In addition to the Restatement, statutes are a second important source of authority, particularly Article 2 of the Uniform Commercial Code, which, as we shall see in the next case, governs all cases involving the sale of goods. We highlight various sources of law as we encounter them below.

Of course, the primary sources relied on in this casebook are judicial opinions, or the common law, and we begin our investigation of promises with a well-known case, Hawkins v. McGee.

Hawkins v. McGee

New Hampshire Supreme Court, 1929.
84 N.H. 114, 146 A. 641.

■ BRANCH, J. The operation in question consisted in the removal of a considerable quantity of scar tissue from the palm of the plaintiff's right hand and the grafting of skin taken from the plaintiff's chest in place thereof. The scar tissue was the result of a severe burn caused by contact with an electric wire, which the plaintiff received about nine years before the time of the transactions here involved. There was evidence to the effect that before the operation was performed the plaintiff and his father went to the defendant's office, and that the defendant, in answer to the question, "How long will the boy be in the hospital?" replied, "Three or four days, not over four; then the boy can go home and it will be just a few days when he will go back to work with a good hand." Clearly this and other testimony to the same effect would not justify a finding that the doctor contracted to complete the hospital treatment in three or four days or that the plaintiff would be able to go back to work within a few days thereafter. The above statements could only be construed as expressions of opinion or predictions as to the probable duration of the treatment and plaintiff's resulting disability, and the fact that these estimates were exceeded would impose no contractual liability upon the defendant. 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." The plaintiff was present when these words were alleged to have been spoken, and, if they are to be taken at their face value, it seems obvious that proof of their utterance would establish the giving of a warranty in accordance with his contention.

The defendant argues, however, that, even if these words were uttered by him, no reasonable man would understand that they were used with the intention of entering "into any contractual relation whatever," and that they could reasonably be understood only "as his expression in strong language that he believed and expected that as a result of the operation he would give the plaintiff a very good hand." It may be conceded, as the defendant contends, that, before the question of the making of a contract should be submitted to a jury, there is a preliminary question of law for the trial court to pass upon, i.e. "whether the words could possibly have the meaning imputed to them by the party who founds his case upon a certain

interpretation," but it cannot be held that the trial court decided this question erroneously in the present case. It is unnecessary to determine at this time whether the argument of the defendant, based upon "common knowledge of the uncertainty which attends all surgical operations," and the improbability that a surgeon would ever contract to make a damaged part of the human body "one hundred per cent perfect," would, in the absence of countervailing considerations, be regarded as conclusive, for there were other factors in the present case which tended to support the contention of the plaintiff. 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. If the jury accepted this part of plaintiff's contention, there would be a reasonable basis for the further conclusion that, if defendant spoke the words attributed to him, he did so with the intention that they should be accepted at their face value, as an inducement for the granting of consent to the operation by the plaintiff and his father, and there was ample evidence that they were so accepted by them. The question of the making of the alleged contract was properly submitted to the jury.

[The Court then discussed the proper measure of damages and, finding that the trial court's instructions regarding damages to the jury were erroneous, ordered a new trial. We take up the question of damages in Section 2.]

NOTES

(1) *One Hundred Percent.* Dr. McGee made a number of statements to the boy's father regarding the outcome of treatment, but it does not appear that Dr. McGee actually used the word "promise." What makes a statement a promise? Consider the role of language, its context, and the nature of the transaction. See Restatement §§ 2 and 4. What result if a surgeon, before performing reconstructive knee surgery, tells the patient that "the operation could give you a knee that was stronger than before" and that the patient would, "if committed, play basketball again"? See Anglin v. Kleeman, 665 A.2d 747 (N.H.1995).

(2) *Policy Considerations.* In a well-known case involving plastic surgery gone wrong, the court observed that "[i]t is not hard to see why the courts should be unenthusiastic or skeptical about contract theory [in such a case]." Sullivan v. O'Connor, 296 N.E.2d 183 (Mass.1973). Is judicial skepticism about recovery in contract warranted? Why? What other theories of recovery might an aggrieved plaintiff try? What factors might contribute to a decision to bring one sort of claim rather than another? The *Sullivan* case is presented on p. 14 below.

(3) *Statutory Override.* Common-law rulings by judges sometimes give way to opposing judgments by legislatures. In this regard, consider the following. In 1971, the Michigan Supreme Court affirmed a judgment for damages for breach of contract against a surgeon who, according to his patient's testimony, had said before a stomach operation, "After this operation, you can throw your pillbox away" and "Once you have an operation it takes care of all your troubles." Guilmet v. Campbell, 188 N.W.2d 601 (Mich.1971). Three years later, the Michigan legislature enacted a statute providing that an "agreement promise, contract, or warranty of cure relating to medical care or treatment" is void unless evidenced by a signed

writing. 31 Mich.Comp.L.Ann. 566132(g). We note the interplay between courts and legislatures at various points throughout this book.

Bayliner Marine Corp. v. Crow

Supreme Court of Virginia, 1999.
257 Va. 121, 509 S.E.2d 499.

■ KEENAN, JUSTICE. In this appeal, the dispositive issue is whether there was sufficient evidence to support the trial court's ruling that the manufacturer of a sport fishing boat breached an express warranty and implied warranties of merchantability and fitness for a particular purpose.

In the summer of 1989, John R. Crow was invited by John Atherton, then a sales representative for Tidewater Yacht Agency, Inc. (Tidewater), to ride on a new model sport fishing boat known as a 3486 Trophy Convertible, manufactured by Bayliner Marine Corporation (Bayliner). During an excursion lasting about 20 minutes, Crow piloted the boat for a short period of time but was not able to determine its speed because there was no equipment on board for such testing.

When Crow asked Atherton about the maximum speed of the boat, Atherton explained that he had no personal experience with the boat or information from other customers concerning the boat's performance. Therefore, Atherton consulted two documents described as "prop matrixes," which were included by Bayliner in its dealer's manual.

Atherton gave Crow copies of the "prop matrixes," which listed the boat models offered by Bayliner and stated the recommended propeller sizes, gear ratios, and engine sizes for each model. The "prop matrixes" also listed the maximum speed for each model. The 3486 Trophy Convertible was listed as having a maximum speed of 30 miles per hour when equipped with a size "20x20" or "20x19" propeller. The boat Crow purchased did not have either size propeller but, instead, had a size "20x17" propeller.

At the bottom of one of the "prop matrixes" was the following disclaimer: "This data is intended for comparative purposes only, and is available without reference to weather conditions or other variables. All testing was done at or near sea level, with full fuel and water tanks, and approximately 600 lb. passenger and gear weight."

Atherton also showed Crow a Bayliner brochure describing the 1989 boat models, including the 3486 Trophy Convertible. The brochure included a picture of that model fully rigged for offshore fishing accompanied by the statement that this model "delivers the kind of performance you need to get to the prime offshore fishing grounds."

In August 1989, Crow entered into a written contract for the purchase of the 3486 Trophy Convertible in which he had ridden. The purchase price was $120,000, exclusive of taxes. The purchase price included various equipment to be installed by Tidewater including a generator, a cockpit cover, a "Bimini top," a winch, a spotlight, radar, a navigation system, an icemaker, fishing outriggers, an automatic pilot system, extra fuel gauges, a