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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

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

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. A review of the facts of contract law's most famous "expectation damages" case—Hawkins v. McGee—shows that the court's application of established doctrine resulted in an unjust decision.

1 Assistant Professor of Law, Barry University School of Law. JD, cum laude, New York University, 1993; BA, summa cum laude, University of Central Florida, 1990. I would like to thank Helen Huntoon of the New Hampshire Superior Court, Coos County; Joan L. Gearin, Archivist at the National Archives and Records Administration, Northeast Region; Dr. Linda Upham-Bornstein; M. Susan Sacco; and Eang Ngov for their help during the preparation of this Article. I would also like to thank Douglas Baird for answering the numerous (and often lengthy) contracts questions I have had over the past two years and for the advice provided by Randy Barnett on teaching contract law at the American Association of Law Schools' New Professor Workshop.

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, 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, but the operation left him with a hairy hand. 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. 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. 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”), by a judge trained at Harvard.

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5 Id. at 643.
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 School (where the leading classical contract law scholar—Samuel Williston—taught).10

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


“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 damages\(^{18}\) designed

\(^{14}\) 13 \textit{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).

\(^{15}\) 15 \textit{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).

\(^{16}\) 16 \textit{Restatement (Second) of Contracts} § 344(c) (1981); see, e.g., United States \textit{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, \textit{An Inquiry into the Principles of the Law of Contracts}, 46 \textit{Harv. L. Rev.} 1, 15-19 (1932), and made famous by Lon Fuller, see L. Fuller & William R. Perdue, Jr., \textit{The Reliance Interest in Contract Damages} (pt. 1), 46 \textit{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, \textit{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, \textit{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.” \textit{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. \textit{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”); \textit{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.” \textit{Id.} § 359. But see Alan Schwartz,
to protect the injured party's expectation interest. In other words, the award is designed to give the injured party the "benefit of the bargain." Recovery for the failure to keep an enforceable promise "was from the beginning measured by the value of the promised performance" and the connection between contract law and expectation damages was "taken as canonical for some hundred years."

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20 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 if the contract had 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.").

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.\(^1\) 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.\(^2\) Thus, the expectation interest rule is arguably contract law's "most basic" principle.\(^3\)

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.\(^4\) 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.\(^5\) And efforts by an injured party

\(^{\text{1}}\) See Restatement (Second) of Contracts § 344 cmt. a (1981).

\(^{\text{2}}\) 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.

\(^{\text{3}}\) 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)).

\(^{\text{4}}\) 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).

\(^{\text{5}}\) 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.").

\(^{\text{6}}\) 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)).

\(^{\text{7}}\) 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." If the defendant carries this burden, the injured party’s recovery would be the same as a recovery that protects the expectation interest.

The restitution interest is usually used only when the contract (from the injured party’s standpoint) turns out to be a losing contract. 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. 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.

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. One of the axioms of classical contract law, which dominated from the mid-nineteenth century to the early twentieth century, 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.”

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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.
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(1871), his A Summary of the Law of Contracts (1880), or Oliver Wendell Holmes, Jr.’s The Common Law (1881).

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. 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 contracts (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”).

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, and it therefore must be a form of distributive justice with a lesser claim to protection than the reliance and restitution interests. Fuller rejected the so-called will theory of contract law (which was based on the notion that contracts were enforceable

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 (“It 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 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.

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. 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). 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

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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.").


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.").
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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 "[c]ontract [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. 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. As Fuller stated, "[t]o encourage reliance we must therefore dispense with its proof." Therefore, Fuller believed that protecting the expectation interest might have the effect of "promoting and facilitating reliance on business agreements." Thus, according to Fuller, expectation damages likely were awarded not to protect the expectation interest, but to protect the reliance interest.

Theorizing about the proper measure of damages arose again in the late 1970s and early 1980s. During this time, Patrick Atiyah argued that protecting the expectation interest could not rank equally with protecting the restitution or reliance interests, 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. 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." The two leading approaches to contract theory—one emphasizing the "moral value of autonomy" (a deontological approach derived from Kantianism and liberalism) and the other emphasizing economic analysis (a consequentialist approach that is in some sense a variation of utilitarianism)—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).
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 McLean & 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. 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.

Law and economics scholars argued that the expectation interest discourages inefficient breaches. "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."

Although expectation damages are the norm, and defended by the

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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 "arguably 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.”\textsuperscript{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;”\textsuperscript{74} damages that the breaching party “did not have reason to foresee as a probable result of the breach when the contract was made;”\textsuperscript{75} damages that cannot be proven with “reasonable certainty;”\textsuperscript{76} “emotional disturbance” damages,\textsuperscript{77} and attorney’s fees incurred enforcing the contract.\textsuperscript{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.”\textsuperscript{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,\textsuperscript{80} “courts typically compute damages objectively, thereby ignoring a party’s special circumstances . . . .”\textsuperscript{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.”\textsuperscript{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.”\textsuperscript{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.”\textsuperscript{84}

\textsuperscript{73} Hillman, supra note 19, at 506.
\textsuperscript{74} Restatement (Second) of Contracts § 350(1) (1981).
\textsuperscript{75} Id. § 351(1).
\textsuperscript{76} Id. § 352.
\textsuperscript{77} Id. § 353.
\textsuperscript{78} See Hillman, supra note 19, at 507–08.
\textsuperscript{79} Restatement (Second) of Contracts § 351(3) (1981).
\textsuperscript{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”).
\textsuperscript{81} Hillman, supra note 19, at 508 (citation omitted). This could be caused by the limitations based on certainty and foreseeability.
\textsuperscript{82} Restatement (Second) of Contracts § 90(1) (1981).
\textsuperscript{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. e. 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).
\textsuperscript{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.\(^9\) Williston maintained that if a promise is enforceable, expectation damages were appropriate regardless of the basis for enforcing the promise.\(^6\) 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.\(^9\) Coudert, in contrast, believed the remedy should be aligned with the interest supporting enforcement.\(^8\)

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.\(^9\) 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.\(^9\) Damages must be proven with reasonable certainty out of a concern courts will award "baseless recoveries."\(^9\)

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.\(^9\) Damages can also be limited in certain situations when "justice requires"\(^9\) or when the result would lead to "disproportionate" compensation.\(^9\)

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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).
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, is that the meaning of an enforceable promise, i.e., the scope of the contractual obligation, is determined objectively. Contract law "adopts an external or objective standard for interpreting conduct; it means the external expression of intention as distinguished from undisclosed intention."\(^95\)

\(^95\) 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

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

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 ("Actual 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. "[T]he intentions of the parties to a contract . . . are to be ascertained from their words and conduct rather than their unexpressed intentions." 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." Therefore, unless the parties attach the same unreasonable meaning to a contract term, the term will be interpreted objectively. 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 . . . ."

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. Under this theory, the rationale for the objective theory is to "protect[] a promisee's reasonable reliance on the promisor's manifestation of intent." 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."

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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., Frigaliment 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, 1780-1866, 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." 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."

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. 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, 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. 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, support the expectation damages measure because it forces the promisor to internalize the promisee's losses from failing to receive the performance. 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. This is known as the "theory of efficient breach."

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. As Judge Posner has noted, "[the 'subjective' theory of contract, which holds that there must be an actual meeting of

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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.


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.'"

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." 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. 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," 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. 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. Incurring such expenditures without taking into account the chance of breach thus encourages inefficient reliance. 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,” 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.
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.\textsuperscript{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—\textit{Hawkins v. McGee}\textsuperscript{126}—and shows that contrary to popular perception, the case involved a contractual misunderstanding. Accordingly, although the measure of damages in \textit{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 \textit{Hawkins}
v. McGee comes primarily from four sources: (1) Justice Oliver Winslow Branch's opinion for the New Hampshire Supreme Court;\(^\text{127}\) (2) the Court of Appeals for the First Circuit's decision in McGee v. United States Fidelity & Guaranty Co.;\(^\text{128}\) (3) Jorie Roberts's 1978 article in the Harvard Law Record about the case;\(^\text{129}\) and (4) John Jay Obsorn, Jr.'s use of the case in the opening scene of his 1971 novel The Paper Chase,\(^\text{130}\) as well as the use of the case in the opening scenes of the movie\(^\text{131}\) and the pilot in the television series.\(^\text{132}\) 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,\(^\text{133}\) learns of young George Hawkins's scarred hand before Dr. McGee served as a doctor in Europe in World War I.\(^\text{134}\) While in Europe during the war he observes skin grafting operations on German soldiers,\(^\text{135}\) and after returning from the war requests permission...
from Charles Hawkins (George's father) to perform an operation on George because he wants to experiment with skin grafting. Charles and George are pursued by Dr. McGee for three years, even though George does not need the operation because his scar is just a "small pencil-size scar" that "does not substantially affect his use of the hand," and in fact his hand "[i]s a practical, useful hand" (he even won several medals for his marksmanship ability). In an effort to convince Charles and George to consent to the operation, Dr. McGee misrepresents his ability to undertake a skin-grafting operation, and further misrepresents that he performed such operations on German soldiers during the war. 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. He also promises George that the surgery will result in "a hundred per cent perfect hand or a hundred per cent good hand;" 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) ("The 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) recollects 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.'").
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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 surgery\(^{150}\) (including using skin from George's chest\(^{151}\) 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. Also, in the second trial, the judge (Judge Scammon) ordered a nonsuit on the negligence claim against Dr. McGee. 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). 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." 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, George settled the case for only $1,400. After the trial Dr. McGee's practice apparently grew, and he was elected mayor of Berlin, New Hampshire, 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; that the First Circuit relied significantly on the allegations in George's state-court complaint; 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.

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 ("The 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 ("The 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 ("The 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.
CONTRACTUAL MISUNDERSTANDINGS

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, and that the hand’s pre-operation condition possibly caused him some difficulty (though likely not significant difficulty). Second, the evidence shows that Charles Hawkins broached the subject of George’s hand with Dr. McGee; Dr. McGee initially did not want to perform the operation, 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. 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 hand 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.

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. 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). 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, there was a bad
storm in his hometown of Berlin, New Hampshire.\textsuperscript{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.\textsuperscript{182} The next morning,\textsuperscript{183} Charles sent George downstairs to start a fire.\textsuperscript{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."\textsuperscript{185}

George was treated by a doctor that morning.\textsuperscript{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.\textsuperscript{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,\textsuperscript{188} and it took three or four weeks for the burn to heal.\textsuperscript{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.\textsuperscript{190} This is significant because it suggests that the pre-operation injury was severe enough to

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\textsuperscript{181} Transcript of Record, supra note 180, at 2, 100.
\textsuperscript{182} Id. at 2–3, 17.
\textsuperscript{183} Id. at 100; Writ, supra note 180.
\textsuperscript{184} Transcript of Record, supra note 180, at 100.
\textsuperscript{185} Id. at 2, 17–18, 33, 100, 120 (right hand).
\textsuperscript{186} Id. at 3, 29.
\textsuperscript{187} Id. at 29–30.
\textsuperscript{188} Id. at 30.
\textsuperscript{189} Id. at 3, 30, 33, 49.
\textsuperscript{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), 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, and Dr. Homer M. Marks, who assisted with the first operation, agreed that it was a third-degree burn. 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. 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." Dr. Leith, an expert called by Dr. McGee, who only inspected the hand after the operation, 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." George testified that the scar was perhaps a little darker than ordinary skin color, whereas Charles and Rose testified that it was dark. George and Rose testified that it was not an "awfully bad looking hand" and was not "repulsive" looking. Ethel Oldham, who appears to have been a friend of the Hawkins family, described it as a small scar across his hand, "about

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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," running from the bottom of a finger to the bottom of his thumb and darker than his natural skin color.

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

With respect to whether the hand was contracted prior to the operation, George and Charles admitted that a finger was "drawn in," and Charles acknowledged that the hand was drawn in slightly. 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. Harold C. Sullivan, who appeared to be a friend of George's and who knew him since George was twelve or fourteen, described the injury as a "cord that had been burned and contracted," and "[i]t seemed to cup the hand." William E. Sawyer, who knew George prior to 1922, testified that the hand had a "contraction," and that a finger and the thumb were somewhat drawn in together.

Dr. McGee testified that when he saw the hand in 1921, it was "contracted and deformed." 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." 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.
as though it had been burned out.\textsuperscript{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."\textsuperscript{221} Elizabeth B. Stewart, one of George's schoolteachers from 1916 to 1919, testified that he had a "deformed hand."\textsuperscript{222}

Edward James Halloran, foreman at the mill where George worked,\textsuperscript{223} testified that the hand was "slightly cupped" and was "pretty well contracted."\textsuperscript{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."\textsuperscript{225}

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

\begin{quote}
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...\textsuperscript{229}
\end{quote}

John M. Dresser, an officer and surgeon in the State Guard, testified that George showed him his hand and the "fingers were contracted."\textsuperscript{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

\textsuperscript{220} Id.
\textsuperscript{221} Id. at 102.
\textsuperscript{222} Id. at 108.
\textsuperscript{223} Id. at 108–09.
\textsuperscript{224} Id. at 109.
\textsuperscript{225} Id. at 92.
\textsuperscript{226} Id. at 69.
\textsuperscript{227} Id. at 92.
\textsuperscript{228} Id. at 120.
\textsuperscript{229} Id.
\textsuperscript{230} Id. at 138.
contractions. 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.

With respect to the operation procedure, Dr. McGee testified that after
cutting out the scar and the affected tissue 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. 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. Dr.
Marks confirmed that the hand was "dressed and put . . . in splints" after
the operation to maintain the position they had achieved.

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." He testified that it was impossible to free the thumb to obtain
full motion, but that it was improved by fifty percent or more. 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." 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.

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

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. 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.

As a member of the Guard, George drilled with a rifle, and handled the rifle with his right hand. George testified that he had no difficulty drilling. Captain Cordwell similarly testified that George did not have any difficulty handling his gun or drilling. William E. Sawyer, who was a member of the Guard with George, likewise testified that he never noticed George having any difficulty drilling. 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 selected because he had one of the “best shots.” 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.” Dresser testified, though, that George was still considered a “very good shot.”

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

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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. For brief periods in 1918 and 1920, George worked at the Brown Company Sulfite Mill as a “common laborer.” He also worked at the Cascade Mills around 1921 or 1922 and he was working there at the time of the surgery.

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

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.” 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. 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.’” 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."\textsuperscript{283} Although George testified that he had no trouble with this work,\textsuperscript{284} he confirmed that he had a talk with Halloran during which Halloran agreed to let him continue working despite his unsatisfactory performance.\textsuperscript{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.\textsuperscript{286} She testified that his hand caused him to type in an unusual manor, by pushing from the wrist instead of from the knuckles,\textsuperscript{287} which made typing difficult and caused him to fail the state typing test (which he later passed).\textsuperscript{288} When she tried to correct his mechanics, he said he could not type differently because of his hand.\textsuperscript{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."\textsuperscript{290}

Dr. Marks testified that the pre-operation contraction of the hand would have affected its usefulness.\textsuperscript{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.\textsuperscript{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.\textsuperscript{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

\begin{footnotes}
\item[283] Id. at 115.
\item[284] Id. at 35.
\item[285] Id. at 136.
\item[286] Id. at 105.
\item[287] Id.
\item[288] Id. at 105–06.
\item[289] Id. at 106.
\item[290] Id. at 106–08.
\item[291] Id. at 121.
\item[292] Id. at 93.
\item[293] See supra notes 227–231 and accompanying text.
\end{footnotes}
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, opened a practice as a physician and surgeon in Berlin, New Hampshire, that same year (he would have been around twenty-six), and became the Hawkins's family doctor around 1914. 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. He returned from the service in 1919. 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." 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. 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

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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).\textsuperscript{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,\textsuperscript{302} and the operation likely took place in January 1922.\textsuperscript{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,\textsuperscript{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.\textsuperscript{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.\textsuperscript{306} He admitted, however, that he anticipated having the operation done at some time.\textsuperscript{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.\textsuperscript{308} George testified that he did not intend to have the operation done at that time.\textsuperscript{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.\textsuperscript{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.\textsuperscript{311} (Dr. McGee

\begin{thebibliography}{99}
\bibitem{301} Id. at 82.
\bibitem{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.
\bibitem{303} Id. at 10, 29, 36.
\bibitem{304} Id. at 11.
\bibitem{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.
\bibitem{306} Id. at 11.
\bibitem{307} Id.
\bibitem{308} Id. at 13.
\bibitem{309} Id. at 51.
\bibitem{310} Id. at 68.
\bibitem{311} Id. at 11, 35, 46–47, 51.
\end{thebibliography}
denied ever having given up surgery for a period of time.\textsuperscript{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).\textsuperscript{313} Charles testified that Dr. McGee replied that he would like him to see Dr. Pulsifer to look at the hand anyway.\textsuperscript{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.\textsuperscript{315} This was supported by testimony from Edward James Halloran, George's foreman at the mill.\textsuperscript{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.\textsuperscript{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.\textsuperscript{318} Dr. McGee testified that he had never performed an operation exactly like this before,\textsuperscript{319} and he admitted on cross-examination that he would like to learn\textsuperscript{320} and was naturally interested in such an operation.\textsuperscript{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.\textsuperscript{322} He also denied telling them it was a simple operation.\textsuperscript{323} He testified that he did not want to perform the operation because such operations require significant attention and several operations\textsuperscript{324} and because the results of such an operation are uncertain.\textsuperscript{325} Dr. McGee denied telling them at that meeting to see Dr.
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, 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 believed) 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. 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

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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.\textsuperscript{330} We also know that the trial judge ordered a nonsuit on George’s negligence claim,\textsuperscript{331} which means that the evidence was insufficient to support a finding that Dr. McGee had acted carelessly.\textsuperscript{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.\textsuperscript{333} Yes, the hand did have hair on it,\textsuperscript{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.\textsuperscript{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.\textsuperscript{336} It is undisputed that the grafted skin did not shrink enough to avoid leaving an excess.\textsuperscript{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.\textsuperscript{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.”\textsuperscript{339} Dr. Marks confirmed that during the first operation the deep cord that ran across the palm was removed.\textsuperscript{340} The second operation took place about a week after the first operation.\textsuperscript{341} Dr. Marks did not participate in the second operation;\textsuperscript{342} rather, Dr. Tappan


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

\textsuperscript{332} BRYAN A. GARNER, A DICTIONARY OF MODERN LEGAL USAGE 596 (2d ed. 1995).

\textsuperscript{333} Transcript of Record, supra note 180, at 78, 91.
Pulsifer assisted.\textsuperscript{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.\textsuperscript{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.\textsuperscript{345} Dr. McGee testified that the purpose of the third operation was to detach the hand from the chest.\textsuperscript{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.\textsuperscript{347}

It is undisputed that the post-operation hand had excessive skin on it,\textsuperscript{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.”\textsuperscript{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).\textsuperscript{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).\textsuperscript{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.\textsuperscript{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.\textsuperscript{353} It is preferable to have too much rather than too little because there is always shrinkage after the operation.\textsuperscript{354} He testified that “there is always more or less of a bunch [in the palm of the hand] where there is a

\begin{itemize}
  \item \textsuperscript{343} \textit{Id.} at 130.
  \item \textsuperscript{344} \textit{Id.} at 122.
  \item \textsuperscript{345} \textit{Id.} at 123.
  \item \textsuperscript{346} \textit{Id.} at 75.
  \item \textsuperscript{347} \textit{Id.}
  \item \textsuperscript{348} \textit{Id.} at 91.
  \item \textsuperscript{349} \textit{Id.} at 76.
  \item \textsuperscript{350} \textit{Id.} at 83.
  \item \textsuperscript{351} \textit{Id.} at 83.
  \item \textsuperscript{352} \textit{Id.} at 76.
  \item \textsuperscript{353} \textit{Id.} at 79.
  \item \textsuperscript{354} \textit{Id.}
\end{itemize}
CONTRACTUAL MISUNDERSTANDINGS

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

Dr. McGee testified that he anticipated that it might be necessary to have a further procedure to get the bunch reduced. 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. He testified, however, that after the operation with the slit, it would look better than it had before. 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. He testified that he achieved the result he expected from the operation, and that he anticipated that George would let him “finish the job.”

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 “shrunken 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. 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.” 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. 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. He further testified that the hand looked healthy and had a good blood supply.

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.” The lump existed because “[t]here is naturally around the margin of the skin flap . . . a rough edge there where

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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." 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. Dr. Pulsifer also testified that an additional operation was needed to remove some of the fat and that it would be simple.

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. Charles described the excess skin as a "big bunch." George's attorney referred to it as "a bunch of skin with hair growing on it" in the palm of the hand. George stated that it had hair on it, "the same as the hair on [his] chest," and the hair kept growing. Rose claimed that it looked "much worse" than before the operation. George testified that there were also marks on the hand where there had been stitches used to attach the hand to his chest. He stated that these marks were noticeable after the operation, but that they have "gone down some" with time. William E. Sawyer asserted that the hand looked "far worse" than it did before the operation. Dr. Pulsifer confirmed that the hand had hair on it, but that it did not hurt him to have hair on his palm. 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.

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. 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." 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." 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. Charles similarly testified that the bunch never went down. 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." Dr. McGee testified that he felt the bunch had reduced since the operation, and had even reduced since the first trial in April.

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. Halloran asked him how his hand was coming, and George replied that it was doing "first rate" or that it was better. Halloran testified that George showed him his hand and said that Dr. McGee had "done well." George told Halloran that he had to have another operation, and that he had not gone back for it yet. George, however, denied telling Halloran that he was going to have another operation.

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," 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.  

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."  

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.  

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. 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," and that she had seen it bleed "several times."  

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. Mark T. White, the loading foreman in the sulphite department at the Brown Company Cascade Mill, corroborated this testimony, stating that George's hand would prevent him from performing that type of work. William E. Sawyer also asserted that he did not think George's hand would permit him to do the previous work he had done. 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.  

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

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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, and that the work was "clerical [and] office work." 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." White also testified that he asked George to help him out with some loading and "it pulled the surplus flesh down so that it tore it from the palm of his hand." White testified that George worked at the mill until around November 1924 and was terminated because he did not attend to his work. The termination had nothing to do with his hand. 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.

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. He was also allegedly unable to handle a rifle as well as before the operation. George also testified that he could probably not carry a heavy pail of water with his right hand anymore, and that he was unable to lay his right hand flat against his knee. He testified that his hand bothered him when skiing and that he could not chop wood. 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. 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. 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.

An encounter between George and Ms. Wight (the neighbor) after the first trial, during which George showed Wight his hand, was a matter of
dispute. Around the last week in May or the first week in June 1922, George passed Wight as he was walking along the sidewalk. 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. She agreed, and he came back and told her that he wanted to show her his hand. 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." Wight testified that the hand had "improved greatly" since she examined it at the trial in April, and that it was "not bleeding." 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." 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. 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. It was especially embarrassing to George when he met a woman. The "fellows" would also make jokes about his hand, and he never "had any trouble like that before the operation." 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. There was not, however, any testimony to this effect, and George had apparently quit school and started working prior to the operation. 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

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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.
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?"

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

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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. 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.