmingham, *Breach of Contract, Damage Measures, and Economic Efficiency*, 24 RUTGERS L. REV. 273, 285 (1970); Steven Shavell, *Damage Measures for Breach of Contract*, 11 BELL J. ECON. 466, 470 (1980).

115 See Craswell, *supra* note 16, at 108 ("This effect—the effect on the incentive to perform a contract or to break it—has since become famous as the 'theory of efficient breach.'" (citation omitted)).

116 *Id.* at 109.

117 POSNER, *supra* note 50, at 101; *see id.* at 103–04 ("Because the parties had a different understanding of what the contract was, there was no basis for thinking that enforcing the contract would maximize value . . .").

the minds of the contracting parties for an enforceable contract to arise, thus makes economic sense.”¹¹⁸ Accordingly, an exchange involving a misunderstanding is worth less protection from a utility standpoint than a contract with no misunderstanding. Law and economics adherents support the objective theory of contracts not because contracts based on misunderstanding are value-maximizing, but to deter future communication failures.¹¹⁹ In fact, as Posner acknowledges, when a party who is at fault for a contract misunderstanding refuses to perform, the “refusal is more like a tort than a breach of contract,”¹²⁰ suggesting that reliance damages would be appropriate. Accordingly, there is no justification from a law and economics standpoint to award expectation damages based on an objective interpretation of the breached promise.

In fact, law and economics scholars acknowledge that an award of expectation damages encourages over-reliance by the promisee.¹²¹ If the promisee knows his or her expectation interest will be protected in the event of a breach, the promisee will have an incentive to incur reliance expenditures that will result in a large profit if the promisor performs, without taking into account the chance of a breach.¹²² Incurring such expenditures without taking into account the chance of breach thus encourages inefficient reliance.¹²³ Under the rule proposed in this Article, the smaller remedy for cases of misunderstanding will not eliminate such inefficient reliance, but it will reduce it to an extent.

With respect to Fuller’s suggestion that an award protecting the expectation interest might be a proxy to protect the reliance interest, in a situation where the parties attached materially different meanings to the breached promise, it is unlikely the injured party would have been able to have secured a contract (as interpreted by the injured party) at a similar price. That the promisor misunderstood what was being promised (viewed objectively) suggests that the price for performance was lower than it would have been had the promisor intended the promise to be as the injured party interpreted it. Accordingly, it is unlikely that the expectation interest and the reliance interest will merge in the case of a misunderstanding. As Fuller acknowledged, his suggestion that the reliance interest and the expectation interest will often be the same is strongest “in a hypothetical society in which all values were available on the market;”¹²⁴ but, in the case of a misunderstanding, it is unlikely the same performance at the same

¹¹⁸ *Id.* at 101.

¹¹⁹ *See id.* at 102.

¹²⁰ *Id.*

¹²¹ *See* POLINSKY, *supra* note 61, at 37–39 (arguing that protecting either the expectation or reliance interest induces inefficient reliance investments by the promisee).

¹²² *Id.* at 37–39.

¹²³ *Id.* at 38–39.

¹²⁴ Fuller & Perdue, *supra* note 16, at 62.

price will be available.

Regarding Fuller's suggestion that an award of expectation damages is more likely to deter breaches of contract, an award of expectation damages based on the meaning intended by the promisor will not encourage many more breaches than under an expectation damages award premised on the objective theory of contracts. The difficulty faced by a promisor in convincing a fact finder that he or she intended something other than what an objective interpretation of the promise would suggest will not significantly alter the promisor's decision whether to breach. Similarly, with respect to Fuller's proposition that an award of expectation damages encourages reliance on contracts, the likelihood of a promisor establishing a contractual misunderstanding will not be significant enough to alter a promisee's conduct in deciding whether (and to what extent) to rely on the contract.

In fact, the rule proposed in this Article will reduce the likelihood of a breach because it encourages a party to ensure there is no misunderstanding with respect to the other party's duties under the contract. A promisee who is aware his or her recovery will be less in the case of a misunderstanding will have an incentive to make sure that the contract is written in a way that eliminates any potential misunderstandings with respect to the promisor's promise. In turn, this will reduce the number of breaches because it will help eliminate breaches caused solely by the promisor misunderstanding its contractual duties.

An additional benefit of the proposed rule is that it takes account of the error rate in litigation. Particularly in those situations in which the judge or the jury concludes that the parties interpreted a promise differently, there is a fair chance that the judge or jury has reached the wrong conclusion as to which interpretation is more reasonable, or whether the injured party actually held the interpretation claimed by him or her. Accordingly, a rule that awards expectation damages based on the promisor's intended meaning of the promise mitigates the harshness of liability in those situations in which the judge or jury has reached an erroneous conclusion.

The possibility that the objective theory of contracts is based on the needs of the market economy does not dictate a rejection of the rule proposed in this Article. The fact that liability would still be based on the objective theory would encourage parties to rely on contracts. The offered rule is limited to the issue of damages, and it would be rare that a promisor could convince a fact finder that he or she intended his or her promise to mean something that would be an unreasonable interpretation. Accordingly, the proposed rule would have a negligible effect on the incentive to rely on contracts.

The argument that the objective theory of contracts is premised on the legal system's distrust of the testimony of parties raises, however, a problem for this Article's proposed rule. A detriment to the rule offered by

this Article is that it might encourage parties to testify that they interpreted their promises in ways that would not be objectively reasonable. Under the proposed rule, such evidence could not be excluded on irrelevancy grounds.¹²⁵ Thus, there might be a danger of fact finders being swayed by perjured testimony. But this concern is not a significant one. Because such testimony would be relevant only to the issue of damages, and not to liability, and because the likelihood of a factfinder concluding a promisor intended an unreasonable meaning will be slight, the incentive to make such an argument would be limited to cases in which there is substantial evidence to support the promisor's position.

Accordingly, the proper measure of damages when the parties interpreted the promise in materially different ways is an award designed to protect the injured party's expectation interest, but based on the promisor's intended meaning of the promise, not a reasonable interpretation of the promise. If, however, an award protecting the injured party's reliance interest would be greater, the reliance interest should be protected. Otherwise, the injured party would receive no compensation in a situation in which the promisor performed as he or she intended the promise. This would result in the adoption of the subjective theory of contracts. Also, because the promisor has acted negligently, the injured party should at least be entitled to be put in the position he or she would have been in had the promisor not acted negligently. Such a recovery is necessary to deter negligent behavior.

III. *HAWKINS V. MCGEE* AS A CASE INVOLVING CONTRACTUAL MISUNDERSTANDING

Having established that the standard remedy for the breach of a contract should be modified when the parties attached materially different meanings to the broken promise, this part of the Article provides the results of an analysis of the most famous expectation damages case—*Hawkins v. McGee*¹²⁶—and shows that contrary to popular perception, the case involved a contractual misunderstanding. Accordingly, although the measure of damages in *Hawkins* should have been determined by the expectation interest, the expectation interest should have been based on Dr. McGee's intended meaning of his promise.

Law students' and law professors' information about the facts in *Hawkins*

¹²⁵ See, e.g., FED. R. EVID. 402 (providing that "[e]vidence which is not relevant is not admissible"). Presumably, however, such evidence should be admissible to determine whether there was a misunderstanding. See RESTATEMENT (SECOND) OF CONTRACTS § 201(1) (1981) ("Where the parties have attached the same meaning to a promise or agreement or a term thereof, it is interpreted in accordance with that meaning."); see also *Kabil Dev. Corp. v. Mignot*, 566 P.2d 505 (Or. 1977) (holding that it was not erroneous for trial court to admit testimony regarding subjective belief that a contract had been formed).

¹²⁶ *Hawkins v. McGee*, 146 A. 641 (N.H. 1929).

v. McGee comes primarily from four sources: (1) Justice Oliver Winslow Branch's opinion for the New Hampshire Supreme Court;¹²⁷ (2) the Court of Appeals for the First Circuit's decision in *McGee v. United States Fidelity & Guaranty Co.*¹²⁸ (a subsequent lawsuit by Dr. McGee against his insurance carrier); (3) Jorie Roberts's 1978 article in the *Harvard Law Record* about the case;¹²⁹ and (4) John Jay Obsorn, Jr.'s use of the case in the opening scene of his 1971 novel *The Paper Chase*,¹³⁰ as well as the use of the case in the opening scenes of the movie¹³¹ and the pilot in the television series.¹³² But based on my review of the trial transcript, the story that emerges from these sources is misleading in several respects, including the condition of George Hawkins's hand prior to the operation, whether he and his father wanted the operation, and whether the operation was in any sense a success. The likely truth with respect to each of these aspects reveals that the case involved a misunderstanding between the parties, which is much different from how the facts of the case are usually portrayed.

A. The Traditional Story

The traditional story is that Dr. Edward R. B. McGee, a general practitioner in Berlin, New Hampshire,¹³³ learns of young George Hawkins's scarred hand before Dr. McGee served as a doctor in Europe in World War I.¹³⁴ While in Europe during the war he observes skin grafting operations on German soldiers,¹³⁵ and after returning from the war requests permission

¹²⁷ *Id.* at 642.

¹²⁸ *McGee v. U.S. Fid. & Guar. Co.*, 53 F.2d 953 (1st Cir. 1931).

¹²⁹ Jorie Roberts, *Hawkins Case: A Hair-Raising Experience*, HARV. L. REC., Mar. 17, 1978, at 1.

¹³⁰ THE PAPER CHASE BOOK, *supra* note 2, at 6–9.

¹³¹ THE PAPER CHASE (Twentieth Century Fox 1973) [hereinafter THE PAPER CHASE MOVIE].

¹³² *The Paper Chase* (CBS television broadcast Sept. 9, 1978) [hereinafter *The Paper Chase Television Series*]. The case is included in several Contracts casebooks. JOHN P. DAWSON, ET AL., CONTRACTS: CASES AND COMMENT 2 (9th ed. 2008); RANDY E. BARNETT, CONTRACTS: CASES AND DOCTRINE 63 (4th ed. 2008); LON L. FULLER & MELVIN ARON EISENBERG, BASIC CONTRACT LAW 190 (8th ed. 2006). The latter two include as a squib case the decision in *McGee v. United States Fidelity & Guaranty Co.*, 53 F.2d 953 (1st Cir. 1931), and an excerpt from Jorie Roberts's article. Barnett, *supra*, at 66–70; Fuller, *supra*, at 193–97. The case is included in these casebooks to demonstrate that the primary purpose of contract damages is to protect the non-breaching party's expectation interest. The first casebook to use the case was apparently Lon Fuller's 1947 casebook. See Frost, *supra* note 8, at 1361 (noting that the use of *Hawkins v. McGee* "traces its lineage back to the first edition of Fuller's influential casebook" (citation omitted)).

¹³³ For a background of Berlin, New Hampshire, see Linda Upham-Bornstein, *Citizens with a "Just Cause": The New Hampshire Farmer-Labor Party in Depression-era Berlin*, 62 HIST. N.H. 117, 118–21 (2008).

¹³⁴ Roberts, *supra* note 129, at 7.

¹³⁵ *Id.*

from Charles Hawkins (George's father) to perform an operation on George¹³⁶ because he wants to experiment with skin grafting.¹³⁷ Charles and George are pursued by Dr. McGee for three years,¹³⁸ even though George does not need the operation because his scar is just a "small pencil-size scar"¹³⁹ that "[d]oes] not substantially affect his use of the hand,"¹⁴⁰ and in fact his hand "[i]s a practical, useful hand"¹⁴¹ (he even won several medals for his marksmanship ability).¹⁴² In an effort to convince Charles and George to consent to the operation, Dr. McGee misrepresents his ability to undertake a skin-grafting operation,¹⁴³ and further misrepresents that he performed such operations on German soldiers during the war.¹⁴⁴ Dr. McGee, in an effort to obtain Charles's and George's consent, exploits George's insecurity about his hand by emphasizing the social problems it will cause him in the future.¹⁴⁵ He also promises George that the surgery will result in "a hundred per cent perfect hand or a hundred per cent good hand;"¹⁴⁶ that he

136 *See id.* ("During this period, the family physician, Edward McGee, while treating one of George's younger brothers for pneumonia, also became aware of George's scarred hand. Later, in 1919, after returning from several years of medical service in Europe during World War I, McGee requested George and his parents to let him operate on the hand in order to restore it to 'perfect' condition.").

137 *See* *Hawkins v. McGee*, 146 A. 641, 643 (N.H. 1929) ("[T]he theory was advanced by plaintiff's counsel in cross-examination of defendant that he sought an opportunity to 'experiment on skin grafting' . . ."); *U.S. Fid. & Guar.*, 53 F.2d at 954 (quoting the plaintiff's allegation in the complaint that Dr. McGee "experimented upon said plaintiff"); *THE PAPER CHASE BOOK*, *supra* note 2, at 7 (portraying the facts as involving Dr. McGee wanting to "experiment in skin grafting"); *THE PAPER CHASE MOVIE*, *supra* note 131 (same); *The Paper Chase Television Series*, *supra* note 132 (same).

138 *See* *Roberts*, *supra* note 129, at 7 ("McGee encouraged the Hawkinses to allow him to operate on the hand for three years . . ."); *Hawkins*, 146 A. at 643 ("There was evidence that the defendant repeatedly solicited from the plaintiff's father the opportunity to perform this operation, and the theory was advanced by plaintiff's counsel in cross-examination of defendant that he sought an opportunity to 'experiment on skin grafting,' in which he had had little previous experience.").

139 *Roberts*, *supra* note 129, at 7 (quoting Howard Hawkins, one of George's younger brothers) (internal quotation marks omitted).

140 *Id.*

141 *U.S. Fid. & Guar.*, 53 F.2d at 954 (quoting the plaintiff's complaint describing the condition of the hand prior to the operation).

142 *Roberts*, *supra* note 129, at 13.

143 *U.S. Fid. & Guar.*, 53 F.2d at 954 (quoting the plaintiff's allegation in the complaint that "the defendant did not possess the skill that he held himself out to possess").

144 *Roberts*, *supra* note 129, at 7.

145 *See id.* ("[Dorothy] St. Hilaire (George's younger sister) recalls that McGee, in persuading George to undergo the surgery, emphasized the social problems which his scarred hand might create." (internal parenthetical added)).

146 *Hawkins v. McGee*, 146 A. 641, 643 (N.H. 1929) (internal quotation marks omitted) ("The only substantial basis for the plaintiff's claim is the testimony that the defendant also said before the operation was decided upon, 'I will guarantee to make the hand a hundred per cent perfect hand' or a 'hundred per cent good hand.'").

will be left only with “a small scar, [that] would hardly be noticeable after healing,”¹⁴⁷ and that he would not be in the hospital for more than four days and that a few days thereafter he could return to work.¹⁴⁸

Despite George’s parents’ doubts, as a result of Dr. McGee’s pressure, George consents to the operation upon turning eighteen.¹⁴⁹ Dr. McGee, having misrepresented his experience with skin-grafting operations, botches the surgery¹⁵⁰ (including using skin from George’s chest¹⁵¹ instead of his thigh as he had originally represented he would do),¹⁵² leaving George’s hand “permanently disfigured and crippled.”¹⁵³ As a result of the operation, the hand is left partially curled-up, it is filled with “dense matted hair,”¹⁵⁴ it “continue[s] to bleed . . . throughout his life,”¹⁵⁵ and it is rendered “useless.”¹⁵⁶ Although “George was very bright,”¹⁵⁷ his embarrassment of his hand causes him to never return to high school,¹⁵⁸ and his “crippled hand affected his employment and outlook throughout his lifetime.”¹⁵⁹

B. Another Side of the Story

But there must be another side to this story. We know that the first

147 *U.S. Fid. & Guar.*, 53 F.2d at 954 (quoting the plaintiff’s allegation in the complaint).

148 *Hawkins*, 146 A. at 642.

149 *U.S. Fid. & Guar.*, 53 F.2d at 954 (quoting the plaintiff’s allegation in the complaint that he relied upon Dr. McGee’s promises in consenting to the operation and would not have otherwise consented to the operation); Roberts, *supra* note 129, at 7 (“George agreed shortly after his 18th birthday. St. Hilaire remembers that, while her parents had strong doubts about the operation, they trusted McGee’s judgment and were hesitant to oppose George’s decision and the physician’s advice.”).

150 Professor Frost states that the case portrays Dr. McGee as “the incompetent surgeon.” Frost, *supra* note 8, at 1363.

151 *Hawkins*, 146 A. at 642 (noting that the skin for the graft was taken from George’s chest).

152 Roberts, *supra* note 129, at 7 (“McGee had earlier stated that the skin for the graft was to come from George’s thigh . . .”).

153 *Id.* at 1.

154 THE PAPER CHASE BOOK, *supra* note 2, at 7; *see also U.S. Fid. & Guar.*, 53 F.2d at 954 (quoting the complaint’s allegation that the skin grafted to George’s hand “became matted, unsightly, and so healed and attached to said hand as to practically fill the hand with an unsightly growth”); Roberts, *supra* note 129, at 7 (“[T]he post-operation scar covered his thumb and two fingers and was densely covered with hair.”).

155 Roberts, *supra* note 129, at 7.

156 *U.S. Fid. & Guar.*, 53 F.2d at 954 (quoting the complaint’s allegation that the skin grafted to George’s hand “restrict[ed] the motion of the plaintiff’s hand so that said hand has become useless to the plaintiff”).

157 Roberts, *supra* note 129, at 13 (quoting Howard J. Hawkins, George’s brother).

158 *Id.*

159 *Id.*

trial resulted in a hung jury.¹⁶⁰ Also, in the second trial, the judge (Judge Scammon) ordered a nonsuit on the negligence claim against Dr. McGee.¹⁶¹ The jury in the second trial, although returning a verdict in George's favor on the assumpsit claim, did not award a particularly large sum of money (\$3,000).¹⁶² The court found that even this amount was "excessive, and . . . order[ed] that the verdict be set aside unless [George agreed] to remit all in excess of \$500."¹⁶³ We know that despite the New Hampshire Supreme Court ruling that the trial judge's jury instruction on damages erroneously precluded George from receiving expectation damages,¹⁶⁴ George settled the case for only \$1,400.¹⁶⁵ After the trial Dr. McGee's practice apparently grew,¹⁶⁶ and he was elected mayor of Berlin, New Hampshire,¹⁶⁷ hardly things that could have occurred had the community believed he was an incompetent surgeon who had pressured a teenager to consent to an operation simply because he wanted to experiment with skin grafting. We also know that the New Hampshire Supreme Court recited the facts in the light most favorable to George;¹⁶⁸ that the First Circuit relied significantly on the allegations in George's state-court complaint;¹⁶⁹ and that Jorie Roberts's article was based primarily on interviews and correspondence with George's relatives, whose information was premised on oral history favorable to George and was provided long after the events at issue.¹⁷⁰

160 *See U.S. Fid. & Guar.*, 53 F.2d at 954 ("At the first trial, the jury disagreed.").

161 *Hawkins v. McGee*, 146 A. 641, 642 (N.H. 1929) ("The writ also contained a count in negligence upon which a nonsuit was ordered, without exception."); *see also U.S. Fid. & Guar.*, 53 F.2d at 954 ("[T]he court directed a verdict for defendant on the [negligence] count . . .").

162 *U.S. Fid. & Guar.*, 53 F.2d at 955; Roberts, *supra* note 129, at 7 ("The jury only awarded the Hawkins [sic] \$3,000 for damages . . .").

163 *See Hawkins*, 146 A. at 641.

164 *Id.* at 644. ("We, therefore, conclude that the true measure of the plaintiff's damage in the present case is the difference between the value to him of a perfect hand or a good hand, such as the jury found the defendant promised him, and the value of his hand in its present condition, including any incidental consequences fairly within the contemplation of the parties when they made their contract." (citation omitted)).

165 *U.S. Fid. & Guar.*, 53 F.2d at 955. Roberts states that the settlement also included George's attorney's fees. Roberts, *supra* note 129, at 7 ("[T]he final settlement was for \$1,400 and lawyers fees.").

166 Roberts, *supra* note 129, at 13.

167 *Id.*

168 *See Hawkins*, 146 A. at 641-44.

169 *See U.S. Fid. & Guar.*, 53 F.2d at 954-55.

170 *See Roberts, supra* note 129, at 1 ("[T]he RECORD has delved into the human aspects behind *Hawkins v. McGee* through interviews and correspondence with George Hawkins' brother and sister-in-law Howard J. and Edith Hawkins, his sister Dorothy Hawkins St. Hilaire, and Berlin lawyer and [Harvard Law School] graduate Arthur J. Bergeron '32."). Roberts' 1978 article was published nearly 50 years after *Hawkins v. McGee* was heard by the New Hampshire Supreme Court. *Id.*

My review of the trial transcript shows that the popular understanding of the events in *Hawkins v. McGee* is likely incorrect in several respects. First, the evidence shows that George's hand was contracted (at least to some extent) prior to the operation,¹⁷¹ and that the hand's pre-operation condition possibly caused him some difficulty (though likely not significant difficulty).¹⁷² Second, the evidence shows that Charles Hawkins broached the subject of George's hand with Dr. McGee;¹⁷³ Dr. McGee initially did not want to perform the operation;¹⁷⁴ and there was a much shorter time period between this initial conversation and the operation than the three years subsequently alleged by the Hawkins family.¹⁷⁵ This casts considerable doubt on the theory that Dr. McGee relentlessly pursued George and his father so that he could experiment with skin grafting. Third, the traditional description of George's post-operation hand¹⁷⁶ fails to take into account that the hand's contracted condition (the correction of which might have been the operation's primary purpose) was likely improved.¹⁷⁷

These three facts ultimately lead to the conclusion that Dr. McGee reasonably believed George wanted the operation primarily to correct his hand's contracted state (not primarily for aesthetic purposes). Furthermore, if he promised George a one hundred percent perfect or good hand, he likely meant one hundred percent perfect or good only from the standpoint of its contracted state.

1. *The Burned Hand.*—The popular conception is that George's pre-operation scar was small and did not affect the use of his hand.¹⁷⁸ This notion supports the conclusion that George and his father did not want the operation, and that Dr. McGee pressured them to agree to the operation (for three years), so that he could experiment with skin grafting (which he had seen performed on German soldiers during World War I).¹⁷⁹ But the trial transcript and other evidence casts significant doubt on this popular conception of the condition of George's hand prior to the operation.

a. A Stormy Night, a Shocking Morning (and a Lawsuit to Follow)

On March 1, 1914, when George was ten years old,¹⁸⁰ there was a bad

171 See discussion *infra* Part III.B.1.b.

172 See discussion *infra* Part III.B.1.c.

173 See *infra* text accompanying notes 302–17.

174 See *infra* notes 324–25 and accompanying text.

175 See *infra* notes 302–03 and accompanying text.

176 See *supra* text accompanying notes 154–57.

177 See *infra* text accompanying notes 386–95.

178 See *supra* text accompanying notes 140–42.

179 See *supra* Part III.A.

180 Transcript of Record at 2, 18, 30, 33, *Hawkins v. McGee*, No. 13724 (N.H. Super.

storm in his hometown of Berlin, New Hampshire.¹⁸¹ As a result of the storm, two electrical wires (one of which came into the Hawkins's house) were blown together and crossed, sending a strong current into the home.¹⁸² The next morning,¹⁸³ Charles sent George downstairs to start a fire.¹⁸⁴ When George stood on a chair and reached up to turn on the electric light in the kitchen over the stove, he was badly burned on his right hand by an "electric spark."¹⁸⁵

George was treated by a doctor that morning.¹⁸⁶ The doctor dressed the hand and told Charles that there was not any need for him (the doctor) to come again, that he would send a nurse to dress the hand, and that nothing more was necessary.¹⁸⁷ The nurse came to the house and initially dressed the hand about every day and then every other day for two or three weeks,¹⁸⁸ and it took three or four weeks for the burn to heal.¹⁸⁹

Shortly after the incident, Charles, as father and next of friend of George, brought suit against the Cascade Light & Power Co., the public utility corporation in charge of the electrical wires.¹⁹⁰ This is significant because it suggests that the pre-operation injury was severe enough to

Ct. Dec. 1926) (on file with the New Hampshire Superior Court, Coos County, the New Hampshire Supreme Court, and the author), *vacated*, 146 A. 641 (N.H. 1929). The evidence of George's age at the time of the accident is conflicting, with the ages nine, ten, eleven, and twelve years old having been reported. The writ filed in *Hawkins v. Cascade Light & Power Co.* (the lawsuit filed at the time of the accident against the responsible party) stated that George was twelve, though it also incorrectly stated that his left hand had been burned. Writ, *Hawkins v. Cascade Light & Power Co.*, (N.H. Super. Ct. Apr. 21, 1914) (on file with the New Hampshire Superior Court, Coos County, and the author). Roberts states that it happened in 1915 when George was eleven. Roberts, *supra* note 129, at 7. Charles testified that George was ten, though it was in response to a question from his lawyer that included the age of ten in the question, Transcript of Record, *supra*, at 2, and it should be noted that Charles did not seem sure of George's age at the time of the trial. *See id.* ("He is *about* twenty-two." (emphasis added)). George testified that he was "[a]bout ten years old," and "[b]etween nine and ten." *Id.* at 33. George's attorney later stated George was nine years old at the time of the accident. *Id.* at 127 (attorney Coulombe stating "he was about nine years old"). We know that the accident occurred on March 2, 1914, from the writ filed in *Hawkins v. Cascade Light & Power Co.* Writ, *supra*; see also Transcript of Record, *supra*, at 137. If George was born in January 1904, Roberts, *supra* note 129, at 1 ("George Hawkins was born in January, 1904"), he was ten years old at the time of the accident. Accordingly, the best evidence supports the conclusion that George was ten years old at the time of the accident.

181 Transcript of Record, *supra* note 180, at 2, 100.

182 *Id.* at 2-3, 17.

183 *Id.* at 100; Writ, *supra* note 180.

184 Transcript of Record, *supra* note 180, at 100.

185 *Id.* at 2, 17-18, 33, 100, 120 (right hand).

186 *Id.* at 3, 29.

187 *Id.* at 29-30.

188 *Id.* at 30.

189 *Id.* at 3, 30, 33, 49.

190 *Id.* at 19; Writ, *supra* note 180.

have warranted a lawsuit. Also, the Hawkins family members reported that Charles took George to skin specialists in Montreal after the accident (who advised against taking any action to restore the hand),¹⁹¹ suggesting that Charles considered the injury to be severe. In fact, an expert called by Dr. McGee testified that George's burn would have been a third-degree burn,¹⁹² and Dr. Homer M. Marks, who assisted with the first operation,¹⁹³ agreed that it was a third-degree burn.¹⁹⁴ Additionally, as discussed below, as time went by, the hand's condition likely worsened as a result of the burn.

b. The Burned and Contracting Hand

The testimony in *Hawkins v. McGee* includes extensive testimony regarding the condition of George's hand prior to the operation by Dr. McGee. As shown by a summary of the testimony below, there is no dispute that the burn caused his hand to start to contract prior to the operation. Accordingly, it is unlikely that Dr. McGee's operation was the cause of George's hand being contracted.

The burn left a scar that ran across the palm of George's right hand.¹⁹⁵ George, Charles, and Rose (George's mother) described it as a scar that "ran across the palm" of his hand from the bottom of a finger to the bottom of the thumb, and that it was raised like a ridge about the size of "half a lead pencil."¹⁹⁶ Dr. Leith, an expert called by Dr. McGee, who only inspected the hand after the operation,¹⁹⁷ testified that in its pre-operative state the "scar not only extended from the base of the second finger to the base of the thumb, it also extended in another direction, at an angle across the palm."¹⁹⁸ George testified that the scar was perhaps a little darker than ordinary skin color,¹⁹⁹ whereas Charles and Rose testified that it was dark.²⁰⁰ George and Rose testified that it was not an "awfully bad looking hand" and was not "repulsive" looking.²⁰¹ Ethel Oldham, who appears to have been a friend of the Hawkins family,²⁰² described it as a small scar across his hand,²⁰³ "about

191 Roberts, *supra* note 129, at 7.

192 Transcript of Record, *supra* note 180, at 92, 94.

193 *Id.* at 119–20.

194 *Id.* at 125.

195 *Id.* at 3, 50.

196 *Id.* at 3, 18, 28, 30–31, 34.

197 *Id.* at 91.

198 *Id.* at 92.

199 *Id.* at 34.

200 *Id.* at 3, 31.

201 *Id.* at 33, 50.

202 She went with Rose to visit George in the hospital after the operation. *Id.* at 60.

203 *Id.* at 59.

the size of half a lead pencil,"²⁰⁴ running from the bottom of a finger to the bottom of his thumb²⁰⁵ and darker than his natural skin color.²⁰⁶

Dr. McGee testified that it was a "deep injury down into the deeper structures, destroying the palmar fascia,"²⁰⁷ going down to the ligaments covering the bone,²⁰⁸ and that the resulting scar was "much larger than the size of a pencil."²⁰⁹ Dr. Marks testified that the palm of George's hand was essentially all scar tissue, "about the size of a dollar."²¹⁰

With respect to whether the hand was contracted prior to the operation, George and Charles admitted that a finger was "drawn in,"²¹¹ and Charles acknowledged that the hand was drawn in slightly.²¹² George testified that the hand was contracted possibly at an angle of five degrees, with the thumb pulled in "possibly a quarter or half an inch" toward his palm.²¹³ Harold C. Sullivan, who appeared to be a friend of George's and who knew him since George was twelve or fourteen,²¹⁴ described the injury as a "cord that had been burned and contracted," and "[i]t seemed to cup the hand."²¹⁵ William E. Sawyer, who knew George prior to 1922, testified that the hand had a "contraction,"²¹⁶ and that a finger and the thumb were somewhat drawn in together.²¹⁷

Dr. McGee testified that when he saw the hand in 1921, it was "contracted and deformed."²¹⁸ Alberta W. Wight, a neighbor who was called by Dr. McGee at trial, testified that she inspected George's hand before the operation, and that it was "decidedly" repulsive and had the appearance of a "dwarfed hand."²¹⁹ She testified that

[i]t seemed to be greatly drawn together from the sides, giving it a very narrow appearance, and there was a finger . . . which was drawn in a great deal. Now the thumb was drawn in also; there was a ridge across his hand across the palm, but it had the appearance of the palm being largely gone,—

204 *Id.* at 61–62.

205 *Id.*

206 *Id.* at 62.

207 *Id.* at 88.

208 *Id.*

209 *Id.* at 79.

210 *Id.* at 127.

211 *Id.* at 4, 18, 27, 34.

212 *See id.* at 18–19.

213 *Id.* at 50.

214 *Id.* at 64.

215 *Id.* at 65.

216 *Id.* at 66.

217 *Id.* at 67.

218 *Id.* at 69.

219 *Id.* at 101.

as though it had been burned out.²²⁰

At the first trial, Wight testified that she had seen his hand out of her window when he would walk along the street in front of her house and that he appeared to have a “withered hand.”²²¹ Elizabeth B. Stewart, one of George’s schoolteachers from 1916 to 1919, testified that he had a “deformed hand.”²²²

Edward James Halloran, foreman at the mill where George worked,²²³ testified that the hand was “slightly cupped” and was “pretty well contracted.”²²⁴ Dr. Leith testified that “th[e] middle finger, ring finger, was drawn in,” that the “thumb was drawn in,” and that the palm was “cupped” or “contracted.”²²⁵

Dr. McGee testified that as George grew older, his hand contracted as a result of the scar not growing along with the hand.²²⁶ Dr. Leith similarly testified that the hand would contract as it grew, pulling in the “parts at either end of the scar.”²²⁷ Dr. Marks testified as well that the burn would have drawn George’s hand together as he grew older.²²⁸ He testified that the second finger and the thumb were drawn inward as a result of the

heavy strong cord of fibrous [scar] tissue . . . almost as though a piece of rope was stretched under the skin, pulling it up like the ridgepole of a tent, and from this cord extending in either direction toward the outer side of the hand and toward the center was quite a large area of scar tissue. That scar tissue had caused contraction there so that the palm of the hand was cupped; the thumb drawn in, the second finger drawn in . . .²²⁹

John M. Dresser, an officer and surgeon in the State Guard, testified that George showed him his hand and the “fingers were contracted.”²³⁰

The testimony of Dr. McGee and Dr. Marks regarding the purpose of the operation, and the operation procedure itself, supports the conclusion that George’s hand was contracted prior to the operation. Dr. McGee, when explaining the procedure used on George, testified that if doctors simply removed the scar tissue without grafting any skin on it, the result would have been a worse scar than the one already there, and with more

²²⁰ *Id.*

²²¹ *Id.* at 102.

²²² *Id.* at 108.

²²³ *Id.* at 108–09.

²²⁴ *Id.* at 109.

²²⁵ *Id.* at 92.

²²⁶ *Id.* at 69.

²²⁷ *Id.* at 92.

²²⁸ *Id.* at 120.

²²⁹ *Id.*

²³⁰ *Id.* at 138.

contractions.²³¹ Dr. Marks testified that

the purpose of this operation was to remove the scar tissue, and to release the contractions, and to break up the adhesions in the hand, to restore it so far as possible to its normal function, with the idea in view of later covering in the denuded area with some sort of a skin graft.²³²

With respect to the operation procedure, Dr. McGee testified that after cutting out the scar and the affected tissue²³³ he tried to straighten out the hand, but because of the length of time it had been contracted, it was difficult to do, and he could not get the hand as straight as he would have liked.²³⁴ Dr. McGee then put the hand “into a sort of padded splint” to hold it in a straightened position for about a week, because without the hand would have returned to its pre-operation contracted condition.²³⁵ Dr. Marks confirmed that the hand was “dressed and put . . . in splints” after the operation to maintain the position they had achieved.²³⁶

Dr. Marks testified that he and Dr. McGee “worked on the hand a long time until all the scar tissues that appeared on the surface so far as we could see, was removed, and until this right hand,—until this second finger was so far freed that it assumed pretty nearly its normal position and motion.”²³⁷ He testified that it was impossible to free the thumb to obtain full motion, but that it was improved by fifty percent or more.²³⁸ Dr. Marks testified that after the scar tissue was dissected as much as possible, they attempted by “stretching and manipulati[on]” to “break up what adhesions were left too deep” and to “flatten out the palm and restore it, so far as possible, to its normal position.”²³⁹ He testified that if a second operation involving the skin graft was not performed, new scar tissue would have formed and the contractions and adhesions that had existed before would have returned.²⁴⁰

The testimony summarized above shows that George’s hand was contracted prior to the operation, at least to some extent. This casts doubt on the assumption that Dr. McGee’s operation caused George’s hand to contract. Rather, evidence supports the conclusion that one of the operation’s purposes (and perhaps its primary purpose) was to relieve the hand of its contraction.

²³¹ *Id.* at 70.

²³² *Id.* at 120.

²³³ *Id.* at 79.

²³⁴ *Id.* at 71–72.

²³⁵ *Id.* at 72.

²³⁶ *Id.* at 121.

²³⁷ *Id.*

²³⁸ *Id.*

²³⁹ *Id.*

²⁴⁰ *Id.* at 121–22.

c. A Burned, Contracted, and *Useful* Hand?

Not surprisingly, George testified that his right hand, after the burn, was “just as useful” as it had been before the burn, that it did not have any tenderness or pain, and that it never bothered him or interfered with work or play.²⁴¹ Charles testified that George never complained about the hand,²⁴² and that as far as use, it was a good hand.²⁴³ George testified that he enjoyed camping, and during one such trip was apparently photographed carrying two pails of water, which he did without difficulty.²⁴⁴ Rose testified that the injury did not affect George; rather, “[h]e played ball, and he was a good rifle shot; he skied [sic] . . . could pitch and paint and cut wood.”²⁴⁵ She testified that he played around with the other boys, and she never heard him say that he could not do something the other boys could.²⁴⁶ She also testified that she never heard him complain about the hand.²⁴⁷

George testified that he skied and performed all kinds of sports, and was also proficient in shooting with his right hand.²⁴⁸ Harold Sullivan had been out shooting with him two or three times, and testified that George was a “very good” shot with a pistol.²⁴⁹ Sullivan also saw him on skis,²⁵⁰ and testified that he did not see him having any difficulty.²⁵¹ William E. Sawyer, who served with George in the New Hampshire State Guard, testified that he had been in the woods shooting with him, and George was a “very good shot.”²⁵² He also testified that he never noticed George having any difficulty using his right hand and never heard him complain about it.²⁵³

One of the bases for believing that George’s pre-operation scar was not a significant impairment was the fact that he reputedly “won several medals as a marksman for the State Home Guard.”²⁵⁴ This assertion by the Hawkins family after George’s death is not supported by the trial transcript, and if it were true, it would surely have been revealed during the direct examination of George. It is true, however, that he was a member of the

241 *Id.* at 34, 49–50.

242 *Id.* at 3.

243 *Id.* at 27.

244 *Id.* at 42.

245 *Id.* at 31.

246 *Id.*

247 *Id.* at 33.

248 *Id.* at 41.

249 *Id.* at 64–65.

250 *Id.* at 64.

251 *Id.* at 65.

252 *Id.* at 66.

253 *Id.*

254 Roberts, *supra* note 129, at 13.

New Hampshire State Guard,²⁵⁵ an infantry unit that was formed during World War I.²⁵⁶ George testified that he was a member of the Guard for two years,²⁵⁷ and Harlan J. Cordwell, who had been a captain in the Guard,²⁵⁸ confirmed that George had been a member of the company.²⁵⁹

Although there is no evidence in the trial transcript that George won medals for his shooting, the mere fact that George was a member of the Guard suggests that his injured hand was not significantly debilitating. To become a member of the Guard, George was required to pass a physical examination, and he testified that he was examined by Dr. Tappan Pulsifer and passed one hundred percent.²⁶⁰ John Dresser, an officer and surgeon in the Guard, recalled having a conversation with Dr. Pulsifer about passing George, and they understood he was a good shot.²⁶¹

As a member of the Guard, George drilled with a rifle, and handled the rifle with his right hand.²⁶² George testified that he had no difficulty drilling.²⁶³ Captain Cordwell similarly testified that George did not have any difficulty handling his gun or drilling.²⁶⁴ William E. Sawyer, who was a member of the Guard with George, likewise testified that he never noticed George having any difficulty drilling.²⁶⁵ George was ranked as a marksman, and when an eight-person rifle team was assembled to compete in Concord, New Hampshire, for a shooting competition, George was selected²⁶⁶ because he had one of the "best shots."²⁶⁷ This is the likely source of the Hawkins family's assertion that George won medals for his shooting.

John Dresser testified, however, that he noticed that George "held his rifle clumsily" and told him so and demonstrated to him how it was to be held. George told him that he could not hold the rifle in that position because "of a slight deformity of his hand."²⁶⁸ Dresser testified, though, that George was still considered a "very good shot."²⁶⁹

Accordingly, the evidence regarding George's service in the Guard

²⁵⁵ Transcript of Record, *supra* note 180, at 41.

²⁵⁶ *Id.* at 56, 66. His attorney suggested that he enlisted on December 22, 1919. *Id.* at 57.

²⁵⁷ *Id.* at 41.

²⁵⁸ *Id.* at 55-56.

²⁵⁹ *Id.* at 56.

²⁶⁰ *Id.* at 41, 133.

²⁶¹ *Id.* at 138-39.

²⁶² *Id.* at 41.

²⁶³ *Id.*

²⁶⁴ *Id.* at 56.

²⁶⁵ *Id.* at 66.

²⁶⁶ *Id.* at 41, 56.

²⁶⁷ *Id.*

²⁶⁸ *Id.* at 137-38.

²⁶⁹ *Id.* at 138.

does not support the Hawkins family's assertion that he was such a good marksman that he won medals, but it does support a conclusion that his hand was not sufficiently impaired that it precluded him from passing the required physical or from being a good shot. Dresser's testimony suggests that George's hand required him to hold the rifle in a position other than normal, but this did not affect his shooting ability.

George's work history suggests that although his hand did not cause him problems with shooting, it might have caused him problems in other ways. When George was sixteen or seventeen he left school, and around the age of seventeen he went to work.²⁷⁰ For brief periods in 1918 and 1920, George worked at the Brown Company Sulfite Mill²⁷¹ as a "common laborer."²⁷² He also worked at the Cascade Mills around 1921 or 1922,²⁷³ and he was working there at the time of the surgery.²⁷⁴

George testified that the work required the use of both hands, and that he did not have any trouble doing the job.²⁷⁵ A coworker similarly testified that George did not have any trouble doing his job.²⁷⁶ William E. Sawyer, who worked with George at the Cascade Mills, never noticed him having any difficulty with the job.²⁷⁷ At the time of the operation, Michael Moffett, the person to whom George's supervisor (Edward Halloran) reported,²⁷⁸ testified that he did not recall Halloran complaining to him about McGee's work.²⁷⁹

Halloran, however, testified that George would often drop sheets of pulp, and when he asked him what was wrong (because Halloran had also been receiving complaints from superiors), George responded, "I have got a bum hand."²⁸⁰ Halloran testified that George's work was unsatisfactory, and he shifted him to a different position (wrapping), but his wrapping was "unsatisfactory" too, and Halloran received complaints.²⁸¹ When he spoke with George, George allegedly told him that "he was doing the best he could; that he wanted to get money enough to have an operation, and [Halloran] told him . . . 'go ahead . . . and I will do what I can.'"²⁸² Halloran later testified that he told him, "I will do everything I can by you, go ahead

²⁷⁰ *Id.* at 3, 34.

²⁷¹ *Id.* at 117–18.

²⁷² *Id.* at 3, 19, 34–35.

²⁷³ *Id.* at 3, 34, 108.

²⁷⁴ *Id.* at 31.

²⁷⁵ *Id.* at 34.

²⁷⁶ *Id.* at 135.

²⁷⁷ *Id.* at 67.

²⁷⁸ *Id.* at 43, 133.

²⁷⁹ *Id.* at 134.

²⁸⁰ *Id.* at 108–09 (internal quotation marks omitted), 114.

²⁸¹ *Id.* at 109, 113.

²⁸² *Id.* at 109.

and do anything that you can, and I will get you through.”²⁸³ Although George testified that he had no trouble with this work,²⁸⁴ he confirmed that he had a talk with Halloran during which Halloran agreed to let him continue working despite his unsatisfactory performance.²⁸⁵ This suggests that George did, in fact, have some trouble working as a result of his hand.

Elizabeth B. Stewart, one of George’s schoolteachers from 1916 to 1919, taught George typewriting, among other subjects.²⁸⁶ She testified that his hand caused him to type in an unusual manor, by pushing from the wrist instead of from the knuckles,²⁸⁷ which made typing difficult and caused him to fail the state typing test (which he later passed).²⁸⁸ When she tried to correct his mechanics, he said he could not type differently because of his hand.²⁸⁹ She also testified that he held his pen and pencil in an unordinary way, and “there seemed to be a stiffness in his fingers,” though his writing was fair or good considering he had a “deformed hand.”²⁹⁰

Dr. Marks testified that the pre-operation contraction of the hand would have affected its usefulness.²⁹¹ Dr. Leith testified that George had also lost the use of the end of his thumb, which he believed was the result of a “deficient nerve supply” caused by the burn.²⁹²

Thus, the contracted condition of George’s hand prior to the operation reportedly caused him some difficulties, though these difficulties do not appear to have been significant. If, however, George was still growing at the time of the operation, his hand was likely continuing to contract, and the contracting condition might have started to cause him greater problems than it had in the past.²⁹³

d. The Burned, Contracted, and Fairly Useful Hand

In conclusion, the trial testimony (and other evidence), viewed as a whole, suggests that George’s burn was significant enough in 1914 to cause his father to file a lawsuit against the Cascade Light & Power Co. The burn caused George’s right hand to contract somewhat as he grew older, and the injury likely caused him to have difficulty performing certain tasks at times. Although the extent of the difficulties do not appear to have been

²⁸³ *Id.* at 115.

²⁸⁴ *Id.* at 35.

²⁸⁵ *Id.* at 136.

²⁸⁶ *Id.* at 105.

²⁸⁷ *Id.*

²⁸⁸ *Id.* at 105–06.

²⁸⁹ *Id.* at 106.

²⁹⁰ *Id.* at 106–08.

²⁹¹ *Id.* at 121.

²⁹² *Id.* at 93.

²⁹³ *See supra* notes 227–231 and accompanying text.

significant, they might well have increased as George grew older.

2. *An Experiment?*—The traditional story is that Dr. McGee learned of George's burn prior to World War I, and after returning from the war requested permission to operate on the hand so that he could experiment with skin grafting. To convince Charles and George, he told them that he had performed skin grafts on soldiers in Germany during the war, though he later admitted this was untrue. For three years he encouraged them to permit him to operate, emphasizing the social problems the hand would cause George and promising to give him a one hundred percent perfect or good hand. Finally, when George turned eighteen, he consented.

But, the fact that George's hand was contracted somewhat prior to the operation, and the fact that it likely caused him some difficulties, suggests that George and his father may have been interested in having the operation performed. If this is true, the traditional view that Dr. McGee had to use years of pressure as well as misrepresentations to convince Charles and George to have the operation is inaccurate. In fact, as discussed below, a review of the trial testimony provides no support for the conclusion that Dr. McGee pursued Charles and George for three years, making misrepresentations and promises so that he could experiment with skin grafting.

Dr. McGee graduated from the University of Vermont Medical College in 1904,²⁹⁴ opened a practice as a physician and surgeon in Berlin, New Hampshire, that same year (he would have been around twenty-six),²⁹⁵ and became the Hawkins's family doctor around 1914.²⁹⁶ He served as a surgeon and a first lieutenant in the United States Medical Service during World War I and was stationed at the Base Hospital at Camp Merritt, New Jersey.²⁹⁷ He returned from the service in 1919.²⁹⁸ He had seen some skin grafting done at the hospital during the war and had even done some himself, but "[n]ot a great deal."²⁹⁹

There is no evidence in the trial testimony that Dr. McGee learned of George's scar before Dr. McGee served in World War I. Also, the Hawkins family members' assertion that Dr. McGee told George and Charles that he had grafted skin on German soldiers in Germany during the war, and then recanted, has no support in the record.³⁰⁰ Rather, Dr. McGee was stationed in New Jersey during the war, and testified (without impeachment) that he had performed some skin grafting (though not to the level of

294 Transcript of Record, *supra* note 180, at 67.

295 *Id.*

296 *Id.* at 17, 30.

297 *Id.* at 68.

298 *Id.* at 82.

299 *Id.*

300 Roberts, *supra* note 129, at 7.

complexity required for George's operation).³⁰¹ Had Dr. McGee made such a misrepresentation (regarding performing skin grafting on German soldiers), George's lawyer surely would have asked George, Charles, and Dr. McGee about this claim.

Additionally, there is no support in the trial testimony for the assertion that Dr. McGee encouraged Charles and George to have the operation for three years. Rather, Charles took George to see Dr. McGee in August or September 1921,³⁰² and the operation likely took place in January 1922.³⁰³ Accordingly, the assertion that there was a multi-year campaign of pressure by Dr. McGee is incorrect.

What was said during that meeting in August or September 1921 was disputed at trial. Although Charles denied wanting to have an operation done at that time,³⁰⁴ he admitted that without any suggestion from Dr. McGee, he asked Dr. McGee to look at George's hand and to provide an opinion as to what Dr. McGee could do in regard to an operation to take off the scar.³⁰⁵ Charles testified that he was only seeking information for the future so that he would be educated when he was ready to have the operation performed.³⁰⁶ He admitted, however, that he anticipated having the operation done at some time.³⁰⁷ On cross-examination, Charles contradicted this harmful testimony, stating that he did not have any intention of having the operation done at all because George was "working every day . . . earning pretty good money," and there was no real need for an operation.³⁰⁸ George testified that he did not intend to have the operation done at that time.³⁰⁹ What is undisputed, however, is that Charles (not Dr. McGee) broached the subject of an operation to correct George's hand.

At that meeting, Dr. McGee looked at George's hand.³¹⁰ Charles and George testified that Dr. McGee examined it and responded that it was "a simple operation [that] could be done very easily," but that he was not undertaking any surgical work at that time, and that Charles should take George to see Dr. Tappan Pulsifer and he would do the job.³¹¹ (Dr. McGee

³⁰¹ *Id.* at 82.

³⁰² *Id.* at 35, 45, 68, 70, 80. Charles testified that he was seeing Dr. McGee around 1922, and that he took George to see the doctor about his hand. *Id.* at 4.

³⁰³ *Id.* at 10, 29, 36.

³⁰⁴ *Id.* at 11.

³⁰⁵ *Id.* at 4, 11, 15, 68, 70, 80. George testified that Charles never suggested an operation to Dr. McGee, *id.* at 45, but that testimony cannot be believed considering Charles admitted broaching the subject with Dr. McGee. *Id.* at 4, 11, 15.

³⁰⁶ *Id.* at 11.

³⁰⁷ *Id.*

³⁰⁸ *Id.* at 13.

³⁰⁹ *Id.* at 51.

³¹⁰ *Id.* at 68.

³¹¹ *Id.* at 11, 35, 46-47, 51.

denied ever having given up surgery for a period of time.³¹² Charles testified that he responded that he did not want the job done now; he just wanted to find out what could be done (which seemingly contradicted his testimony that he was not interested in having it done at all).³¹³ Charles testified that Dr. McGee replied that he would like him to see Dr. Pulsifer to look at the hand anyway.³¹⁴

Dr. McGee testified that Charles told him that George's hand was bothering him at work and with hunting or shooting, that it was "getting worse all the time," and that he would like to have it operated on to have the scar removed.³¹⁵ This was supported by testimony from Edward James Halloran, George's foreman at the mill.³¹⁶ As previously noted, Halloran testified that when he complained to George about his work performance, George said that he was "doing the best he could," and that he wanted to earn money to have an operation.³¹⁷ This is also consistent with Charles's admission that he broached the subject of the hand with Dr. McGee, and is further consistent with the medical testimony that George's hand would have been contracting as he grew older.

Dr. McGee asserted that he told Charles that a skin graft could be performed on George, and explained to him the procedure, including the fact that sometimes the graft does not heal.³¹⁸ Dr. McGee testified that he had never performed an operation exactly like this before,³¹⁹ and he admitted on cross-examination that he would like to learn³²⁰ and was naturally interested in such an operation.³²¹ He testified that he told them he could do the operation, but that they should go to Boston or New York to see someone who performed such procedures.³²² He also denied telling them it was a simple operation.³²³ He testified that he did not want to perform the operation because such operations require significant attention and several operations³²⁴ and because the results of such an operation are uncertain.³²⁵ Dr. McGee denied telling them at that meeting to see Dr.

312 *Id.* at 80.

313 *Id.* at 4, 11.

314 *Id.* at 4, 11, 13.

315 *Id.* at 87.

316 *See id.* at 109.

317 *Id.*

318 *Id.* at 70–71.

319 *Id.* at 82, 90.

320 *Id.* at 82.

321 *Id.* at 90.

322 *Id.* at 70, 80.

323 *Id.* at 80.

324 *Id.* at 70.

325 *Id.* at 81.

Pulsifer.³²⁶

While the jury apparently believed that Dr. McGee had promised George a one hundred percent perfect or good hand, the evidence does not reveal a doctor obsessed with experimenting with skin grafting and misrepresenting his qualifications to encourage Charles and George to consent to the operation. To the contrary, Charles broached the subject of an operation to correct George's hand,³²⁷ which suggests that the hand bothered George, either physically or aesthetically, more than he admitted during trial. The fact that Dr. McGee recommended that George see a different doctor (either Dr. Pulsifer or a doctor in New York or Boston, depending on whose version is believed³²⁸) further suggests that Dr. McGee was not pursuing George so that he could experiment with skin grafting. Although Dr. McGee might have solicited the work between August/September 1921 and the operation in January 1922, perhaps even making the operation seem easier than it was, and although he was intrigued by the chance to perform the operation, the trial testimony does not comport with the traditional description of Dr. McGee. The theory that Dr. McGee wanted to experiment with skin grafting was simply a theory advanced by George's lawyer in a question posed during trial to Dr. McGee.³²⁹ Also, had there been substantial evidence that Dr. McGee simply wanted to experiment with skin grafting, one would think that his reputation in Berlin would have been damaged such that it would have been unlikely that he could thereafter be elected mayor.

3. *The Hairy Hand*.—Several facts suggest that the condition of George's right hand after the operation might not have been as bad as commonly thought. For example, the description of the post-operation hand comes from the writ filed by George in his lawsuit, and it is likely that George's lawyer would have described the hand's condition in as grotesque a fashion as possible. Also, we know that the jury did not award a particularly large sum of money (\$3,000), and the trial judge felt that any amount above

³²⁶ *Id.* at 80–81. Charles and George testified that they visited Dr. Pulsifer, a physician and surgeon in Berlin who apparently had a busy practice. *Id.* at 15, 35, 47. Charles asked him what he could do in regard to removing the scar. *Id.* at 14. Charles and George testified that Dr. Pulsifer told them that it was a very simple operation that could be done very easily. *Id.* at 35, 47. Whenever Charles was ready to have the operation, he was to notify Dr. Pulsifer and he would do it for him. *Id.* at 4, 10–11, 14, 26, 47. Dr. Pulsifer did not say anything about guaranteeing the result of the operation. *Id.* at 11. Charles and Dr. Pulsifer did not discuss the cost of the operation. *Id.* at 15. Charles did not report back to Dr. McGee about Pulsifer's opinion. *Id.* at 14. George testified that he did not have any intention of having the operation. *Id.* at 35–36.

³²⁷ *Id.* at 4.

³²⁸ *Id.* at 4, 70, 80.

³²⁹ *Id.* at 82.

\$500 was excessive.³³⁰ We also know that the trial judge ordered a nonsuit on George's negligence claim,³³¹ which means that the evidence was insufficient to support a finding that Dr. McGee had acted carelessly.³³² It seems that the more damaged the hand after the operation, the more difficult it would be to direct a nonsuit on the negligence claim.

The trial testimony indicates that the condition of George's hand might not have been significantly different from what would be expected from such an operation.³³³ Yes, the hand did have hair on it,³³⁴ which George surely did not expect (and Dr. McGee did not assert that he made George aware of this risk). And it also had excessive skin.³³⁵ After surgery, grafted skin shrinks so doctors must use enough skin to ensure the area from which the skin tissue was removed remains covered.³³⁶ It is undisputed that the grafted skin did not shrink enough to avoid leaving an excess.³³⁷ Thus, there seems to be little doubt that aesthetically the hand was worse after the operation than it had been before.

But this is only conclusive evidence that the operation was unsuccessful and the hand was worse than before *if* the only goal of the operation was to improve the hand's appearance. If one of the goals of the operation, and perhaps the primary goal, was to relieve the hand of its contracted condition, it is not so clear that the hand's condition worsened. To fully assess the post-operation condition of the hand, an analysis of the operation and the resulting condition of the hand is necessary.

Dr. McGee testified that the procedure included three operations.³³⁸ He testified that during the first operation, he cut off George's scar, which was difficult to do because it was attached to tendons, and he cut out down "to the healthy tissue as much as possible."³³⁹ Dr. Marks confirmed that during the first operation the deep cord that ran across the palm was removed.³⁴⁰ The second operation took place about a week after the first operation.³⁴¹ Dr. Marks did not participate in the second operation;³⁴² rather, Dr. Tappan

330 *McGee v. U.S. Fid. & Guar. Co.*, 53 F.2d 953, 955 (1st Cir. 1931); *Hawkins v. McGee*, 146 A. 641, 644 (N.H. 1929).

331 Transcript of Record, *supra* note 180, at 1; *U.S. Fid. & Guar.*, 53 F.2d at 954; *Hawkins*, 146 A. at 644.

332 BRYAN A. GARNER, *A DICTIONARY OF MODERN LEGAL USAGE* 596 (2d ed. 1995).

333 Transcript of Record, *supra* note 180, at 78, 91.

334 *Id.* at 40.

335 *Id.* at 91.

336 *Id.*

337 *Id.*

338 *Id.* at 75.

339 *Id.* at 71.

340 *Id.* at 121.

341 *Id.* at 37.

342 *Id.* at 122.

Pulsifer assisted.³⁴³ The purpose of the second operation was to graft the skin from George's chest onto his right hand where the scar tissue had been removed.³⁴⁴ To make sure that the skin graft properly attached to George's hand, it was necessary to attach the hand directly to the skin on his chest.³⁴⁵ Dr. McGee testified that the purpose of the third operation was to detach the hand from the chest.³⁴⁶ He testified that once the flap of skin attached to the hand had been there long enough to establish new circulation, the flap was then completely removed from the chest and fully attached to the hand.³⁴⁷

It is undisputed that the post-operation hand had excessive skin on it,³⁴⁸ and interestingly, it was the excessive skin—not the hair—that was the focus of the trial. Thus, although the hair on the hand was an issue, the primary issue with respect to the so-called burned and hairy hand was neither its burn (which admittedly had been removed) nor its hair (which likely was not excessive; otherwise it would have been a more significant issue at trial).

The excess skin was referred to at trial as a “bunch,” and the bunch was “largely skin and fat [with] some connective tissue in it, and . . . a little scar tissue.”³⁴⁹ As demonstrated below, the primary issue with respect to the bunch was whether it was a “big bunch” or a “little bunch.”

Dr. McGee felt that the operation had an “exceptionally good result,” despite the excess skin (and the hair).³⁵⁰ He testified that he felt the hand did not look any worse than it did before the operation, except possibly for the “little bunch” (as he described it).³⁵¹ He stated that there was a place on a finger that “bulge[d] out” that could not be attended to immediately, until it was seen how much of the flap would shrink and before the nourishment for the flap was established.³⁵² He asserted that although there was a little too much skin on the hand after the operation, it is the practice to have too much.³⁵³ It is preferable to have too much rather than too little because there is always shrinkage after the operation.³⁵⁴ He testified that “there is always more or less of a bunch [in the palm of the hand] where there is a

343 *Id.* at 130.

344 *Id.* at 122.

345 *Id.* at 123.

346 *Id.* at 75.

347 *Id.*

348 *Id.* at 91.

349 *Id.* at 96.

350 *Id.* at 76.

351 *Id.* at 79.

352 *Id.* at 76.

353 *Id.* at 83.

354 *Id.*

graft.”³⁵⁵ He stated that he did not know “how much shrinkage there would be” or “how long it would take.”³⁵⁶

Dr. McGee testified that he anticipated that it might be necessary to have a further procedure to get the bunch reduced.³⁵⁷ He stated that the procedure involved making a slit and removing the surplus tissue, though he admitted that there would still be a bunch of some kind and there would still be hair.³⁵⁸ He testified, however, that after the operation with the slit, it would look better than it had before.³⁵⁹ He also asserted that with an injury as deep as George’s, it would be impossible to have a graft that left the skin smooth.³⁶⁰ He testified that he achieved the result he expected from the operation, and that he anticipated that George would let him “finish the job.”³⁶¹

Dr. William H. Leith, a witness called by Dr. McGee, testified that the result of the operation was “[a] good result so far as it has gone,” and that because the graft had not “shrunk as much as might be hoped or anticipated,” there remained some superfluous skin that needed to be removed to complete the operation, and that it would not be a difficult procedure.³⁶² The procedure Dr. Leith recommended was different from the operation suggested by Dr. McGee, and if feasible, involved removing a portion of the bunch to “flatten it.”³⁶³ Dr. Leith testified that such an operation would not require George to remain in the hospital, the hand would heal in about ten days, and he could work with it several weeks later.³⁶⁴ Dr. Leith also testified that it is customary to cut an over-size graft because it will shrink during healing, but that one cannot know for sure how much it will shrink.³⁶⁵ He further testified that the hand looked healthy and had a good blood supply.³⁶⁶

Dr. Marks, who had inspected the hand, testified that he did not recall “any great lumps in the palm of his hand,” and the only “lump” he recalled that was noticeable was “one that exist[ed] at the base of the second finger, where the stump of the flap was left.”³⁶⁷ The lump existed because “[t]here is naturally around the margin of the skin flap . . . a rough edge there where

355 *Id.* at 88.

356 *Id.* at 84.

357 *Id.*

358 *Id.* at 78.

359 *Id.* at 79–80.

360 *Id.* at 88–89.

361 *Id.* at 78.

362 *Id.* at 91.

363 *Id.* at 96–98.

364 *Id.* at 98–99.

365 *Id.* at 91.

366 *Id.* at 99.

367 *Id.* at 122.

that joins the normal skin of the hand,” and “because [his] margin will leave a slight ridge.”³⁶⁸ He testified that a “simple” operation was needed to take out some of the fatty tissue at the base of one of the fingers to make it smooth.³⁶⁹ Dr. Pulsifer also testified that an additional operation was needed to remove some of the fat and that it would be simple.³⁷⁰

In contrast to Dr. McGee’s testimony regarding the post-operation condition of the hand, George testified that when he saw his hand, he felt it looked so bad he asked Dr. McGee to cut it off.³⁷¹ Charles described the excess skin as a “big bunch.”³⁷² George’s attorney referred to it as “a bunch of skin with hair growing on it” in the palm of the hand.³⁷³ George stated that it had hair on it, “the same as the hair on [his] chest,” and the hair kept growing.³⁷⁴ Rose claimed that it looked “much worse” than before the operation.³⁷⁵ George testified that there were also marks on the hand where there had been stitches used to attach the hand to his chest.³⁷⁶ He stated that these marks were noticeable after the operation, but that they have “go[ne] down some” with time.³⁷⁷ William E. Sawyer asserted that the hand looked “[f]ar worse” than it did before the operation.³⁷⁸ Dr. Pulsifer confirmed that the hand had hair on it, but that it did not hurt him to have hair on his palm.³⁷⁹ He also testified that skin is taken from wherever it is easiest, and that the chest is a “common place” from which to get skin for a graft.³⁸⁰

Charles testified that he asked Dr. McGee about the bunch, and McGee told him that it was nothing, and it would heal and then “go down in time,” perhaps in a year.³⁸¹ George also testified that Dr. McGee told him that “the bunch was going to work down to the same level as the rest of the hand.”³⁸² Dr. McGee testified that he probably told George that it would shrink some and to “come in and see [him] once in a while” so he could “see how it was doing.”³⁸³ George testified that the hand healed, but the

³⁶⁸ *Id.*

³⁶⁹ *Id.* at 124.

³⁷⁰ *Id.* at 131.

³⁷¹ *Id.* at 38.

³⁷² *Id.* at 7.

³⁷³ *Id.* at 88.

³⁷⁴ *Id.* at 40.

³⁷⁵ *Id.* at 33.

³⁷⁶ *Id.* at 40.

³⁷⁷ *Id.*

³⁷⁸ *Id.* at 67.

³⁷⁹ *Id.* at 132.

³⁸⁰ *Id.* at 133.

³⁸¹ *Id.* at 7, 25 (internal quotation marks omitted).

³⁸² *Id.* at 39.

³⁸³ *Id.* at 85.

bunch did not go down.³⁸⁴ Charles similarly testified that the bunch never went down.³⁸⁵ He testified that Dr. McGee ultimately said he was “all done with the hand” and there was “nothing more that he could do for it.”³⁸⁶ Dr. McGee testified that he felt the bunch had reduced since the operation, and had even reduced since the first trial in April.³⁸⁷

Interestingly, after the operation, George visited Edward Halloran one evening at Halloran’s house, which was the first time Halloran had seen him since the operation.³⁸⁸ Halloran asked him how his hand was coming, and George replied that it was doing “first rate” or that it was better.³⁸⁹ Halloran testified that George showed him his hand and said that Dr. McGee had “done well.”³⁹⁰ George told Halloran that he had to have another operation, and that he had not gone back for it yet.³⁹¹ George, however, denied telling Halloran that he was going to have another operation.³⁹²

Thus, with respect to the appearance of George’s hand after the operation, it is undisputed that it had a “bunch” consisting of excess skin, and that the bunch had hair on it. The size of the bunch was emphasized by Charles and George and deemphasized by Dr. McGee. Of course, the jury surely saw the hand (though the transcript does not indicate that the jury inspected it). Based on the jury’s award of only \$3,000 (an amount the Hawkins family later felt was small), the judge’s decision that any amount in excess of \$500 was excessive, and George’s subsequent agreement to settle for only \$1,400, it is likely that the “bunch” was not as grotesque, either in terms of the amount of excess skin or the amount of hair on it, as commonly thought. Although George’s sister later stated that she believed “the jurors, while at heart solidly behind the Hawkinses’ cause, were afraid to return heavier damages against McGee because he was one of the more prominent physicians in the area,”³⁹³ the small verdict combined with the judge’s opinion and George’s decision to settle for a small amount suggest that a more reasonable explanation is that the hand’s condition was not as bad as commonly portrayed.

Concerning the contracted condition of George’s hand, Dr. Leith testified that after the operation George could extend all of his fingers except one, which “lack[ed] about ten degrees of full extension, due to a

384 *Id.* at 40.

385 *Id.* at 12, 25.

386 *Id.* at 12, 21, 23, 26.

387 *Id.* at 84.

388 *Id.* at 111, 115.

389 *Id.* at 115–16.

390 *Id.* at 111.

391 *Id.* at 116.

392 *Id.* at 136.

393 Roberts, *supra* note 129, at 7.

little contraction of the scar” still on the hand.³⁹⁴ He testified that George could move all of his fingers and that “he [could] proximate the thumb to each of the fingers all the way across, and [that] he ha[d] a good, firm grasp, so that the mobility of the hand ha[d] been very much improved by the operation.”³⁹⁵ Dr. Pulsifer testified that George had “better tensions in his hand” at the time of the second trial than he had when Pulsifer examined him.³⁹⁶ Importantly, George did not offer any evidence that his hand’s contracted condition had not been improved as a result of the operation. Accordingly, to the extent Charles and George wanted the operation to relieve the hand of its contracted condition, the operation was successful.

In regard to the usefulness of George’s hand after the operation, the testimony focused primarily on whether George’s hand was more sensitive after the operation, and it appears undisputed that it was. Dr. McGee admitted that you could not expect the palm to be as tough as it was originally because it is a different kind of tissue.³⁹⁷ Rose testified that for activities that require a strong grip, George could only do them for a certain length of time, perhaps an hour, or his hand would get “raw,”³⁹⁸ and that she had seen it bleed “several times.”³⁹⁹

George testified that after the operation he was not able to perform the same work as he had before the operation without injuring his hand.⁴⁰⁰ Mark T. White, the loading foreman in the sulphite department at the Brown Company Cascade Mill,⁴⁰¹ corroborated this testimony, stating that George’s hand would prevent him from performing that type of work.⁴⁰² William E. Sawyer also asserted that he did not think George’s hand would permit him to do the previous work he had done.⁴⁰³ George testified that the “skin would peal [sic] off and become raw . . . a yellow matter [would] run out of it,” and it would take three or four days to heal.⁴⁰⁴

George testified that it was six months before he felt he could return to work after the operation.⁴⁰⁵ He stated that he returned to his old job but in a promoted position in the weighing department.⁴⁰⁶ White testified that

394 Transcript of Record, *supra* note 180, at 92.

395 *Id.* at 93.

396 *Id.* at 133.

397 *Id.* at 79.

398 *Id.* at 32–33.

399 *Id.* at 33.

400 *Id.* at 40.

401 *Id.* at 62.

402 *Id.* at 63.

403 *Id.* at 67.

404 *Id.* at 40.

405 *Id.* at 43.

406 *Id.* at 43, 53, 134.

he gave him the job because of his hand,⁴⁰⁷ and that the work was “clerical [and] office work.”⁴⁰⁸ George asserted that at times he would help out his foreman and do the work he did before, but that he could only do it for ten or fifteen minutes before his hand became “sore and raw.”⁴⁰⁹ White also testified that he asked George to help him out with some loading and “it pulled th[e] surplus flesh down so that it . . . tore it from the palm of his hand.”⁴¹⁰ White testified that George worked at the mill until around November 1924⁴¹¹ and was terminated because he did not attend to his work. The termination had nothing to do with his hand.⁴¹² George asserted that he also had problems at a subsequent job, and his hand would become raw and a “running matter” would come out of it, and it would take three or four days to heal.⁴¹³

George testified that after the operation he was also unable to shoot a revolver with his right hand because the bunch would prevent him from getting a “grip on the revolver butt,” and his index finger could barely reach the trigger, preventing him from holding the gun steady.⁴¹⁴ He was also allegedly unable to handle a rifle as well as before the operation.⁴¹⁵ George also testified that he could probably not carry a heavy pail of water with his right hand anymore,⁴¹⁶ and that he was unable to lay his right hand flat against his knee.⁴¹⁷ He testified that his hand bothered him when skiing and that he could not chop wood.⁴¹⁸ He admitted that he drove a car, but testified that it bothered him to shift because the bunch was in the way, though he could steer with his left hand.⁴¹⁹ Robert H. Reid testified that he saw George on skis in January 1925, but he did not think George could compete in an annual ski race due to his hand.⁴²⁰ William E. Sawyer stated that he saw George cranking up a motor boat, and that it left George’s hand “bruised and bleeding” where the skin was grafted.⁴²¹

An encounter between George and Ms. Wight (the neighbor) after the first trial, during which George showed Wight his hand, was a matter of

407 *Id.* at 63.

408 *Id.*

409 *Id.* at 53.

410 *Id.* at 63.

411 *Id.* at 64.

412 *Id.*

413 *Id.* at 43–44.

414 *Id.* at 41, 53.

415 *Id.* at 42.

416 *Id.*

417 *Id.* at 42–43.

418 *Id.* at 53.

419 *Id.*

420 *Id.* at 119.

421 *Id.* at 67.

dispute. Around the last week in May or the first week in June 1922, George passed Wight as he was walking along the sidewalk.⁴²² He greeted her and “went perhaps [twenty-five] or [thirty] feet and stopped and looked back at [her],” and asked if he could show her something.⁴²³ She agreed, and he came back and told her that he wanted to show her his hand.⁴²⁴ He told her that he had just bought a new car, and “there had been quite a bit of work to do on this new car, and he had scratched his hand while he was working on the car.”⁴²⁵ Wight testified that the hand had “improved greatly” since she examined it at the trial in April,⁴²⁶ and that it was “not bleeding.”⁴²⁷ She testified that “[h]e had one little scratch about a quarter of an inch long,” and that she spoke of “putting something on it, and he said it didn’t need it, . . . it was nothing; it would heal up.”⁴²⁸ George testified that this event occurred, but that his “hand was raw in places, and [a] kind of matter [was] running out of it,” and it was bleeding as a result of working on his car that morning.⁴²⁹ It seems likely that George’s hand had suffered some harm from the work on the car or else George would not have asked Wight to look at it.

George testified that his hand was a source of embarrassment, in that if he met someone for the first time and went to shake hands, the person would want to know what was in his hand.⁴³⁰ It was especially embarrassing to George when he met a woman.⁴³¹ The “fellows” would also make jokes about his hand,⁴³² and he never “had any trouble like that before the operation.”⁴³³ The Hawkins family later stated that George’s parents encouraged him to return to school but he was too embarrassed, which might well have been true.⁴³⁴ There was not, however, any testimony to this effect, and George had apparently quit school and started working prior to the operation.⁴³⁵ It is certainly possible, however, that if his hand was excessively sensitive and prevented him from performing manual labor, his parents may have encouraged him to return to school.

In conclusion, with respect to the hand’s post-operation condition, its

⁴²² *Id.* at 101.

⁴²³ *Id.*

⁴²⁴ *Id.*

⁴²⁵ *Id.*

⁴²⁶ *Id.* at 102.

⁴²⁷ *Id.* at 103.

⁴²⁸ *Id.*

⁴²⁹ *Id.* at 135.

⁴³⁰ *Id.* at 45.

⁴³¹ *Id.*

⁴³² *Id.*

⁴³³ *Id.*

⁴³⁴ Roberts, *supra* note 129, at 13.

⁴³⁵ Transcript of Record, *supra* note 180, at 34.

appearance was surely worsened, and its sensitivity likely increased. But its contracted state was likely improved.

C. The Real Story

An analysis of the trial testimony, combined with the other available information, suggests that the following is a more accurate description of the events surrounding *Hawkins v. McGee* than those commonly provided. The burn suffered by George in 1914 was a third-degree burn, and so serious that Charles filed suit against the responsible utility company and took George to Montreal to determine if anything could be done to restore the hand. The doctors in Montreal recommended against taking any action, and over the years the fingers on George's hand drew inward because the hand grew but the scar tissue did not. Although there is not substantial evidence that the contracting nature of the hand caused George serious problems, the hand was continuing to contract as he aged and was perhaps causing him increasing difficulties. As a result, Charles inquired of Dr. McGee as to whether anything could be done to correct the problem.

Charles and George, when speaking with Dr. McGee, probably emphasized the contracted condition of the hand, and there was likely little discussion about the hand's appearance (or improving it). Dr. McGee told Charles and George that there were better persons to perform such an operation than he, but a few months later they agreed that Dr. McGee would perform the operation. Dr. McGee might have encouraged Charles and George to have the operation, but it would have been over the course of four or five months, not three years as was later alleged by the Hawkins family.

Dr. McGee most likely did a poor job of warning Charles and George about the *seriousness of the operation*; about *having to use excess skin that might not shrink to a perfect fit*; about chest skin being more sensitive than the skin originally on the hand; and about the possibility of having hair on the grafted skin. (There is no evidence in the record, however, that Dr. McGee told Charles and George that he was going to use skin from George's thigh, as was later alleged by the Hawkins family.) Dr. McGee might not have been as forthcoming as he should have been because he was intrigued with the possibility of the operation, but he did not pursue Charles and George so that he could experiment with skin grafting.

The operation was successful with respect to relieving the hand of its contracted state. With respect to how the hand looked, it was surely worse than before: George traded scar tissue for excess skin with hair. It was also likely more sensitive than it had been before, which might have made it difficult for him to engage in manual labor or other similar tasks. Thus, a burned and contracted hand was replaced with a hairy and sensitive hand. And, there is no testimony in the record indicating that Dr. McGee warned

Charles and George that even if the operation was a success with respect to relieving the hand of its contraction, it might look worse and be sensitive.

Thus, I suspect that *Hawkins v. McGee* is not about an incompetent doctor (remember, the trial judge ordered a nonsuit on the negligence claim) who pursued a patient for years, saying whatever was necessary to convince the patient to undergo an unnecessary and undesired surgery so that the doctor could experiment with skin grafting. Rather, I suspect that it is a case of a patient who wanted to fix a problem with his hand and a doctor who failed to effectively communicate some significant side effects that might result. Accordingly, the popular perception of the facts, gleaned from *The Paper Chase* and Jorie Roberts's interview with Hawkins family members, is likely wrong.

Rather, the case was probably about a misunderstanding. If Dr. McGee promised George a one hundred percent perfect or good hand, George likely thought Dr. McGee meant perfect in all respects, but Dr. McGee likely meant perfect with respect to relieving the hand of its contracted condition. Presumably a reasonable person would have interpreted Dr. McGee's alleged promise to mean perfect in all respects, so under the objective theory of contracts Dr. McGee would be liable for breach. But we are still left to answer Professor Kingsfield's question to James Hart in *The Paper Chase*: "[W]hat sort of damages do you think the doctor should pay?"⁴³⁶ As discussed in Part I of this Article, I think he should pay the difference between George's post-operation hand and what Dr. McGee intended to promise him (or an amount based on George's reliance interest, whichever is greater).

CONCLUSION

This Article has shown that when there is a misunderstanding with respect to what has been promised under a bargained-for exchange contract, the remedy for breach should be based on what the promisor intended to promise. An award based on the objective theory of contracts cannot be justified on either deontological or consequential grounds and is therefore unwarranted.

Under the exception to the general rule of damages this Article proposes for cases involving contractual misunderstandings, the most famous case involving expectation damages—*Hawkins v. McGee*—was wrongly decided. George Hawkins should have been entitled only to the difference in value between his hand prior to the operation and the post-operation condition of the hand as Dr. McGee intended to promise. Accordingly, any negative side effects of the operation (such as the hair and additional skin) should not have been taken into account when measuring damages. If, however, the reliance

⁴³⁶ THE PAPER CHASE BOOK, *supra* note 2, at 7 (internal quotation marks omitted).

interest would have provided for a greater recovery, Hawkins should have been entitled to the difference between the condition of his hand before the operation and the condition of his hand after the operation.⁴³⁷ Although McGee was likely to blame for the misunderstanding, the availability of the award proposed by this Article will be sufficient incentive for promisors to act carefully when using *promissory language*.

⁴³⁷ Thus, let us assume (as I think was true) that Dr. McGee intended his alleged reference to a one hundred percent perfect or good hand to relate solely to the hand's contracted state, and let us assign a value of "10" to a hand with perfect flexibility. If George's hand prior to the operation had a value of "6," and after the operation it had a value of "9," George would be entitled to damages based on the difference between a hand with a flexibility of "9" and a hand with a flexibility of "10." If, however, the difference in value between the post-operation hand and the value of the promised hand based on an objective interpretation of the promise (which would likely include its appearance and its sensitivity) was greater than the difference between a hand with a "9" flexibility and a "10" flexibility, this larger amount would be awarded.

