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PHYSICIANS COUNTERATTACK: LIABILITY OF LAWYERS FOR INSTITUTING UNJUSTIFIED MEDICAL MALPRACTICE ACTIONS*

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I asked him whether, as a moralist, he did not think that the practice of the law, in some degree, hurt the nice feeling of honesty. JOHNSON. "Why no, Sir, if you act properly. You are not to deceive your clients with false representations of your opinion: you are not to tell lies to a judge." BOSWELL. "But what do you think of supporting a cause which you know to be bad?" JOHNSON. "Sir, you do not know it to be good or bad till the Judge determines it. I have said that you are to state facts fairly; so that your thinking, or what you call knowing, a cause to be bad, must be from reasoning, must be from your supposing your arguments to be weak and inconclusive. But, Sir, that is not enough. An argument which does not convince yourself, may convince the Judge to whom you urge it: and if it does convince him, why, then, Sir, you are wrong, and he is right. It is his business to judge; and you are not to be confident in your own opinion that a cause is bad, but to say all you can for your client, and then hear the Judge's opinion."

—James Boswell[1]

I. INTRODUCTION

The dramatic increase in the frequency of medical malpractice actions as well as the size of individual awards has created a crisis situation in several states,[2] causing the cost of medical malpractice

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* Although this Article primarily focuses on physicians' remedies against attorneys who institute unjustified medical malpractice suits, the conclusions reached here are applicable to other professionals who have been unjustifiably sued for professional malpractice.

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1. J. Boswell, The Life of Samuel Johnson, LL.D. 366-67 (Oxford ed. 1934).

2. See generally HEW, Medical Malpractice Report of the Secretary's Commission on Medical Malpractice (1973) [hereinafter cited as HEW Report]; Special Advisory Panel, State of New York, Report of the Special Advisory Panel on Medical Malpractice—State of New York 234-55 (1976) [hereinafter cited as New York Report]; Adler, Malicious Prosecution Suits as Counterbalance to Medical Malpractice Suits, 21 Cleveland St. L.R. 51 (1972) [hereinafter cited as Adler]; Epstein, Medical Malpractice: The Case for Contract, 1976 Am. B. Foundation Research J. 87-89; Symposium—Medical Malpractice, 1975 Duke L.J. 1177; Symposium—The 1975 Indiana Medical Malpractice Act, 51 Ind. L.J. 91, 93-94 (1975); Note, Rx for New York's Medical Malpractice Crisis, 11 Colum. J.L. & Social Problems 467 (1975).

The Idaho Supreme Court in passing upon the constitutionality of the Idaho Hospital Medical Liability Act passed in 1975, rejected an argument that the Act was a relevant response to a medical malpractice "crisis". The court, after reviewing some of the available data noted that there was no evidence of a crisis either from the record or outside of it. The court, however,

insurance to skyrocket[3] and physicians to feel threatened and outraged. Many physicians believe that the medical malpractice insurance crisis has, in large part, been caused by overzealous and unethical attorneys who institute groundless malpractice suits.[4] Recently several physicians who were sued for medical malpractice have mounted a legal counterattack against those lawyers whom the physicians claim instituted such actions without justification.[5] These physicians and their attorneys hope that these legal tactics will discourage other patients and their attorneys from prosecuting medical malpractice suits of dubious merit.[6]

While most of the actions instituted by these physicians have been based upon the traditional tort theories of malicious prosecution,[7] abuse of process[8] and defamation,[9] several cases have advanced such novel causes of action as prima facie tort[10] and professional negli-

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remanded the case for further findings. Jones v. State Bd. of Medicine, 555 P.2d 399 (Idaho 1976).

3. New York Report, supra note 2, at 242-43; Adler, supra note 2, at 206-07; Aitken, Medical Malpractice: The Alleged "Crisis" in Perspective, 3 W. St. U.L. Rev. 27 (1975) [hereinafter cited as Aitken]; Ashler, Medical Malpractice Insurance—The Regulator's View, 49 Fla. B.J. 506 (1975); Gouldin & Gouldin, The Medical Malpractice Insurance Crisis, 3 Ohio N.U.L. Rev. 510 (1975) [hereinafter cited as Gouldin & Gouldin]; Gray, The Insurer's Dilemma, 51 Ind. L.J. 120 (1975); Linster, Insurance View of Malpractice, 38 Ins. Counsel J. 528 (1971); Segar, Is Malpractice Insurable?, 51 Ind. L.J. 128 (1975); Note, Medical Malpractice—A Question of Insurability, 80 Dick. L. Rev. 594 (1976); Note, Professional Liability Insurance: The Doctor's Dilemma, 7 Loyola U.L.J. 459 (1976).

4. Adler, supra note 2, at 207; Aitken, supra note 3, at 28-29, 36-37; Daughtry, The View of the Medical Profession, 38 Ins. Counsel J. 534, 535 (1971); Mallor, A Cure for the Plaintiff's Ills?, 51 Ind. L.J. 103 (1975); Stewart, The Malpractice Problem—Its Cause and Cure: The Physician's Perspective, 51 Ind. L.J. 134 (1975); Time Magazine, Apr. 19, 1976, at 89, col. 1. However, the HEW Report, supra note 2, at 10, and AMA, Doctor's Countersuit: Hard to Win, Medical World News, May 19, 1975, at 37 indicate that very few frivolous suits are filed against doctors.

5. For an account of current attempts by physicians to countersue plaintiffs' malpractice attorneys, see Berlin, The Need for Countersuits to Balance the Malpractice Scales, Am. Medical News, Aug. 16, 1976, at 6; Gorney, Countersue That Malpractice Accuser? Better Think Twice, Medical Econ., Sept. 3, 1973, at 242; Levine, I Beat a Malpractice Blackmailer, Medical Econ., Feb. 23, 1976, at 65; Reynolds, Doctor vs. Doctor, Medical Econ., Mar. 4, 1974, at 205; Rosenberg, He Sued His Malpractice Accusers Right Back—for $3,000,000, Medical Econ., Dec. 8, 1975, at 69.

6. Rosenberg, He Sued His Malpractice Accusers Right Back—for $3,000,000, Medical Econ., Dec. 8, 1975, at 69, 75; Time Magazine, Apr. 19, 1976, at 89, col. 1.

7. Adler, supra note 2, at 208-11. See pt. V A infra.

8. E.g., Doctor Strikes Back—Wins in Nuisance Suit, Medical World News, May 19, 1975, at 38. See pt. V B infra.

9. Libel has proved an almost impossible cause of action to sustain. The only successful case was marked by peculiar circumstances. Reynolds, Doctor vs. Doctor, Medical Econ., Mar. 4, 1974, at 205, 206, 211. See pt. V C infra.

10. See pt. VI A infra.

gence in the absence of privity.[11] In addition to seeking relief in the courts, physicians have also sought legislative redress.[12] Regulatory legislation has recently been proposed or enacted in several states in an attempt to curtail the institution of groundless malpractice actions.[13]

Before analyzing the theories of recovery, both traditional and innovative, now being asserted by physicians against lawyers who institute unjustified medical malpractice actions, this Article will analyze the available statistical data to determine whether such data substantiates the physicians' allegations that far too many malpractice actions are wrongfully instituted. The Article will then examine the theories of liability being advanced by physicians who believe they have been unjustifiably sued, in view of the recognized public policy in this country of encouraging open access to the courts for the settlement of disputes.[14] Finally, an exploration of the reforms which have been proposed to alleviate the problem of frivolous medical malpractice suits will be undertaken.

II. STATISTICAL ANALYSIS

Many physicians contend that the majority of medical malpractice claims are of doubtful merit and initiated by plaintiffs' attorneys primarily to secure a fee under the contingent fee system.[15] Certainly,

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11. See pt. VI B infra.

12. ABA Commission on Medical Professional Liability, Informational Report, Appendix B (1976) [hereinafter cited as ABA Report], notes that 25 states took some legislative action with regard to medical malpractice liability insurance in 1975 and provides relevant data thereon. See also Charbonneau, Medical Malpractice Crisis: Fact or Fiction?, 3 Orange County B.J. 139, 142-46 (1976) (summary of California's new legislation on malpractice); Gouldin & Gouldin, supra note 3, at 530-33 (statistics and facts on legislative reforms in 1975); Steinberg, Medical Malpractice Reform Act—A Legislator's View, 49 Fla. B.J. 510, 512-13 (1975) (discussing Florida's new legislation); Comment, An Analysis of State Legislative Responses to the Medical Malpractice Crisis, 1975 Duke L.J. 1417 (surveying all states); Comment, Recent Medical Malpractice Legislation—A First Checkup, 50 Tul. L. Rev. 655 (1976) (Louisiana law emphasized); Note, Medical Malpractice—A Question of Insurability, 80 Dick. L. Rev. 594 (1976) (Pennsylvania law discussed).

13. The new legislation includes the setting of ceilings on recoveries, the regulation of contingency fees, the institution of review panels and shorter statutes of limitations. See ABA Report, supra note 12, at 2-6; New York Report, supra note 2, at 256-58; Epstein, Medical Malpractice: The Case for Contract, 1976 Am. B. Foundation Research J. 87, 128-41; Gibbs, The Montana Plan for Screening Medical Malpractice Claims, 36 Mont. L. Rev. 321, 323-25 (1975); Gouldin & Gouldin, supra note 3, at 530-33; Mallor, A Cure for the Plaintiff's Ills?, 51 Ind. L.J. 103, 106-18 (1975); Note, Professional Liability Insurance: The Doctor's Dilemma, 7 Loyola U.L.J. 459, 480-82 (1976).

14. Lee v. Habib, 424 F.2d 891, 901 (D.C. Cir. 1970); Mendez v. Heller, 380 F. Supp. 985, 989 (E.D.N.Y. 1974) (three-judge court) (per curiam), vacated and remanded, 420 U.S. 916 (1975), aff'd, 530 F.2d 457 (2d Cir. 1976) (citing Boddie v. Connecticut, 401 U.S. 371, 374, 377, 380-81 (1971)); Young v. Redman, 55 Cal. App. 3d 827, 838, 128 Cal. Rptr. 86, 93 (1976).

15. See HEW Report, supra note 2, at 10, 32; N.Y. Times, June 6, 1975, at 18, col. 2.

if the statistical evidence supports the physicians' claims that a substantial number of malpractice actions are unjustifiably instituted merely for their settlement value, physicians should receive relief from such suits.

The available statistical data is unfortunately incomplete and inconclusive since none of the studies undertaken have expressly focused on the problem of unjustified medical malpractice claims. However, three major studies,[16] completed within the last four years, shed some light on the extent of the problem. Each study deals with a vastly different sampling group: the HEW Report of the Malpractice Commission,[17] established by the Secretary of Health, Education, and Welfare in 1973, broadly outlined nationwide trends in the malpractice field; the New York State Advisory Panel Report examined the medical malpractice crisis in the State of New York;[18] and the Michigan Physicians Crisis Committee Survey concentrated on statistical data in three Michigan counties.[19]

Although many of the conclusions reached in these surveys are contradictory, they all agree that the number of medical malpractice claims has increased substantially in recent years.[20] The studies have

16. It must be noted at the outset that the three studies discussed are by no means the only attempts to analyze the medical malpractice crisis. Rather they have been chosen because of their currency, statistical orientation and their representative sampling mix. However, the studies use different units of measurement which makes any real comparison difficult. See, in addition, the first major study on medical malpractice, Ribicoff, Medical Malpractice: the Patient vs. the Physician, Trial, Feb./Mar. 1970, at 10.

17. HEW Report, supra note 2. The Commission studied the medical malpractice files closed in 1970 by 26 major malpractice insurers. Id. at 5 n.l.

18. New York Report, supra note 2. The major source of data for this report was the Actuarial Survey of Professional Medical Liability Insurance and Defense Program of the Medical Society of New York as of June 30, 1975 which was based on physician data collected by Employers Mutual of Wausau, Wisconsin, the official carrier of malpractice insurance for the New York State Medical Society from 1959 to 1974. Id. at 237-38. For a review of the Florida malpractice problem, see generally Symposium—Shedding Light on the Medical Malpractice Problem, 49 Fla. B.J. 499-517 (1975).

19. Physicians Crisis Committee, Court Docket Survey (1975) [hereinafter cited as Physicians Survey]. The Committee surveyed malpractice cases filed in Wayne, Oakland and Macomb Circuit Courts in Michigan from 1970 to 1974. Id. at 3.

20. In New York from 1969 to 1974, the number of new cases rose 56% (from 1283 to 2003). New York Report, supra note 2, at 17. This figure includes: an "event" (notification by the physician to the insurance company that an incident has occurred); a "claim" (a patient or his attorney indicates to the physician that they are contemplating bringing action against a physician); a "suit" (the instituting of an action for malpractice). Id. at 248. The Physicians Survey noted a 193% increase in medical malpractice suits filed in the three counties from 1970 to 1974. Physicians Survey, supra note 19, at 6-7. The HEW Report documented a 10.6% increase in malpractice files opened in 1970 by the insurance carriers surveyed over those closed in that year. HEW Report, supra note 2, at 5-6. Despite the publicity given to a few large malpractice settlements and verdicts, the HEW Report concluded that "a medical malpractice incident is a relatively rare event; claims are even rarer . . . ." Id. at 12.

attributed this significant increase to several factors.[21] They recognized that there have been "[s]teady and marked increases in the utilization of health services" in this country as a result of "expanded private health insurance and the enactment of major Federal health programs, particularly Medicare and Medicaid . . . ."[22] With increased medical services, the frequency of adverse consequences to a patient is correspondingly increased. Another factor contributing to the rise in litigation has been the utilization of "more sophisticated and advanced medical procedures and technology"[23] by physicians who fail to explain to their patients the risks and experimental nature of these treatments. When the treatment does not result in a complete "cure," the patient, who is often confused and unsatisfied, initiates a malpractice action.[24] Another factor almost universally cited for the increase in malpractice claims has been the breakdown of the traditional doctor-patient relationship.[25] As the Committee on Medicine and Law of the Association of the Bar of the City of New York has noted:

> The decline of the general practitioner and the increase in specialization, which by itself frequently requires but does not always result in a referral, have combined to create a less personal patient-physician relationship and a greater willingness on the part of the patient to sue the physician.[26]

Other factors have also been cited by various studies as being responsible for the dramatic increase in medical malpractice litigation.[27] The HEW Report noted that there has been a substantial growth in all forms of personal injury litigation[28] since World War II, attributing this increase in part to a growing interest in consumer rights and "a concomitant trend toward the socialization of compensa-

21. See Mechanic, Some Social Aspects of the Medical Malpractice Dilemma, 1975 Duke L.J. 1179, 1181-86 [hereinafter cited as Mechanic].

22. New York Report, supra note 2, at 9-10.

23. Id. at 10; see Assoc. of the Bar of the City of N.Y., Committee on Medicine and Law, The Medical Malpractice Insurance Crisis, 30 Record of N.Y.C.B.A. 336 (1975) [hereinafter cited as City Bar Report].

24. City Bar Report, supra note 23, at 336.

25. See id.; HEW Report, supra note 2, at 3; New York Report, supra note 2, at 10.

26. City Bar Report, supra note 23, at 336.

27. The Physicians Survey attempted to correlate the increase in malpractice suits with the introduction of no-fault insurance in Michigan and the resultant decline of personal injury litigation in that state. Physicians Survey, supra note 19, at 8-9. The New York statistics, however, apparently refute this contention. Not only has the rate of increase in New York medical malpractice claims remained fairly constant over the years, but the institution of no-fault has not as yet resulted in a documented decrease in automobile litigation. New York Report, supra note 2, at 248.

28. HEW Report, supra note 2, at 3. The statistical data in the products liability field also reflects a marked increase in claims filed in recent years. The insurance industry has seen a 26% increase in the number of products claims from 1969 to 1973. See Product Liability, A Tale Written in Red Ink, 52 J. Am. Ins. 16 (1976).

tion for all types of injuries."[29] It would appear that many Americans have come to look upon the courts as arbiters of their legal, social, and economic problems, including purported errors in medical treatment.[30]

Compounding the problem in the medical field has been the development of what the Association of the Bar of the City of New York Report has termed the " 'Marcus Welby Syndrome'—an unrealistic expectation [on the part of the general public] that medical treatment will provide a cure in every instance."[31] Fueled by media reports of medical "miracles," a greater public interest in medicine has emerged, "leading the public to develop many unrealistic expectations about medicine's capabilities."[32] As a result "[m]any Americans regard good health as though it were a commodity, something that the doctor can dispense at will."[33] The failure to achieve this state of ideal health has led more and more Americans to seek relief in the courts in an attempt to assuage their disappointment.

Although all of the studies document an increase in the frequency of malpractice claims, only the HEW Report directly focused upon the physicians' chief contention—that most malpractice claims are groundless. To test the validity of the physicians' assertions, the HEW Report asked malpractice insurers to indicate whether or not each closed malpractice claim filed during 1970 was "legally meritorious in terms of liability." According to the Commission:

> The results indicated that the insurance carriers judged 46 percent of the claims to be meritorious. This percentage is slightly higher than the percentage of all claims paid (45%); however, cross tabulations are not yet available to establish any possible correlation between claims paid and claims judged to be meritorious. Viewed together, the number of claims judged to be meritorious by malpractice insurers and the number in which payment was made to the claimant would seem to indicate that the vast majority of malpractice claims are not "entirely baseless," as often alleged.[34]

Contrary to the HEW Report, the Physicians Survey concluded that settlement or other disposition of malpractice claims has little to do with merit.[35] Rather, the Survey contended that many baseless claims are settled rather than litigated because defense counsel fears a "sympathetic" or "emotional" judgment by a jury.[36] The Survey asserted

29. HEW Report, supra note 2, at 3.
30. See Newsweek, Jan. 10, 1977, at 42.
31. City Bar Report, supra note 23, at 336.
32. HEW Report, supra note 2, at 3.
33. Id.
34. Id. at 10.
35. Physicians Survey, supra note 19, at 10.
36. Id. at 13. The Physicians Survey indicates that "emotional" is merely a code word for

that insurance companies can afford the predictable losses from settlements, but cannot bear the risk of judgments resulting from unpredictable factors.[37] A decision to settle a baseless claim may be made by defense counsel who in reality represents not the physician but the insurance company which would often rather settle out of court to avoid the expenses of litigation than defend against a baseless suit. The Survey concluded that the physician, despite his protestations of innocence, will usually acquiesce in the decision because he is

> literally at the mercy of the insurance company. If he incurs their displeasure, they can "rate" his premium or arbitrarily refuse to review his insurance. Since the market is not competitive, he is without recourse and can thereby be deprived of his livelihood.[38]

While the New York Report did not address itself directly to the number of groundless claims or suits filed, it did present some statistics that are helpful in analyzing the problem. The Report indicated that the number of suits "marked off" (that is, suits where there has been no activity by the plaintiff's lawyer on the case for a substantial period of time and which may therefore be considered frivolous) has been increasing steadily since 1970.[39] Dismissed or discontinued causes of action (that is, suits where no payments have been made), which for the most part reflect unsubstantiated claims, remained relatively stable between January 1958 and June 1974, averaging 28 percent of the total number of suits brought.[40]

The HEW Report revealed that 50 percent of the 16,000 insurance files closed in 1970 were concluded without the claims resulting in suits, with some payment made in approximately 25 percent of these closed files.[41] The remainder of the claims not litigated were abandoned or settled without any payment.[42] The other 50 percent of the claims filed resulted in lawsuits and 80 percent of these actions were settled prior to trial, with the claimant receiving some payment 60 percent of the time.[43] The remaining 20 percent of the suits filed were tried by jury and resulted in plaintiffs' verdicts 20 percent of the time.[44] In

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factors which would lead the jury to award a plaintiff a large judgment, regardless of the merit of the claim. These factors include race, religion, stature, national origin, the nature of the injury and a desire to redistribute income. Id.

37. Id.

38. Id. at 14.

39. New York Report, supra note 2, at 240. The figures for the first six months of 1974 indicate that 15% of the suits closed were marked off. Id.

40. Id. at 242. The Report noted that from 1964-74 over 70% of the closed claims resulted in no payment. Id. at 245-46.

41. HEW Report, supra note 2, at 10.

42. Id.

43. Id.

44. Id.

sum, there was payment in approximately 45 percent of all claims, whether or not a lawsuit was filed.[45]

The Physicians Survey reached far different conclusions from the New York and HEW Reports. The Michigan tri-county study indicated that 91 percent of the medical malpractice suits resulted in some payment to the plaintiff.[46]

Another trend which has disturbed physicians is the steady increase in the size of malpractice awards.[47] The HEW Report recognized that the number of large awards or settlements increased dramatically. In 1970, however, over 50 percent of the claimants received less than $3,000.[48] Awards in excess of $40,000 constituted 6.1 percent of the total funds allocated to claimants[49] and less than one out of every 1,000 claimants was paid $1,000,000 or more, with no more than seven such payments being made in each year prior to 1973.[50] The New York Report noted that in 1974 the average payment per claim rose to $35,151.70.[51] This figure is somewhat misleading as it incorporates several disproportionally high awards.The median payment per claim in which payment was made fell between $10,000 and $19,999.[52] The Physicians Survey reports a vastly greater increase in the size of awards. Although it indicated that the average recovery for 77 cases (settlement or verdict) filed from 1970 to 1974 was $66,000, it suggested that a more accurate estimate is the known result of 35 cases filed in 1970 in which the average payment was in excess of $78,000.[53]

The studies agree that only a very small percentage of the cases instituted ever reach the courtroom. An even smaller number of cases are actually tried before a jury to a verdict.[54] The New York Report,

45. Id. In a survey of the medical malpractice legal system prepared for the HEW Commission on Medical Malpractice it was reported that in 68% of the cases in the national survey and 79% of the cases in the selective survey some dollar amount was recovered by plaintiff. HEW Report, supra note 2, Appendix 104. This national survey was conducted by mailing questionnaires to a random sample of about 800 lawyers in private practice. Four hundred additional lawyers known to be engaged in medical malpractice were surveyed in the selective survey by mail questionnaires or personal interviews. Id. at 87. See note 57 infra.

46. Physicians Survey, supra note 19, at 25.

47. In California, an average of one $1,000,000 judgment is awarded each month. N.Y. Times, Jan. 19, 1975, at 36, col. 1. The large judgments awarded have resulted in a sharp increase in the cost of malpractice insurance. Id., cols. 1-2.

48. HEW Report, supra note 2, at 10.

49. Id. Since the Report's years of study, inflation will have increased the percentage of awards totalling more than $40,000.

50. Id. In New York, there were eight awards over $100,000 in 1970, but 44 in 1974. See New York Report, supra note 2, at 186.

51. New York Report, supra note 2, at 245-48.

52. Id.

53. Physicians Survey, supra note 19, at 28.

54. According to the Physicians Survey, 9% of the cases in the four-year survey period were tried and only 5.4% were tried before a jury. The Survey acknowledges, however, that a

in fact, reported a decline in the number of cases tried by a jury from 1970 to 1974.[55] No consensus emerged from the studies as to plaintiffs' success rate at trial.[56] The reports all confirmed, however, that the vast majority of cases are settled favorably to plaintiff prior to trial.[57]

No accord has been reached with respect to the reasons prompting these settlements. The Physicians Survey views the high settlement rate largely as a maneuver to cut litigation costs from the defendant's point of view and increase recovery and contingent fees from the point of view of plaintiff's lawyers.[58] In contrast, the HEW Report implies that lawyers have no such self-serving motives in settling claims. In most cases they have already incurred much of the expense and undergone preparation for trial prior to the trial itself—even if the trial is never conducted.[59]

Physicians have asserted that the contingent fee arrangement[60] encourages attorneys to institute malpractice claims of doubtful merit in order to secure substantial fees.[61] Lawyers, on the other hand, have

percentage of the cases filed have not yet reached trial and the figure will therefore increase. In rural counties with shorter calendars 17% of all cases were tried. Id. at 10-11. The New York Report found that the percentage of suits ultimately decided by a jury verdict remained fairly constant from 1958 to 1969 averaging about 9%. New York Report, supra note 2, at 240. The survey prepared for the HEW Commission indicated that 17% or 29% of the cases are ever tried depending upon whether the national or selective survey figures are chosen. HEW Report, supra note 2, Appendix 103. The national survey consisted of a random sampling of the nation's private practitioners. The selective survey was composed of lawyers specializing in medical malpractice litigation. Id. at 89.

55. While the percentage of suits tried by jury between 1958 and 1969 remained stable and averaged 9%, this figure decreased to an annual rate of 4% of all suits brought between the years 1970 and 1974. New York Report, supra note 2, at 240.

56. The Physicians Survey suggested that plaintiff received a jury award in about 50% (30 of 58) of the cases. Physicians Survey, supra note 19, at 26. In contrast, the New York Report indicated that from 1958 to 1974, 13% of the cases decided by jury verdict were decided in favor of plaintiff and 87% in favor of defendant. New York Report, supra note 2, at 240. The HEW Report indicated that plaintiffs' win-rate at trial was 63% according to the selective survey but only 44% according to the national survey. HEW Report, supra note 2, Appendix 104.

57. The success rate of plaintiffs is found to be highest in the Physicians Survey which concluded that 91% of all cases result in some money settlement. Physicians Survey, supra note 19, at 25, Table 12. The New York Report indicated that the percentage of suits settled by the patient averaged 57% for the years 1958 to 1974. New York Report, supra note 2, at 240. The HEW national survey showed that in 68% of all cases, whether terminated by trial or settlement, some dollar amount was recovered by plaintiff, while the selective survey indicated that 79% of all cases resulted in some dollar recovery. HEW Report, supra note 2, Appendix 104.

58. Physicians Survey, supra note 19, at 12-14; see notes 35-38 supra and accompanying text for a discussion of the additional factors promoting settlement.

59. HEW Report, supra note 2, at 33.

60. "A contingent fee is a fee set as a percentage of recovery for a successful law suit." New York Report, supra note 2, at 42. If the client receives no recovery, the lawyer is usually not compensated for the work he performed. Id.; HEW Report, supra note 2, at 32-33.

61. HEW Report, supra note 2, at 32; New York Report, supra note 2, at 42; N.Y. Times, June 6, 1975, at 18, col. 2.

vigorously supported the contingent fee arrangement on the ground that it enables claimants with legitimate claims who could not pay legal fees in advance of trial to pursue their claims.[62] In fact, it has been asserted that the contingent fee system actually protects physicians from groundless suits, since an attorney will reject a frivolous claim if it appears that he will not receive any remuneration for his services.[63] The HEW Report concluded that "most physicians generally placed undue emphasis on the influence of the contingent fee system upon malpractice litigation . . . ."[64] The New York Report suggested that the contingent fee while useful should be limited, especially in those cases where exceptionally high verdicts or settlements are awarded.[65]

There is substantial evidence to infer, contrary to the physicians' claims, that there are many more acts of medical malpractice than are actually reported or litigated. The data indicates that the number of claims brought by patients against physicians has not been excessive and that serious acts of malpractice frequently occur, especially in the course of hospital treatment.[66] It has been estimated that as many as five percent of the medical profession are unfit to practice medicine.[67] If this figure is accurate, these 16,000 incompetent physicians are treating an estimated 7.5 million patients a year.[68] Moreover, in a recent study by the American College of Surgeons and the American Surgical Association, it was found that 78 percent of preventable surgical complications were due to surgeons' errors, with one-half resulting from faulty surgical techniques.[69] These figures alone suggest

62. HEW Report, supra note 2, at 33; New York Report, supra note 2, at 42. "[T]he contingent fee system tends to discourage the acceptance of . . . meritorious malpractice cases involving minor injury and relatively small potential recovery. . . ." HEW Report, supra note 2, at 33.

63. A recent New York survey indicated that "80 percent of all prospective clients are turned down by plaintiffs' malpractice lawyers . . . ." Harley & Rheingold, New Survey of Malpractice Litigation, 175 N.Y.L.J., April 28, 1976, at 1, col. 2. The HEW Report confirmed these estimates and noted that about 12% of all malpractice claims were accepted by the lawyers to whom they were brought. HEW Report, supra note 2, Appendix 153. The lawyers surveyed in the HEW Report reported that about half of the claims were rejected because of a lack of apparent liability. Id. at 97.

64. HEW Report, supra note 2, at 32; see also City Bar Report, supra note 23, at 352.

65. New York Report, supra note 2, at 42. In New York, legislation was passed limiting the attorneys' contingent fee as follows: 50% of the first $1,000 recovered; 40% of the next $2,000 recovered; 35% of the next $22,000; and 25% of any amount in excess of $25,000. A larger fee may be authorized by court order if there is a showing of extraordinary circumstances. N.Y. Judiciary Law § 474-a (McKinney Supp. 1976). See also Pa. Stat. Ann. tit. 40, § 1301.604 (Supp. 1976).

66. Mechanic, supra note 21, at 1188-89.

67. N.Y. Times, Jan. 26, 1976, at 1, col. 1.

68. Id.

69. N.Y. Times, Jan. 27, 1976, at 24, col. 1. American surgeons are performing an estimated

that many patients may have legitimate claims of malpractice. Although this evidence does not establish that all of the malpractice claims that are litigated are meritorious, it does demonstrate that there are at least many more cases of malpractice than most physicians care to publicly admit. In fact, some physicians have recently acknowledged that the quality of medical care given by the average physician falls below accepted standards.[70]

A study of consumer attitudes also reflects that the great majority of cases involving potential medical malpractice never result in legal action of any kind.[71] In a study conducted by the Temple University Institute of Survey Research, approximately two-fifths of the 1,017 respondents reported that either they, their spouses, or their dependents had suffered a negative medical care experience[72] within the past ten years.[73] It is significant to note that only eight percent of those with negative medical care experience considered seeking the advice of a lawyer, and of these, less than half actually consulted with a lawyer.[74] Based on this survey, it can be inferred that very few acts of malpractice actually culminate in a law suit.

It is clear that the statistical studies do not lend themselves to comparison and vary widely in their conclusions. The varied conclusions reached appear to reflect, to some extent, the biased viewpoint of those conducting the surveys. While no clear-cut assessment of the problem of unjustified malpractice claims emerges from the available contradictory surveys, the fragmentary data does not suggest that a significant portion of malpractice claims are unfounded. In the final analysis, any meaningful appraisal of the statistical information must await a refinement of sampling techniques and the creation of a

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total of 2.4 million unnecessary operations each year in which 11,900 patients die as a result of complications. Id.

70. N.Y. Times, Jan. 26, 1976, at 1, col. 1; id. at 20, col. 4. A former director of the Federal Commission on Medical Malpractice noted that: "The time has come . . . to recognize that the root cause of the current malpractice problem is the substantial number of injuries and other adverse results sustained by patients during the course of hospital and medical treatment." Id. at 20, col. 3.

71. See Peterson, Consumers' Knowledge of and Attitudes Toward Medical Malpractice, in HEW Report, supra note 2, Appendix 659.

72. HEW Report, supra note 2, Appendix 668; Mechanic, supra note 21, at 1188-89 ("Such reports . . . reflect only the perceptions of the respondents, and provide no indication of the degree of malpractice involved.").

73. HEW Report, supra note 2, Appendix 658-59.

74. Id. at Appendix 659. The report specifically found that of the thirty-seven respondents who considered legal action, fourteen actually consulted with a lawyer. Of those fourteen who took their case to a lawyer, twelve reported having their cases accepted by counsel. Of these twelve claimants, six eventually decided not to bring a claim, two brought a claim but later withdrew it without settlement, two claims were settled before trial, and two claims were still not settled at the time of the survey. Id. at Appendix 675.

mechanism to specifically secure reliable and consistent data on the various aspects of the medical malpractice problem generally and "meritorious" claims in particular.[75] Many physicians, however, remain convinced of the legitimacy of their grievances[76] and have initiated a counterattack against the lawyers they view as adversaries. The battle lines have been drawn and it remains to be seen whether the legal strategy advanced by these physicians will overcome the traditional resistance of the courts against providing a recovery for unjustified litigation.

III. Conflicting Policy Considerations

A balance must be struck between competing policy considerations when a physician seeks legal redress against a lawyer who has allegedly instituted an unjustified medical malpractice suit.[77] It is axiomatic to our system of jurisprudence that potential litigants should have free and open access to courts in order to settle their grievances.[78] Theoretically, the courts are available to every citizen, subject only to the penalty of lawful costs[79] if the action is unsuccessful.[80] To ensure open access to the courts, substantial financial penalties have not been levied against litigants for instituting actions which ultimately prove unsuccessful.

The same general principles and policy considerations must apply to attorneys representing claimants. An attorney must have the same freedom in initiating the client's action as the client, or else the client's freedom of access to the courts would indeed become a sham. According to the ABA Code of Professional Responsibility, an attorney has a

75. In an attempt to establish improved reporting of malpractice claims many states have enacted legislation requiring insurers writing professional liability coverage to keep detailed records of malpractice claims. See, e.g., N.Y. Ins. Law § 335 (McKinney Supp. 1976).

76. See N.Y. Times, June 6, 1975, at 18, col. 2.

77. See Soffos v. Eaton, 152 F.2d 682, 683 (D.C. Cir. 1945).

78. Lee v. Habib, 424 F.2d 891, 901 (D.C. Cir. 1970); Mendez v. Heller, 380 F. Supp. 985, 989 (E.D.N.Y. 1974) (three-judge court) (per curiam), vacated and remanded, 420 U.S. 916 (1975) (citing Boddie v. Connecticut, 401 U.S. 371, 374, 377, 380-81 (1971)); Young v. Redman, 55 Cal. App. 3d 827, 838, 128 Cal. Rptr. 86, 93 (1976).

79. " 'Costs' are statutory allowances to a party to an action for his expenses incurred in the action" and are recoverable from the losing party. 20 Am. Jur. 2d Costs § 1 (1965). Attorneys' fees, in the absence of a special statute, are generally not recoverable. 1 S. Speiser, Attorneys' Fees § 12:3 (1973).

80. Many statutes award court costs to the prevailing party at the expense of the loser. Even where such awards are discretionary, this prevailing party rule usually controls. D. Dobbs, Remedies § 3.8, at 193 (1973). There have been recent proposals in the New York legislature for additional cost allowances for attorneys' fees to defendants who prevail in malpractice cases. Note, Rx for New York's Medical Malpractice Crisis, 11 Colum. J.L. & Social Problems 467, 481-82 (1975).

duty to zealously represent his client, seek any lawful objective through legally permissible means and present for adjudication any lawful claim.[81] The Code also provides that an attorney may, in good faith and within the framework of the law, proceed to test the correctness of a rule or attempt to extend, modify or reverse traditional outmoded theories of law.[82] If attorneys were unduly restricted in commencing lawsuits by the threat of a countersuit should they be unsuccessful, not only would worthy litigants be denied their day in court, but the common law would lose much of its flexibility and would be unresponsive to changing social needs.

The physicians' interest in discouraging patients and their attorneys from prosecuting what the physicians consider to be unjustified claims may conflict with the public policy of open access to the courts if the prosecution of meritorious claims is discouraged as well. However, physicians, as well as other professionals who are sued for malpractice, can suffer substantial damage to their professional reputations as a result of such claims. Especially in smaller communities, the commencement of a malpractice action may cause the physician considerable adverse publicity, resulting in the loss of patients and income. Furthermore, a physician who is wrongfully sued for malpractice may suffer severe mental distress.[83] The physician so sued has to commit a substantial amount of time and energy helping to prepare his defense at the expense of his practice and personal life. Even if the physician is ultimately successful in defending the malpractice action, he may still sustain a substantial economic loss, since his insurance premiums may be increased or his insurance may be cancelled altogether.[84]

The disruptive impact that malpractice suits, especially unjustified ones, have on medical services is substantial. Physicians who are sued for malpractice may become more suspicious of their patients. As a result of their fear of malpractice actions, doctors have begun to practice a kind of defensive medicine[85] that is expensive and often counterproductive, a reaction which adversely affects the overall quality of medical services.[86]

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81. ABA Code of Professional Responsibility EC 7-1.

82. Id. at EC 7-4.

83. See Daughtry, The View of the Medical Profession, 38 Ins. Counsel J. 534, 535-36 (1971).

84. E.g., Rosenberg, He Sued His Malpractice Accusers Right Back—for $3,000,000, Medical Econ., Dec. 8, 1975, at 69, 71.

85. HEW Report, supra note 2, at 14. Defensive medicine has been defined as the conducting of a test or performance of a diagnostic or therapeutic procedure which is not medically justified but is carried out primarily—if not solely—to prevent or defend against the threat of medical-legal liability. Id.

86. Id. at 14-15; New York Report, supra note 2, at 110; Adler, supra note 3, at 207;

The impact of unjustified malpractice claims on the court system and society is also considerable. Increased numbers of malpractice claims add to court congestion and adversely affect already overburdened court personnel and facilities. Wrongfully instituted malpractice actions which would be vigorously defended, of course, exacerbate this condition.

The increase in malpractice suits and the size of awards[87] has furthermore had an enormous impact on the insurance industry and in many states has precipitated a medical malpractice insurance crisis with serious ramifications.[88] In some states, insurance companies have refused to write professional liability insurance.[89] In other states there has been a significant increase in insurance premiums,[90] a cost which is ultimately passed on by physicians to their patients.[91]

The courts must ultimately balance the competing interests of physicians who wish to be secure from defending unjustified malpractice suits and of patients and their attorneys who have a right to pursue meritorious malpractice claims. In reaching this goal the courts must confront the threshold issue of defining those malpractice claims which are, in fact, "unjustifiably" instituted.[92]

IV. Defining Unjustifiably Instituted Malpractice Claims

Although there is little agreement as to the proportion of medical malpractice claims that are unjustifiably instituted, there is substantial

Hershey, Defensive Medicine, Trial, May/June 1973, at 61; Mechanic, supra note 21, at 1189-92; Project—The Medical Malpractice Threat: A Study of Defensive Medicine, 1971 Duke L.J. 939.

87. See notes 20, 47, 49-53 supra and accompanying text.

88. See notes 2-3 supra.

89. In 1975, two insurance companies dropped their malpractice insurance coverage for nearly 2,000 physicians in the Los Angeles area. Newsweek, Feb. 10, 1975, at 41. First Employers of Wausau, the primary insurer of physicians in New York, withdrew its coverage in that state on July 1, 1974. New York Report, supra note 2, at 10. The Argonaut Insurance Company of Menlo Park, California, who replaced First Employers as the primary malpractice insurer for New York physicians, announced in 1975 that it would withdraw its coverage from New York State. Id. at 10; N.Y. Times, Jan. 7, 1975, at 23, col. 1.

90. The average medical malpractice insurance premium in 1973 was $1,905 a year. By 1975 it had risen to an average of $7,787. N.Y. Times, Oct. 25, 1976, at 22, col. 2. Other statistics indicate that in 1970 physicians generally paid 541% more for their malpractice insurance than they did ten years previously. Surgeons, a higher risk group, paid more than 949% more for their malpractice insurance during the same period. HEW Report, supra note 2, at 13.

91. In the past, physicians have passed on to their patients 80-90% of the cost of malpractice insurance. New York Report, supra note 2, at 108. A recent American Medical Association study indicated that over a two-year period doctors raised their fees 96 cents per patient because of malpractice insurance costs. N.Y. Times, Oct. 25, 1976, at 22, col. 2.

92. See Rheingold, Remedies of the Wrongfully Sued Professional, 1975 Nat'l Medicolegal Symposium 52.

agreement that some portion of the malpractice actions brought are groundless.[93] Some actions clearly are unjustifiably instituted and must be vigorously discouraged by both the bench and the bar. Such an action is one brought solely to harass a physician as a result of a patient's spite, malice or ill will. Although it is relatively easy to state that the action has been unjustifiably commenced, it is difficult in many cases to prove that a patient has been primarily motivated by hostility or ill will. Similarly, an attorney who knows or obviously should know that a malpractice action would serve merely to harass or maliciously injure another should be liable for initiating an unjustified malpractice action. Moreover, if an attorney has failed to use reasonable skill and diligence to ascertain the pertinent facts or examine the applicable law prior to instituting a malpractice action, and the facts or the law would not support such a claim, the action may be considered unjustifiably and wrongfully instituted.[94] If an attorney continues to prosecute an action after discovering that the relevant facts or the law do not support a claim against the physician, the action should also be considered unjustifiably and wrongfully maintained.

Another category of unjustified actions are those instituted in an attempt to extort a settlement from a physician's insurance carrier for the "nuisance value" of a claim.[95] An attorney who institutes such a claim may know, or should know, that the allegations of malpractice are extremely tenuous, if not completely groundless. The attorney nevertheless hopes that the insurance carrier, who is indemnifying and defending the physician, will find it economically beneficial to settle the action rather than pay the substantial defense costs that could result from a protracted complex jury trial and appeal. Such claims, even though not motivated by hostility or ill will, have the same effect: economic and professional harassment and injury to the defendant physician. A claim or action instituted merely to force a nuisance settlement from a physician or his insurer should be considered unjustifiably instituted and should be strenuously discouraged. However, the difficulty will again be in identifying those claims which lack any merit and are instituted merely for their "settlement value."

There are also those malpractice claims that are asserted by a

93. See N.Y. Times, June 6, 1975, at 18, col. 2 (physicians' charges).

94. Such acts by an attorney would amount to an absence of probable cause—one of the essential elements of a suit for malicious prosecution. See notes 131-43 infra and accompanying text.

95. Rosenberg, He Sued His Malpractice Accusers Right Back—for $3,000,000, Medical Econ., Dec. 8, 1975, at 69, 74; Note, Rx for New York's Medical Malpractice Crisis, 11 Colum. J.L. & Social Problems 467, 480 (1975).

patient in response to a physician's claim or suit for an unpaid bill for services rendered.[96] In an attempt to reduce the physician's claim for services, the patient, on advice of counsel, may assert a baseless counterclaim for medical malpractice. The patient and his attorney, in this instance, hope that the physician will reduce his bill rather than report the claim to his insurance carrier and be forced to defend a malpractice action. If such a counterclaim is introduced merely to "blackmail" the physician, it is obvious that the action is unjustifiably and wrongfully brought and the physician should have some legal redress against the claimant and his attorney.

Many other malpractice actions prove to be unsuccessful, but they may not and should not be classified as unjustifiably instituted. Prior to complete discovery in a malpractice case it is difficult, if not impossible, to determine which of several physicians involved in treating a patient was actually responsible for the medical malpractice which caused the patient's injuries. The attorney's problem, if this occurs, is magnified in those states that have adopted extremely short statutes of limitation for medical malpractice actions.[97] If the attorney failed to join a physician who he later discovered was responsible for the alleged malpractice, the attorney could be held liable to his own client for professional malpractice if the statute of limitations subsequently barred the action. The attorney's dilemma may be exacerbated at the time of trial when those physicians who are sued attempt to shift the blame to a physician who is not a party to the action. In these instances, however, the attorney may not be justified in continuing the action if it becomes apparent after pretrial discovery that the physician is not a proper party defendant. This is true even though initially an attorney may have been justified in bringing an action against all of the treating physicians. If the attorney wrongfully continues an action, the physician should have an action against the attorney for the continuance of an unjustified claim.

There are also those malpractice actions in which an attorney joins a physician as a party defendant in order to secure his testimony although the attorney does not ultimately intend to pursue the action against that defendant.[98] Even though the attorney discontinues the

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96. Levine, I Beat a Malpractice Blackmailer, Medical Econ., Feb. 23, 1976, at 65.

97. In 1975, many states changed their statutes of limitations relating to medical malpractice. The general thrust of these reforms was to shorten the period and set absolute maximums for bringing an action. ABA Report, supra note 12, Appendix B Attachment 1, at 6-7. Comment, An Analysis of State Legislative Responses to the Medical Malpractice Crisis, 1975 Duke L.J. 1417, 1429-36; Comment, Recent Medical Malpractice Legislation—A First Checkup, 50 Tul. L. Rev. 655, 672-74 (1976).

98. Courts have disapproved of the practice of joining a doctor as a party defendant solely for

action immediately after taking the doctor's deposition, the doctor may still have sustained substantial mental and pecuniary damage as a result of being named as a defendant. However, an attorney may have what he believes to be a justifiable reason for pursuing such a practice, especially where a hospital or a physician has refused to permit the attorney to examine records prior to suit[99] or where it is impossible to secure qualified expert testimony because of a physician's standing in the local medical community.[100] The attorney, however, must not only seriously consider the ethical ramifications of such conduct but the legal implications of prosecuting an action that may, at a later date, be considered unjustifiably prosecuted.

Expanding tort law in many jurisdictions also tends to encourage attorneys to sue any physician who was involved in treating the patient. In some jurisdictions, the rule of res ipsa loquitur has been expanded to such an extent that all those involved in an operative procedure may be found liable for a patient's injury. This is true even though they are innocent of malpractice since the burden of proof is shifted from the unconscious plaintiff to each of the physicians in the operating room to establish that he was not negligent.[101] Where the courts have expanded the physicians' liability to this extent, an attorney would certainly be justified in proceeding against all the physicians who may have been involved in an operative procedure, even if one or more of the physicians were actually innocent of malpractice. The attorney under these circumstances is merely utilizing the applicable case law, and the physicians' remedy, if any, would be to seek legislative or judicial modification of this expansive interpretation of the res ipsa loquitur rule.

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the purpose of obtaining his testimony as an expert. McDermott v. Manhattan Eye, Ear & Throat Hosp., 15 N.Y.2d 20, 30 n.5, 203 N.E.2d 469, 475 n.5, 255 N.Y.S.2d 65, 73 n.5 (1964) ("It is, of course, assumed that a plaintiff, in naming a doctor as a defendant, has done so in good faith, on the basis of his relationship with the case and not as a device or subterfuge in order to afford the plaintiff an opportunity to call him as an expert witness."); Pipers v. Rosenow, 39 App. Div. 2d 240, 245-46, 333 N.Y.S.2d 480, 485-86 (2d Dep't 1972).

99. Disclosure is generally permitted prior to the commencement of an action, by court order, to aid in bringing an action and determining the identity of the party to be sued. E.g., N.Y. CPLR § 3102(c) (McKinney 1970).

100. Although it has long been the case that the plaintiff could call the defendant doctor to testify concerning facts within his knowledge, a significant number of states now hold that a doctor can be called as an expert witness in the case in which he is a defendant. J. Waltz & F. Inbau, Medical Jurisprudence 80-82 (1971). See Gouldin & Gouldin, supra note 2, at 525 & n.71.

101. Ybarra v. Spangard, 25 Cal. App. 2d 486, 154 P.2d 687 (1944); Anderson v. Somberg, 67 N.J. 291, 338 A.2d 1 (plurality opinion), cert. denied, 423 U.S. 929 (1975), noted in 7 Seton Hall L. Rev. 208 (1975); HEW Report, supra note 2, at 28-29; Epstein, Medical Malpractice: The Case for Contract, 1976 Am. B. Foundation Research J. 87, 138-49; Comment, An Analysis of State Legislative Responses to the Medical Malpractice Crisis, 1975 Duke L.J. 1417, 1426-29.

There are some cases which do not fall into the above categories, but which are brought by a patient for a minor or superficial injury. Such claims are legitimate, but the courts' facilities are taxed and the defendant physician is forced to expend substantial money and effort to contest an action which he considers insignificant or frivolous. These actions may be unjustifiably instituted in terms of the amount of money that the plaintiff may recover compared with the amount of money and energy that the defendant expends to defend against such an action; but the courts must remain open to all legitimate claimants no matter how miniscule the amount of their recovery.

Finally, it should be remembered that the mere fact that a jury returns a verdict for the defendant physician does not establish that the action was unjustified, any more than the fact that a jury returns a verdict for the plaintiff would establish that a physician has been guilty of malpractice. There are many factors, both objective and subjective, which may have caused such a result. The patient and his attorney may not have been able to obtain qualified expert witnesses who would testify against a fellow physician, even where an act of malpractice was performed. The attorney who represented the patient may have been inadequate as compared to defense counsel, or, even worse, he may have been incompetent to try such a technical and complicated case. The subjective bias or feelings of the jury and not the merits of the patient's case may also have determined the outcome of the action. However, a small portion of these actions may have been instituted without probable cause. These actions may be considered unjustifiably prosecuted, but only if a mechanism can be devised for distinguishing the unjustified action from the meritorious one.

If a physician believes that an unjustified malpractice action has been instituted against him, he must consider what remedies are available as a legal counterattack against the patient's lawyer who initiated the groundless action. Before exploring the possible innovative concepts, both judicial and legislative, that have been proposed to remedy the problem of unjustifiably instituted malpractice actions, it is essential to examine the traditional tort remedies that have been utilized in the past when a civil action was unjustifiably instituted.

V. Traditional Theories of Recovery

A. *Malicious Prosecution*

The action for malicious prosecution or malicious use of process[102] has its roots in the early common law of England as a tort action to

102. An action for malicious use of process and one for malicious prosecution are essentially the same. See Golden Commissary Corp. v. Shipley, 157 A.2d 810, 814 (D.C. Mun. Ct. App.

recover damages for the institution, maliciously and without probable cause, of a criminal judicial proceeding that terminated in favor of the accused.[103] However, since the passage of the Statute of Marlbridge,[104] which provided that attorneys' fees could be awarded as costs[105] to a successful defendant in a civil action, English courts have refused to extend the tort of malicious prosecution to wrongfully instituted civil actions unless there has been an arrest of the person or seizure of property.[106]

In the United States, two views have developed as to whether a malicious prosecution action is available when a civil action is wrongfully initiated. A sizeable minority of jurisdictions[107] adhere to the English rule and refuse to recognize a claim for malicious prosecution in a civil action, even though the suit was instituted for an improper purpose and without probable cause, in the absence of an arrest, an interference with the defendant's property,[108] or some special injury[109] which is ordinarily not an incident of defending similar civil actions.[110] A few jurisdictions, in an attempt to modify the harshness of this requirement, have broadened the accepted definition of special injury to include the loss of a legally protected right,[111] and the burden of

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1960). Some cases, however, use the term malicious prosecution when referring to criminal process and the term malicious use of process when referring to civil process. See Woodley v. Coker, 119 Ga. 226, 46 S.E. 89 (1903); Publix Drug Co. v. Breyer Ice Cream Co., 347 Pa. 346, 32 A.2d 413 (1943).

103. W. Prosser, Handbook of the Law of Torts § 119, at 834-35 (4th ed. 1971) [hereinafter cited as Prosser].

104. 52 Hen. 3, c. 6 (1267).

105. The statute afforded a summary remedy for costs and damages in the original action in lieu of an independent action for damages for malicious prosecution. Shute v. Shute, 180 N.C. 386, 104 S.E. 764 (1920); Kolka v. Jones, 6 N.D. 461, 71 N.W. 558 (1897).

106. 52 Am. Jur. 2d Malicious Prosecution § 9 (1970).

107. Shute v. Shute, 180 N.C. 386, 388-89, 104 S.E. 764, 766 (1920); Prosser, supra note 103, at 851.

108. See, e.g., North Point Constr. Co. v. Sagner, 185 Md. 200, 44 A.2d 441 (1945); Pittsburg, J.E. & E.R.R. v. Wakefield Hardware Co., 138 N.C. 174, 50 S.E. 571 (1905); Cincinnati Daily Tribune Co. v. Bruck, 61 Ohio St. 489, 56 N.E. 198 (1900) (per curiam).

109. The special injury which traditionally supported a malicious prosecution action occurred where there was an arrest, an attachment, an appointment of a receiver, a writ of replevin or an injunction. Manufacturers & Jobbers Fin. Corp. v. Lane, 221 N.C. 189, 196, 19 S.E.2d 849, 853 (1942).

110. See, e.g., Wetmore v. Mellinger, 64 Iowa 741, 18 N.W. 870 (1884); Chappelle v. Gross, 26 App. Div. 2d 340, 274 N.Y.S.2d 555 (1st Dep't 1966); Petrich v. McDonald, 44 Wash. 2d 211, 266 P.2d 1047 (1954).

111. Rivers v. Dixie Broadcasting Corp., 88 Ga. App. 131, 76 S.E.2d 229 (1953) (business losses resulting from suspension of radio station construction during pendency of proceeding considered a special injury); Carver v. Dykes, 262 N.C. 345, 137 S.E.2d 139 (1964) (loss of right to practice profession as a broker considered a special injury).

defending against the successive institution of the same action[112] or a wholly frivolous appeal.[113] However, the usual expenses of litigation, annoyance, and inconvenience are regarded as the normal incidents of defending a civil suit and are generally insufficient to form the basis of a claim of special injury.[114] The courts adopting this restrictive rule reason that the assessment of lawful costs compensates the successful litigant and that the honest litigant must be encouraged to seek justice in a court of law unhampered by fear of a countersuit for malicious prosecution. These courts also rationalize that such restrictions are necessary to prevent successful defendants from instituting countersuits which could result in interminable and vexatious litigation.[115]

A majority of jurisdictions, however, have eliminated this restriction, and recognize an action for malicious prosecution for any civil suit instituted maliciously and without probable cause.[116] These courts acknowledge that the traditional American concept of legal costs differs significantly from the costs available to a successful litigant in England,[117] and that costs in the United States are totally inadequate compensation for the time, effort, and expense of defending a baseless suit.[118] In addition, these courts reason that the heavy burden of proof resting upon the plaintiff in an action for malicious prosecution will usually operate as a sufficient restraint upon the indiscriminate institution of such claims as well as a sufficient safeguard against interminable litigation.[119]

In those jurisdictions where an action for malicious prosecution is permitted without proof of special injury,[120] a physician may institute

112. Soffos v. Eaton, 152 F.2d 682 (D.C. Cir. 1945); Shedd v. Patterson, 302 Ill. 355, 134 N.E. 705 (1922).

113. Holt v. Boyle Bros., 217 F.2d 16 (D.C. Cir. 1954).

114. Schwartz v. Schwartz, 366 Ill. 247, 8 N.E.2d 668 (1937); Alswang v. Claybon, 40 Ill. App. 3d 147, 351 N.E.2d 285 (1976).

115. Peerson v. Ashcraft Cotton Mills, 201 Ala. 348, 78 So. 204 (1917).

116. See, e.g., Peerson v. Ashcraft Cotton Mills, 201 Ala. 348, 78 So. 204 (1917); Ackerman v. Kaufman, 41 Ariz. 110, 15 P.2d 966 (1932); Eastin v. Bank of Stockton, 66 Cal. 123, 4 P. 1106 (1884) (en banc); Slee v. Simpson, 91 Colo. 461, 15 P.2d 1084 (1932) (en banc); Levy v. Adams, 140 Fla. 515, 192 So. 177 (1939); Kolka v. Jones, 6 N.D. 461, 71 N.W. 558 (1897); Teesdale v. Liebschwager, 42 S.D. 323, 174 N.W. 620 (1919); Prosser, supra note 103, at 853. This position has been approved by Restatement of Torts § 674 (1938).

117. See McCormick, Counsel Fees and Other Expenses of Litigation as an Element of Damages, 15 Minn. L. Rev. 619 (1931).

118. Id. at 620-21. See Peerson v. Ashcraft Cotton Mills, 201 Ala. 348, 78 So. 204 (1917); Kolka v. Jones, 6 N.D. 461, 71 N.W. 558 (1897).

119. Eastin v. Bank of Stockton, 66 Cal. 123, 4 P. 1106 (1884) (en banc).

120. In jurisdictions that continue to apply the strict requirement of proof of special injury, the physician's ability to assert a cause of action for malicious prosecution is illusory, in most

such an action arising from an unjustifiably initiated medical malpractice claim[121] provided the necessary elements of the action can be established.[122] These elements include: the commencement or continuation of a malpractice proceeding by the patient against the physician; the termination of such proceeding in the physician's favor; the absence of probable cause for instituting the proceeding; malice on the part of the patient in instituting such proceeding; and damage to the physician as a result of the proceeding.[123] A malicious prosecution action is not favored by the law[124] and therefore the elements of the action are strictly construed.[125] Hence, the physician who fails to prove any one of the prescribed elements will be unable to recover for malicious prosecution.

An action for malicious prosecution of a medical malpractice suit may be maintained against the patient[126] who initiated the action as well as his attorney.[127] Although the attorney owes a duty[128] to his client to present his case vigorously, the attorney cannot completely disregard the rights of the defendant physician in the discharge of this duty.[129] The cause of action for malicious prosecution against an attorney is dependent upon the existence of elements comparable to

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cases, because the patient's suit against a physician for malpractice does not usually involve a civil arrest of the physician, seizure of the physician's property, or any recognized special injury to the physician which would not ordinarily result in all suits prosecuted for like causes of action. See notes 108-10 supra and accompanying text.

121. See, e.g., Carroll v. Kalar, 112 Ariz. 595, 545 P.2d 411 (1976); Babb v. Superior Court, 3 Cal. 3d 841, 479 P.2d 379, 92 Cal. Rptr. 179 (1971) (en banc); Spencer v. Burglass, 337 So. 2d 596 (La. App. 1976).

122. See Note, Malicious Prosecution: An Effective Attack on Spurious Medical Malpractice Claims?, 26 Case W. Res. L. Rev. 653, 657 (1976).

123. Carroll v. Kalar, 112 Ariz. 595, 545 P.2d 411 (1976).

124. Babb v. Superior Court, 3 Cal. 3d 841, 479 P.2d 379, 92 Cal. Rptr. 179 (1971) (en banc), Gore v. Condon, 87 Md. 368, 39 A. 1042 (1898); Mayflower Indus. v. Thor, 15 N.J. Super. 139, 83 A.2d 246 (1951).

125. Higgins v. Knickmeyer-Fleer Realty & Inv. Co., 335 Mo. 1010, 1029, 74 S.W.2d 805, 814 (1934) (per curiam).

126. The patient could establish probable cause for instituting the malpractice action by proving that he instituted the action on the advice of counsel, after full and truthful disclosure of the facts. This good faith reliance defense is available even though the lawyer's advice proves erroneous. Restatement of Torts § 675, comment g (1938). See also Allen v. Moyle, 84 Idaho 18, 367 P.2d 579 (1961); Patapoff v. Vollstedt's, Inc., 230 Ore. 266, 369 P.2d 691 (1962); Consumers Filling Station Co. v. Durante, 79 Wyo. 237, 333 P.2d 691 (1958).

127. See, e.g., Carroll v. Kalar, 112 Ariz. 595, 545 P.2d 411 (1976); Ferraris v. Levy, 223 Cal. App. 2d 408, 36 Cal. Rptr. 30 (1963); Annot., 27 A.L.R.3d 1113 (1969).

128. ABA Code of Professional Responsibility EC 7-1, DR 7-101(A)(1).

129. Norton v. Hines, 49 Cal. App. 3d 917, 123 Cal. Rptr. 237 (1975); Tool Research & Eng'r Corp. v. Henigson, 46 Cal. App. 3d 675, 120 Cal. Rptr. 291 (1975).

those necessary to sustain an action for malicious prosecution against his client, the patient.[130]

A physician has the burden of proving by a preponderance of the evidence that the patient's attorney lacked probable cause for instituting the prior malpractice suit.[131] If probable cause is established it operates as an absolute defense to a malicious prosecution action, even if actual malice is proved.[132]

It is difficult to define precisely the term probable cause,[133] especially when applying it to an attorney who is pursuing a litigant's rights in a lawsuit. In a recent California case[134] the court correctly defined probable cause in the context of a malicious prosecution suit brought against attorneys who had instituted a civil action on behalf of their clients. The test enunciated by the court to determine whether the attorneys acted with probable cause was twofold, comprising both subjective and objective elements. The attorney must entertain a subjective belief that his client has a tenable claim; and that belief must satisfy an objective standard of what a reasonable or ordinarily prudent attorney would have believed after an industrious investigation of both the facts and the law.[135] Before instituting an action an attorney need not be convinced that his client will prevail provided he has a reasonable and honest belief that his client's claim merits litigation.[136]

The attorney, in representing his client, must be permitted to pursue litigation vigorously although unsure of whether his client or his client's adversary is truthful, as long as the issue is genuinely in doubt.[137] Hence an attorney generally may rely in good faith upon the facts his client relates to him without seeking verification of these facts

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130. Tool Research & Eng'r Corp. v. Henigson, 46 Cal. App. 3d 675, 120 Cal. Rptr. 291 (1975); Hoppe v. Klapperich, 224 Minn. 224, 28 N.W.2d 780 (1947). See text accompanying note 123 supra.

131. Hunter v. Beckley Newspapers Corp., 129 W. Va. 302, 310, 40 S.E.2d 332, 337 (1946).

132. Burt v. Smith, 181 N.Y. 1, 6, 73 N.E. 495, 496 (1905), appeal dismissed, 203 U.S. 129 (1906).

133. Probable cause for a criminal prosecution has been defined as "the knowledge of facts, actual or apparent, strong enough to justify a reasonable man in the belief that he has lawful grounds for prosecuting the defendant in the manner complained of." Id. at 5, 73 N.E. at 496.

134. Tool Research & Eng'r Corp. v. Henigson, 46 Cal. App. 3d 675, 120 Cal. Rptr. 291 (1975).

135. Id. at 683, 120 Cal. Rptr. at 297; accord, Norton v. Hines, 49 Cal. App. 3d 917, 123 Cal. Rptr. 237 (1975).

136. Tool Research & Eng'r Corp. v. Henigson, 46 Cal. App. 3d 675, 120 Cal. Rptr. 291 (1975).

137. Id. at 684, 120 Cal. Rptr. at 297.

through independent inquiry.[138] Unless lack of probable cause for a claim is obvious from the facts disclosed by the patient or otherwise brought to the attorney's attention, the attorney may assume that his client is honest and that the facts disclosed by him are substantially correct.[139]

Finally, the existence of some evidence contrary to the position advanced by the attorney, although probative of the reasonableness of his belief, does not, in and of itself, support an inference that the attorney did not honestly believe that the patient's claim merited litigation.[140] However, if the attorney prosecutes a malpractice claim which a reasonable attorney would not regard as tenable, or proceeds with a malpractice action after unreasonably neglecting to investigate the facts and the law, the absence of probable cause may be established.[141] When an attorney initiates an action, he is not, and should not be, "an insurer to his client's adversary that his client will [be successful]."[142] The attorney may reasonably submit a doubtful issue of law when the outcome is uncertain or the law is unclear as a result of changing public and judicial attitudes.[143] If, at the conclusion of the litigation, the attorney's position proves to be erroneous, he should not be held liable for malicious prosecution merely because he advanced a new theory of law which the courts were not willing to accept.

Proof of malice is also an indispensable element of a malicious prosecution claim.[144] Malice is difficult to define, however, because of the varied meanings courts have given the term.[145] Malice in fact, or actual malice, in the context of a malicious prosecution action, has been defined as an evil or sinister purpose, or a depraved, wicked or mischievous intention or motive.[146] It is not necessary, however, to prove actual malice in the sense of hatred, hostility, or ill will in order

138. Maechtlen v. Clapp, 121 Kan. 777, 250 P. 303 (1926); Peck v. Chouteau, 91 Mo. 138, 3 S.W. 577 (1887); Milliner v. Elmer Fox & Co., 529 P.2d 806 (Utah 1974).

139. Maechtlen v. Clapp, 121 Kan. 777, 250 P. 303 (1926); Peck v. Chouteau, 91 Mo. 138, 3 S.W. 577 (1887).

140. Tool Research & Eng'r Corp. v. Henigson, 46 Cal. App. 3d 675, 120 Cal. Rptr. 291 (1975).

141. Norton v. Hines, 49 Cal. App. 3d 917, 123 Cal. Rptr. 237 (1975); Tool Research & Eng'r Corp. v. Henigson, 46 Cal. App. 3d 675, 120 Cal. Rptr. 291 (1975).

142. Tool Research & Eng'r Corp. v. Henigson, 46 Cal. App. 3d 675, 683, 120 Cal. Rptr. 291, 297 (1975).

143. See ABA Code of Professional Responsibility EC 7-2.

144. Crescent City Live Stock Co. v. Butcher's Union Slaughter-House Co., 120 U.S. 141 (1887); Hanchey v. Brunson, 175 Ala. 236, 56 So. 971 (1911); Konas v. Red Owl Stores, Inc., 158 Colo. 29, 404 P.2d 546 (1965); Keller v. Butler, 246 N.Y. 249, 158 N.E. 510 (1927).

145. See Fridman, Malice in the Law of Torts, 21 Modern L. Rev. 484 (1958).

146. Griswold v. Horne, 19 Ariz. 56, 165 P. 318 (1917).

to prevail.[147] Malice has been held to be present when the original civil suit was actuated with an improper motive,[148] such as lack of belief in the validity of the claim or of the possibility of success in the action.[149] Legal or implied malice[150] may also be sufficient, in some jurisdictions, to sustain a malicious prosecution action. Legal malice "may be evidenced by a wanton or reckless refusal to make reasonable investigation with regard to the propriety of a prosecution, or by the refusal to terminate [an action] upon notice that it is wrongful."[151] Of course, as with probable cause, termination of a malpractice action in favor of the former defendant affords no evidence that the action was maliciously instituted.[152] It is not necessary that the attorney was himself motivated by malice; it is sufficient that he knew of his client's malicious motives when instituting the proceeding.[153] Moreover, proof of malice need not be direct. The jury may infer malice from an absence of probable cause, although the opposite inference may not be drawn.[154]

To succeed in a malicious prosecution action against an attorney, a physician must also establish that the prior malpractice suit terminated in his favor.[155] Until this occurs, the former defendant has not sustained any damages.[156] The requirement of favorable termination precludes a defendant from interposing a counterclaim for malicious prosecution in the original malpractice proceeding.[157] Where a physi-

147. Prosser, supra note 103, at 855.

148. Kolka v. Jones, 6 N.D. 461, 71 N.W. 558 (1897).

149. Southwestern R.R. v. Mitchell, 80 Ga. 438, 5 S.E. 490 (1888).

150. Legal or implied malice has been defined as "a state of mind, which may be inferred from the intentional doing of a wrongful act." Ray v. City Bank & Trust Co., 358 F. Supp. 630, 638 (S.D. Ohio 1973); Adams v. Whitfield, 290 So. 2d 49, 51 (Fla. 1974).

151. Ray v. City Bank & Trust Co., 358 F. Supp. 630, 638 (S.D. Ohio 1973).

152. See Malloy v. Chicago, M. & St. P.R.R., 34 S.D. 330, 148 N.W. 598 (1914).

153. Munson v. Linnick, 255 Cal. App. 2d 589, 63 Cal. Rptr. 340 (1967); Burnap v. Marsh, 13 Ill. 536 (1852); Hoppe v. Klapperich, 224 Minn. 224, 28 N.W.2d 780 (1947); Peck v. Chouteau, 91 Mo. 138, 3 S.W. 577 (1887).

154. Stewart v. Sonneborn, 98 U.S. 187, 194 (1878); Adams v. Whitfield, 290 So. 2d 49, 51 (Fla. 1974).

155. Babb v. Superior Court, 3 Cal. 3d 841, 845, 479 P.2d 379, 380, 92 Cal. Rptr. 179, 180 (1971) (en banc); see Schwartz v. Schwartz, 366 Ill. 247, 8 N.E.2d 668 (1937); Desmond v. Fawcett, 226 Mass. 100, 115 N.E. 280 (1917).

156. MacEachern v. MacEachern, 127 Wash. 32, 216 P. 881 (1923).

157. Babb v. Superior Court, 3 Cal. 3d 841, 479 P.2d 379, 92 Cal. Rptr. 179 (1971) (en banc), Brand v. Hinchman, 68 Mich. 590, 36 N.W. 664 (1888); MacEachern v. MacEachern, 126 Wash. 32, 216 P. 881 (1923); Note, Counterclaim for Malicious Prosecution in the Action Alleged to be Malicious, 58 Yale L.J. 490 (1949). In Herendeen v. Ley Realty Co., 75 N.Y.S.2d 836 (Sup. Ct. 1947), the court permitted a counterclaim for malicious prosecution to be asserted in the original proceeding. Subsequent New York cases have not followed this case. E.g., Embassy Sewing Stores, Inc. v. Leumi Financial Corp., 39 App. Div. 2d 940, 333 N.Y.S.2d 106 (2d Dep't

cian sought a declaratory judgment that the malpractice action was being maliciously prosecuted, in the malpractice action itself, one court, in defense of the favorable termination rule, noted that it was supported by "conceptual, practical and policy reasons."[158] The rule prevents the possibility of inconsistent judgments which might result if the plaintiff prevailed in the main action, yet lost the malicious prosecution action.[159]

Public policy, also, requires that the favorable termination rule be retained to discourage additional claims for malicious prosecution,[160] a cause of action which the courts disfavor. Moreover, if counterclaims for malicious prosecution were permitted to be asserted in the original action, a plaintiff could suffer substantial prejudice by the introduction of proof of lack of probable cause and malice in the original proceedings.[161] Finally, if an attorney was joined as a defendant in the malicious prosecution action before termination of the original proceeding, the attorney would be placed in a potentially adverse position to his client and separate counsel would have to be retained at additional expense to the plaintiff to prosecute the original action.[162]

A favorable termination does not necessarily require an adjudication on the merits.[163] Termination of the prior malpractice proceeding therefore may be established by proof that the action was abandoned or dismissed.[164] Where it was "stipulated and agreed" that a case be dismissed as to the defendants "without prejudice and without costs to either party" a federal court concluded that the jury must decide, under the circumstances, whether the withdrawal or abandonment

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1972) (per curiam). See also Sonnichsen v. Streeter, 4 Conn. Cir. 659, 239 A.2d 63 (1967); Mayflower Indus. v. Thor Corp., 15 N.J. Super. 139, 83 A.2d 246 (1951), where counterclaims for malicious prosecution were recognized.

158. Babb v. Superior Court, 3 Cal. 3d 841, 846, 479 P.2d 379, 381, 92 Cal. Rptr. 179, 181 (1971) (en banc).

159. Id. at 847, 479 P.2d at 382, 92 Cal. Rptr. at 182.

160. Id. at 847-48, 479 P.2d at 382, 92 Cal. Rptr. at 182. If a counterclaim was permitted, the frequency of malicious prosecution would increase considerably, since less time, expense and preparation is generally needed to file a counterclaim than to prosecute an independent action.

161. Id., 479 P.2d at 382, 92 Cal. Rptr. at 182. One commentator who supports the filing of counterclaims during the pendency of the original action as a deterrent to the prosecution of spurious claims suggests that adjudication of the counterclaim could await the disposition of the original action to minimize the unfairness to the original plaintiff. Note, Malicious Prosecution: An Effective Attack on Spurious Medical Malpractice Claims?, 26 Case W. Res. L. Rev. 653, 684 (1976).

162. Babb v. Superior Court, 3 Cal. 3d 841, 848, 479 P.2d 379, 382, 92 Cal. Rptr. 179, 182 (1971) (en banc).

163. Hernon v. Revere Copper & Brass, Inc., 363 F. Supp. 96, 99 (E.D. Mo. 1973).

164. Baird v. Aluminum Seal Co., 250 F.2d 595 (3d Cir. 1957); Webb v. Youmans, 248 Cal. App. 2d 851, 57 Cal. Rptr. 11 (1967).

constituted a favorable termination.[165] However, a voluntary discontinuance or a settlement agreed to by both parties generally acts as a bar to an action for malicious prosecution.[166] By terminating the action in such a manner, the physician estops himself from claiming that the malpractice action was initiated without probable cause.[167]

The physician must also prove actual damages in excess of the costs recoverable in the original action in order to recover since no damage will be presumed.[168] Once a physician establishes that he has sustained some actual damage he may recover for all of his consequential damages:[169] any lost income;[170] reasonable legal fees incurred in defending the malpractice suit;[171] harm to reputation;[172] and mental suffering.[173] In addition, punitive damages may be recovered where there is proof of actual malice[174] or, in some jurisdictions, even where there is proof of legal malice.[175] However, the mere absence of probable cause[176] for instituting an action is insufficient to imply the degree of legal malice generally necessary to support an award for punitive damages.[177]

Until quite recently[178] there have been very few malicious prosecu-

165. Hernon v. Revere Copper & Brass, Inc., 363 F. Supp. 96, 99 (E.D. Mo. 1973).

166. Baird v. Aluminum Seal Co., 250 F.2d 595 (3d Cir. 1957); Leonard v. George, 178 F.2d 312 (4th Cir. 1949), cert. denied, 339 U.S. 965 (1950); Patete v. Baker, 14 Ill. App. 3d 385, 302 N.E.2d 416 (1973).

167. Leonard v. George, 178 F.2d 312 (4th Cir. 1949), cert. denied, 339 U.S. 965 (1950).

168. Lipscomb v. Shofner, 96 Tenn. 112, 33 S.W. 818 (1886); Prosser, supra note 103, at 855.

169. Babb v. Superior Court, 3 Cal. 3d 841, 847-48 & n.4, 479 P.2d 379, 382-83 & n.4, 92 Cal. Rptr. 179, 182-83 & n.4 (1971) (en banc).

170. Ray Wong v. Earle C. Anthony, Inc., 199 Cal. 15, 247 P. 894 (1926).

171. Stevens v. Chisholm, 179 Cal. 557, 178 P. 128 (1919); Connelly v. White, 122 Iowa 391, 98 N.W. 144 (1904); Annot., 21 A.L.R.3d 1068 (1968). But the physician will normally be unable to recover for attorneys' fees incurred in bringing the malicious prosecution action itself. See Stewart v. Sonneborn, 98 U.S. 187 (1878); Benderack v. Grujicich, 30 N.M. 331, 233 P. 520 (1925).

172. Metzenbaum v. Metzenbaum, 121 Cal. App. 2d 64, 262 P.2d 596 (1953); Malone v. Belcher, 216 Mass. 209, 103 N.E. 637 (1913). It has been argued that damage to reputation resulting from a malicious prosecution action should be considered a special injury in those states that follow the minority rule. See Note, Malicious Prosecution—Injury to Reputation as a Basis for Recovery, 6 Willamette L.J. 173 (1970).

173. Stalker v. Drake, 91 Kan. 142, 136 P. 912 (1913); Cohn v. Saidel, 71 N.H. 558, 53 A. 800 (1902).

174. Alvarez v. Retail Credit Ass'n, 234 Ore. 255, 381 P.2d 499 (1963) (en banc); McIntosh v. Wales, 21 Wyo. 397, 134 P. 274 (1913).

175. Adams v. Whitfield, 290 So. 2d 49, 51 (Fla. 1974). Legal malice may be inferred from gross negligence indicating a wanton disregard for the rights of the litigant. Id. See notes 150-51 supra and accompanying text.

176. See notes 133-43 supra and accompanying text.

177. Adams v. Whitfield, 290 So. 2d 49, 51 (Fla. 1974).

178. Since 1975 an unprecedented number of malicious prosecution actions have been

tion actions instituted by physicians against attorneys who have unsuccessfully litigated medical malpractice actions, and none of these cases, except one,[179] has been successfully prosecuted.[180]

The courts have been reluctant to find that an attorney has engaged in malicious prosecution when a medical malpractice case has been successfully defended. In *Spencer v. Burglass*,[181] the Louisiana Court of Appeals directly passed upon the question of an attorney's liability for instituting a frivolous malpractice suit against a physician. The physician alleged that in a medical malpractice action which terminated in her favor the patient's attorney had failed to interview and consult with any medical witnesses prior to filing suit or trying the case. Moreover, it was alleged that the hospital record indicated that four doctors had examined the infant patient and found no bodily damage. The physician claimed that the attorney owed her and the public a duty to refrain from filing such groundless litigation. Although the physician did not expressly plead malice, she claimed that an action for malicious prosecution was stated because malice could be inferred from the allegation that the patient's attorney filed suit with knowledge that the allegations of malpractice were false or with a reckless disregard of their truth.[182]

The court, in affirming a dismissal of the physician's complaint, concluded that her factual allegations did not support the claim that the attorney knew that the patient's allegations were false or that he acted with a reckless disregard of the truth when he filed the suit. On the contrary, the physician's allegations created an inference that the attorney simply did not know enough about the case when he instituted suit and this could not be construed as malice. The court emphasized that if this type of conduct was considered to be malice, "many a successful lawsuit would never have been or never would be filed because oftentimes the case comes to the attorney just prior to prescription date and the evidence is not discovered and developed

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instituted by physicians against their former patients and the patients' attorneys. Most of these cases have not yet been tried. See, e.g., Sullivan v. Terry, Civil No. 75-565-CA-B (Fla. Cir. Ct. 1975); Rogers v. Hills, Civil No. W. 76 G. 268 L. (Ill. Cir. Ct. 1976); Balthazar & Schoenfield v. Dowling, Safanda & Reyes, Civil No. 76-1-799 (Ill. Civ. Ct. 1976); Schleinkofer v. Shambaugh, Civil No. S-75-412 (Ind. Cir. Ct. 1975); Friedman v. Dozorc, Civil No. 76-137492NZ (Mich. Cir. Ct. 1976); Hoppenstein v. Zemek & Puskuldjian, Civil No. 19283-1976 (N.Y. Sup. Ct. 1976); Burkons v. Rogoff, Civil No. 953.503 (Ohio C.P. 1975).

179. Berlin v. Nathan, Civil No. 75 M2 542 (Ill. Cir. Ct. June 1, 1976) (recovery on prima facie tort and professional negligence causes of action). See notes 422-24, 482-84 infra and accompanying text.

180. Adler, supra note 2.

181. 337 So. 2d 596 (La. App. 1976).

182. See Carter v. Catfish Cabin, 316 So. 2d 517 (La. App. 1975).

until after the suit is filed."[183] Although the allegation that the attorney failed to interview any expert witness prior to filing suit might indicate that the attorney was negligent in preparing the case, it did not imply malice on the attorney's part.[184] The court found that "at worst . . . defendant went to trial with a poor case and got his just desserts, to wit, he lost."[185] An attorney should be able to rely on circumstantial evidence, reasonable inference and common sense without risking a retaliatory countersuit for malicious prosecution. The court recognized that the attorney was acting on behalf of his client, the father of the infant plaintiff, who thought his child was damaged even though no doctor agreed with him. The attorney was acting simply as the instrument through which the patient invoked the judicial process and without proof of specific malice in persuading the patient to initiate the action, no cause of action for malicious prosecution was stated. The majority of the court was obviously concerned with protecting the state's avowed public policy of open access to the courts for redress of grievances when it stated: "[C]onsideration must be given to the 'chilling effect' such an action might have on the basic right of a citizen to seek redress in court for what he considers to be a wrong."[186]

The dissenting opinion, however, refused to recognize the common law tort of malicious prosecution since Louisiana was a civil law state.[187] Instead, the dissent treated the physician's action as one akin to prima facie tort,[188] pursuant to a section of the Louisiana Civil Code and Louisiana's constitutional guarantee that courts be open to remedy injuries.[189]

In cases such as this, the public policy favoring free access to the courts will obviously be given enormous weight. It is difficult to conceive of many cases where an action for malicious prosecution would be stated, if one was not found in this case where an attorney proceeded to trial without consulting any medical experts and there was no evidence to support an inference of res ipsa loquitur.

A similar result recently occurred in Arizona[190] where a physician,

183. 337 So. 2d 596, 599 (La. App. 1976).

184. The court suggested that the attorney's failure to adequately prepare the case might provide a basis for a malpractice action by the attorney's client, but not the prior adverse defendant. Id.

185. Id. at 600.

186. Id. at 601.

187. Id. at 602.

188. The dissent likened lack of probable cause in a malicious prosecution action to instituting an action without arguable justification in an action in the nature of prima facie tort. Id. at 603. See notes 430-36 infra and accompanying text.

189. See La. Const. art. 1, § 22; La. Civ. Code Ann. art. 2315 (West 1972).

190. Carroll v. Kalar, 112 Ariz. 595, 545 P.2d 411 (1976).

after obtaining a dismissal of a malpractice claim on summary judgment, brought suit for malicious prosecution against both the patient and his attorney. A lower court rendered summary judgment for the patient and his attorney on the ground that probable cause existed to maintain the malpractice action. In affirming, the Supreme Court of Arizona recognized that the failure to establish a lack of probable cause for the malpractice claim constituted a defense to the malicious prosecution action.[191] The attorney had sufficient reason to believe, based on a deposition of another physician, that acts of malpractice had indeed been committed. The court noted that in the absence of some conflict concerning the facts, the decision as to whether probable cause existed rested with the court as a matter of law.[192] There was no conflict in the facts merely because the affidavits of two attorneys submitted in opposition to the summary judgment motion expressed an opinion that the underlying facts of the malpractice case were insufficient to support probable cause. This merely amounted to a conflict in personal opinions as to the significance of facts, and did not raise an issue of fact for the jury to resolve. Since the trial judge had to determine whether probable cause was present, the opinions of other attorneys were irrelevant and inadmissible.[193] The court concluded that the attorney had conducted a reasonable investigation into the circumstances surrounding the alleged malpractice and therefore his decision to pursue the patient's case did not give rise to a cause of action for malicious prosecution since "a reasonable man in [his] place . . . could [have filed a] suit for malpractice."[194]

The facts reported in a recently settled malicious prosecution suit in California[195] against a patient's attorney illustrate the kind of conduct on the part of an attorney that could support a valid claim for malicious prosecution. In this action, a pathologist was one of several physicians named as defendants in a wrongful death action arising from a surgical procedure. The pathologist's only connection with the case was the performance of the autopsy. This fact, if unknown to plaintiff's attorney when the action was first initiated, became known to him early in the litigation when the pathologist's deposition was taken. At the trial, several years later, the action against the pathologist was discontinued after he testified.

A close analysis of these facts demonstrates the presence of all the

191. Id. at 596, 545 P.2d at 412.

192. The only function of the jury is to determine what the actual facts are if there is a conflict. Id. at 598-99, 545 P.2d at 414-15.

193. Id. at 599, 545 P.2d at 415.

194. Id.

195. See Professional Liability Newsletter, Jan. 1976 at 1.

essential elements of a malicious prosecution action. First, the dismissal of the action against the physician during trial established that the action was terminated in defendant's favor. Second, the facts indicated that the attorney had knowledge that the action he had instituted against the physician lacked probable cause. It was unreasonable for the attorney to continue the action against the pathologist after discovering he had no role in the surgical procedure. One can only assume that the attorney did not discontinue the action against the physician because he wanted his testimony as a witness at the time of the trial—an insufficient reason for continuing the action. Third, malice could have been inferred by the jury from an absence of probable cause. If there was no evidence to establish the pathologist's malpractice the jury could have found that the attorney's motive was improper or unjustifiable.

With the steady expansion of liability in medical malpractice cases, there are very few suits in which an attorney cannot successfully claim that he had a tenable malpractice action against a physician and thereby establish a defense to an action for malicious prosecution. For example, in at least one jurisdiction it has been held that a patient need not prove that the physician was negligent to recover, but may rely on a theory of strict liability.[196] In some jurisdictions, the doctrine of res ipsa loquitur has been extended in malpractice actions to permit a plaintiff to establish a prima facie case on the basis of well-defined circumstantial evidence without expert testimony and thereby to shift the burden of proof to the defendant.[197] Furthermore, in some jurisdictions, the doctrine of res ipsa loquitur has been extended to hold that each of the physicians involved in an operative procedure is presumed to be negligent unless he rebuts this presumption.[198] Some jurisdictions have abandoned the locality rule with regard to expert testimony and have replaced it with a national standard test, thereby lessening the plaintiff's burden of proving that a physician failed to meet the requisite standard of care.[199] The doctrine of informed consent has also been expanded in many jurisdictions so that the plaintiff, without relying on expert testimony, need only establish that the physician failed to inform him of the material risks of an operative procedure or treatment which a reasonable person would expect to know before deciding to go forward with the treatment.[200]

196. See Helling v. Carey, 83 Wash. 2d 514, 519 P.2d 981 (1974) (concurring opinion).

197. Anderson v. Somberg, 67 N.J. 291, 338 A.2d 1 (1975).

198. See, e.g., Ybarra v. Spangard, 25 Cal. 2d 486, 154 P.2d 687 (1944).

199. See, e.g., Shilkret v. Annapolis Emergency Hosp. Ass'n, 276 Md. 186, 349 A.2d 245 (1975); Pederson v. Dumouchel, 72 Wash. 2d 73, 431 P.2d 973 (1967); Note, An Evaluation of Changes in Medical Standard of Care, 23 Vand. L. Rev. 729 (1970).

200. Canterbury v. Spence, 464 F.2d 772 (D.C. Cir.), cert. denied, 409 U.S. 1064 (1972);

Given the traditional judicial attitude against expanding the malicious prosecution action so as not to defeat the policy of open access to the courts, it is doubtful that a physician, in most cases, can overcome the burden of proving probable cause and malice. The traditional malicious prosecution action could be an effective remedy only in those few cases where it is obvious that the physician is a peripheral defendant in the malpractice action. An attorney who continues an action against a physician merely to obtain his expert testimony at the time of trial in order to implicate the prime defendants could be vulnerable to a malicious prosecution action. Although the attorney may initially have reasonable grounds to believe that such a physician was liable for malpractice, he has a duty[201] to discontinue the action if he learns through pre-trial discovery that the physician was not, in fact, negligent or causally responsible for plaintiff's injury.

If the action for malicious prosecution was extended beyond its present boundaries, attorneys who now represent physicians in malicious prosecution actions against patients' attorneys might find themselves liable for malicious prosecution if their actions ultimately proved unsuccessful.[202] Certainly in those jurisdictions where doctors and their attorneys have publicly stated that they are instituting these actions to deter the prosecution of frivolous medical malpractice suits, it would be relatively easy to establish malice. Any significant expansion of the tort of malicious prosecution would lead to interminable and vexatious litigation that should be avoided.

B. *Abuse of Process*

Abuse of process in its broadest sense has been defined[203] as the misuse or perversion of regularly issued legal process,[204] after it has

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Fogal v. Genesee Hosp., 41 App. Div. 2d 468, 344 N.Y.S.2d 552 (4th Dep't 1973); see Note, Informed Consent—A Proposed Standard for Medical Disclosure, 48 N.Y.U.L. Rev. 548 (1973).

201. An attorney has an ethical obligation to "treat with consideration all persons involved in the legal process and to avoid the infliction of needless harm." ABA Code of Professional Responsibility EC 7-10.

202. Hopke v. O'Byrne, 148 So. 2d 755 (Fla. App. 1963).

203. Several commentators have observed that the vital elements of the tort of abuse of process are not clearly definable. 1 F. Harper & F. James, Law of Torts § 4.9 (1956); Prosser, supra note 103, at § 121; Bretz, Abuse of Process—A Misunderstood Concept, 20 Cleveland St. L. Rev. 401 (1971); Gillam, Abuse of Process, 16 N.C.L. Rev. 276 (1938).

204. Process has traditionally been defined as "[t]he means of compelling a defendant to appear in court, after suing out the original writ, in civil, and after indictment, in criminal, cases . . . . A writ, warrant, subpoena, or other formal writing issued by authority of law . . . ." Bouvier's Law Dictionary 2731 (3d rev. ed. F. Rawle 1914); see Meadows v. Bakersfield Savings & Loan Ass'n, 250 Cal. App. 2d 749, 59 Cal. Rptr. 34 (1967). In a narrow sense process refers to individual writs issued by the court during or after litigation. Stearns v. State ex rel. Biggers, 23 Okla. 462, 477, 100 P. 909, 914 (1909). Process has been broadly interpreted in some abuse of

been issued, to achieve some collateral purpose not justified by the nature of the process.[205] Courts and others have frequently confused an abuse of process action with a malicious prosecution action.[206] Although both torts originated from the action for trespass on the case in the nature of conspiracy,[207] and both possess the common element of improper purpose in the use of legal process, upon careful analysis they are readily distinguishable. Generally an action for malicious prosecution[208] is available for causing process to issue maliciously and without reasonable or probable cause.[209] However, in an abuse of process action the original issuance of the legal process is justified, but the process itself is subsequently used for a purpose for which it was not designed.[210] One court succinctly described the distinction between malicious use and malicious abuse of process: "[T]he malicious use is the employment of process for its ostensible purpose, although without reasonable or probable cause, whereas the malicious abuse is the employment of a process in a manner not contemplated by law."[211] Lack of probable cause is therefore not an essential element of an abuse of process action.[212]

Another crucial distinction between the two actions is that unlike a malicious prosecution action, in an abuse of process proceeding the action in the initial proceeding does not have to terminate in favor of the original defendant.[213] Accordingly, an action for abuse of process may generally be asserted as a counterclaim in the original action,[214]

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process cases "to encompass the entire range of procedures incident to litigation." Younger v. Solomon, 38 Cal. App. 3d 289, 296, 113 Cal. Rptr. 113, 117 (1974).

205. Restatement of Torts § 682 (1938); Prosser, supra note 103, at 856-57; 1 Am. Jur. 2d Abuse of Process § 1 (1962).

206. See Italian Star Line, Inc. v. United States Shipping Bd. Emergency Fleet Corp., 53 F.2d 359, 361 (2d Cir. 1931); Bretz, Abuse of Process—Misunderstood Concept, 20 Cleveland St. L. Rev. 401 (1971).

207. See Board of Educ. v. Farmingdale Classroom Teachers Ass'n, 38 N.Y.2d 397, 401, 343 N.E.2d 278, 281, 380 N.Y.S.2d 635, 639-40 (1975); see also Saliem v. Glovsky, 132 Me. 402, 172 A. 4 (1934).

208. See pt. V A supra for a complete discussion of the elements of a malicious prosecution action.

209. If the plaintiff has no cause of action against the defendant, but nevertheless institutes the suit, the action that arises is one for malicious prosecution. Baird v. Aluminum Seal Co., 250 F.2d 595, 600 (3d Cir. 1957).

210. Hyde Constr. Co. v. Koehring Co., 387 F. Supp. 702, 712-13 (S.D. Miss. 1974); Restatement of Torts § 682 (1938).

211. Ash v. Cohn, 119 N.J.L. 54, 58, 194 A. 174, 176 (1937).

212. Moore v. Michigan Nat'l Bank, 368 Mich. 71, 75, 117 N.W.2d 105, 106 (1962).

213. Id., 117 N.W.2d at 106-07; Hoppe v. Klapperich, 224 Minn. 224, 28 N.W.2d 780 (1947); Ash v. Cohn, 119 N.J.L. 54, 194 A. 174 (1937). Termination in favor of defendant is an essential element of malicious prosecution. See notes 155-57 supra and accompanying text.

214. See generally Moore v. Michigan Nat'l Bank, 368 Mich. 71, 117 N.W.2d 105 (1962).

while one for malicious prosecution can only be asserted after the original action has terminated.[215]

The tort of abuse of process was first recognized in England in *Grainger v. Hill*.[216] The plaintiff in that case was a shipowner who borrowed money from defendants secured by a mortgage on his vessel. The defendants, in an attempt to secure the ship's register, sued Grainger in assumpsit and had a writ of arrest issued. Grainger, who was wounded and bedridden, was threatened with imprisonment unless he delivered the register to the defendants. Grainger delivered the register and then sued the defendants for procuring the writ of arrest wrongfully, illegally and maliciously to injure or harass and distress him and compel him to give up the ship's register. The court, in affirming a judgment in favor of the plaintiff, held that the action was not one for maliciously putting process in force but rather was an action for maliciously abusing court process. The employment of process to extort property was sufficient to state a cause of action and it was immaterial whether the original suit had been terminated or whether it was founded on probable cause.[217]

In this country, the term abuse of process evolved as a catchall label for a variety of dissimilar situations which had in common the improper use of judicial machinery but the circumstances of the case did not fit within the narrowly circumscribed action for malicious prosecution.[218] However, it has generally been recognized that the gist of the action was the misuse of process, no matter how properly obtained, to compel the party against whom it was used to do some collateral act which he could not legally or regularly have been compelled to do.[219] In order to recover for abuse of process, plaintiff must establish three essential elements: defendant's misuse of a properly issued court process in the course of a legal proceeding; defendant's ulterior motive or purpose in misusing the process; and damage as a result of such irregular act.[220]

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215. Babb v. Superior Court, 3 Cal. 3d 841, 469 P.2d 379, 92 Cal. Rptr. 179 (1971) (en banc); Metro Chrysler-Plymouth, Inc. v. Pearce, 121 Ga. App. 835, 175 S.E.2d 910, 915 (1970).

216. 132 Eng. Rep. 769 (C.P. 1838).

217. See Board of Educ. v. Farmingdale Classroom Teachers Ass'n, 38 N.Y.2d 397, 401-02, 343 N.E.2d 278, 281-82, 380 N.Y.S.2d 635, 640-41 (1975).

218. Italian Star Line, Inc. v. United States Shipping Bd. Emergency Fleet Corp., 53 F.2d 359, 361 (2d Cir. 1931).

219. Coy v. Advance Automatic Sales Co., 228 Cal. App. 2d 313, 39 Cal. Rptr. 476 (1964), overruled on other grounds, White Lighting Co. v. Wolfson, 68 Cal. 2d 336, 350-51 & n.8, 438 P.2d 345, 353-54 & n.8, 66 Cal. Rptr. 697, 705-06 & n.8 (1968); Moore v. Michigan Nat'l Bank, 368 Mich. 71, 117 N.W.2d 105 (1962); Restatement of Torts § 682, comment a (1938).

220. Italian Star Line, Inc. v. United States Shipping Bd. Emergency Fleet Corp., 53 F.2d 359 (2d Cir. 1931); Hoppe v. Klapperich, 224 Minn. 224, 28 N.W.2d 780 (1947); Moffett v. Commerce Trust Co., 283 S.W.2d 591 (Mo. 1955), cert. denied, 350 U.S. 996 (1956).

Although it is difficult to categorize all of the cases in which an abuse of process action has been recognized, it has been applied generally where court process was invoked to work some form of blackmail or extortion,[221] as where a writ of attachment,[222] or civil arrest[223] or criminal prosecution[224] was used as a threat or club to compel payment of a debt or surrender of property not involved in the proceeding.

Since the gravamen of the action is abuse of the process *after it is issued*, it must appear that the actor did something in the "use of the process outside of the purpose for which it was intended."[225] The mere fact that the actor had an ulterior or vindictive motive in using court process will not support an abuse of process action as long as the process is used properly.[226]

A classical illustration of a successful abuse of process action occurred in *Spellens v. Spellens*.[227] There a wife, in an action against her husband to have their marriage declared valid, sought a determination of their rights in certain personal property. During the pendency of this suit the husband brought a second action to recover possession of the personal property involved in the prior action. While the sheriff was taking possession of the property pursuant to a validly issued writ of attachment, the husband told his wife he would drop his claim if she would discontinue the main action. The court held that while the issuance of the writ was proper, the abuse of process consisted in using it as a threat to coerce the wife to abandon the main action.[228]

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221. Spellens v. Spellens, 49 Cal. 2d 210, 317 P.2d 613 (1957) (en banc); Prosser, supra note 103, at 857.

222. Jacoby v. Spector, 292 Mass. 366, 198 N.E. 157 (1935) (successive wage attachments to induce plaintiff to enter into a contract through fear of loss of job); Reardon v. Sadd, 262 Mass. 345, 159 N.E. 751 (1928) (attachment of property to enforce a claim that is known to be groundless); Zinn v. Rice, 154 Mass. 1, 27 N.E. 772 (1891) (attachment for greatly excessive amount).

223. Shatz v. Paul, 7 Ill. App. 2d 223, 129 N.E. 2d 348 (1955) (writs of arrest issued to compel plaintiff to borrow funds or to pledge personal credit toward payment of debts incurred through the discounting of invoices by the plaintiff as an officer of bankrupt corporations).

224. McClenny v. Inverarity, 80 Kan. 569, 103 P. 82 (1909) (warrant of arrest issued to collect a debt); White v. Apsley Rubber Co., 181 Mass. 339, 63 N.E. 885 (1902) (procuring plaintiff's arrest on a criminal charge in order to compel him to abandon a claim of right to occupy a house); Moore v. Michigan Nat'l Bank, 368 Mich. 71, 117 N.W.2d 105 (1962) (improper use of criminal process as a means of collecting a private debt).

225. Hauser v. Bartow, 273 N.Y. 370, 374, 7 N.E.2d 268, 269 (1937); accord, Dean v. Kochendorfer, 237 N.Y. 384, 390, 143 N.E. 229, 231 (1924).

226. Fairfield v. Hamilton, 206 Cal. App. 2d 594, 24 Cal. Rptr. 73 (1962); Tellefsen v. Key Sys. Transit Lines, 198 Cal. App. 2d 611, 17 Cal. Rptr. 919 (1962).

227. 49 Cal. 2d 210, 317 P.2d 613 (1957) (en banc).

228. Id. at 230-35, 317 P.2d at 625-27.

Mere vexation or harassment in prosecuting an action, however, is insufficient to give rise to an abuse of process claim.[229] As one court has noted:

> [T]he mere institution of a civil action which has occasioned a party trouble, inconvenience and expense of defending, will not support an action for abuse of process. . . . . . The tort is not committed until the defendant uses or attempts to use the process of the court, not to effect its proper function, but to accomplish through it some collateral object.[230]

This principle was reiterated in the recent case of *Ewert v. Wieboldt Stores, Inc.*,[231] where an abuse of process counterclaim and third-party action was interposed against a plaintiff and his attorneys who had previously instituted a negligence action for injuries suffered by plaintiff in a fall while employed as a window washer. The defendant, who had manufactured and sold the allegedly defective harness device used by the plaintiff, alleged in its counterclaim and third-party complaint that plaintiff and his attorneys knew or should have known that the defendant corporation was not in existence nor had it transacted business at any time prior to plaintiff's accident. The court, in dismissing the abuse of process claim, concluded that there was no allegation of improper use of process other than the mere institution of a civil action, and there was no damage other than that necessarily incident to filing a lawsuit.[232] The court held that the proper test to be applied in an abuse of process action is "whether process has been used to accomplish some end which is beyond the purview of the process, or which compels"[233] a party to do some collateral thing which he could not legally be compelled to do.[234] Other courts have applied a similar test to dismiss abuse of process actions.[235]

While traditionally this tort was available only where there was

229. Younger v. Solomon, 38 Cal. App. 3d 289, 297, 113 Cal. Rptr. 113, 118 (1974).

230. Miller v. Stern, 262 App. Div. 5, 7-8, 27 N.Y.S.2d 374, 375-76 (1st Dep't 1941).

231. 38 Ill. App. 3d 42, 347 N.E.2d 242 (1976).

232. Id. at 44, 347 N.E.2d at 244.

233. Id., 347 N.E.2d at 243.

234. Id.

235. It has been held that where plaintiff was motivated by malice in issuing a garnishee execution based on a properly obtained judgment, an action for abuse of process was unavailable since there was no perversion of the process for a purpose outside of that for which it was intended. Bohm v. Holzberg, 47 App. Div. 2d 764, 365 N.Y.S.2d 265 (2d Dep't 1975); see White Lighting Co. v. Wolfson, 68 Cal. 2d 336, 350-51, nn. 7 & 8, 438 P.2d 345, 353-54, nn. 7 & 8, 66 Cal. Rptr. 697, 705-06, nn. 7 & 8. A party was held not to be liable for abuse of process when he served a garnishment on a debtor's employer, for the purpose of collecting a supposed indebtedness, as long as the demand was not used to coerce the debtor to do something foreign to the main objective of the garnishment proceeding. Ammons v. Jet Credit Sales, Inc., 34 Ill. App. 2d 456, 181 N.E.2d 601 (1962). And where a party was alleged to have prosecuted a frivolous appeal, an abuse of process action was held not to be stated since there was no allegation that defendant was

clear evidence of some sort of extortion by use of the process,[236] the tort has been broadened to include any act not within the scope of the process, whether such a result could be obtained lawfully or otherwise.[237] In addition, the term *process*, which has generally been considered to include those processes that are instituted either independently, such as the original commencement of a suit, or collaterally, such as an attachment, has been broadened, in some states, to encompass the entire range of procedures incident to litigation.[238]

A more expansive interpretation of abuse of process was recently adopted by the New York Court of Appeals[239] in a case where subpoenas had been issued by a teacher's association to 87 teachers to compel their attendance as witnesses at a hearing. The attorney for the teacher's association refused a request by the school district to stagger the appearances of the teachers. As a result of this action, the school district, in order to avert a shutdown, was compelled to hire a substantial number of substitute teachers. The court, in holding that a sufficient abuse of process action was stated, concluded that the subpoenas were:

> [R]egularly issued process, defendants were motivated by an intent to harass and to injure, and the refusal to comply with a reasonable request to stagger the appearances was sufficient to support an inference that the process was being perverted to inflict economic harm on the school district.[240]

The court noted that the tort of abuse of process would be available "[w]here process is manipulated to achieve some collateral advantage, whether it be denominated extortion, blackmail or retribution

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using such appeal for other than its proper purpose. Tellefsen v. Key Sys. Transit Lines, 198 Cal. App. 2d 611, 17 Cal. Rptr. 919 (1962). But the court noted that a party may be fined by the court or damages may be awarded to respondent if the appeal is found to be frivolous. Id. at 600, 17 Cal. Rptr. at 922. See 3 Witkin, California Procedure 2354-57 (1963).

236. See notes 221-24 supra and accompanying text.

237. Bretz, Abuse of Process—A Misunderstood Concept, 20 Cleveland St. L. Rev. 401, 403 (1971); 7 Brooklyn L. Rev. 123 (1937).

238. Younger v. Solomon, 38 Cal. App. 3d 289, 113 Cal. Rptr. 113 (1974) (written interrogatories constituted use of process); Tellefsen v. Key Sys. Transit Lines, 198 Cal. App. 2d 611, 17 Cal. Rptr. 919 (1962) (taking of an appeal under certain circumstances could give rise to an abuse of process action); but see Meadows v. Bakersfield Sav. & Loan Ass'n, 250 Cal. App. 2d 749, 59 Cal. Rptr. 34 (1967) (posting of notice of default and intention to sell under a deed of trust was held not to be process emanating from the authority of the court); Jones v. Brockton Public Mkts., Inc.,—Mass.—, 340 N.E.2d 484 (1975) (an injunction was held not to be process within the meaning of abuse of process).

239. Board of Educ. v. Farmingdale Classroom Teachers Ass'n, 38 N.Y.2d 397, 343 N.E.2d 278, 380 N.Y.S.2d 635 (1975).

240. Id. at 404, 343 N.E.2d at 283, 380 N.Y.S.2d at 642-43.

. . . ."[241] The court broadened the scope of this tort considerably by holding that the intentional infliction of economic injury without "economic or social excuse" is a basis for an abuse of process action.[242]

Despite the expansion of the scope of abuse of process, its impact is still very limited especially in those states which require as an element of the cause of action proof of special injury, such as arrest of the person or seizure of plaintiff's property.[243] However, even in those jurisdictions that apply this strict rule of damages, once the plaintiff has proved that he was arrested or his property was seized, he may then recover for all damages which are the natural and probable consequence of the defendant's conduct,[244] including damages for mental distress,[245] loss of reputation, expenses for loss of time and attorneys fees, and injury to business, property, or financial standing.[246]

An attorney may, of course, be held liable for abuse of process where the acts performed in abusing the process were his own and were not dependent upon any evidence or representations made by his client.[247] If an attorney was cognizant of his client's improper motive, such impropriety could be imputed to the attorney who would then be personally liable for abuse of process. Moreover, as one case has held, an attorney may be liable if he maliciously participates with others, including his client, in an abuse of process or "he maliciously encourages and induces another to act as his instrumentality in committing"[248] an abuse of process. However, if the attorney was unaware of his client's ulterior motive to use process as a device to obtain a

241. Id., 343 N.E.2d at 283, 380 N.Y.S.2d at 643.

242. Id. at 405, 343 N.E.2d at 283-84, 380 N.Y.S.2d at 643.

243. See, e.g., Siebrand v. Eyerly Aircraft Co., 185 F. Supp. 538, 540-41 (D. Ore. 1960) (applying Illinois law); John Allan Co. v. Brandow, 59 Ill. App. 2d 328, 335, 207 N.E.2d 343 (1965). Many of these states require similar proof of special injury in malicious prosecution actions. Huggins v. Winn-Dixie Greenville, Inc., 252 S.C. 353, 166 S.E.2d 297 (1969). See notes 108-10 supra.

244. Malone v. Belcher, 216 Mass. 209, 103 N.E. 637 (1913); see Italian Star Line, Inc. v. United States Shipping Bd. Emergency Fleet Corp., 53 F.2d 359 (2d Cir. 1931).

245. Spellens v. Spellens, 49 Cal. 2d 210, 317 P.2d 613 (1957) (en banc); Murray v. Mace, 41 Neb. 60, 59 N.W. 387 (1894); Adelman v. Rosenbaum, 133 Pa. Super. 386, 3 A.2d 15 (1938). See also Witte, Damages for Injury to Feelings in Malicious Prosecution and Abuse of Process, 15 Clev.-Mar. L. Rev. 15, 25 (1966).

246. Saliem v. Glovsky, 132 Me. 402, 172 A. 4 (1934); Huggins v. Winn-Dixie Greenville, Inc., 252 S.C. 353, 166 S.E.2d 297 (1969).

247. Dishaw v. Wadleigh, 15 App. Div. 205, 44 N.Y.S. 207 (3d Dep't 1897); see Ash v. Cohn, 119 N.J.L. 54, 194 A. 174 (1937); Adelman v. Rosenbaum, 133 Pa. Super. 386, 3 A.2d 15 (1938).

248. Hoppe v. Klapperich, 224 Minn. 224, 235, 28 N.W.2d 780, 792 (1947).

collateral advantage and the action was meritorious on its face, the attorney should have a good faith defense to an abuse of process action.[249]

Although the scope of the abuse of process action has recently been expanded, it will not, except under very special and limited circumstances, afford an effective remedy against attorneys who have instituted groundless medical malpractice actions. A case that was recently reported settled presents the rare factual situation that would support an abuse of process action by a physician against a patient or his attorney.[250] A surgeon, who had been unable to collect a long overdue bill for performing a myelogram, sued his patient to recover his fee. In a transparent effort to counteract this suit, the patient instituted a malpractice claim against the physician accusing him of negligently failing to remove the pantopaque dye from her spinal cord following the procedure. Convinced that he had pursued the proper course of treatment, the surgeon counterclaimed for abuse of process, alleging that the patient had instituted the malpractice action solely to avoid paying the physician's bill for services rendered. The physician further claimed that he sustained damage to his reputation and was required to hire an attorney to defend the spurious malpractice action.[251]

The facts of this case present all of the requisite elements of a successful abuse of process action. The patient regularly issued process as a threat to coerce the physician into discontinuing a valid claim against her for money owed for services rendered. If an attorney counseled such a course of conduct or was aware of his client's improper motive, he too would be liable for abuse of process. This case also contained all the elements of a malicious prosecution action, for not only was process misused after it had been issued but process was improperly issued without probable cause. However, if the physician wished to assert a malicious prosecution action, he could not have interposed it by way of counterclaim in the original action.[252]

The recent case of *Joseph v. Markovitz*,[253] is illustrative of a case where an abuse of process action will not lie. Dr. Joseph instituted actions for malicious prosecution,[254] abuse of process and intentional

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249. See Adelman v. Rosenbaum, 133 Pa. Super. 386, 3 A.2d 15 (1938); Wilkerson v. Randall, 254 Miss. 546, 180 So. 2d 303 (1965) (holding same for a surety).

250. For an account of the case see Levine, I Beat a Malpractice Blackmailer, Medical Econ., Feb. 23, 1976, at 65.

251. Shortly after the counterclaim had been instituted the patient discontinued her malpractice claim and agreed to pay both the overdue bill and the physician's legal fees. Id.

252. See notes 155-57 supra and accompanying text.

253. 27 Ariz. App. 122, 551 P.2d 571 (1976).

254. The malicious prosecution action was dismissed on a motion for summary judgment

infliction of mental distress[255] against his former partners who, in a previous malpractice action against them, had filed a third party action against Dr. Joseph for indemnification for any judgment exceeding their insurance limits.[256] Dr. Joseph alleged that the third party complaint was filed to prevent him from testifying against his former partners in the malpractice action. The court, in dismissing the abuse of process action, noted that some act beyond the initiation of a lawsuit was necessary to support an abuse of process action.[257] If the defendants had offered to dismiss the third party action in exchange for Dr. Joseph's not testifying against them, the initiation of process might have been considered to have been used for a collateral advantage.[258] However, the facts presented did not indicate that this was the defendants' purpose in instituting the third party action and, in any event, no act or threat beyond the filing of the lawsuit itself was alleged.

Generally, where a physician considers a malpractice action vexatious, harassing and brought merely as a nuisance suit to coerce a settlement, he will be unable to recover for abuse of process. Every action is somewhat coercive and puts a party to some inconvenience and expense in defending it. Moreover, institution of a weak or tenuous claim should not, without more, give rise to an abuse of process action. Public policy mandates that there be free access to the courts for the redress of wrongs.[259] If a malpractice action was instituted with probable cause, the desire of an attorney or his patient to settle the claim should not be considered a collateral purpose outside the scope of litigation. Indeed, settlement of actions is a positive goal of the courts in order to avoid unnecessary and lengthy litigation. If the original action lacks merit and has been instituted solely to coerce a settlement, the physician may, of course, have a valid malicious prosecution action. An abuse of process claim, however, will not lie unless the physician can prove that the patient or his attorney reached beyond the natural consequences of the litigation to accomplish some collateral purpose. Thus, if an unjustified malpractice action was brought as a counterclaim to coerce the physician into discontinuing an

since the physicians in instituting the third party action relied upon the legal advice of their attorney and therefore probable cause was established as a matter of law. Id. at 100, 551 P.2d at 574.

255. See notes 333-35 infra and accompanying text.

256. The original malpractice action terminated in favor of the defendant physicians. Id. at 100, 551 P.2d at 575.

257. Id.

258. Id.

259. Board of Educ. v. Farmingdale Classroom Teachers Ass'n, 38 N.Y.2d 397, 404, 343 N.E.2d 278, 283, 380 N.Y.S.2d 635, 643 (1975).

action for money due for services rendered, an abuse of process action should be available.[260]

C. *Defamation*

A physician may have an action for libel or slander per se when false words, whether oral or written, tend to prejudice the physician in his profession.[261] Thus, it has been held that it is actionable per se to falsely charge a physician with a want of professional ability and integrity,[262] malpractice,[263] gross negligence in diagnosis,[264] or gross misconduct, which implies that the physician is unfit to practice his profession.[265] In *Jankelson v. Cisel,*[266] for example, a dentist recovered damages for slanderous publications made by a dissatisfied patient, who complained to other dentists and wrote numerous letters to various dentists, dental societies and governmental agencies complaining of the treatment she had received.

Although many statements concerning a physician made in the context of a medical malpractice action could be considered defamatory, if untrue, a physician will ordinarily not have an effective remedy against a patient who published such defamatory statements if they were made within the confines of a judicial proceeding. The rationale supporting this rule is based on the common law[267] recognition of an

260. Courts should clearly define and distinguish a malicious prosecution action from an abuse of process action. If these two torts are treated in an analogous manner, the impact on the judicial system could be substantial. Since a physician in most jurisdictions would be able to counterclaim in the original malpractice suit for abuse of process, the malpractice action could become unduly complicated and prolonged. In addition the attention of the trier of the facts would be diverted from the issue of malpractice to the motives of the plaintiff and his attorney for initiating the action.

261. See Lathrop v. Sundberg, 55 Wash. 144, 104 P. 176 (1909). See Prosser, supra note 103, at 757-59.

262. Krug v. Pitass, 162 N.Y. 154, 56 N.E. 526 (1900).

263. Foster v. Scripps, 39 Mich. 376 (1878); Quimby v. Minnesota Tribune Co., 38 Minn. 528, 38 N.W. 623 (1888); Mauk v. Brundage, 68 Ohio St. 89, 67 N.E. 152 (1903).

264. Ganvreau v. Superior Publishing Co., 62 Wis. 403, 22 N.W. 726 (1885).

265. Blende v. Hearst Publications Inc., 200 Wash. 426, 93 P.2d 733 (1939). But a charge of ignorance or mistake on a single occasion may not be actionable per se since one mistake does not amount to incompetence. If the charge, however, fairly imputes either habitual conduct, general ignorance or lack of skill, which the public has a right to expect of a doctor, it may be actionable without proof of special damages. Prosser, supra note 103, at 759; see November v. Time Inc., 13 N.Y.2d 175, 194 N.E.2d 126, 244 N.Y.S.2d 309 (1963) (lawyer accused of unprofessional conduct).

266. 3 Wash. App. 139, 473 P.2d 202 (1970). The dentist's recovery for slander was apparently based on the false statements the patient published to others outside of the malpractice action she had instituted against the dentist. Id. at 140-41, 473 P.2d at 204.

267. Some states have codified the absolute privilege applicable to defamatory statements

absolute privilege[268] for defamatory statements published in the course of judicial proceedings.[269] The privilege afforded to litigants[270] to express themselves freely during a judicial proceeding is based on the recognized public policy of affording litigants free access to the courts in order to secure and defend their rights.[271] The right of free speech and the public need for free and full disclosure of facts in a judicial proceeding outweigh the right of an individual to enjoy his reputation free from defamatory attacks.[272]

It is clear, in almost all jurisdictions,[273] that attorneys,[274] as well as judges[275] and witnesses,[276] are absolutely privileged to publish defamatory matter concerning another if the statements are made during the course of a judicial proceeding.[277] The attorney's privilege is coextensive with that of his client[278] and is invoked " 'to protect attorneys in their primary function—the representation of a client . . . .' "[279] In order to preserve the free and unfettered administration of justice, attorneys must be given great latitude during the course of judicial proceedings in drawing pleadings and affidavits, examining witnesses, and commenting upon testimony and demeanor without

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published in the course of judicial proceedings. See, e.g., Cal. Civ. Code § 47(2) (West 1954); Ga. Code Ann. § 105-711 (1968).

268. An absolute privilege applies without regard to actor's motive or purpose, or the reasonableness of his conduct. Prosser, supra note 103, at 776-77.

269. Restatement of Torts, Introductory Note §§ 585-92 (1938).

270. Id. § 587.

271. Abbott v. Tacoma Bank of Commerce, 175 U.S. 409, 411 (1899); Lerette v. Dean Witter Organization Inc., 60 Cal. App. 3d 575, 578, 131 Cal. Rptr. 592, 595 (1976); Bradley v. Hartford Accident & Indem. Co., 30 Cal. App. 3d 818, 824, 106 Cal. Rptr. 718, 721 (1973).

272. Veeder, Absolute Immunity in Defamation: Judicial Proceedings, 9 Colum. L. Rev. 463 (1909).

273. The rule of absolute privilege does not apply in Louisiana. Oakes v. Alexander, 135 So. 2d 513 (La. App. 1961). There the privilege is qualified and for the privilege to attach the statement must be material and be made with probable cause and without malice. Lescale v. Joseph Schwartz Co., 116 La. 293, 40 So. 708 (1905). See notes 301-02 infra.

274. Restatement of Torts § 586 (1938).

275. Id. § 585.

276. Id. § 588.

277. Theiss v. Scherer, 396 F.2d 646 (6th Cir. 1968); Ginsburg v. Black, 192 F.2d 823 (7th Cir. 1951), cert. denied, 343 U.S. 934 (1952); Romero v. Prince, 85 N.M. 474, 513 P.2d 717 (1973); Irwin v. Ashurst, 158 Ore. 61, 74 P.2d 1127 (1938) (en banc); Restatement of Torts § 586 (1938); Restatement (Second) of Torts § 586 (Tent. Draft No. 20, 1974); Note, 35 N.C.L. Rev. 541 (1957).

278. Robinson v. Home Fire & Marine Ins. Co., 242 Iowa 1120, 49 N.W.2d 521 (1951); Andrews v. Gardiner, 224 N.Y. 440, 121 N.E. 341 (1918).

279. Smith v. Hatch, 271 Cal. App. 2d 39, 50, 76 Cal. Rptr. 350, 357 (1969), quoting Friedman v. Knecht, 248 Cal. App. 2d 455, 462, 56 Cal. Rptr. 540, 545 (1967).

fear of being subjected to a lawsuit for libel or slander if their statements later prove to be defamatory.[280]

Once the absolute privilege is recognized,[281] no inquiry is permitted into the attorney's motivation or purpose in publishing the false statements. The privilege thus will attach even when the defamatory statements are published with actual malice and with knowledge of their falsity.[282] Further, the privilege attaches to every step of the judicial proceeding,[283] from pre-trial activities[284] to final disposition of the action.[285] It extends not only to oral testimony given during the trial,[286] but to pleadings,[287] affidavits,[288] depositions,[289] statements made in briefs,[290] and comments made by an attorney during argument, opening or summation.[291] In fact, the privilege has recently been held to cover communications of lawyers made prior to the

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280. Abbott v. Tacoma Bank of Commerce, 175 U.S. 409, 411 (1899); Veeder, Absolute Immunity in Defamation: Judicial Proceedings, 9 Colum. L. Rev. 463, 482-83 (1909).

281. Thornton v. Rhoden, 53 Cal. Rptr. 226, 230 (1966), subsequent opinion on rehearing, 245 Cal. App. 2d 80, 53 Cal. Rptr. 706 (1966); Restatement of Torts § 586, comment a at 229-30 (1938). Contra, Oakes v. Alexander, 135 So. 2d 513, 516 (La. App. 1961) (qualified privilege recognized).

282. Smith v. Hatch, 271 Cal. App. 2d 39, 76 Cal. Rptr. 350 (1969); Friedman v. Knecht, 248 Cal. App. 2d 455, 56 Cal. Rptr. 540 (1967); Thornton v. Rhoden, 245 Cal. App. 2d 80, 53 Cal. Rptr. 706 (1966); State v. Tillett, 111 So. 2d 716 (Fla. 1959).

283. The judicial proceedings to which the privilege applies have not been explicitly defined. However, judicial proceedings have been held to include any hearing before a court or tribunal which performs a judicial function, ex parte or otherwise. See 50 Am. Jur. 2d Libel and Slander § 232 (1970). Many jurisdictions have extended the privilege to administrative proceedings where the administrative officer or board is exercising a judicial or quasi-judicial function. See Dixie Broadcasting Corp. v. Rivers, 209 Ga. 98, 70 S.E.2d 734 (1952); Engelmohr v. Bache, 66 Wash. 2d 103, 401 P.2d 346, cert. dismissed, 382 U.S. 950 (1965).

284. Petty v. General Accident Fire & Life Assurance Corp., 365 F.2d 419 (3d Cir. 1966) (negotiations for settlement); Spoehr v. Mittelstadt, 34 Wis. 2d 653, 150 N.W.2d 502 (1967) (pre-trial conference).

285. Brown v. Shimabukuro, 118 F.2d 17 (D.C. Cir. 1941) (motion for rehearing); Jones v. Trice, 210 Tenn. 535, 360 S.W.2d 48 (1962) (motion for new trial). See Restatement of Torts § 586 (1938).

286. Horton v. Tingle, 113 Ga. App. 512, 149 S.E.2d 185 (1966); Wells v. Carter, 164 Tenn. 400, 50 S.W.2d 228 (1932).

287. DiBlasio v. Kolodner, 233 Md. 512, 197 A.2d 245 (1964); Meriwether v. Publishers: George Knapp & Co., 211 Mo. 199, 109 S.W. 750 (1908); Greenberg v. Aetna Ins. Co., 427 Pa. 511, 235 A.2d 576 (1967); Restatement of Torts § 587 (1938).

288. Glasson v. Bowen, 84 Colo. 57, 267 P. 1066 (1928) (en banc); Schmitt v. Mann, 291 Ky. 80, 163 S.W.2d 281 (1942); Keeley v. Great N. Ry., 156 Wis. 181, 145 N.W. 664 (1914).

289. Thornton v. Rhoden, 245 Cal. App. 2d 80, 53 Cal. Rptr. 706 (1966).

290. Albertson v. Raboff, 46 Cal. 2d 375, 295 P.2d 405 (1956) (en banc); Lesperance v. North Am. Aviation, Inc., 217 Cal. App. 2d 336, 31 Cal. Rptr. 873 (1963); Soter v. Christoforacos, 53 Ill. App. 2d 133, 202 N.E.2d 846 (1964).

291. Wall v. Blalock, 245 N.C. 232, 95 S.E.2d 450 (1956).

commencement of the lawsuit itself, where "[a]ll signs pointed to incipient litigation and to the necessity for protective action."[292]

The only limitation imposed upon this absolute privilege in the United States[293] is that the statements must be relevant or pertinent to some issue in the case.[294] Relevancy in this context has been broadly interpreted, and is not limited to statements that fall within the technical rules of evidence.[295] Most jurisdictions have adopted a good faith standard,[296] requiring only that the defamatory statements be either reasonably connected or related to the judicial proceeding[297] or pertinent to it.[298] All doubts should be resolved in favor of relevancy, pertinency and materiality.[299] The defense of privilege will therefore fail only if a statement is so palpably irrelevant to the subject matter of the controversy that no reasonable person could doubt its immateriality.[300]

In view of the absolute privilege afforded to an attorney for statements, both written and oral, published during a judicial proceeding, it is unlikely that a physician could ever recover for libel or slander even where an action was unjustifiably instituted and the charge of malpractice was false unless the allegation was completely irrelevant to the litigation. The only case to directly discuss the issue of a physician's claim for defamation arising out of a previous malpractice

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292. Johnston v. Cartwright, 355 F.2d 32, 37 (8th Cir. 1966); Lerette v. Dean Witter Organization, Inc., 60 Cal. App. 3d 573, 578-79, 131 Cal. Rptr. 592, 595 (1976). See Restatement (Second) of Torts § 586, comment c at 169 (Tent. Draft No. 20, 1974).

293. The English rule is that defamatory statements made in the course of judicial proceedings are absolutely privileged regardless of whether or not they are relevant to any issue involved in the case. Sebree v. Thompson, 126 Ky. 223, 103 S.W. 374 (1907); Munster v. Lamb, [1883] 11 Q.B.D. 588.

294. Matthis v. Kennedy, 243 Minn. 219, 67 N.W.2d 413 (1954); LaPorta v. Leonard, 88 N.J.L. 663, 97 A. 251 (1916); Seltzer v. Fields, 20 App. Div. 2d 60, 244 N.Y.S.2d 792 (1st Dep't 1963), aff'd, 14 N.Y.2d 624, 198 N.E.2d 368, 249 N.Y.S.2d 174 (1964).

295. Taliaferro v. Sims, 187 F.2d 6 (5th Cir. 1951); Matthis v. Kennedy, 243 Minn. 219, 67 N.W.2d 413 (1954); Seltzer v. Fields, 20 App. Div. 2d 60, 244 N.Y.S.2d 792 (1st Dep't 1963), aff'd, 14 N.Y.2d 624, 198 N.E.2d 368, 249 N.Y.S.2d 174 (1964).

296. Prosser, supra note 103, at 779.

297. Ginsburg v. Black, 192 F.2d 823 (7th Cir. 1951), cert. denied, 343 U.S. 934 (1952); Rader v. Thrasher, 22 Cal. App. 3d 883, 99 Cal. Rptr. 670 (1972); Thornton v. Rhoden, 245 Cal. App. 2d 80, 53 Cal. Rptr. 706 (1966).

298. Bleecker v. Drury, 149 F.2d 770 (2d Cir. 1945); Matthis v. Kennedy, 243 Minn. 219, 67 N.W.2d 413 (1954); Feldman v. Bernham, 6 App. Div. 2d 498, 179 N.Y.S.2d 881 (1st Dep't 1958) (per curiam), aff'd, 7 N.Y.2d 772, 163 N.E.2d 145, 194 N.Y.S.2d 41 (1959). See Ginsburg v. Black, 192 F.2d 823 (7th Cir. 1951), cert. denied, 343 U.S. 934 (1952); Robinson v. Home Fire & Marine Ins. Co., 242 Iowa 1120, 49 N.W.2d 521 (1951).

299. Matthis v. Kennedy, 243 Minn. 219, 67 N.W.2d 413 (1954); Greenberg v. Aetna Ins. Co., 427 Pa. 511, 235 A.2d 576 (1967).

300. Scott v. Statesville Plywood & Veneer Co., 240 N.C. 73, 81 S.E.2d 146 (1954).

action, *Foster v. McLain,*[301] occurred in Louisiana which only recognizes a qualified privilege for defamatory statements made during a judicial proceeding.[302]

The *Foster* litigation arose from three related medical malpractice actions that were instituted against Dr. Foster for allegedly leaving a foreign substance, described in the pleadings as a sponge, in Mrs. McLain's abdomen during an operation. Mrs. McLain informed her attorneys that the surgeon had told her that a piece of cotton the size of her little finger had been removed from the area of surgery. These attorneys referred the matter to a second attorney with a referral letter which related their conversations with Mrs. McLain and stated that some cotton or sponge had been removed. The trial attorneys then filed a petition based upon the referral letter, Mrs. McLain's statements, and the fact that a second operation was *actually* performed to remove an object from the area of incision. The prosecution of the medical malpractice action as well as the alleged basis for the action was widely publicized in the local newspapers.[303]

Upon dismissal of the malpractice actions, Dr. Foster instituted an action for libel, based upon the allegedly false and maliciously filed allegations in the previous malpractice actions, against the trial attorney who prepared the pleadings, the patient-client, and the referring attorneys.[304] Upon appeal, the appellate court reversed a judgment against the attorneys on the ground that they could not have known that the allegations made in the petition were untrue.[305] The court concluded that Dr. Foster had not met his burden of proof, since there was no evidence to establish that the allegations were motivated by malicious intent or ill will toward him. Moreover, there was no

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301. 251 So. 2d 179 (La. App. 1971).

302. Oakes v. Alexander, 135 So. 2d 513 (La. App. 1961). For this qualified privilege to attach to defamatory statements made in the course of a judicial proceeding, Louisiana requires that the statements must be material to the case, made with probable cause to believe them true and made without actual malice. Waldo v. Morrison, 220 La. 1006, 58 So. 2d 210 (1952). This test is the equivalent of the elements applied in a malicious prosecution action in other jurisdictions except for the requirement of favorable termination. See pt. V A supra and accompanying text. Actual malice in this context means that the false statements were motivated by personal spite or ill will, or were made with a reckless disregard for the truth. Bienvenu v. Angelle, 254 La. 182, 223 So. 2d 140 (1969).

303. 251 So. 2d at 181.

304. Id. The action and third party action brought by the trial attorneys against the referring attorneys were dismissed on appeal since their sole involvement in the malpractice action was a letter to the trial attorneys relating that the client had told them that a piece of cotton or a suture had been left in her body. They did not participate in investigating, drafting or filing the libelous allegation.

305. Id. at 181-82.

evidence to indicate that the allegations were made with a reckless disregard for the truth.[306]

It was clear that Mrs. McLain had a second operation and that something was removed from the original surgical incision. Whether a cotton suture which had been used to close the surgical incision was removed, as the doctor claimed, or a piece of cotton inadvertently left in the incision, could only be determined by a thorough pre-trial investigation, and presented a question of fact to be determined by a jury on the merits. Thus, the allegation that a sponge, not a piece of cotton or cotton suture, had been left in plaintiff's abdomen was at most an honest mistake of fact which was relevant to the medical malpractice action.[307]

In most jurisdictions, where an absolute privilege is extended to statements made during judicial proceedings, the attorney is free to allege that the physician was incompetent or committed acts of malpractice if such statements are relevant to the proceedings. An attorney, however, can lose the protection of the absolute privilege if he repeats the defamatory statement made during a judicial proceeding to newspapers outside the purview of the proceeding.[308] One court has aptly noted "an attorney who wishes to litigate his case in the press will do so at his own risk."[309]

Where an action for libel or slander is unavailable because of the absolute privilege, a physician may still be able to interpose an action for malicious prosecution if the malpractice action was instituted without probable cause, malice is proved and the action terminated in the physician's favor. As one court has stated:

> The remedy for one who has been harassed by a malicious and groundless suit, where there is any remedy, is not an action for defamation, but for bringing and prosecuting the suit maliciously, and without probable cause.[310]

But, in at least one jurisdiction, a physician may not recover for

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306. The court seemed to be confining malice to actual malice, although it extended it somewhat by applying a standard of reckless disregard. Id. at 182.

307. Although the court does not specifically refer to the inference of res ipsa loquitur, this rule would generally apply where a foreign object is left in a person's body after an operative procedure. See Mitchell v. Saunders, 219 N.C. 178, 13 S.E.2d 242 (1941). Therefore, the attorney would have probable cause to institute such an action even without expert testimony to support the allegation of malpractice and could delay investigating fully the patient's claim until after filing the complaint. See Note, 26 Case W. Res. L. Rev. 653, 676-77 (1976).

308. Robinson v. Home Fire & Marine Ins. Co., 242 Iowa 1120, 49 N.W.2d 521 (1951); Kennedy v. Cannon, 229 Md. 92, 182 A.2d 54 (1962); Jacobs v. Herlands, 51 Misc. 2d 907, 17 N.Y.S.2d 711 (Sup. Ct.), aff'd, 259 App. Div. 823, 19 N.Y.S.2d 770 (2d Dep't 1940).

309. Kennedy v. Cannon, 229 Md. 92, 99, 182 A.2d 54, 58 (1962).

310. Wilson v. Sullivan, 81 Ga. 238, 7 S.E. 274 (1888).

damages to his reputation in the guise of a malicious prosecution action. In *Dixie Broadcasting Corp. v. Rivers,*[311] plaintiff instituted an action to recover damages on the ground that defendants maliciously and without probable cause initiated proceedings against plaintiff before the Federal Communications Commission to revoke plaintiff's permit to construct a radio station. It was alleged that defendants made false charges against plaintiff in the prior proceeding without probable cause, and that plaintiff's personal reputation and radio business had been injured as a result.[312] Plaintiff did not specifically characterize the nature of his cause of action, in all likelihood to avoid the absolute defense of privilege available to false statements made during a judicial proceeding.

The court treated the action as one for malicious prosecution, but would not permit recovery for those elements of damage which were attributable to the libelous statements made during the course of the proceedings before the Commission. The court recognized an absolute privilege for publishers of libelous statements made during a judicial proceeding.[313] This privilege completely protects defendants from any liability for damage in a libel suit, and that which the law prohibits directly it should not permit indirectly.[314] Thus, the court concluded that a plaintiff who cannot recover damages for injury to reputation arising from libelous allegations in a judicial proceeding cannot proceed indirectly to recover the very same damages by denoting the action as one for malicious prosecution. The defense of absolute privilege would therefore bar recovery for damages to reputation arising from libelous allegations in a judicial proceeding even though the plaintiff alleged almost all of the essential elements of a malicious prosecution action.[315]

In view of the absolute privilege afforded to false statements made during judicial proceedings, an action for defamation is clearly unavailable to a physician. The paramount public policy affording patients and their attorneys freedom of access to the courts without fear that they will be sued for false statements made during judicial proceedings outweighs the physician's interest in protecting his reputation.

311. 209 Ga. 98, 70 S.E.2d 734 (1952).

312. Georgia follows the minority rule and requires a showing of special injury, such as (1) arrest of the person, (2) seizure of property, or (3) other special damage, as an element of a malicious prosecution action. Jacksonville Paper Co. v. Owen, 193 Ga. 23, 17 S.E.2d 76 (1941). In Dixie no special injury was proved and the malicious prosecution action was dismissed. 209 Ga. at 108, 70 S.E.2d at 741-42.

313. This privilege is recognized by statute in Georgia. Ga. Code Ann. § 105-711 (1968). See note 283 supra.

314. 209 Ga. at 107, 70 S.E.2d at 741.

315. Id. Plaintiff failed to establish special injury. See note 312 supra.

D. *Intentional Infliction of Mental Distress*

In recent years many jurisdictions have recognized an independent action for intentional infliction of mental distress.[316] Courts had traditionally been reluctant to expand recovery for emotional distress as a separate tort because of the fear of flooding the courts with fraudulent and fictitious claims and the difficulty in measuring damages for mental distress.[317] For these reasons, the tort of intentional infliction of mental distress has generally been limited to those situations where the defendant's acts were so outrageous that they tended to guarantee the genuineness of plaintiff's claim of serious mental distress.[318]

The Second Restatement of Torts specifically recognized that "[o]ne who by extreme and outrageous conduct intentionally or recklessly causes severe emotional distress . . . is subject to liability for such emotional distress"[319] and any bodily harm that resulted from the emotional distress.[320] However, the Restatement limited the tort of intentional infliction of mental distress to those cases where the defendant's conduct has been so outrageous in character and so extreme in degree as to exceed all reasonable bounds of decency.[321] In order for defendant's conduct to give rise to liability, it must therefore be regarded as atrocious and "outrageous" by the average member of the community.[322]

In addition, the emotional distress suffered by the plaintiff must be severe.[323] A minor annoyance or affront to plaintiff's dignity is too unimportant to support such an action, since "trivial emotional distress is a part of the price of living [in society]."[324] The cause of action for intentional infliction of mental distress should therefore be recognized only when the distress inflicted is so severe that no reasonable person of ordinary sensibilities could be expected to endure it.[325]

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316. Restatement (Second) of Torts § 46 (1965). See, e.g., Savage v. Boies, 77 Ariz. 355, 272 P.2d 349 (1954); Wilson v. Wilkins, 181 Ark. 137, 25 S.W.2d 428 (1930); State Rubbish Collectors Ass'n v. Siliznoff, 38 Cal. 2d 330, 240 P.2d 282 (1952); Wilkinson v. Downton, [1897] 2 Q.B. 57.

317. See Prosser, supra note 103, at 50-51.

318. See Magruder, Mental and Emotional Disturbance in the Law of Torts, 49 Harv. L. Rev. 1033 (1936); Prosser, Insult and Outrage, 44 Calif. L. Rev. 40 (1956).

319. Restatement (Second) of Torts § 46(1) (1965).

320. Some states that recognize the tort restrict its application to cases in which plaintiff suffered physical consequences. See Clark v. Associated Retail Credit Men, 105 F.2d 62 (D.C. Cir. 1939); Duty v. General Fin. Co., 154 Tex. 16, 273 S.W.2d 64 (1954).

321. Restatement (Second) of Torts § 46, comment d at 72-73 (1965).

322. Id. at 73.

323. Id., comment j at 77.

324. Id.

325. Knierim v. Izzo, 22 Ill. 2d 73, 174 N.E.2d 157 (1961); Swanson v. Swanson, 121 Ill. App. 2d 182, 257 N.E.2d 194 (1970).

The types of situations in which this tort has been recognized are quite varied, but they all have in common the element of extreme, outrageous conduct.[326] It has been used most successfully to counteract the extremely harassing and high pressure tactics of collection agencies,[327] creditors,[328] insurance carriers and adjusters[329] and landlords attempting to evict tenants.[330]

Although the limits of the tort of intentional infliction of emotional distress have not yet been fully determined,[331] it is doubtful that the conduct of an attorney in instituting an unjustified medical malpractice suit would be considered the type of outrageous conduct that has previously been recognized as actionable. Even though a malpractice action was motivated by a malicious intent to cause mental distress, it is highly unlikely that the courts would view the attorney's conduct in prosecuting the malpractice action as extreme and outrageous conduct that exceeds the bounds of decency, if probable cause was present for instituting the action. If probable cause was absent, malice could be inferred and the physician could then recover damages for the mental distress he sustained in a traditional action for malicious prosecution.[332] It would therefore be unnecessary under the circumstances to recognize a separate action for such damage.

In *Joseph v. Markovitz*,[333] a physician's action for intentional infliction of mental distress[334] against his former partners, who had instituted a third party action against him in a prior malpractice action, was dismissed on a motion for summary judgment. The suit had its origin in a malpractice action against two members of a medical

326. See, e.g., Savage v. Boies, 77 Ariz. 355, 272 P.2d 349 (1954) (police tricked plaintiff into confinement by telling her that her child had been injured and was in the hospital); Halio v. Lurie, 15 App. Div. 2d 62, 222 N.Y.S.2d 759 (2d Dep't 1961) (man who had jilted a woman wrote her taunting letters); Flamm v. Van Nierop, 56 Misc. 2d 1059, 291 N.Y.S.2d 189 (Sup. Ct. 1968) (defendant constantly harassed plaintiff by such conduct as dashing out at him in public places).

327. Duty v. General Fin. Co., 154 Tex. 16, 273 S.W.2d 64 (1954). See also Berger, The Bill Collector and the Law—A Special Tort, at Least for a While, 17 DePaul L. Rev. 327 (1968). But a reasonable effort to collect a bill, even though it may cause serious mental distress, is not actionable. Berrier v. Beneficial Fin., Inc., 234 F. Supp. 204 (N.D. Ind. 1964).

328. Barnett v. Collection Serv. Co., 214 Iowa 1303, 242 N.W. 25 (1932); La Salle Extension Univ. v. Fogarty, 126 Neb. 457, 253 N.W. 424 (1934).

329. Frishett v. State Farm Mut. Auto. Ins. Co., 3 Mich. App. 688, 143 N.W.2d 612 (1966).

330. See Kaufman v. Abramson, 363 F.2d 865 (4th Cir. 1966).

331. Restatement (Second) of Torts § 46, comment c at 72 (1965).

332. See note 173 supra.

333. 27 Ariz. App. 122, 551 P.2d 571 (1976).

334. Plaintiff's causes of action for malicious prosecution and abuse of process were also dismissed since probable cause was shown to exist and there was no act or threat beyond the filing of the lawsuit itself. See notes 253-58 supra and accompanying text.

partnership which had been dissolved prior to the filing of the malpractice action. A third party complaint was filed by the physicians against Dr. Joseph, their former partner, asserting a right of indemnification under a partnership agreement for any judgment exceeding the limits of their insurance policy. Dr. Joseph alleged that the filing of the third party complaint against him by his former partners, with the acquiescence of his own insurance company, and the fact that the insurance company paid the attorneys' fees in the third party action, constituted extreme and outrageous conduct. Although the jurisdiction had previously recognized an action for intentional infliction of mental distress,[335] this court concluded that the filing of the third party complaint here was not the kind of extreme and outrageous conduct that would support an action for intentional infliction of mental distress.

Clearly, the mere institution of an unjustified law suit will not amount to the outrageous conduct necessary for the tort of intentional infliction of mental distress. Furthermore, it is difficult to conceive of a set of circumstances where an attorney's conduct would be considered so outrageous that a separate action for mental distress would arise without the physician also stating a valid cause of action for malicious prosecution in which he could recover damages for the mental distress he sustained.[336] The malicious prosecution action should therefore be the only cause of action permitted to vindicate the rights of a wrongfully sued physician. The stringent proof requirements in a malicious prosecution action[337] better serve the policy of free access to the courts, and the definition of outrageous conduct should not be broadened to reach those cases where an attorney has allegedly instituted an unjustified malpractice action.

VI. More Innovative Theories of Recovery

A. *Prima Facie Tort*

It is obvious from the foregoing analysis of the traditional tort theories that, in most cases, a physician will not have an available remedy against an attorney who institutes an unjustified medical malpractice action. The physician generally cannot establish the prescribed elements of these narrowly circumscribed torts. Several jurisdictions, in the past, have recognized a distinct action for prima facie

335. Savage v. Boies, 77 Ariz. 355, 272 P.2d 349 (1954).
336. See note 173 supra.
337. See pt. V A supra.

tort[338] when traditional tort remedies were inadequate to provide a remedy to an injured party. This doctrine may, in the future, provide an innovative alternative to the traditional tort categories by creating a remedy for the prosecution of unjustified medical malpractice actions where none existed.

Prima facie tort has been broadly defined as "the infliction of intentional harm, resulting in damage, without excuse or justification, by an act or a series of acts which would otherwise be lawful."[339] The prima facie tort doctrine was first enunciated in England in 1889 when Lord Bowen in his now famous dictum stated that: "intentionally to do that which is calculated in the ordinary course of events to damage, and which does, in fact, damage another in that other person's property or trade, is actionable if done without just cause or excuse."[340] In this country, the principle of prima facie tort was first recognized by Mr. Justice Holmes when he wrote that: "*prima facie*, the intentional infliction of temporal damage is a cause of action, which, as a matter of substantive law, whatever may be the form of pleading, requires a justification if the defendant is to escape."[341]

As a result of Justice Holmes' influence, a number of states soon thereafter recognized a distinct cause of action for prima facie tort[342] where intentional harm had been inflicted "by an act or series of acts which might otherwise be lawful and which do not fall within the categories of traditional tort actions."[343]

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338. For a general discussion of the prima facie tort doctrine see Brown, The Rise and Threatened Demise of the Prima Facie Tort Principle, 54 Nw. U.L. Rev. 563 (1959) [hereinafter cited as Brown]; Forkosch, An Analysis of the "Prima Facie Tort" Cause of Action, 42 Cornell L.Q. 465 (1957) [hereinafter cited as Forkosch]; Hale, Prima Facie Torts, Combination, and Non-Feasance, 46 Colum. L. Rev. 503 (1946); Halpern, International Torts and the Restatement, 7 Buff. L. Rev. 7 (1957); Holmes, Privilege, Malice, and Intent, 8 Harv. L. Rev. 1 (1894); James, Tort Law in Midstream: Its Challenge to the Judicial Process, 8 Buff. L. Rev. 315 (1959); Seavey, Bad Motive Plus Harm Equals a Tort, 26 St. John's L. Rev. 279 (1952); Smith, Torts Without Particular Names, 69 U. Pa. L. Rev. 91 (1921); Note, The Prima Facie Tort Doctrine, 52 Colum. L. Rev. 503 (1952); Note, A Remedy for All Injuries?, 25 Chi.-Kent L. Rev. 90 (1959); Note, Abstaining from Wilful Injury—The Prima Facie Tort Doctrine, 10 Syracuse L. Rev. 53 (1958).

339. Ruza v. Ruza, 286 App. Div. 767, 769, 146 N.Y.S.2d 808, 811 (1st Dep't 1955).

340. Mogul S.S. Co. v. McGregor, Gow, & Co., [1899] 23 Q.B.D. 598, 613.

341. Aikens v. Wisconsin, 195 U.S. 194, 204 (1904).

342. Massachusetts accepted the doctrine at an early date. See Bogni v. Perroti, 224 Mass. 152, 112 N.E. 853 (1916); Walker v. Cronin, 107 Mass. 555 (1871). New York appears to have recognized the doctrine in 1923 in Beardsley v. Kilmer, 236 N.Y. 80, 89, 140 N.E. 203, 205 (1923), although it did not come into full use until 1934. Al Raschid v. News Syndicate Co., 265 N.Y. 1, 191 N.E. 713 (1934). See also Note, The Prima Facie Tort Doctrine, 52 Colum. L. Rev. 503, 504 (1952); Note, Abstaining from Wilful Injury—The Prima Facie Tort Doctrine, 10 Syracuse L. Rev. 53, 54-55 (1958).

343. Knapp Engraving Co. v. Keystone Photo Engraving Corp., 1 App. Div. 2d 170, 172, 148 N.Y.S.2d 635, 637 (1st Dep't 1956).

This doctrine of prima facie tort, if liberally applied, could provide greater flexibility in the law of torts by recognizing novel claims for damages arising as a result of changing social and economic needs which had little common law precedent.[344] The common law of torts "does not consist of absolute, fixed, and inflexible rules, but rather of broad . . . principles [of] justice, reason, and common sense."[345] As the social needs of the community change, the common law must respond to these changes.[346] If it becomes clear therefore that plaintiff's interests are entitled to legal protection against the defendant's conduct, the mere fact that the claim is novel should not bar a remedy.[347] As one commentator has noted:

> The prima facie tort principle . . . has proved useful in assisting the development of needed reforms in the law of tort, particularly in receiving and resolving the myriad of claims which have arisen from new relationships and power groupings formed, and continuously reformed, in the business world. It serves a high purpose in providing within its compass a residuary action for timely recognition of novel claims . . . .[348]

However, in most jurisdictions the action for prima facie tort has tended to crystallize, like other tort actions, into a rather narrowly restricted specific remedy, requiring proof of malice and special damages.[349]

Although rarely labeled "prima facie tort" there also appears in the law the parallel maxim *ubi jus ibi remedium*—for every right there is a remedy.[350] The constitutions of a majority of American states expressly recognize this principle by guaranteeing to every person a legal remedy for all injuries and wrongs done to persons, property or reputation.[351]

Both the judicially created action of prima facie tort and the

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344. Some authorities reject the view that all wilful harm is actionable unless defendant justifies his conduct and maintain that every plaintiff must bring his case under some traditionally accepted tort category. Salmond, Law of Torts, 15-16 (10th ed. 1945).

345. Miller v. Monsen, 228 Minn. 400, 405, 37 N.W.2d 543, 547 (1949).

346. Id. at 406-07, 37 N.W.2d at 547.

347. Prosser, supra note 103, at 3-4; Smith, Torts Without Particular Names, 69 U. Pa. L. Rev. 91 (1921).

348. Brown, supra note 338, at 573.

349. Brown, supra note 338; Forkosch, supra note 338, at 480. See Annot., 16 A.L.R.3d 1191, 1202 (1967).

350. Annot., 16 A.L.R.3d 1191, 1196 & n.10 (1967).

351. Typical of such state constitutional provisions is Ill. Const. art. 1, § 12 which states: "Every person shall find a certain remedy in the laws for all injuries and wrongs which he receives to his person, privacy, property or reputation. He shall obtain justice by law, freely, completely, and promptly." See also Ala. Const. art. 1, § 13; Conn. Const. art. 1, § 10; Kan. Const. Bill of Rights, § 18; Ky. Const. Bill of Rights, § 14; Mo. Const. art. 1, § 14; Neb. Const. art. 1, § 13; Ore. Const. art. 1, § 10; R.I. Const. art. 1, § 5; Tenn. Const. art. 1, § 17.

constitutional guarantee of a remedy for every wrong may provide novel remedies to the physician who successfully defends a groundless medical malpractice action. Both of these approaches must be carefully analyzed to determine if they can be used as an effective remedy by physicians to curtail the prosecution of unjustified medical malpractice claims.

In the past, prima facie tort has been invoked to provide a remedy for all types of intentional wrongdoings which were difficult to categorize, although it was applied most frequently in cases of labor disputes and interference with employment and other contractual relations.[352] The doctrine of prima facie tort has achieved its greatest degree of sophistication and utilization in New York State, where it has been expanded to provide a remedy for a wide variety of otherwise uncategorized misconduct.[353] The New York courts, however, have severely restricted the effect of this tort by applying formidable requirements of both pleading and proof.[354]

The basic elements of the prima facie tort cause of action that emerge from the case law include an intent to injure on the part of the defendant, a lack of justification in so acting, and proof of special damages.[355] A prima facie tort, in the restricted sense of the term, arises only where plaintiff can prove that the defendant acted maliciously by showing an actual intent to harm as distinguished from an intent merely to commit the act.[356]

Some courts have further circumscribed this tort action by requiring plaintiff to prove that the defendant's sole motive was to injure the

352. Note, The Prima Facie Tort Doctrine, 52 Colum. L. Rev. 503, 505 (1952); Note, Abstaining From Wilful Injury—The Prima Facie Tort Doctrine, 10 Syracuse L. Rev. 53, 55 (1958).

353. For a discussion of the doctrine as it evolved in New York, see Forkosch, supra note 338, at 475-79; Note, The Prima Facie Tort Doctrine in New York—Another Writ?, 42 St. John's L. Rev. 530 (1968).

354. A recent New York case appears to have overruled long standing precedent by eliminating some of the formalism in pleading and proving a prima facie tort action. See Board of Educ. v. Farmingdale Classroom Teachers Ass'n, 38 N.Y.2d 397, 343 N.E.2d 278, 380 N.Y.S.2d 635 (1975); notes 377-78 infra and accompanying text.

355. 74 Am. Jur. 2d Torts § 38, at 651-52 (1974).

356. Passaic Print Works v. Ely & Walker Dry-Goods Co., 105 F. 163 (8th Cir. 1900), cert. denied, 181 U.S. 617 (1901); Tuttle v. Buck, 107 Minn. 145, 119 N.W. 946 (1909); Advance Music Corp. v. American Tobacco Co., 296 N.Y. 79, 70 N.E.2d 401 (1946); Ruza v. Ruza, 286 App. Div. 767, 146 N.Y.S.2d 808 (1st Dep't 1955). The requirement of proof of intent to do harm has been criticized as being unnecessarily restrictive. The better view, which has been advanced by some commentators, is to inquire as to whether there was an intention to commit the disfavored act. See Brown, supra note 338, at 569-70; Note, The Prima Facie Tort Doctrine, 52 Colum. L. Rev. 503, 506-07 (1952).

plaintiff.[357] This rule is based on Justice Holmes' dictum that in order for intentional harm, inflicted without justification, to be prima facie actionable, it must have been motivated solely by "disinterested malevolence."[358] Thus, if a defendant's motivation to injure the plaintiff was combined with his own self-interest in pursuing a profit, the necessary malice would be negated and plaintiff's prima facie tort action would be dismissed.[359] The sole intent requirement,[360] if restrictively applied, limits the physician's use of the prima facie tort doctrine even if proof was available to establish an intent to harm the physician since the patient's self-interest in achieving a monetary recovery could negate the essential element of malice.

Most courts concerned with the possible proliferation of prima facie tort actions also require, as an essential element, an allegation of special damages[361]—deprivation of pecuniary benefit.[362] While some courts have acknowledged that an allegation of injury to professional reputa-

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357. Reinforce, Inc. v. Birney, 308 N.Y. 164, 169-70, 124 N.E.2d 104, 106-07 (1954); Beardsley v. Kilmer, 236 N.Y. 80, 90, 140 N.E. 202, 206 (1923).

358. American Bank & Trust Co. v. Federal Reserve Bank, 256 U.S. 350, 358 (1921).

359. Benton v. Kennedy-Van Saun Mfg. & Eng'r Corp., 2 App. Div. 2d 27, 152 N.Y.S.2d 955 (1st Dep't 1956); Girard Trust Co. v. Melville Shoe Corp., 275 App. Div. 117, 88 N.Y.S.2d 121 (1st Dep't), aff'd, 300 N.Y. 496, 88 N.E.2d 724 (1949).

360. The "sole" intent requirement has been criticized by some commentators as "choking to death" the prima facie tort doctrine. Forkosch, supra note 338, at 479. Several states apply a test in which they distinguish between the primary and secondary intent of the defendant. If the primary or predominant intent of the defendant is to cause harm liability attaches. Connors v. Connolly, 86 Conn. 641, 86 A. 600 (1913); Boggs v. Duncan-Schell Furniture Co., 163 Iowa 106, 143 N.W. 482 (1913); Robitaille v. Morse, 283 Mass. 27, 186 N.E. 78 (1933).

361. Advance Music Corp. v. American Tobacco Co., 296 N.Y. 79, 70 N.E.2d 401 (1946); Coopers & Lybrand v. Levitt, 52 App. Div. 2d 493, 384 N.Y.S.2d 804 (1st Dep't 1976); Brandt v. Winchell, 286 App. Div. 249, 141 N.Y.S.2d 674 (1st Dep't 1955), aff'd, 3 N.Y.2d 628, 144 N.E.2d 160, 170 N.Y.S.2d 828 (1958). A few courts have permitted recovery without a showing of special damage, but these decisions have not been generally followed. See, e.g., Grattan v. Societa Per Azzioni Cotonificio Cantoni, 137 N.Y.S.2d 235 (Sup. Ct. 1954), aff'd, 285 App. Div. 1042, 140 N.Y.S.2d 154 (1st Dep't 1955) (special damages unnecessary).

362. An allegation of a decline in business has been held to be a mere conclusion which can be cured only by stating specifically and with particularity the items of loss claimed, including names of customers. Rager v. McCloskey, 305 N.Y. 75, 81, 111 N.E.2d 214, 217-18 (1953). Where plaintiff's demand for damages was alleged in a round sum, it was held that an allegation of general, not special, damages was asserted. Leather Dev. Corp. v. Dun & Bradstreet, Inc., 15 App. Div. 2d 761, 224 N.Y.S.2d 513 (1st Dep't 1962), aff'd mem., 12 N.Y.2d 909, 188 N.E.2d 270, 237 N.Y.S.2d 1007 (1963). An allegation that plaintiff was subjected to ridicule and impairment of his reputation and damaged in the sum of $100,000 was not a proper allegation of special damages. Friedlander v. National Broadcasting Co., 39 Misc. 2d 612, 241 N.Y.S.2d 477 (Sup. Ct. 1963), rev'd on other grounds, 20 App. Div. 2d 701, 246 N.Y.S.2d 889 (1st Dep't 1964) (mem.).

tion[363] and harassment caused by the institution of successive groundless suits[364] would be sufficient to sustain a prima facie tort action, other courts have held that an allegation of damage to professional standing and reputation, without more, would result in a dismissal of the complaint for failure to allege special damages with sufficient particularity.[365] If a physician could only allege that his standing or reputation in the community had been damaged or that he had been harassed and distressed as a result of the prosecution of the malpractice suit, he would fail to state a cause of action in some jurisdictions.[366] The physician must, at the very least, allege loss of business income attributable to the groundless action.

In addition to proving intent to harm and special damages, plaintiff must also prove that the defendant's acts were committed without economic or social justification.[367] The defendant's conduct would be considered justified if the privilege of the defendant to act in a way that causes injury to another outweighs the plaintiff's right to be free from injury.[368] Public policy considerations are most relevant[369] in determining whether the defendant's conduct was justified in light of the harm done to the plaintiff.[370] As the New York Court of Appeals stated:

> [W]henever the gist of an alleged cause of action . . . is that an otherwise lawful act has become unlawful because the actor's motives were malevolent, the court is called upon to analyze and weigh the conflicting interests of the parties and of the public in order to determine which shall prevail.[371]

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363. French v. United States Fidelity & Guar. Co., 88 F. Supp. 714 (D.N.J. 1950); Stein v. Schmitz, 21 N.J. Misc. 218, 32 A.2d 844 (Super. Ct. 1943); Mangum Elec. Co. v. Border, 101 Okla. 64, 222 P. 1002 (1923).

364. Munson Line, Inc. v. Green, 6 F.R.D. 14 (S.D.N.Y. 1946).

365. See Morrison v. National Broadcasting Co., 19 N.Y.2d 453, 227 N.E.2d 572, 280 N.Y.S.2d 641 (1967).

366. E.g., J.J. Theatres, Inc. v. V.R.O.K. Co., 96 N.Y S.2d 271, 273 (Sup. Ct. 1950).

367. See Advance Music Corp. v. American Tobacco Co., 296 N.Y. 79, 70 N.E.2d 401 (1946).

368. Note, Abstaining from Wilful Injury—The Prima Facie Tort Doctrine, 10 Syracuse L. Rev. 53, 59-60 (1958).

369. House of Materials, Inc. v. Simplicity Pattern Co., 298 F.2d 867, 872 (2d Cir. 1962); Prosser, supra note 103, at 15-16; Note, The Prima Facie Tort Doctrine, 52 Colum. L. Rev. 503, 509-12 (1952).

370. Public policy considerations motivated one court to dismiss a counterclaim offering the technical elements of prima facie tort. The court reasoned that the counterclaim would complicate an already complex litigation with separate burdens of proof and measures of damages. Knapp Engraving Co. v. Keystone Photo Engraving Corp., 1 App. Div. 2d 170, 148 N.Y.S.2d 635 (1st Dep't 1956).

371. Brandt v. Winchell, 3 N.Y.2d 628, 634-35, 148 N.E.2d 160, 164, 170 N.Y.S.2d 828, 833-34 (1958).

Where a patient has, in fact, suffered a bad medical result, the physician will have the overwhelming burden of proving lack of justification since there may be probable cause for the institution of a medical malpractice suit.[372] Public policy favoring free access to the courts will in all likelihood tip the balance against the physician even if there was doubtful merit to the patient's claim or overwhelming proof of the attorney's malevolent intent.

Another serious obstacle to utilizing prima facie tort as a potential weapon against unjustified medical malpractice suits is the generally accepted principle that conduct actionable under one of the traditional tort categories is not actionable under the prima facie tort theory.[373] Where this rule is strictly applied, a physician who alleges the elements of a recognized traditional tort such as malicious prosecution[374] or defamation[375] may not be permitted to rely on prima facie tort.[376]

The New York Court of Appeals has recently retreated from this restrictive position in view of the liberalized pleading requirements in that state.[377] The court held that at the pleading stage plaintiff may allege alternate causes of action for a traditional tort (abuse of process) and prima facie tort. Once the traditional tort was established, however, the allegation with respect to prima facie tort would be rendered academic since double recovery would not be permitted.[378]

The prima facie tort theory could provide an effective remedy for the wrongful institution of an unjustified malpractice litigation in those jurisdictions that adhere to the minority rule requiring proof of special

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372. Proof of lack of justification is akin, in this context, to lack of probable cause. If a patient and his attorney had probable cause to institute the malpractice action, the attorney's acts should be considered justified. See Spencer v. Burglass, 337 So. 2d 596, 602 (La. App. 1976) (dissenting opinion).

373. Knapp Engraving Co. v. Keystone Photo Engraving Corp., 1 App. Div. 2d 170, 172, 148 N.Y.S.2d 635, 637 (1st Dep't 1956); Ruza v. Ruza, 286 App. Div. 767, 769, 146 N.Y.S.2d 808, 811 (1st Dep't 1955).

374. Metromedia, Inc. v. Mandel, 21 App. Div. 2d 219, 249 N.Y.S.2d 806 (1st Dep't), aff'd, 15 N.Y.2d 616, 203 N.E.2d 914, 255 N.Y.S.2d 660 (1964).

375. Knapp Engraving Co. v. Keystone Photo Engraving Corp., 1 App. Div. 2d 170, 148 N.Y.S.2d 635 (1st Dep't 1956); Green v. Time, Inc., 147 N.Y.S.2d 828 (Sup. Ct.), aff'd, 1 App. Div. 2d 665, 146 N.Y.S.2d 812 (1st Dep't 1955), aff'd, 3 N.Y.2d 732, 143 N.E.2d 517, 163 N.Y.S.2d 970 (1957). See Alpert v. Gordon, 15 App. Div. 2d 673, 224 N.Y.S.2d 119 (2d Dep't 1962). Contra, Strollo v. Jersey Cent. Power & Light Co., 20 N.J. Misc. 217, 26 A.2d 559 (Super. Ct. 1942).

376. Knapp Engraving Co. v. Keystone Photo Engraving Corp., 1 App. Div. 2d 170, 148 N.Y.S.2d 635 (1st Dep't 1956); Ruza v. Ruza, 286 App. Div. 767, 146 N.Y.S.2d 808 (1st Dep't 1955).

377. Board of Educ. v. Farmingdale Classroom Teachers Ass'n, 38 N.Y.2d 397, 406, 343 N.E.2d 278, 284-85, 380 N.Y.S.2d 635, 645 (1975). See N.Y. CPLR § 3013 (McKinney 1974).

378. 38 N.Y.2d at 406, 343 N.E.2d at 284-85, 380 N.Y.S.2d at 645.

injury[379] in malicious prosecution actions. Several cases have examined the interrelationship between the traditional tort action of malicious prosecution and prima facie tort. In some cases, plaintiff's action for prima facie tort was sustained even though an action based upon malicious prosecution would have failed because plaintiff could not establish one of the traditional elements—special injury.[380] For example, in *Munson Line, Inc. v. Green*,[381] it was alleged that the defendants instituted successive groundless lawsuits maliciously and without probable cause solely to harass the plaintiff. All of the suits terminated in plaintiff's favor.[382] Plaintiff could not recover under malicious prosecution since all of the jurisdictions that had an interest in the litigation required proof of special injury.[383] Although a cursory reading of the complaint might have given the impression that the action was solely for malicious prosecution,[384] the court held that a valid claim in the nature of prima facie tort was stated since the defendant's acts taken together established an intentional series of wrongs that created a wrongful interference with another's business.[385] In *J.J. Theatres, Inc. v. V.R.O.K. Co.*,[386] the court adopted a similar position. In that case tenants of a theatre charged that the owner of the property had instituted baseless lawsuits to harass the tenants into abandoning their lease. The court concluded that the complaint alleged a sufficient action for unlawful interference with plaintiffs' business, since "[e]ven lawful acts if done maliciously and with intent to injure can be the subject of a cause of action."[387]

These courts, by the adroit use of the prima facie tort doctrine, have permitted a plaintiff to prove that a defendant who maliciously instituted prior civil proceedings was liable for the damage he caused, although plaintiff could not meet one of the stringent proof requirements of malicious prosecution. Such an expansive application of the

379. Special injury in the context of a civil malicious prosecution action is generally considered an interference with plaintiff's person or property or some injury other than the normal incident of defending similar civil actions. See notes 108-14 supra and accompanying text. Special damage as used in prima facie tort refers to a pecuniary loss. See notes 361-62 supra.

380. See, e.g., Gillis v. Georgas, 225 N.Y.S.2d 164 (Sup. Ct. 1962); J.J. Theatres, Inc. v. V.R.O.K. Co., 96 N.Y.S.2d 271 (Sup. Ct. 1950).

381. 6 F.R.D. 14 (S.D.N.Y. 1946), appeal dismissed, 165 F.2d 321 (2d Cir. 1942).

382. Id. at 16.

383. Maryland, the District of Columbia and New York followed the minority rule which required proof of special injury in malicious prosecution actions. Id.

384. The court indicated that if plaintiff's cause of action was "nothing more than a glorified cause of action for malicious prosecution," it would not have sustained it. Id. at 18.

385. Id. at 17.

386. 96 N.Y.S.2d 271 (Sup. Ct. 1950).

387. Id. at 273.

prima facie tort doctrine would circumvent one of the harsher requirements of malicious prosecution actions still followed in a minority of jurisdictions.

There is an apparent conflict of authority as to whether the prima facie tort doctrine can be utilized to avoid another of the essential requirements of malicious prosecution actions—termination of the original suit in the defendant's favor.[388]

In *Gillis v. Georgas*,[389] the court rejected the requirement of favorable-termination where plaintiff alleged that the defendant maliciously circulated or gave false information or testimony which led to plaintiff's conviction of a crime. Although the complaint failed to allege termination of the prior action in plaintiff's favor, the court held that such acts provided the basis for a prima facie tort action[390] since there was an intentional doing of acts which were calculated, in the ordinary course of events, to damage the plaintiff. The acts were actionable because they were done without just cause or excuse.[391]

Several courts have dismissed counterclaims in the nature of prima facie tort which were interposed in the original maliciously instituted action[392] as being prematurely instituted and contrary to public policy. There is some authority, however, to support the view that a counterclaim charging that plaintiff conducted groundless litigation should be sustained.[393]

Those cases that do not permit a counterclaim for prima facie tort are better reasoned. A counterclaim of this nature would confuse an already complex malpractice case[394] and divert the attention of the

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388. See notes 155-57 supra and accompanying text.

389. 225 N.Y.S.2d 164 (Sup. Ct. 1962).

390. Id. at 166. Where a person, however, maliciously provokes public officials to act and the defendants' statements, although motivated by malice, prove to be true, there is no action stated for prima facie tort. Since the public interest is advanced by the exposure of those guilty of offenses against the public, such a person is entitled to immunity from civil suit. In one case the damage sustained by the plaintiff was held to be due to the actions of the public officials after an investigation and good cause shown. See Brandt v. Winchell, 3 N.Y.2d 628, 635, 170 N.Y.S.2d 828, 834, 148 N.E.2d 160, 164 (1958).

391. The complaint for prima facie tort was nevertheless dismissed since it failed to plead special damages and concise statements of the material facts which had to be proved at trial. 225 N.Y.S.2d at 166.

392. See Luckett v. Cohen, 169 F. Supp. 808 (S.D.N.Y. 1956); Knapp Engraving Co. v. Keystone Photo Engraving Corp., 1 App. Div. 2d 170, 148 N.Y.S.2d 635 (1st Dep't 1956); Friedman v. Roseth Corp., 190 Misc. 742, 74 N.Y.S.2d 733 (Sup. Ct. 1947), modified on other grounds sub nom. Friedman v. Odora Co., 273 App. Div. 755, 75 N.Y.S.2d 515 (1st Dep't), aff'd, 297 N.Y. 495, 74 N.E.2d 192 (1947).

393. Nathan v. Berlin, Civil No. 75-M2-542 (Ill. Civ. Ct., June 1, 1976); Herbert Prods., Inc. v. Oxy-Dry Sprayer Corp., 1 Misc. 2d 71, 145 N.Y.S.2d 168 (Sup. Ct. 1955).

394. From the physician's point of view, if a counterclaim could be instituted in the original

jury to collateral issues—the motives of the patient and attorney in initiating the malpractice action.[395] On the other hand, a physician would suffer only the inconvenience of a relatively short delay and little additional expense if he had to proceed in a separate action after the malpractice suit terminated in his favor.[396]

The doctrine of prima facie tort has been used by some courts to avoid the defense of absolute privilege afforded defamatory statements made in the course of judicial proceedings.[397] In *Schauder v. Weiss*,[398] the plaintiff's complaint, in essence, pleaded a conspiracy among a detective, an indemnity company, and plaintiff's husband to institute a fraudulent divorce action on the basis of a false report made by the detective which showed that plaintiff had committed adultery. Although the complaint did not support a cause of action for libel or slander[399] because of the defense of privilege, the broader doctrine of prima facie tort was also pleaded. The court held that the defense of privilege could not be interposed in the prima facie tort action.[400]

Finally, most courts have held that prima facie tort may not be used to avoid the application of the statute of limitations of one of the traditional tort actions.[401] In a few jurisdictions, however, the prima facie theory has been utilized to avoid the harsh effect of the extremely short statutes of limitations applicable to intentional tort actions.[402] In

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malpractice action there would be a savings in both litigation time and expenses. Moreover, all of the relevant issues including the patient's and attorney's motives in instituting the malpractice action could be explored in the original proceedings.

395. Knapp Engraving Co. v. Keystone Photo Engraving Corp., 1 App. Div. 2d 170, 172-73, 148 N.Y.S.2d 635, 637-38 (1st Dep't 1956).

396. Id. at 173, 148 N.Y.S.2d at 638.

397. See notes 267-300 supra and accompanying text.

398. 88 N.Y.S.2d 317 (Sup. Ct. 1949), aff'd, 276 App. Div. 967, 94 N.Y.S.2d 748 (2d Dep't 1950).

399. Id. at 322. The court held that the allegations also failed to state a sufficient cause of action for malicious prosecution since there was no allegation of special injury in the nature of an interference with plaintiff's personal property. In addition it failed to state an action for abuse of process since the process employed was not diverted to a use for which it was not intended. Id.

400. A contrary prior holding which was not referred to in the Schauder decision held that the absolute privilege accorded defamatory statements in libel and slander actions should be applied in an action for injurious falsehood based upon non-defamatory statements. Lucci v. Engel, 73 N.Y.S.2d 78 (Sup. Ct. 1947). See also Al Raschid v. News Syndicate Co., 265 N.Y. 1, 191 N.E. 713 (1934), where a cause of action for injurious falsehood was recognized.

401. E.g., Morrison v. National Broadcasting Co., 19 N.Y.2d 453, 227 N.E.2d 572, 280 N.Y.S.2d 641 (1967); see Forkosch, supra note 338, at 475-76.

402. In many states, the statute of limitations period for intentional torts such as defamation and malicious prosecution is as short as one year. See, e.g., N.Y. CPLR § 215(3) (McKinney 1972). In malicious prosecution actions, however, the statute of limitations is rarely a problem since the cause of action does not accrue until the original action has terminated. See Jones v. Independent Fence Co., 12 Misc. 2d 413, 173 N.Y.S.2d 684 (Sup. Ct. 1958).

one case, where plaintiff alleged that the defendants falsely and maliciously charged that he was stealing electricity for the purpose of inducing plaintiff's employer to dismiss him, the court held that plaintiff stated a timely cause of action for malicious interference with employment, even though any action for slander was barred by a one year statute of limitations.[403] The court reasoned that although slander was the means used by the defendants to accomplish their wrongful design, their malicious intent rather than their slander was the gist of the cause of action.[404]

In New York where the doctrine of prima facie tort has traditionally had its most widespread utilization, the restrictions of intent, justification and special damage limited the impact of the tort almost exclusively to the business field where there had been an interference with some form of contractual relation.[405] However, a recent New York case[406] has eliminated much of the formalism and restrictions that previously surrounded the prima facie tort action. This development may encourage additional actions based upon prima facie tort against attorneys who institute unjustified malpractice litigation.

In *Board of Education v. Farmingdale Classroom Teachers Association, Inc.*,[407] plaintiff alleged that the defendant wrongfully and maliciously subpoenaed 87 teachers to appear simultaneously at a hearing with full knowledge that they could not all testify at the same time. The defendant's attorney thereafter refused to stagger the teachers' appearances. The school district sought damages for the amount expended in hiring substitute teachers and for punitive damages. The court recognized that these allegations supported both abuse of process[408] and prima facie tort actions. The court held that the defendant's conduct in utilizing legal procedure to harass and to oppress the plaintiff who suffered damages should be recognizable at law. It appeared to redefine prima facie tort in an expansive way: "Consequently whenever there is an intentional infliction of economic damage, without excuse or justification, we will eschew formalism and recognize the existence of a cause of action."[409]

The prima facie tort doctrine, as it has developed through judicial

403. Strollo v. Jersey Cent. Power & Light Co., 20 N.J. Misc. 217, 26 A.2d 559 (Super. Ct. 1942).

404. Id. at 223, 26 A.2d at 562.

405. Ruza v. Ruza, 286 App. Div. 767, 770, 146 N.Y.S.2d 808, 811 (1st Dep't 1955).

406. Board of Educ. v. Farmingdale Classroom Teachers Ass'n, 38 N.Y.2d 397, 343 N.E.2d 278, 380 N.Y.S.2d 635 (1975).

407. 38 N.Y.2d 397, 343 N.E.2d 278, 380 N.Y.S.2d 635 (1975).

408. See notes 239-42 supra for a discussion of the abuse of process action.

409. 38 N.Y.2d at 406, 343 N.E.2d at 284, 380 N.Y.S.2d at 644.

evolution, could provide a wrongfully sued physician with the needed flexibility to avoid some of the rigid proof requirements of the traditional tort actions. Prima facie tort could be considered as a residual or "last-chance" cause of action covering those situations where intentional harm is done without justification but which do not necessarily fall within the traditional tort categories. However, in those jurisdictions where the prima facie tort doctrine has become as crystallized as the more traditional torts—with its own set of rigid proof requirements—the doctrine will not provide a new remedy to wrongfully sued physicians. In any event, as a practical matter it is doubtful in most cases that an action for prima facie tort would be stated if a traditional malicious prosecution action was not also available. If a physician could establish lack of justification, he could also prove lack of probable cause in instituting the prior malpractice action. An expansive interpretation of prima facie tort, however, could permit a physician to avoid at least the most restrictive requirement of malicious prosecution—proof of special injury.

An alternative approach is an action in the *nature* of prima facie tort, based on a state constitutional provision that provides a remedy for every wrong.[410] Although the constitutional provisions guaranteeing a remedy for every wrong vary from state to state, they have generally not been interpreted to create a new remedy where none existed prior to the passage of the constitutional provision.[411] A number of courts regard these constitutional guarantees merely as an expression of universal philosophy and not as a mandate for a certain remedy.[412] In most cases, the failure to state sufficient facts to constitute any cause of action cannot be cured by alleging that plaintiff is entitled to a remedy under the relevant constitutional provision.[413] Even those courts which interpret these provisions expansively often limit their applicability by narrowly defining the word "injury" to mean only conduct violative of established law.[414] Such a limited definition effectively precludes use of this constitutionally based prima facie tort doctrine as a means of extending the bounds of the tradi-

410. See note 351 supra.

411. 16 Am. Jur. 2d Constitutional Law § 385 (1964).

412. Sullivan v. Midlothian Park Dist., 51 Ill. 2d 274, 281 N.E.2d 659 (1972); Welch v. Davis, 342 Ill. App. 69, 95 N.E.2d 108 (1950), rev'd on other grounds, 410 Ill. 130, 101 N.E.2d 547 (1951).

413. E.g., Belmar Drive-In Theatre Co. v. Illinois State Toll Highway Comm'n, 34 Ill. 2d 544, 216 N.E.2d 788 (1966); Bauscher v. City of Freeport, 103 Ill. App. 2d 372, 243 N.E.2d 650 (1968).

414. Benson v. Housing Authority, 145 Conn. 196, 140 A.2d 320 (1958); Stewart v. Standard Publishing Co., 102 Mont. 43, 55 P.2d 694 (1936); Barnes v. Kyle, 202 Tenn. 529, 306 S.W.2d 1 (1957).

tional torts to create new causes of action. These provisions have thus been more useful in preventing the dilution of recognized rights and remedies than in spearheading the drive for new causes of action.[415]

In Illinois,[416] however, such a constitutional provision has been invoked to give relief to a physician who claimed he had been unjustifiably sued for malpractice. In Illinois, the constitutional guarantee providing a remedy for every wrong has been used to recognize new causes of action for invasion of privacy,[417] alienation of affections,[418] and contribution to a minor's support[419]—all of which had not previously been recognized in that state.[420]

A recent jury verdict[421] in the case of *Nathan v. Berlin*[422] is the first reported decision where a physician has successfully sued an attorney for instituting a groundless medical malpractice case. The physician's claim was premised on a purported remedy for all injuries guaranteed by the Illinois constitution.

This precedent-setting case began when a radiologist was sued for malpractice for allegedly misreading hospital X-rays and failing to discover a fracture in plaintiff's right hand. Apparently the treatment plaintiff actually received was the same as that given for a fracture. The physician shortly after being sued for malpractice filed a complaint against the patient, her attorney-husband,[423] and the two attorneys representing them. The first count of the physician's complaint alleged that the defendants owed the physician the duty to refrain from willfully and wantonly bringing suit against him without reasonable cause to believe that he had committed malpractice. The physician claimed that the defendants filed the original malpractice suit despite an opinion they had received from an orthopedic surgeon that the

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415. See, e.g., Neely v. St. Francis Hosp. & School of Nursing, Inc., 192 Kan. 716, 391 P.2d 155 (1964).

416. Ill. Const. art. 1, § 12 (1970); see note 351 supra.

417. Erick v. Perk Dog Food Co., 347 Ill. App. 293, 106 N.E.2d 742 (1952).

418. Johnson v. Luhman, 330 Ill. App. 598, 71 N.E.2d 810 (1947).

419. Parker v. Parker, 335 Ill. App. 293, 81 N.E.2d 745 (1948).

420. Other states relying on nearly identical constitutional provisions as the Illinois provision have refused to recognize some of these very same causes of action. Taylor v. Keefe, 134 Conn. 156, 56 A.2d 768 (1947); Nash v. Baker, 552 P.2d 1335 (Okla. Ct. App. 1974).

421. The jury award was $2,000 for compensatory damages and $6,000 for punitive damages. N.Y. Times, June 3, 1976, at 20, col. 1.

422. Civil No. 75-M2-542 (Ill. Civ. Ct., June 1, 1976). This decision has received much notoriety, see N.Y. Times, June 3, 1976, at 20, col. 1.

423. The physician alleged a violation of a barratry statute against the patient's attorney-husband. This count was dismissed prior to trial. Barratry is defined as: "The offense of frequently exciting and stirring up quarrels and suits . . . ." Black's Law Dictionary 190 (4th ed. 1968).

physician had not committed malpractice. The doctor alleged further that the Illinois constitution guaranteed him a remedy for this wrong. The damages claimed by the physician were injury to his business profession, mental anguish, devotion of time to the defense of the malpractice suit and increased insurance premiums as a result of the litigation. The physician further alleged that the attorneys were negligent in filing a lawsuit without reasonable evidence to support the allegations of medical malpractice.[424]

The doctor's action and the malpractice suit were consolidated for trial. On the morning of trial, the malpractice action against Dr. Berlin was voluntarily dismissed with prejudice and Dr. Berlin proceeded to trial on his claims. The evidence introduced at trial disclosed that the patient's attorneys relied solely on the statements of their client in instituting the malpractice action. They made no effort to contact the treating physician or subsequent physicians who examined the patient. Two attorneys testified, as expert witnesses, that defendant's attorneys did not act as reasonably prudent attorneys since they even failed to conduct an initial investigation of their client's charges of malpractice.

At the time he filed his complaint, the physician obviously could not allege two of the crucial elements of a malicious prosecution action; termination of the prior medical malpractice action in his favor and special injury. In effect, Dr. Berlin recovered on a new cause of action based upon a constitutional guarantee of a remedy for every wrong.

A review of the prior applications of this constitutional guarantee in Illinois indicates that the physician's victory may be short lived in the appellate courts. The Illinois courts have held that article I, section 12 of the Illinois constitution is an expression of a philosophy that some remedy be provided for every wrong, but does not require that any specific form of remedy be provided.[425] If plaintiff's pleading was dismissed for failure to sufficiently state a cause of action, plaintiff would not have been denied a constitutional right under the theory that there must be a remedy for every wrong.[426] The Illinois courts have thus held in these instances that if no cause of action exists, or if a defective complaint was dismissed, constitutional rights are not

424. See note 482 infra and accompanying text.

425. See Sullivan v. Midlothian Park Dist., 51 Ill. 2d 274, 281 N.E.2d 659 (1972) (interpreting predecessor to Ill. Const. art. 1, § 12); Mier v. Stanley, 28 Ill. App. 3d 373, 329 N.E.2d 1 (1975) (immunity from suit granted officers of corporate employers by the Workmen's Compensation Act for work-related injuries was not unconstitutional since plaintiff had an available remedy—workmen's compensation benefits).

426. City of Decatur v. Kushmer, 7 Ill. App. 3d 567, 288 N.E.2d 65 (1972) (abuse of process action dismissed as being insufficient); Holiday Magic, Inc. v. Scott, 4 Ill. App. 3d 962, 282 N.E.2d 452 (1972) (abuse of process complaint dismissed).

infringed.[427] Based on these judicial decisions, it would seem that the constitutional guarantee of a remedy for every wrong may not be used to create a cause of action where plaintiff has a remedy in the form of an action for malicious prosecution or a petition for recovery of expenses and attorney's fees.[428] The fact that a malicious prosecution action could not be instituted prior to the termination of the malpractice suit in defendant's favor or that plaintiff could not plead one of the other essential elements of such an action (special injury) could hardly be construed as a denial of a constitutional right to a remedy. If this were so, a party could avoid the bar of the statute of limitations by alleging he had a constitutionally created cause of action pursuant to the state constitution.

In *Spencer v. Burglass*,[429] a case involving a suit by a physician against an attorney arising from the filing of an allegedly frivolous malpractice suit, a majority of the Louisiana Court of Appeals held that the physician's complaint failed to state a cause of action for malicious prosecution under general tort and negligence concepts.[430] The dissenting opinion, however, noted that Louisiana—a civil code state—did not recognize a malicious prosecution action.[431] The dissent stated that the plaintiff's complaint was founded on a section of the Louisiana Civil Code that obliges one to repair damage caused by his fault.[432] In view of the public policy recognizing that courts be open to remedy an injury,[433] the dissent held that there could be no liability for instituting an action unless this is no arguable justification for having done so.[434] In this context, instituting an action without probable cause[435] would be equivalent to bringing a suit without arguable justification.

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427. See County of Champaign v. Anthony, 33 Ill. App. 3d 466, 337 N.E.2d 87 (1975), aff'd, 64 Ill. 2d 532, 356 N.E.2d 561 (1976); Zamouski v. Gerrard, 1 Ill. App. 3d 890, 275 N.E.2d 429 (1971).

428. Section 41 of the Illinois Civil Practice Act provides that where allegations and denials are made without reasonable cause and are found to be untrue, the party pleading them shall pay the reasonable expenses actually incurred by the other party by reason of the untrue pleading, together with reasonable attorneys' fees to be summarily taxed by the court at trial. Ill. Ann. Stat. ch. 110, § 4 (Smith-Hurd Supp. 1976); see notes 556-58 infra and accompanying text.

429. 337 So. 2d 596 (La. App. 1976).

430. See notes 181-86 supra and accompanying text.

431. 337 So. 2d at 602. See notes 185-87 supra and accompanying text.

432. La. Civ. Code Ann. art. 2315 (West 1972).

433. La. Const. art. 1, § 22.

434. 337 So. 2d at 602.

435. The dissent seemed to indicate that malice was not a necessary element of this action except to the extent that merely having brought or tried a wholly unfounded suit would indicate malice. Id. This appears to be the equivalent of implying malice from a lack of probable cause in a malicious prosecution action.

This action which the dissent recognized, although not clearly defined, appears to be analogous to an action for prima facie tort arising from a constitutional guarantee of a remedy for every wrong. The dissent concluded that the petition stated a valid cause of action against the attorney because he breached his general legal duty when he continued to prosecute the malpractice action without any evidence whatsoever.[436]

This case is instructive in analyzing the meaning that courts should give to justification when confronted with a prima facie tort action. If justification is to be given the same meaning as probable cause, the same result would generally occur when a physician sues an attorney for instituting an unjustified malpractice action regardless of the theory he pleads. The only real benefit that accrues to the physician if he pleads a prima facie tort action is that he may be able to bypass some of the more traditional requirements of malicious prosecution such as special injury and termination in his favor. However, this would only be so where the prima facie tort action is broadly interpreted by the courts to provide a remedy even if a traditional tort remedy is available.

B. *Professional Negligence*

Although physicians and other professionals have been increasingly exposed to professional malpractice actions, the liability of attorneys for their malpractice has until recently remained relatively circumscribed.[437] In order to discourage malpractice suits against attorneys, the early American cases imposed a stringent requirement on legal malpractice actions: the necessity of privity.[438] This requirement

436. The dissent recognized that the physician would not have stated a cause of action if the attorney merely filed the suit prior to consulting with any medical witnesses since the statute of limitations was about to expire and the attorney had to file the claim to preserve his client's rights. However, the dissent believed that a valid cause of action was stated since almost three years passed between the filing and trial of the action during which time the attorney obtained no evidence to support his client's claim. 337 So. 2d at 603.

437. For a discussion of the historical evolution of attorneys' liability for professional negligence, see Wade, The Attorney's Liability for Negligence, 12 Vand. L. Rev. 755 (1959) [hereinafter cited as Wade]. For a fuller review of the elements of a legal malpractice action, see Blaustein, Liability of Attorney to Client in New York for Negligence, 19 Brooklyn L. Rev. 233 (1953); Coggin, Attorney Negligence . . . A Suit Within A Suit, 60 W. Va. L. Rev. 225 (1958); Gardner, Attorneys' Malpractice, 6 Clev.-Mar. L. Rev. 264 (1957); Gillen, Legal Malpractice, 12 Washburn L.J. 281 (1973) [hereinafter cited as Gillen]; Note, Attorney Malpractice, 63 Colum. L. Rev. 1292 (1963); Note, Liability of an Attorney in the Conduct of Litigation, 12 Syracuse L. Rev. 494 (1961); Note, The Bases of the Attorney's Liability to His Client for Malpractice, 37 Va. L. Rev. 429 (1951).

438. Savings Bank v. Ward, 100 U.S. 195 (1879). But cf. Glanzer v. Shepard, 233 N.Y. 236, 135 N.E. 275 (1922) (public weigher).

limited the attorney's liability for negligence solely to his own client with whom he was in privity of contract. The courts also diluted the ordinary standard of reasonable care and skill by applying a subjective standard requiring that the lawyer represent his client only to the best of his knowledge.[439] While courts have expanded the scope of the attorney's liability to his own client, their traditional reluctance to abrogate the privity rule remains an overwhelming hurdle for a physician who seeks to sue his adversary's attorney for instituting a medical malpractice action without reasonable evidence to support the claim.

The clear trend of recent decisions has been toward the establishment of a higher standard of responsibility for attorneys by eroding the strict proof requirements of the earlier cases.[440] Although there are several definitions that have been used to express the degree of care that an attorney owes to his client, it is now generally accepted that an objective standard will be applied.[441] Accordingly, the creation of an attorney-client relationship[442] imposes a duty upon an attorney to represent his client with "such skill, prudence and diligence as lawyers of ordinary skill and capacity commonly possess and exercise in the performance of the tasks which they undertake."[443] This duty has been held to encompass both an obligation to know the law and an obligation to diligently research the law and make an informed judg-

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439. Savings Bank v. Ward, 100 U.S. 195 (1879). See Gillen, supra note 437, at 287-91

440. For a discussion of the expansion of attorneys' liability for malpractice, see Curran, Professional Negligence—Some General Comments, 12 Vand. L. Rev. 535 (1959); Gillen, supra note 437; but see Haughey, Lawyers' Malpractice: A Comparative Appraisal, 48 Notre Dame Law. 888, 903-07 (1973), for the view that an attorney's liability should remain limited to preserve the adversarial system.

441. In Hodges v. Carter, 239 N.C. 517, 519, 80 S.E.2d 144, 145-46 (1954), the standard of care was expressed as follows: "[o]rdinarily when an attorney engages in the practice of the law and contracts to prosecute an action in behalf of his client, he impliedly represents that (1) he possesses the requisite degree of learning, skill, and ability necessary to the practice of his profession and which others similarly situated ordinarily possess; (2) he will exert his best judgment in the prosecution of the litigation entrusted to him; and (3) he will exercise reasonable and ordinary care and diligence in the use of his skill in the application of his knowledge to his client's cause." Some courts, however, still consider subjective factors. See Palmer v. Nissen, 256 F. Supp. 497, 501 (D. Me. 1966) (an attorney should exercise his own best judgment to the best of his personal ability).

442. Since an attorney generally undertakes to perform duties pursuant to a contract with his client, the attorney's failure to exercise the requisite skill and care is a breach of an express or implied term of that contract and therefore legal malpractice constitutes both a tort and a breach of contract. Neel v. Magana, Olney, Levy, Cathcart & Gelfand, 6 Cal. 3d 176, 491 P.2d 421, 98 Cal. Rptr. 837 (1971); Gillen, supra note 437, at 286.

443. Wright v. Williams, 47 Cal. App. 3d 802, 809, 121 Cal. Rptr. 194, 199 (1975), quoting Ishmael v. Millington, 241 Cal. App. 2d 520, 523, 50 Cal. Rptr. 592, 593 (1966).

ment.[444] The standard of care generally applied is measured by the conduct of members of the profession in the same or similar locality under similar circumstances.[445] An attorney, however, is not an insurer of the correctness of his work[446] or the results which will be attained and is therefore not responsible for mere errors of judgment.[447] A lawyer, moreover, is generally not liable for mistaken advice when well-informed lawyers in the community would entertain a reasonable doubt as to the proper resolution of the legal question involved.[448]

It is especially difficult to assess an attorney's conduct in prosecuting a litigation. Decisions involving the introduction of testimony and evidence made during a trial involve trial strategies that are not susceptible of precise evaluation.[449] As one court has noted:

> In a litigation a lawyer is well warranted in taking chances. . . . The conduct of a lawsuit involves questions of judgment and discretion, as to which even the most distinguished members of the profession may differ. They often present subtle and doubtful questions of law. If in such cases a lawyer errs on a question not elementary or conclusively settled by authority, that error is one of judgment for which he is not liable.[450]

An attorney may therefore choose among various alternative strategies,

444. Wright v. Williams, 47 Cal. App. 3d 802, 121 Cal. Rptr. 194 (1975).

445. Some courts have recently recognized that a lawyer who holds himself out as a specialist within the legal profession should be held to a higher than average standard of care. See, e.g., id. at 809, 121 Cal. Rptr. at 199; Note, Attorney Malpractice, 63 Colum. L. Rev. 1292, 1302-04 (1963).

446. See Tool Research & Eng'r Corp. v. Henigson, 46 Cal. App. 3d 675, 683, 120 Cal. Rptr. 291, 297 (1975) ("the attorney is not an insurer to his client's adversary that his client will win in litigation").

447. Hodges v. Carter, 239 N.C. 517, 80 S.E.2d 144 (1954). In the context of legal malpractice as distinguished from medical malpractice the determination as to whether an undesirable legal result was caused by the lawyer's bad judgment or by actionable negligence is still treated in some jurisdictions as a question of law. See Wallach & Kelley, Attorney Malpractice in California: A Shaky Citadel, 10 Santa Clara Law. 257, 264 (1970). Some courts, however, have recently changed this rule, so that the issue of whether the attorney used bad judgment or was negligent is treated as an issue of fact for the jury. See, e.g., Ishmael v. Millington, 241 Cal. App. 2d 520, 50 Cal. Rptr. 592 (1966).

448. Lucas v. Hamm, 56 Cal. 2d 583, 364 P.2d 685, 15 Cal. Rptr. 821 (1961) (en banc), cert. denied, 368 U.S. 987 (1962). (The rule against perpetuities poses such complex and difficult problems for the draftsman that even careful and competent attorneys fall prey to its traps.) But in Smith v. Lewis, 13 Cal. 3d 349, 530 P.2d 589, 118 Cal. Rptr. 621 (1975) (overruled on other grounds, In re Marriage of Brown, 313 Cal. 3d 838, 544 P.2d 561, 126 Cal. Rptr. 633 (1976) (en banc)), the court found that an attorney had a duty to undertake reasonable research even when a question of law was unsettled.

449. Wade, supra note 437, at 756; Note, Attorney's Malpractice, 63 Colum. L. Rev. 1292, 1301 (1963).

450. Byrnes v. Palmer, 18 App. Div. 1, 4, 45 N.Y.S. 479, 481-82 (2d Dep't 1897), aff'd, 160 N.Y. 699, 55 N.E. 1093 (1899).

one of which may be to refrain from pressing a point that is legally unclear because the potential benefit to the client may not outweigh the detriment in terms of expenditure of time and resources.[451] But as one federal court has noted, "[t]here is nothing strategic or tactical about ignorance . . . ."[452]

The expansion of the attorney's liability for negligence[453] has led in part to the significant increase in the number of legal malpractice claims instituted in the last several years.[454] Thus, physicians have increasingly attempted to counterattack against attorneys who they believe have instituted unjustified medical malpractice suits by relying on a theory that has in the past been used so successfully against the physicians themselves. However, despite the relative ease with which a disappointed client may now proceed against his negligent attorney, a third party not in privity with an attorney does not generally possess the same advantages.

Historically, an attorney could not be held liable to one other than his client in an action arising out of his professional duty in the absence of fraud or collusion.[455] The courts have generally advanced two arguments in support of the privity requirement. The courts reason that if liability would be permitted to a third party without regard to privity, the parties to the contract would be deprived of control of their own agreement.[456] In addition, if the courts imposed a duty on the attorney to the general public a potentially unlimited burden would be placed on attorneys.[457]

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451. Smith v. Lewis, 13 Cal. 3d 349, 530 P.2d 589, 118 Cal. Rptr. 621 (1975).

452. Pineda v. Craven, 424 F.2d 369, 372 (9th Cir. 1970), cert. dismissed, 410 U.S. 932 (1973).

453. Some states have simplified a client's burden of establishing causation by eliminating the traditional suit within a suit requirement, i.e., the client has to prove that he would have won the first suit against the original defendant in order to win the second one. Note, Legal Malpractice, Erosion of the Traditional Suit Within a Suit Requirement, 7 U. Toledo L. Rev. 328, 339-40 (1975). There has also been a liberalization of the application of the statute of limitations by holding that the period of limitation does not begin to run until the attorney's failure to perform the requisite function becomes irremediable. Heyer v. Flaig, 70 Cal. 2d 223, 449 P.2d 161, 74 Cal. Rptr. 225 (1969) (en banc). See also Woodruff v. Tomlin, 511 F.2d 1019 (6th Cir. 1975).

454. In a recent report it was estimated that in the last five years the number of suits against lawyers have doubled. N.Y. Times, Feb. 28, 1977, at 1, col. 6; id. at 44, col. 6; see also Blaine, Professional Liability Claims: An Increasing Concern for Lawyers, 59 Ill. Bar J. 302 (1970).

455. In Savings Bank v. Ward, 100 U.S. 195, 200 (1879) the Supreme Court stated the general rule that "the obligation of the attorney is to his client and not to a third party, and unless there is something in the circumstances of [the] case to take it out of the general rule, it seems clear that the proposition . . . must be sustained." Several recent decisions have reiterated this traditional rule. E.g., McGlone v. Lacey, 288 F. Supp. 662 (D.S.D. 1968); McDonald v. Stewart, 289 Minn. 35, 182 N.W.2d 437 (1970).

456. Annot., 45 A.L.R.3d 1184 (1972).

457. Id.

With the "citadel of privity" collapsing in other areas of the law[458] it was inevitable that some inroads would be made in the area of legal malpractice.[459] The first significant erosion occurred in California in *Biakanja v. Irving*.[460] There, a notary public who had drafted a will for his "client" was held liable—despite the absence of privity—to the intended sole beneficiary of the will for negligently failing to have the will properly attested.[461] Three years later, the California Supreme Court, in *Lucas v. Hamm*,[462] extended the *Biakanja* holding to an attorney who negligently drafted a provision of his client's will so as to render it void. The court noted that the attorney could be held liable to the intended beneficiaries of the will either on the basis of a third party beneficiary contract[463] or on the grounds of negligence.[464] The court reasoned that damage to the intended beneficiaries was clearly foreseeable if the will was found to be invalid as a result of the attorney's negligence. The court replaced the rigid privity requirement with a flexible balancing test.[465] Among those factors which would be considered in determining whether as a matter of policy a party not in privity

458. In other areas of the law, especially products liability, the strict requirement of privity of contract has been abrogated as being anomalous to modern concepts of tort law which should be based on issues of foreseeability. See Greenman v. Yuba Power Prods., Inc., 59 Cal. 2d 57, 377 P.2d 897, 27 Cal. Rptr. 697 (1963) (en banc); Henningsen v. Bloomfield Motors, Inc., 32 N.J. 358, 161 A.2d 69 (1960); Codling v. Paglia, 32 N.Y.2d 330, 298 N.E.2d 662, 345 N.Y.S.2d 461 (1973); MacPherson v. Buick Motor Co., 217 N.Y. 382, 111 N.E. 1050 (1916); Baxter v. Ford Motor Co., 168 Wash. 456, 12 P.2d 409 (1932). See also Ultramares Corp. v. Touche, Niven & Co., 255 N.Y. 170, 174 N.E. 441 (1931) (discussion of privity requirement for negligent misrepresentations made by accountants).

459. See Averill, Attorney's Liability to Third Persons for Negligent Malpractice, 2 Land & Water L. Rev. 379 (1967) [hereinafter cited as Averill]; Annot., 45 A.L.R.3d 1181 (1971).

460. 49 Cal. 2d 647, 320 P.2d 16 (1958) (en banc).

461. The court noted that the notary's conduct in addition to being negligent was "highly improper" since he had engaged in the unauthorized practice of law, and such conduct should be discouraged. Id. at 650, 320 P.2d at 19.

462. 56 Cal. 2d 583, 364 P.2d 685, 15 Cal. Rptr. 821 (1961) (en banc), cert. denied, 368 U.S. 987 (1972).

463. The court observed that lack of privity would not prevent the intended beneficiaries from recovering as third-party beneficiaries of the contract between the testator and the attorney since the primary purpose in drafting the will was to transfer the estate to them in the future. This intent could be effectuated only by giving the beneficiaries a cause of action in the event the attorney breached the agreement. Id. at 590, 364 P.2d at 689, 15 Cal. Rptr. at 825.

464. However, the attorney's failure to properly apply the complex rule against perpetuities was held not to be negligent. Id. at 592-93, 364 P.2d at 690, 15 Cal. Rptr. at 826.

465. This test was first enunciated in Biakanja v. Irving, 49 Cal. 2d 647, 320 P.2d 16 (1958) (en banc). There, however, the court also included as a factor the moral blame attached to the conduct. This factor was apparently dropped by the California Supreme Court in the Lucas decision, 56 Cal. 2d at 15, 364 P.2d at 687, 15 Cal. Rptr. at 823. See also Averill, supra note 459, at 395.

could recover for an attorney's professional negligence were the following: "the extent to which the transaction was intended to affect the plaintiff, the foreseeability of harm to him, the degree of certainty that the plaintiff suffered injury, the closeness of the connection between defendant's conduct and the injury, and the policy of preventing future harm."[466] The court rejected the argument that an undue burden would be imposed upon the legal profession by holding an attorney liable to the beneficiaries of a negligently drawn will, particularly in view of the fact that a contrary conclusion would cause the innocent beneficiaries to bear the loss.[467]

The California courts, in subsequent decisions,[468] emphasized that the privity requirement had not been abolished in all actions instituted by a third party against a negligent attorney. It has therefore been held that the scope of the duty owed to a beneficiary must still be determined by reference to the attorney-client relationship, even though a duty to third persons is imposed.[469] As one court has stated: "[P]ublic policy requires that the attorney exercise his position of trust and superior knowledge . . . so as not to affect adversely persons whose rights and interests are certain and foreseeable."[470] While an attorney may therefore be held liable to named beneficiaries for negligently drafting a will, he will not be held liable to a larger class of undesignated potential beneficiaries, since an attorney has no duty to determine the true but unexpressed intentions of the testator or to draft an unambiguous will.[471]

The courts that have abolished the privity requirement have done so primarily in two situations which by their very nature lend themselves to injuries to third persons in the event of negligence: will drafting[472]

466. 56 Cal. 2d at 421, 364 P.2d at 687, 15 Cal. Rptr. at 823.

467. Id. at 721, 364 P.2d at 688, 15 Cal. Rptr. at 824.

468. Heyer v. Flaig, 70 Cal. 2d 223, 449 P.2d 161, 74 Cal. Rptr. 225 (1969); Wright v. Williams, 47 Cal. App. 3d 802, 121 Cal. Rptr. 194 (1975).

469. Heyer v. Flaig, 70 Cal. 2d 223, 449 P.2d 161, 74 Cal. Rptr. 225 (1969).

470. Id. at 229, 449 P.2d at 165, 74 Cal. Rptr. at 229.

471. Ventura County Humane Soc'y for the Prevention Of Cruelty to Children & Animals, Inc. v. Holloway, 40 Cal. App. 3d 897, 115 Cal. Rptr. 464 (1974).

472. See Licata v. Spector, 26 Conn. Supp. 378, 225 A.2d 28 (C.P. 1966); Woodfork v. Sanders, 248 So. 2d 419 (La. App.), writ denied, 252 So. 2d 455 (1971). Few jurisdictions have, however, as yet embraced the California rule abrogating the necessity of privity even in the limited situation of will drafting where a duty to the intended beneficiary is clear. See Averill, supra note 459, at 397. New York, in fact, has specifically rejected the reasoning of the California cases, holding that an attorney is not liable for negligence to a third party with whom he has no privity of contract—in the absence of fraud or collusion. Victor v. Goldman, 74 Misc. 2d 685, 344 N.Y.S.2d 672 (Sup. Ct. 1973), aff'd mem. 351 N.Y.S.2d 956 (2d Dep't 1974); Maneri v. Amodeo, 38 Misc. 2d 190, 238 N.Y.S.2d 302 (Sup. Ct. 1963).

and examination of titles.[473] However, the class of foreseeable plaintiffs has expanded very little beyond these cases.[474]

The conclusion is inescapable from an analysis of the applicable case law that a third party, in order to successfully proceed in an action for legal malpractice, must be a direct and intended beneficiary of the attorney's services. The mere fact that the third party may be foreseeable is insufficient to give rise to a legal duty on the part of an attorney to such a third person. It follows that an attorney should not be held liable for professional negligence to a third party who is in an adversarial relationship. Accordingly, an action instituted by a physician against a patient's attorney for professional negligence in instituting an unjustified medical malpractice suit should clearly fall outside the limited abrogation of the privity rule enunciated in *Lucas* v. *Hamm*.[475]

473. Lawall v. Groman, 180 Pa. St. 532, 37 A. 98 (1897) (attorney knew that a third party was relying on his title search).

474. In Donald v. Garry, 19 Cal. App. 3d 769, 97 Cal. Rptr. 191 (1971), an attorney employed by a collection agency to bring an action for the collection of a debt owed to an individual client of the agency was held liable to the individual creditor despite the absence of privity of contract when the lawyer's negligent failure to diligently prosecute the action caused the individual creditor to lose his recovery on a valid claim.

The California courts have also passed upon an attorney's duty toward a third person in a criminal proceeding. In one case, a court dismissed a suit brought against defense counsel who, while defending a client charged with murder, called plaintiff as a witness. It was alleged that the attorney knew or should have known that the witness involved would have incriminated herself on the stand. Plaintiff was later charged with a crime. DeLuca v. Whatley, 42 Cal. App. 3d 574, 117 Cal. Rptr. 63 (1974). The court, in holding that the attorney could not be held liable to the defense witness on a third-party beneficiary theory, concluded that "when an attorney defends a person accused of a crime he has but one intended *beneficiary*—his client." Id. at 576, 117 Cal. Rptr. at 64 (emphasis supplied).

In Metzker v. Slocum, 537 P.2d 74 (Ore. 1975) (en banc), the court did not abolish the privity requirement, but hinted that it might do so in a proper case. Nevertheless, the court dismissed an action for legal malpractice brought by a minor child who alleged that an attorney who had been retained by a husband and wife ten years previously had negligently failed to perfect her adoption for his clients. The child claimed that because the adoption had not taken place she could not secure an award for support upon the separation of her putative parents. The court concluded that the foreseeability of such harm (that the failure to perfect the adoption would mean that a court could not in a later divorce action force any legal obligation for support upon the father), the certainty that the plaintiff would have secured support but for the attorney's negligence and the closeness of the connection between the attorney's conduct and the injury suffered were too tenuous. In order to state a cause of action for legal malpractice a "more certain, direct and foreseeable connection" between the lawyer's negligence and the third party's injury must exist. Id. at 76.

In Haldane v. Freedman, 204 Cal. App. 2d 475, 22 Cal. Rptr. 445 (1962), attorneys who represented a woman in a divorce proceeding were not liable to the woman's minor children for negligently depleting their mother's estate. The court in applying the balancing test enunciated in previous cases concluded that the attorneys had committed no actionable wrong to the children simply because they represented the mother in a divorce action.

475. 56 Cal. 2d 583, 364 P.2d 685, 15 Cal. Rptr. 821 (1961). Such a suit should also be barred

Several courts have recently considered whether a former defendant, who was allegedly unjustifiably sued, stated a valid cause of action for professional negligence against plaintiff's counsel. In *Norton v. Hines*,[476] a defendant, who had obtained a dismissal of an earlier action, sued the attorneys who had represented the previous plaintiff for negligence.[477] He contended that the attorney owed him a duty as a foreseeable third person[478] to exercise reasonable care in advising his client to commence a suit against him. This duty was allegedly breached since the attorney knew or should have known that the client lacked probable cause to sue. The court rejected this argument stating that an "adverse party is not an intended beneficiary of the adverse counsel's client."[479] If a cause of action existed against the attorney for wrongfully instituting a civil action, it had to be pleaded as an action for malicious prosecution,[480] and plaintiff could not avoid the stringent proof requirements of a malicious prosecution action by pleading negligence. The court found no reason to extend the law in view of the recognized public policy limiting causes of action for instituting unjustified litigation to malicious prosecution actions. A party should not be permitted to subvert the public policy favoring free access to the courts by relying on a cause of action for simple negligence which requires a less demanding standard of proof than an action for malicious prosecution.[481]

In *Nathan v. Berlin*,[482] a physician who successfully defended a malpractice action recovered a verdict against the attorneys who prosecuted the action on two theories: prima facie tort (constitutional

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on public policy grounds. Any other rule would expose attorneys to unlimited liability in every case in which a suit was unsuccessfully litigated and would discourage meritorious litigation. See Haughey, Lawyers' Malpractice: A Comparative Appraisal, 48 Notre Dame Law. 888, 903-06 (1973).

476. 49 Cal. App. 3d 917, 123 Cal. Rptr. 237 (1975).

477. On oral argument it was conceded that the attorneys were not sued for malicious prosecution because plaintiff's attorney did not believe they acted maliciously. A cause of action was, however, alleged against the attorney's client for malicious prosecution. Id. at 919 n.2, 123 Cal. Rptr. at 239 n.2.

478. Since the strict requirement of privity had been eased in certain situations in California, plaintiff argued that modern tort concepts required that foreseeability of injury to a third party should be determinative in defining duty and not privity of contract. Id. at 920, 123 Cal. Rptr. at 239.

479. Id. at 921, 123 Cal. Rptr. at 240.

480. Id.

481. The court stated that the third person could state a cause of action for malicious prosecution if the attorney prosecuted a claim which a reasonable lawyer would not regard as tenable or proceeded with the action by unreasonably neglecting to investigate the law. Id. at 924, 123 Cal. Rptr. at 240.

482. Civil No. 72-M2-542 (Ill. Cir. Ct., June 1, 1976).

guarantee of a remedy for every wrong)[483] and professional negligence. One count of the physician's complaint alleged that the patient's attorneys failed to act as reasonable and prudent attorneys in filing a lawsuit against the physician without reasonable evidence to support their medical malpractice claim. It is doubtful, however, that the appellate courts will sustain the physician's cause of action for professional negligence.

The physician here was apparently attempting to avoid the stringent proof requirements of a malicious prosecuting action.[484] Sound public policy recognizing free access to courts must not be subverted by permitting a plaintiff to sue for negligence when he cannot recover on a malicious prosecution theory. An adverse party should not be considered an intended beneficiary of the adverse counsel's client. The burden on the physician resulting from the short delay incurred in waiting until the prior action was terminated in his favor is far less than the strain that would be placed on our system of justice if litigants were permitted to bypass the traditional remedies that were created to protect the well recognized public policy of free access to the courts.[485]

Lawyers should not be discouraged from vigorously prosecuting meritorious actions by the threat of malpractice litigation. If an attorney were faced with a malpractice action by his adversary every time he was unsuccessful, the impact on the adversary system would be disastrous. The lawyer, as distinguished from other professionals, is in a unique position because of the basic adversary nature of the legal profession and overriding public policy requires that the lawyer be immune from a negligence action instituted by a successful adverse litigant who feels that a medical malpractice action was unjustifiably prosecuted. Public policy considerations require that such a litigant's exclusive remedy be based on a malicious prosecution theory.

C. *Private Action for Breach of an Attorney's Oath or Ethical Code by Filing a False Claim*

A formal statement of the rules governing the conduct of members of the legal profession is contained in the Code of Professional Responsibility adopted by the American Bar Association.[486] The Code makes

483. See notes 422-24 supra and accompanying text for discussion of the prima facie tort aspects of this case.

484. The physician initiated his countersuit before the original malpractice action had terminated in his favor and therefore he would not have been able to prove one of the essential elements of malicious prosecution. Apparently he also could not prove special injury. See Caspers v. Chicago Real Estate Bd., 58 Ill. App. 2d 113, 206 N.E.2d 787 (1965); see notes 108-10 155-67 supra and accompanying text.

485. See Norton v. Hines, 49 Cal. App. 3d 917, 123 Cal. Rptr. 237 (1975).

486. This code replaces the Canons of Professional Ethics which were originally promulgated

no attempt to define the penalties that should be imposed for a violation of a Disciplinary Rule.[487] It merely notes that the penalty imposed should be determined by the nature of the attorney's conduct and the attendant circumstances.[488]

The Code of Professional Responsibility specifically provides that a lawyer shall not:

> File a suit, assert a position, conduct a defense, delay a trial, or take other action on behalf of his client when he knows or when it is obvious that such action would serve merely to harass or maliciously injure another.[489]

In addition, the Code states that a lawyer in representing his client shall not "[k]nowingly advance a claim or defense that is unwarranted under existing law. . . ."[490]

Some physicians have argued that a violation of these Disciplinary Rules or Ethical Considerations should give rise to a civil tort action for breach of a statutory duty. Moreover, it is contended that a breach of an oath (not to maintain a suit which appears to be unjust) sworn to in some states by attorneys upon admission to the bar should support a tort action. The courts, however, have rejected any attempt to transform the breach of an attorney's ethical duty into a private remedy.

In *Spencer v. Burglass*,[491] a physician brought an action against a patient's attorney for filing a frivolous medical malpractice suit. In addition to a cause of action in the nature of malicious prosecution,[492] the plaintiff alleged that the attorney breached a duty to plaintiff based upon the oath[493] taken by the attorney upon his admission to the practice of law as well as the Canons of Professional Ethics.[494] The

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by the American Bar Association in 1908. It has been formally adopted in all states and the District of Columbia with a variety of omissions and alterations in any particular jurisdiction. See Kaufman, Problems in Professional Responsibility 29 (1975).

487. The Disciplinary Rules state the minimal level of conduct below which no attorney can fall without being subject to disciplinary action. The Ethical Considerations are aspirational and constitute a body of principles which provide guidance in many specific situations. ABA Code of Professional Responsibility Preliminary Statement.

488. The disciplinary measures taken are discretionary and an attorney may be disbarred, suspended or censured depending on the character of the offense. Note, 43 Cornell L.Q. 488, 495 (1958).

489. ABA Code of Professional Responsibility DR 7-102(A)(1). See also id. DR 2-109; id. DR 6-101(A)(2); id. EC 7-4; id. EC 7-10.

490. Id. at DR 7-102(A)(2).

491. 337 So. 2d 596 (La. App. 1976).

492. For a full discussion of the other aspects of this case see notes 181-86 supra and accompanying text.

493. The oath cited provided: "You will not counsel or maintain any suit or proceeding which shall appear to you to be unjust, nor any defense except such as you believe to be honestly debatable under the law of the land." 337 So. 2d at 600.

494. Canon 30 provided: "The lawyer must decline to conduct a civil cause or to make a defense when convinced that it is intended merely to harass or to injure the opposite party or to

court dismissed the action after exploring the ethical complexities which govern the lawyer's conduct in relation to his client, the court and the public. The court found that other ethical considerations[495]—besides the attorney's duty to avoid unjustified suits—governed when, at the time of trial, the attorney discovered that he had no evidence to sustain the malpractice action. The attorney's freedom to withdraw from the case was tempered by the interests of his client, subjective considerations of honor and self respect, and an evaluation of his client's subjective motives in pursuing the litigation.[496] The court concluded that the attorney did not abnegate his duty to the physician because the Canons of Ethics merely permitted, but did not require, an attorney to withdraw from a lawsuit when he discovers that his client has no case. Moreover, the court held that public policy required that all persons shall have free access to the courts to redress wrongs and, as long as an attorney acts in good faith upon reasonable grounds in commencing a civil proceeding, he should not be subject to a countersuit if the action proves unsuccessful.[497]

In *Merritt-Chapman & Scott Corp. v. Elgin Coal, Inc.*,[498] the plaintiff, in addition to pleading causes of action for malicious prosecution[499] and abuse of process, alleged that the plaintiff's attorneys in the prior litigation had violated their oath and public duty by filing an action stating facts which they knew to be false.[500] The court in holding that plaintiff failed to state cause of action stated: "[A] private action for civil damages for alleged breach of an attorney's oath by the filing of a false claim would not lie. The remedy for such a breach is a public one and not a private one."[501]

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work oppression or wrong . . . . His appearance in Court shall be deemed equivalent to an assertion on his honor that in his opinion his client's case is one proper for judicial determination." Id.

495. Canon 42 provided that an attorney may withdraw from employment only for good cause. "The lawyer shall not throw up the unfinished task to the detriment of his client except for reasons of honor or self-respect. . . . [W]hen a lawyer discovers that his client has no case and the client is determined to continue it; or even if the lawyer finds himself incapable of conducting the case effectively," the lawyer may be justified in withdrawing from the case. Id. at 601.

496. Id.

497. Id. Logically, even where a statute codifies certain ethical guidelines for attorneys in their capacity as officers of the court, a breach of these directives should not provide the basis for a civil suit against the attorney. See Tingle v. Arnold, Cate & Allen, 129 Ga. App. 134, 137, 199 S.E.2d 260, 263 (1973).

498. 358 F. Supp. 17 (E.D. Tenn. 1972), aff'd without opinion, 477 F.2d 598 (6th Cir. 1973).

499. The court dismissed the malicious prosecution action because the prior proceeding had been settled and therefore had not terminated in plaintiff's favor. Id. at 21.

500. Although the plaintiff did not cite the statutory authority relied upon, the court concluded that the statutory duty was apparently a statutory section dealing with the procedure for admission to the practice of law and the oath required therein. Id. at 22.

501. Id.

Although local disciplinary agencies should vigorously condemn and penalize attorneys who violate the disciplinary rules by instituting unjustified malpractice suits, a private cause of action for damages arising from such a violation should not be recognized by the courts.

VII. LEGISLATIVE RESPONSES

Several states have recently enacted reform legislation to discourage the prosecution of unjustified medical malpractice actions.[502] Although these legislative responses are on the whole salutary, they fail to effectively resolve the problem of unjustified malpractice suits.

California and Ohio have enacted statutes that require a patient to serve a notice of intent to commence a malpractice action upon a potential defendant 90 (California) or 180 (Ohio) days prior to filing a claim, but within the time afforded by the applicable statute of

502. Law of Sept. 23, 1975, act 513, §§ 8(1), (2), [1975] Ala. Acts; Alaska Stat. § 09.55.535 (Cum. Supp. 1976); Ariz. Rev. Stat. Ann. §§ 12-561, -567 to -569 (Supp. 1976); Law of Mar. 28, 1976, act 638, §§ 1-15, [1976] Ark. Acts; Cal. Bus. & Prof. Code § 6146 (West Supp. 1976); Cal. Civ. Pro. Code § 1295 (West Supp. 1976); Del. Code Ann. tit. 18, §§ 6803-14, 6864-65 (Cum. Supp. 1976); Fla. Stat. Ann. §§ 95.11(4)(b), 768.133 (Cum. Supp. 1976); Law of June 9, 1976, act 219, §§ 2, 13, [1976] Hawaii Sess. Laws; Idaho Code §§ 6-1001 to -10013 (Supp. 1976); Ill. Ann. Stat. ch. 110, §§ 58.2, .3-.8 (Smith-Hurd Supp. 1977) (declared unconstitutional, Wright v. Central Du Page Hosp. Ass'n, 63 Ill. 2d 313, 347 N.E.2d 736 (1976)). Ind. Ann. Stat. §§ 16-9.5-9-1 to -10 (Burns Cum. Supp. 1976); Iowa Code Ann. § 147.138 (Cum. Pamphlet 1976); Law of April 15, 1976, ch. 248, § 1, ch. 249, §§ 1-9, [1976] Kan. Sess. Laws; La. Rev. Stat. Ann. § 40:1299.47 (West Supp. 1977); Md. Ann. Code, Cts. & Jud. Proc., §§ 3-2A05-06 (Cum. Supp. 1976); Mass. Gen. Laws Ann. ch. 231, § 60B (Cum. Supp. 1975); Mich. Comp. Laws Ann., §§ 600.5040-.5059 (Cum. Supp. 1976); Mo. Stat. Ann. §§ 538.015-050 (Vernon, Cum. Supp. 1976); Law of April 6, 1976, L.B. 434, §§ 40-47, [1976] Neb. Stat.; Nev. Rev. Stat. §§ 41A.010-.090 (Supp. 1975); N.H. Rev. Stat. Ann. § 519A-A:2 (1974); N.J. Stat. Ann. § 1:21-6(f) (Supp. 1976); N.M. Stat. Ann. §§ 58-33-1 to -28 (Interim Supp. 1976); N.Y. Judiciary Law §§ 148-a, 213(9), 474-a (McKinney Supp. 1976); Ohio Rev. Code Ann. §§ 2711.21-.24 (Page Supp. 1975) (declared unconstitutional, Simon v. St. Elizabeth Medical Center, — Ohio Op. 2d —, 355 N.E.2d 903 (C.P. 1976)); Pa. Stat. Ann. tit. 40, §§ 1301.308, .605 (Supp. 1976); Law of Sept. 1, 1976, § 1, [1976] R.I. Gen. Laws; S.D. Compiled Laws Ann. §§ 21-25A-1 to -38 (Supp. 1976); Tenn. Code Ann. §§ 23.3401 to .3421 (Cum. Supp. 1976); Vt. Stat. Ann. tit. 12, §§ 7001-08 (Cum. Supp. 1976); Va. Code Ann. §§ 8-911 to -922 (Supp. 1975); Law of Feb. 21, 1976, ch. 56, §§ 1-15, [1976] Wash. Laws; Wis. Stat. Ann. § 298.04 (Cum. Supp. 1976).

Many other legislative changes have also been promulgated in response to the malpractice crisis. Many of these procedural changes were enacted to limit recoveries and include: shortening statutes of limitations; eliminating the ad damnum from the complaint; permitting collateral source evidence to be admitted at trial; providing peer review immunity; not allowing evidence of advance payment at trial; allowing periodic payments of awards; establishing patient's compensation funds; and limiting amounts recoverable. Some states have also made substantive changes in their tort law. These states have altered traditional res ipsa loquitur doctrines, clarified their laws as to informed consent, provided that a promise to cure must be in writing, and enacted good samaritan laws. These legislative enactments are beyond the scope of this Article. See Beck, Medical Malpractice Developments, 6 Ins., Negligence & Compensation Law Brief 6-7 (1976); Comment, An Analysis of State Legislative Responses to the Medical Malpractice Crisis, 1975 Duke L.J. 1417; N.Y.U., Annual Survey of American Law 249-54 (1976).

limitations.[503] This notice must describe the legal basis of the patient's claim and the type of loss sustained.[504] The attorney's failure to serve a notice will not invalidate the proceeding but may subject him to disciplinary action.[505]

The primary purpose of such notice of claim legislation is to allow for a "cooling-off" period prior to the formal institution of a malpractice action.[506] It was hoped that during this period the patient's claim would be settled or that the patient, upon reflection, would be dissuaded from instituting any action.[507] If insurance carriers promptly investigate claims and attempt to settle them during this early stage of the proceedings, many meritorious actions may not have to be instituted, but the groundless actions that could not be settled because they lacked merit would still be prosecuted. There is certainly no evidence that fewer groundless malpractice actions have been instituted against municipal hospitals and doctors in those states where claimants must file a notice of claim against a municipality[508] prior to instituting suit. In all likelihood, this legislation will merely postpone the formal institution of suit for a short period of time, and do little to discourage patients and their attorneys from instituting unjustified malpractice actions.

In order to resolve the malpractice crisis, a majority of states[509] have

503. E.g., Cal. Civ. Pro. Code § 364 (West Supp. 1976); Ohio Rev. Code Ann. § 2305.11 (Page Supp. 1975).

504. Cal. Civ. Pro. Code § 364(b) (West Supp. 1976).

505. Cal. Civ. Pro. Code § 365 (West Supp. 1976).

506. ABA, Interim Report of the Commission on Medical Professional Liability 51-52 (1976).

507. Id.

508. See, e.g., N.Y. Gen. Munic. Law § 50-e (McKinney 1965).

509. In some states the panels are only used where there is a prior agreement to arbitrate. Law of Sept. 23, 1975, act 513, §§ 8(1)-(2), [1975] Ala. Acts; Alaska Stat. § 09-55-535 (Cum. Supp. 1976); Cal. Civ. Pro. Code § 1295 (West Supp. 1976); Ohio Rev. Code Ann. §§ 2711.22-.24 (Page Supp. 1975) (declared unconstitutional, Simon v. St. Elizabeth Medical Center, — Ohio Op. 2d —, 355 N.E.2d 903 (C.P. 1976)); Pa. Stat. Ann. tit. 40, §§ 1301.308-.605 (Supp. 1976); S.D. Compiled Laws Ann. §§ 21-25A-1 to -38 (Supp. 1976); Vt. Stat. Ann. tit. 12, §§ 7001-08 (Cum. Supp. 1976); Wis. Stat. Ann. § 655.013 (Supp. 1976-77). In some states, the claimant and respondent may voluntarily submit their dispute to an arbitration panel. Law of May 28, 1975, act 638, § 4, [1975] Ark. Acts; Del. Code Ann. tit. 18, §§ 6803-14 (Cum. Supp. 1976); Law of April 15, 1976, ch. 249, [1976] Kan. Sess. Laws; Mich. Comp. Laws Ann. §§ 600.5040-59, -65 (Supp. 1976); N.H. Rev. Stat. Ann. §§ 519A-1a:2 (1974); Va. Code Ann. §§ 8-911 to -22, (Cum. Supp. 1976). In some states the panel is a mandatory part of malpractice litigation. Ariz. Rev. Stat. Ann. § 12-567 (Supp. 1976); Fla. Stat. Ann. §§ 768.133-34 (Supp. 1976); Law of June 9, 1976, act 219, §§ 2-11 to -20, [1970] Hawaii Sess. Laws; Idaho Code §§ 6-1001 to -02 (Supp. 1976); Ill. Ann. Stat. ch. 110, §§ 58.2, -.3-.8 (Smith-Hurd Supp. 1977) (declared unconstitutional, Wright v. Central Du Page Hosp. Ass'n, 63 Ill. 2d 313, 347 N.E.2d 736 (1976)); Ind. Ann. Stat. §§ 16-9.5-9-1 to -10 (Burns Supp. 1976); La. Rev. Stat. § 40:1299.47 (West Supp. 1977); Md. Ct. & Jud. Proc. Code Ann. § 3-2A01-09 (Supp. 1976); Mass. Ann. Laws ch. 231, § 60B (Supp.

created some type of pre-trial screening or arbitration panels. Although the legislation creating these panels varies considerably among the states, generally a claimant will submit his case prior to trial to a panel composed of some combination of judges, lawyers, doctors and laymen who make a preliminary determination as to whether malpractice has occurred. If the panel finds that there is no substantial evidence of malpractice, the patient generally may reject the decision of the panel and proceed to try the case before a jury.[510] In some states, the panel's findings as to liability may be admissible at the trial.[511] There are, however, no real sanctions imposed upon either the patient or his attorney for proceeding to trial despite the panel's tentative finding that the malpractice claim was groundless.

The panel system may indirectly have the effect of discouraging some groundless medical malpractice actions. In the first instance, this procedure forces an attorney to prepare and evaluate his case fully at an early stage of the proceedings. At this juncture, if the attorney cannot secure a medical expert or persuade the panel of the merits of the patient's claim, he could easily discontinue the action with a significant savings in time and future litigation expenses. However,

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1976); Mo. Ann. Stat. §§ 516.105, 538.015-.050 (Vernon Supp. 1976); Law of April 6, 1976, ch. 434, §§ 40-47, [1976] Neb. Laws; Nev. Rev. Stat. §§ 41A.010-.090 (Supp. 1975); N.M. Stat. Ann. §§ 58-33-15 to -28 (Interim Supp. 1976); N.Y. Judiciary Law, §§ 148-(a)(4), (6), (8), 213(9) (McKinney Supp. 1976); Law of Sept. 1, 1976, § 1, [1976] R.I. Gen. Laws; Tenn. Code Ann. § 23-3401-21 (Cum. Supp. 1976); Wis. Stat. Ann. § 298.04 (Supp. 1976). See Gibbs, Malpractice Screening Panels and Arbitration in Medical Liability Disputes, 1 J. Legal Medicine, May-June 1973, at 30; Holder, Joint Screening Panels, 215 J.A.M.A. 1715 (1971).

510. This provision upholds their constitutionality since it preserves the right to a jury trial. While U.S. Const. amend. VII does not apply to state courts since it has not been selectively incorporated into the fourteenth amendment, most states provide for a right to a jury trial in their own state constitutions. Adams & Bell, Alternatives to Litigation II, in HEW Report, supra note 2, Appendix 318. The constitutionality of some panels and arbitration statutes has recently been tested by the courts. Carter v. Sparkman, 335 So. 2d 802 (Fla. 1976), cert. denied, 45 U.S.L.W. 3463 (U.S. Jan. 11, 1977), rev'g 43 Fla. Supp. 107 (Cir. Ct. 1975) (mandatory panel held constitutional); Wright v. Central Du Page Hosp. Ass'n, 63 Ill. 2d 313, 347 N.E.2d 736 (1976) (mandatory panel held unconstitutional); Comisky v. Arlen, 55 App. Div. 2d 304, 390 N.Y.S.2d 122 (2d Dep't 1976) (panel held constitutional); Halpern v. Gozan, 85 Misc. 2d 753, 381 N.Y.S.2d 744 (Sup. Ct. 1976) (mandatory panel held constitutional); Simon v. St. Elizabeth Medical Center, — Ohio Op. 2d —, 355 N.E.2d 903 (C.P. 1976) (mandatory arbitration held unconstitutional).

511. The following states allow the findings of the panels to be admitted into evidence if a trial follows: Alaska Stat. § 09.55.536(e) (Supp. 1976); Del. Code Ann. tit. 18, § 6812 (Cum. Supp. 1976); Ind. Ann. Stat. §§ 16-9.5-9-9 (Burns Supp. 1976); La. Rev. Stat. § 40:1299.47(I) (West Supp. 1977); Md. Ct. & Jud. Proc. Code Ann. § 3-2A06(d) (Supp. 1976); Mass. Ann. Laws ch. 231, § 60B (Supp. 1976); N.Y. Judiciary Law § 148-a(8) (McKinney Supp. 1976); Pa. Stat. Ann. tit. 40, § 1301.510 (Supp. 1976); Tenn. Code Ann. § 23-3409 (Cum. Supp. 1976); Va. Code Ann. § 8-918 (Supp. 1976); Wis. Stat. Ann. § 298.04 (Supp. 1976).

unless legislatures impose some sanctions, such as payment of reasonable attorneys' fees to the physician who successfully defends an unjustified malpractice action, the panel system will not significantly reduce the prosecution of groundless suits.

The American Medical Association, in an effort to discourage unjustified malpractice suits, has drafted a model counterclaim act that would apparently enable physicians to counterclaim for malicious prosecution against a patient and his attorney in the malpractice action itself. This proposal reads:

> In any action for damages for personal injury or death, whether based on tort or contract law, or otherwise, a counterclaim for damages for abuse of process in filing such action may be filed and litigated in the same action provided that the counterclaim is based upon substantial allegations of material facts.

It would appear that the term, "abuse of process," contained in the draft proposal actually refers to malicious prosecution. There would certainly be no need for such a statute if "abuse of process" was used in the technical sense since a counterclaim has traditionally been permitted in such actions.[512] This proposed reform has been adopted in Tennessee, where it explicitly includes malicious prosecution actions.[513]

The proponents of this act argue that it would force patients and their attorneys to consider their own liability before proceeding with an action against a physician. Moreover, it is claimed that such a change would minimize litigation time and expenses since the questions of malpractice and malicious prosecution would be adjudicated at the same time and before the same fact finder.

Although this counterclaim proposal may appear to save judicial time and energy, in practice it would undermine the policy of open access to the courts for the redress of grievances. If a counterclaim was permitted with ease in the original action litigants with legitimate claims could be discouraged by the fear of retaliatory actions. Furthermore, such counterclaims would tend to confuse the issues of a highly complex litigation. The patient who already has a substantial burden of proving malpractice would be put on the defensive by having to prove that he instituted the malpractice action with probable cause and without malice. This would shift the focus of the jury's

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512. See notes 213-14 supra and accompanying text.

513. Tenn. Code Ann. § 23-3415(b) (Cum. Supp. 1976). The Tennessee counterclaim provision specifically provides that a counterclaim will be permitted for "malicious prosecution (on the ground that the principal action was instituted with improper intent and without probable cause) or malicious abuse of process (on the ground that there was an improper use with improper intent of the process) in the same action . . . ." Id.

inquiry from the main issue of whether malpractice was actually committed to collateral issues.

It has also been proposed that verification of pleadings be made mandatory in medical malpractice cases.[514] Pursuant to such a provision, an attorney as a prerequisite to filing a malpractice action, would have to verify under oath that he had reviewed the facts of the case, consulted with an appropriate specialist who is licensed to practice in the state and had concluded, on the basis of such a review, that there was substantial and reasonable cause for filing the action. Such a statute would do very little to resolve the physician's dilemma. In those states where pleadings must be verified,[515] there is no empirical evidence to indicate that such a procedure has caused any decrease in the number of unjustified actions. On the contrary, in New York, where pleadings must be verified, in some courts, in order to secure a general trial preference, the number of malpractice cases filed has continued to increase.[516]

In any event, a verification statute would not deter any appreciable number of malpractice suits since it is no longer as difficult as it once was to secure the opinion of a medical expert. In addition, the verification legislation, as proposed, would appear to impose no specific penalties upon an attorney who incorrectly or wrongfully verifies a pleading. Although an attorney who falsely verifies may be subject to a charge of perjury,[517] this severe criminal penalty has rarely been imposed.[518]

While the number of unjustified malpractice actions may not be directly affected as a result of verification provisions, a lawyer's violation of a verification statute could provide the basis for a successful malicious prosecution action. The failure to consult with a medical expert or reasonably to investigate and review the facts of a malpractice action, when considered in conjunction with the attorney's conduct in wrongfully or falsely verifying the pleadings, could provide the essential elements of malice and lack of probable cause in a malicious prosecution action.

514. See A.B. 2939, 1976 Calif. Leg. which died in Committee on November 30, 1976.

515. E.g., 22 N.Y. CRR § 660.9(c) (Supp. 1974) (New York and Bronx Counties Sup. Ct.). A bar association committee has recommended that malpractice complaints be verified by both plaintiff and his counsel. Assoc. of the Bar of the City of New York, Report on Medical Malpractice Insurance Crisis § Q (1976).

516. See note 20 supra and accompanying text.

517. E.g., N.Y. Penal Law § 210.00-.10 (McKinney 1975).

518. See Siegel, Practice Commentary, N.Y. CPLR § 3020 (McKinney 1974). The attorney who falsely verifies would, of course, be subject to disciplinary proceedings. The ABA Code of Professional Responsibility DR 1-102(A)(4) states: "A lawyer shall not . . . [e]ngage in conduct involving dishonesty, fraud, deceit, or misrepresentation."

Many physicians believe and strenuously argue that the contingent fee arrangement encourages the prosecution of unjustified malpractice litigation.[519] In response to such arguments, many states[520] have recently enacted legislation to limit the attorneys' fees in medical malpractice actions. While it is too early to evaluate the effect of these changes on the frequency of litigation, meritorious or otherwise, a few general observations can be made. Since many of these legislative changes limit the amount of the lawyer's fee only where the recovery is substantial,[521] they should have little, if any, effect on the prosecution of smaller nuisance claims. Moreover, such legislation may have the adverse effect of discouraging the prosecution of meritorious malpractice suits especially where the patients' monetary recovery appears to be limited.

The most revolutionary reform which has yet to be seriously considered by any state as a deterrent to unjustified malpractice actions is a total revision of the traditional American approach to attorneys' fees.[522]

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519. HEW Report, supra note 2, at 32. There is, however, significant evidence to indicate that, in reality, the contingent fee protects the physician from groundless suits. Id. at 153; Harley & Rheingold, New Survey of Malpractice Litigation, 175 N.Y.L.J., April 28, 1976, at 1, col. 2. For the arguments for and against the contingent fee system see F. MacKinnon, Contingent Fees for Legal Services 4-5 (1964); Hughes, The Contingent Fee Contract in Massachusetts, 43 Boston U.L. Rev. 1 (1963); Radin, Contingent Fees in California, 28 Calif. L. Rev. 587 (1940). See also Grunskay v. Simenauskas, 107 Conn. 380, 140 A. 724 (1928).

520. Ariz. Rev. Stat. Ann. § 12-568 (Supp. 1976); Cal. Bus. & Prof. Code § 6146 (West Supp. 1976); Del. Code Ann. tit. 18, § 6865 (Cum. Supp. 1976); Law of June 9, 1976, ch. 219, § 2-2, [1976] Hawaii Sess. Laws; Ind. Ann. Stat. § 16-9.5-5.1(a) (Burns Supp. 1976); Iowa Code Ann. § 147.138 (Cum. Pamphlet 1976); Law of April 15, 1976, ch. 248, [1976] Kan. Sess. Laws; Md. Cts. & Jud. Proc. Code Ann. § 3-2A07 (Supp. 1976); Mich. Comp. Laws Ann. § 600.5040-59 (Supp. 1976); Law of April 6, 1976, ch. 434, § 34, [1976] Neb. Stat.; N.J. Stat. Ann. Rule 1:21-6(f) (Supp. 1976); N.Y. Judiciary Law § 474-a (McKinney Supp. 1976); Ohio Rev. Code Ann. § 2711.21-.24 (Page 1975) (declared unconstitutional, Simon v. St. Elizabeth Medical Center, — Ohio Op. 2d —, 355 N.E.2d 903 (C.P. 1976)); Ore. Rev. Stat. § 12.110 (1975); Pa. Stat. Ann. tit. 40, § 1301.604 (Supp. 1976); Tenn. Code Ann. § 23-3419 (Cum. Supp. 1976); Law of Feb. 21, 1976, ch. 56, § 12, [1976] Wash. Laws; Wis. Stat. Ann. § 655.013 (Supp. 1976-77).

521. The California statute provides a representative example of such statutes. It provides: "(a) An attorney shall not contract for or collect a contingency fee . . . in excess of the following limits:

(1) Forty percent of the first fifty thousand dollars ($50,000) recovered.

(2) Thirty-three and one-third percent of the next fifty thousand dollars ($50,000) recovered.

(3) Twenty-five percent of the next one hundred thousand dollars ($100,000) recovered.

(4) Ten percent of any amount on which the recovery exceeds two hundred thousand dollars ($200,000)." Cal. Bus. & Prof. Code § 6146 (West Supp. 1976); see also N.Y. Judiciary Law, § 474-a (McKinney Supp. 1976).

522. In the 1974 New York State Assembly session a bill was introduced which provided that "a defendant in an action for malpractice, if judgment is entered in his favor, is entitled to costs, disbursements and additional sums as the court deems reasonable for counsel fees and other

In the United States,[523] attorneys' fees are not ordinarily recoverable as costs[524] in the absence of a specific statute or enforceable contract providing for such fees.[525] Each party must therefore generally bear the cost of his own attorneys' fees as part of the privilege of using the courts. Under the American rule,[526] the successful party, who must bear the costs of his own attorneys' fees, is never made totally whole.[527] Those who support the American rule, however, argue that:

> [O]ne should not be penalized for merely defending or prosecuting a lawsuit, and that the poor might be unjustly discouraged from instituting actions to vindicate their rights if the penalty for losing included the fees of their opponents' counsel. . . . Also the time, expense, and difficulties of proof inherent in litigating the question of what constitutes reasonable attorney's fees would pose substantial burdens for judicial administration.[528]

Those who support a substantial change in the traditional approach to awarding attorneys' fees claim that if the unsuccessful litigant and his attorney were responsible for the reasonable attorneys' fees incurred by a physician who successfully defended a malpractice action, unjustifiable litigation would be deterred if not eliminated altogether. Al-

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expenses necessarily incurred with respect to such action." A.B. 10187, 1974 N.Y. Leg. See Note, Rx for New York's Medical Malpractice Crisis, 11 Colum. J.L. & Social Problems 467, 481 (1975).

523. In England, courts are authorized by statute to award reasonable counsel fees to a successful litigant. See Fleischman Distilling Corp. v. Maier Brewing Co., 386 U.S. 714, 717 (1967). See generally C. McCormick, Handbook on the Law of Damages § 60, at 234-36 (1935); 1 S. Speiser, Attorneys' Fees, § 12.7 (1973); Goodhart, Costs, 38 Yale L.J. 849 (1929).

524. For a discussion of taxable costs as a sanction to deter frivolous suits see Mayer & Stix, The Prevailing Party Should Recover Counsel Fees, 8 Akron L. Rev. 426 (1975); Comment, Deterring Unjustifiable Litigation by Imposing Substantial Costs, 44 Ill. L. Rev. 507 (1949); Note, Use of Taxable Costs to Regulate the Conduct of Litigants, 53 Colum. L. Rev. 78 (1953).

525. See Alyeska Pipeline Serv. Co. v. Wilderness Soc'y, 421 U.S. 240 (1975); F.D. Rich Co. v. Industrial Lumber Co., 417 U.S. 116 (1974); Fleischman Distilling Corp. v. Maier Brewing Co., 386 U.S. 714 (1967); Kinter v. Harr, 146 Mont. 461, 480 P.2d 487 (1965); Utica Mut. Ins. Co. v. Plante, 106 N.H. 525, 214 A.2d 74 (1965).

526. The American rule denying recovery for attorneys' fees has been criticized by many commentators. See Ehrenzweig, Reimbursement of Counsel Fees and the Great Society, 54 Calif. L. Rev. 792 (1966); Kuenzel, The Attorney's Fee: Why Not a Cost of Litigation?, 49 Iowa L. Rev. 75 (1963); McLaughlin, The Recovery of Attorneys' Fees: A New Method of Financing Legal Services, 40 Fordham L. Rev. 761 (1972).

527. F.D. Rich Co. v. Industrial Lumber Co., 417 U.S. 116, 129 (1974); Rodulfa v. United States, 295 F. Supp. 28 (D.D.C. 1969). Advocates of the English rule claim that the allowance of the successful party's legal expense would discourage the institution of unfounded litigation. Goodhart, Costs, 38 Yale L.J. 849, 862 (1929).

528. Fleischman Distilling Corp. v. Maier Brewing Co., 386 U.S. 714, 718 (1967) (citations omitted). See also Agostini v. State, 255 App. Div. 264, 5 N.Y.S.2d 732 (3d Dep't 1938) where the court stated, "To permit a successful party to bring an action against his unsuccessful opponent to recover the legal expenses of prosecuting a former action would lead to endless litigation. . . ." Id. at 267, 5 N.Y.S.2d at 735.

though such an approach could provide the most direct deterrent to unjustified suits, it could also affect the foundations of our judicial system. As mentioned previously, access to the courts to redress grievances has been one of the cornerstones of justice in the United States. A proposal requiring the payment of counsel fees by the unsuccessful attorney or litigant in all cases would have a detrimental effect on the prosecution of all actions. Many actions are lost not because they are unjustified but because of the circumstances surrounding the trial. To impose a penalty upon a lawyer every time he loses a malpractice action would have a chilling effect on the attorney's obligation to pursue the interests of a client who has a meritorious claim containing complex and novel issues. Any proposal which so directly affects free access to the courts should be rejected.

There is, however, some constructive legislation[529] providing for an award of attorneys' fees under certain limited circumstances which could provide some relief for physicians who believe they have been unjustifiably sued. These types of statutes could effectively deter the prosecution of unjustified actions without contravening the well-recognized public policy of free access to the courts.

VIII. ATTORNEYS' FEES AWARDED IN LIMITED SITUATIONS

A. *Attorneys' Fees as Costs*

Several limited exceptions to the general American rule[530] denying recovery of attorneys' fees as costs have developed.[531] Usually these exceptions arise as "part of the historic equity jurisdiction" of the courts.[532] The federal courts, thus, may assess counsel fees as part of taxable costs "for dominating reasons of justice."[533]

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529. There is some authority in support of an award of costs and attorneys' fees as damages against a plaintiff who has prosecuted a suit that was vexatious, groundless or fraudulent. 1 S. Speiser, Attorney's Fees § 13.3 (1973). See notes 556-58 supra and accompanying text.

530. See notes 523-27 supra and accompanying text.

531. These exceptions generally occur: where a statute authorizes such attorneys' fees; where there is an enforceable contract obligation; where a common fund has been created; where obstinate behavior occurs; and where the successful litigant has acted as a private attorney general and a statute authorizes such fees. Alyeska Pipeline Serv. Co. v. Wilderness Soc'y, 421 U.S. 240 (1975); F.D. Rich Co. v. Industrial Lumber Co., 417 U.S. 116 (1974); Fleischman Distilling Corp. v. Maier Brewing Co., 386 U.S. 714 (1967); Cleveland v. Second Nat'l Bank & Trust Co., 149 F.2d 466 (6th Cir.), cert. denied, 326 U.S. 775 (1945); Tenants & Owners in Opposition to Redevelopment v. HUD, 406 F. Supp. 1060 (N.D. Cal. 1975); 6 J. Moore, Federal Practices ¶ 954.77[2], at 1704-05 (2d ed. 1976).

532. Sprague v. Ticonic Bank, 307 U.S. 161, 164 (1939); accord, Vaughan v. Atkinson, 369 U.S. 527, 530 (1962). See Annot., 31 A.L.R. Fed. 833 (1977).

533. Sprague v. Ticonic Bank, 307 U.S. 161, 167 (1939).

The federal courts,[534] pursuant to their equity power, have recognized that attorneys' fees may be awarded in the court's discretion "to a successful party when his opponent has acted in bad faith, vexatiously, wantonly, or for oppressive reasons."[535] The award of attorneys' fees pursuant to this rule has been used most sparingly[536] by the courts in extraordinary cases.[537]

This exception to the general rule may be easily stated, but it is difficult to define the type of conduct on the part of a party or an attorney that will amount to bad faith.[538] Bad faith in this context has been interpreted to connote fraud,[539] an actual or willful wrongdoing[540] or a continued and persistent course of harassment.[541] A distinction, however, must be drawn between intermittent, burdensome or dilatory conduct by a party and unreasonably wanton or willfully oppressive conduct that is sufficient to support a finding of bad faith.[542] It is only when a party's conduct goes beyond "generally accepted vigor and persistence commonly employed in our adversary

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534. See Fed. R. Civ. P. 54(d), which states in pertinent part: "Except when express provision therefor is made either in a statute of the United States or in these rules, costs shall be allowed as of course to the prevailing party unless the court otherwise directs . . . ." Under this rule, federal courts have a wide discretion in the apportionment and taxation of costs. Jones v. Schellenberget, 225 F.2d 784, 794 (7th Cir. 1955), cert. dismissed, 350 U.S. 789 (1956).

535. F.D. Rich Co. v. Industrial Lumber Co., 417 U.S. 116, 129 (1974); see, e.g., Vaughan v. Atkinson, 369 U.S. 527 (1962); Universal Oil Prods. Co. v. Root Ref. Co., 328 U.S. 575 (1946); Fairley v. Patterson, 493 F.2d 598 (5th Cir. 1974); McEnteggart v. Cataldo, 451 F.2d 1109 (1st Cir. 1971); Bell v. School Bd., 321 F.2d 494 (4th Cir. 1963); Rolax v. Atlantic Coast Line R.R., 186 F.2d 473 (4th Cir. 1951); 6 J. Moore, Federal Practice ¶ 54.77[2], at 1709 (2d ed. 1976).

536. Note, Use of Taxable Costs to Regulate the Conduct of Litigants, 53 Colum. L. Rev. 78, 83 (1953).

537. "[O]nly in exceptional cases and for dominating reasons of justice can the exercise of the power by the district court be justified." 6 J. Moore, Federal Practice ¶ 54.77[1], at 1709-11 (2d ed. 1976). See also Rolax v. Atlantic Coast Line R.R., 186 F.2d 473 (4th Cir. 1951).

538. It appears that bad faith would be more than the implied malice or in some instances the actual malice necessary to support a malicious prosecution action. See notes 144-54 supra and accompanying text.

539. E.g., Universal Oil Prods. Co. v. Root Ref. Co., 328 U.S. 575, 580 (1946) ("No doubt, if the court finds after a proper hearing that fraud has been practiced upon it, or that the very temple of justice has been defiled, the entire cost of the proceedings could justly be assessed against the guilty parties."); Technograph Printed Circuits Ltd. v. Methode Electronics, Inc., 484 F.2d 905, 909 (7th Cir. 1973) ("In this circuit, attorney fees are only awarded . . . in exceptional cases 'to prevent gross injustice and where fraud and wrong-doings are clearly proved.' ").

540. E.g., Forest Laboratories, Inc. v. Formulations, Inc., 320 F. Supp. 211 (E.D. Wis. 1970); Carter Prods., Inc. v. Colgate-Palmolive Co., 214 F. Supp. 383 (D. Md. 1963).

541. E.g., Fairley v. Patterson, 493 F.2d 598, 606 (5th Cir. 1974) ("When a party's conduct has been vexatious, groundless or in bad faith"); Tenants & Owners in Opposition to Redevelopment v. HUD, 406 F. Supp. 961, 964 (N.D. Cal. 1975) ("continued, unreasonably obstinate, wanton or wilfully oppressive conduct").

542. Tenants & Owners in Opposition to Redevelopment v. HUD, 406 F. Supp. 961, 964 (N.D. Cal. 1975).

system" that sanctions should be imposed.[543] Moreover, the moving party has the burden of clearly proving his adversary's fraud or wrongdoing.[544]

If bad faith is equated with fraud or wilful conduct, it is obvious that an award of attorneys' fees can only be imposed in very few cases.[545] It is doubtful that a physician who has been unjustifiably sued for malpractice can meet the stringent requirement of proof of bad faith which would amount to a fraud on the federal courts.[546]

Some state statutes[547] also specifically provide for the taxing of reasonable attorneys' fees where false allegations[548] were made without reasonable cause,[549] and in bad faith.[550] These statutes were enacted to prevent litigants from being subjected to harassment by the prosecution of actions which by their nature were vexatious or brought without legal foundation.[551] It has been held that such statutes should only be invoked in those cases which fall strictly within their terms.[552]

In order to recover attorneys' fees under most of these statutes a party generally has the burden of proving that the allegations in the pleadings were made without reasonable cause[553] and in bad faith.[554]

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543. Id.

544. Sarkes Tarzian, Inc. v. Philco Corp., 351 F.2d 557, 560 (7th Cir. 1965); Armour & Co. v. Wilson & Co., 274 F.2d 143, 148 (7th Cir. 1960).

545. Note, Use of Taxable Costs to Regulate the Conduct of Litigants, 53 Colum. L. Rev. 78, 83 (1953).

546. Even if the physician could meet this proof requirement, however, it is questionable whether this exception to the general rule of costs is applicable in a federal suit based on diversity, if the forum state would not recognize an award of attorneys' fees. 6 J. Moore, Federal Practice ¶ 954.77[2], at 1712-13 (2d ed. 1976); C. Wright & A. Miller, Federal Practice and Procedure § 2669, at 154-55 (1973).

547. E.g., Ill. Ann. Stat., ch. 110, § 41 (Smith-Hurd Supp. 1976); Md. R. Civ. Prac. 604, § b; N.D. Cent. Code Ann. R. App. P. 38 (1974); see F.W. Berens Sales Co. v. McKinney, 310 A.2d 601 (D.C. App. 1973). Ga. Code Ann. § 20-1404 (1965) allows recovery to plaintiff if the defendant has been stubbornly litigious. There is some question as to whether a defendant may use this section if the plaintiff was stubbornly litigious. Busbee v. Sellers, 71 Ga. App. 26, 29 S.E.2d 110 (1944). See also Levine, Section 41 of the Civil Practice Act—the Sleeper Awakes, 54 Ill. Bar. J. 388 (1966).

548. Ill. Ann. Stat., ch. 110, § 41 (Smith-Hurd Supp. 1976); see Murczek v. Powers Label Co., 31 Ill. App. 3d 939, 335 N.E.2d 172 (1975).

549. Md. R. Civ. Prac. 604, § b(2); see F. W. Berens Sales Co. v. McKinney, 310 A.2d 601 (D.C. App. 1973); Horween v. Dubner, 68 Ill. App. 2d 309, 216 N.E.2d 288 (1966).

550. Md. R. Civ. Prac. 604 § b(1); 1901 Wyoming Ave. Cooperative Ass'n v. Lee, 345 A.2d 456 (D.C. App. 1975); cf. Feist v. Luzerne County Bd. of Assessment Appeals, 347 A.2d 772 (1975). Illinois has recently eliminated its requirement of a showing of bad faith. Ill. Ann. Stat. ch. 110, § 41 (Smith-Hurd Supp. 1976).

551. See, e.g., F. W. Berens Sales Co. v. McKinney, 310 A.2d 601, 603 (D.C. App. 1973); Ready v. Ready, 33 Ill. App. 2d 145, 161-62, 178 N.E.2d 650, 656 (1961).

552. Murczek v. Powers Label Co., 31 Ill. App. 3d 943, 935, 335 N.E.2d 172, 176 (1975).

553. Md. R. Civ. Prac. 604 § b(2); Murczek v. Powers Label Co., 31 Ill. App. 3d 939, 335

Bad faith is obviously a vague standard and is difficult to define. It is evidently more than a mistake of judgment and appears to require a conscious wrongdoing. It also appears to be more than the mere absence of probable cause. The District of Columbia, for example, requires that a grievous wrongdoing must have been committed before awarding attorneys' fees.[555]

Illinois, in response to the medical malpractice problem,[556] has recently revised its statute by eliminating the bad faith requirement altogether.[557] To recover attorneys' fees a party must merely prove that the allegations in the pleading were untrue and were made without reasonable cause.[558] The fact that a court resolves a factual issue adversely to the pleader does not necessarily establish that an allegation was made without reasonable cause.[559] In Illinois, therefore it would be much easier to prove a right to attorneys' fees, than to successfully prove a cause of action for malicious prosecution.

The advantages of a statute such as the Illinois statute is obvious. A physician who claims to have been unjustifiably sued for malpractice need only prove that the plaintiff-patient or his attorney lacked reasonable or probable cause to institute the action in order to recover the attorneys' fees he incurred in successfully defending the action. Actual or implied malice or bad faith need not be proven. Moreover, the physician need not institute a second proceeding to recover attorneys' fees, but may do so as part of the original suit, with an appreciable saving in time and costs.[560] Even though a party may prove all the

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N.E.2d 172 (1975). Where plaintiff makes a false pleading knowing that it is false, one case has held that all of defendant's expenses and fees that result from plaintiff's pleadings in disregard of the known facts were recoverable. Kostbade v. Telford, 13 Ill. App. 3d 961, 301 N.E.2d 321 (1973).

554. Md. R. Civ. Prac. 604 § b(1); F.W. Berens Sales Co. v. McKinney, 310 A.2d 601 (D.C. App. 1973). Illinois no longer requires proof of bad faith. Upon a finding that an allegation was made without reasonable cause and that it was untrue recovery of attorneys' fees can be had. See Jenner & Martin, Commentary, Ill. Ann. Stat. ch. 110, § 41 (Smith-Hurd Supp. 1976).

555. F.W. Berens Sales Co. v. McKinney, 310 A.2d 601, 603 (D.C. App. 1973).

556. Jenner & Martin, Commentary, Ill. Ann. Stat. ch. 110, § 41 (Smith-Hurd Supp. 1976).

557. Ill. Ann. Stat. ch. 110, § 41 (Smith-Hurd Supp. 1976).

558. Id. See also Grandys v. Spring Soft Water Conditioning Co., 101 Ill. App. 2d 225, 242 N.E.2d 454 (1968).

559. Theodorou v. Community Builders, Inc., 6 Ill. App. 3d 277, 280, 285 N.E.2d 474, 476 (1972). See Horoween v. Dunbar, 68 Ill. App. 2d 309, 319-20, 216 N.E.2d 288, 293 (1965) ("Plaintiffs had to present sufficient evidence that the allegation in defendants' pleadings were not only untrue, but that defendants, at the time they made the allegations, knew they were untrue.").

560. A hearing will be held at trial at which time the court may summarily tax expenses incurred by reason of the untrue pleadings. Krass v. Froio, 24 Ill. App. 3d 924, 322 N.E.2d 67 (1975). See also Adams v. Silfen, 342 Ill. App. 415, 96 N.E.2d 628 (1951).

requisites of a malicious prosecution action and recover all the expenses incurred in defending the maliciously instituted suit, he still may not recover the legal expenses he incurred in the malicious prosecution action itself.[561] A statute[562] providing for attorneys' fees would, at least, afford a limited remedy to a physician[563] who believes he has been unjustifiably sued.[564] A more realistic use of an award of attorneys' fees where there is proof of a lack of reasonable cause in prosecuting an action would certainly deter unjustified litigation without unduly restricting the institution of meritorious malpractice actions.

B. *Security for Costs*

Another procedure which may deter unjustified suits has been promulgated in California.[565] Under this statute, at any time before final judgment, a defendant may move, upon notice and hearing, for an order requiring the plaintiff to provide security for costs. The defendant must allege in his moving papers that the plaintiff "is a vexatious litigant and that there is not a reasonable probability that he will prevail in the litigation against the moving defendant."[566] When such a motion is filed, the court must stay the proceedings pending determination of the motion. The amount of security, if any, to be provided by the plaintiff is within the court's discretion.[567]

Security for costs legislation would benefit the physician since it requires the plaintiff and his attorney to determine at the time of the defendant's motion, which would generally be at the initial stages of the litigation, whether to continue a claim which the court has determined lacks merit. The deterrent effect of this statute on nuisance claims could be substantial. It would seem that the requirement that there is no "reasonable probability that he will prevail," should be

561. See Stewart v. Sonneborn, 98 U.S. 187 (1878).

562. Any power of a trial court to impose attorneys' fees to deter bad faith litigation should be created by the legislature with appropriate safeguards and guidelines. Young v. Redman, 55 Cal. App. 3d 827, 838-39, 128 Cal. Rptr. 86, 93-94 (1976).

563. The plaintiff should, of course, be permitted to recover his reasonable attorneys' fees if the defendant interposed frivolous defenses.

564. In all of these cases, the costs of the attorneys' fees were apparently assessed against the party not the attorney. There is some authority indicating that costs may be assessed against an attorney who asserts a frivolous position in a litigation. Acevedo v. Immigration & Naturalization Serv., 538 F.2d 918, 921 (2d Cir. 1976) (double costs were assessed against an attorney since it was unlikely that the petitioner would be able to satisfy the costs and the petitioner was found not to be responsible for the unreasonable prolongation of the litigation).

565. Cal. Civ. Pro. Code § 391.1 (West Supp. 1976).

566. Id.

567. Id. § 391.3 (West 1973). If Security is not furnished, the action shall be dismissed. Id. § 391.4.

considered to be at least the equivalent of lack of probable cause.[568] It is questionable, however, whether the issue of probable cause in initiating the action should be determined at this early stage of the proceedings.

Moreover, if the security was minimal, it would not act as a deterrent to bringing an unjustified action. Yet if the security was too substantial, it could discourage meritorious malpractice claims since there is no requirement that plaintiff's financial ability[569] to furnish adequate security be considered.[570]

It would appear that statutes requiring an award of attorneys' fees at the conclusion of the malpractice action, rather than requiring security at the initiation of the suit, better accomplish the goal of deterring unjustified suits without discouraging meritorious ones.

IX. CONCLUSION

Although some unidentifiable percentage of medical malpractice suits are unjustifiably instituted, there is insufficient evidence to indicate or infer that a substantial number of medical malpractice claims are groundless. The well-recognized public policy of providing free access to the courts without fear that a subsequent action will be instituted as a penalty for using the courts in the event the litigant is unsuccessful must be preserved. On balance, the public's interest in open access to the courts and the attorneys' need freely to institute and litigate malpractice claims to implement this policy outweighs the physicians' interest in freedom from defending unjustified malpractice suits. There do not appear to be sufficient policy grounds for reversing the courts' traditional reluctance to expand the available remedies against those who have allegedly instituted unjustified litigation. The traditional remedies of malicious prosecution and abuse of process safeguard the attorney's and his client's rights to prosecute meritorious

568. Id. § 391.1 (West Supp. 1976). See Muller v. Tanner, 2 Cal. App. 3d 445, 82 Cal. Rptr. 738 (1970).

569. A bill was introduced in 1975 in the New York Senate proposing a similar security for costs procedure. S. 660 § 1, 1975 N.Y. Leg. The bill would have required, however, that the defendant, in addition to showing that there was no "reasonable possibility" that plaintiff had a cause of action, prove that the plaintiff would not suffer undue economic hardship in giving such security. This proposal was not passed. See Note, Rx for New York's Medical Malpractice Crisis, 11 Colum. J.L. & Social Problems 467, 481-82 (1975).

570. The plaintiff, not his attorney, is generally liable for security for costs. A provision that an attorney pay his client's security for costs would violate the spirit of ABA Code of Professional Responsibility DR 5-103(B) which restricts the attorney's right to advance the expenses of litigation to his client. See 8 J. Weinstein, H. Korn & A. Miller, New York Civil Practice ¶ 8501.05 (1976). Wisconsin, however, follows the practice of holding the plaintiff's attorney liable for security for costs. See Wis. Stat. Ann. §§ 814.27, 814.28, 814.34 (1977).

claims and provide an adequate remedy to the physician who feels that he has been unjustifiably sued.

It is essential that those states still that adhere to the minority position, requiring proof of special injury in malicious prosecution actions, abrogate this restrictive rule.[571] A defendant who has incurred legal fees as a result of defending an unjustified action, which has been instituted without probable cause and with malice, should be able to recover such fees without proof of any additional special injury. In those jurisdictions which continue to adhere to the restrictive rule requiring special injury, courts could recognize a physician's claim for defending an unjustified medical malpractice suit by relying on the theory of prima facie tort. However, the prima facie tort concept should not be invoked to overcome the other stringent proof requirements of a malicious prosecution action. If a prima facie tort action is alleged, plaintiffs' burden of proving that the original malpractice action was instituted without justification should be the equivalent of proof of lack of probable cause.[572] Proof of malice should be an essential element of plaintiffs' case regardless of the theory plaintiff utilizes, provided malice is broadly defined to include implied malice, *i.e.*, malice may be inferred from the absence of just cause or excuse for doing an act which causes damage or from a lack of probable cause. Moreover, the remedy of prima facie tort should not be employed to circumvent the generally required element in malicious prosecution actions of termination of the prior suit in defendants' favor. If a physician or other professional is permitted to assert a counterclaim for malicious prosecution or prima facie tort in the original action, the primary focus in the original action will be shifted from the often complicated issues of malpractice to the motives of the attorney and his client in instituting the action. The delay and additional expense which the defendant physician would incur in having to wait until the successful termination of the original malpractice action is slight compared to the adverse psychological effect and additional confusion that could be caused by permitting a counterclaim in the original action.

There are, however, certain reforms[573] that could deter, to some extent, the prosecution of unjustifiable medical malpractice claims. Many states have adopted a system of impartial medical malpractice

571. See notes 108-15 supra and accompanying text.

572. See note 435 supra and accompanying text.

573. For a discussion of some solutions to the problem of unjustified medical malpractice suits, see Rheingold, The Remedies of the Wrongfully Sued Professional, 1975 Nat'l Medicolegal Symposium 52, 55-56; Willis, Assault with a Deadly Lawsuit: A Wrong in Search of a Remedy, Case & Comment, Nov.-Dec. 1976, at 19.

panels to review malpractice claims prior to trial.[574] The panel system could be structured in conjunction with an award of attorneys' fees to discourage the trial of unjustified malpractice suits. Where the panel unanimously[575] finds that a patient does not present a valid malpractice claim, the patient and his attorney still have a right to pursue the action in the courts. However, in view of the unanimous panel finding that the doctor was not negligent, a patient and his attorney, who continue to prosecute the action, should pay the reasonable attorneys' fees of the physician who successfully defends the action. Such a finding is sufficient to put the patient's attorney on notice that the claim has little, if any merit. A patient and his attorney who then proceed to trial are obviously gambling that a jury will be sympathetic to the claim. This procedure would discourage the prosecution of many groundless malpractice actions. On the other hand, the reverse of this procedure could be used to encourage settlements as well as limit the expenses of unnecessary litigation. If the medical malpractice panel unanimously finds that the physician was negligent, it is obvious that the action should be settled at that point without incurring any additional costs in preparing or trying the case. Neither party's attorney should be permitted to act unreasonably with regard to settling the action. If the physician's attorneys offer an unreasonably small sum in settlement and the patient at the time of trial recovers a sum in excess of the amount offered, the plaintiff should be permitted to recover the reasonable attorneys' fees incurred in trying the case. On the other hand, if the sum recovered at trial is less than the amount offered by the physician's attorneys in settlement, it can be inferred that the plaintiff was unreasonable in his demand and was therefore the cause of additional litigation. In that case, the patient and his attorney (at least to the extent of his contingent fee) should be responsible for the reasonable attorneys' fees incurred by the defendant. Such a procedure would serve the dual purpose of discouraging the trial of many malpractice suits and of fostering more realistic settlement offers and demands.

Moreover, the legal profession itself must recognize and become more responsive to the physicians' problems. Physicians, as well as other professionals, have a right to be free from defending groundless professional liability suits. Local bar associations or grievance committees should carefully investigate claims brought by physicians

574. See notes 509-10 supra and accompanying text.

575. If there has been a split finding by the panel there is some indication that the plaintiff may have a valid claim of malpractice and he should be permitted to pursue the suit. An inference arises that the patients' claim was instituted with probable cause and attorneys' fees should not be awarded merely because the plaintiff proceeds to trial to vindicate his rights.

against lawyers who they contend have prosecuted unjustified professional liability suits. Appropriate disciplinary measures should be imposed upon those lawyers who abuse the courts by prosecuting groundless litigation.

A more constructive use of an award of attorneys' fees in medical malpractice cases[576] could have the positive effect of discouraging the prosecution of unjustified litigation, without having a chilling effect on meritorious litigation. Statutes providing for an award of attorneys' fees, where the allegations of a pleading are untrue and asserted without probable cause, would provide some relief for a physician who believes he has been unjustifiably sued. Such statutes would bypass some of the traditional proof requirements of malicious prosecution actions such as malice, special injury, and the necessity of instituting a second action for malicious prosecution after the termination of the original proceeding. The physician's recovery would, however, be limited to his direct economic loss in defending the unjustified action. He would not be able under such a statute to recover all of his other consequential damages such as loss of business, loss of reputation, mental distress or punitive damages.

If a lawyer is going to be sued by another lawyer every time a professional successfully defends a malpractice action, litigation would truly become interminable and the strain on the American legal system would be overwhelming. The public policy of open access to the courts for the redress of grievances would only be realized by those litigants who have "sure" claims. On balance, therefore, except for the awarding of attorneys' fees in certain well-defined situations, the successful professional who feels that he has been unjustifiably sued by a patient and his attorney should be permitted to recover only if he can prove the essential elements of a traditional malicious prosecution or abuse of process action.

576. An argument can be made that the traditional American rule awarding counsel fees should be abandoned only in medical malpractice cases because of the professional's unique interest in maintaining his professional reputation. See Rheingold, The Remedies of the Wrongfully Sued Professional, 1975 Nat'l Medicolegal Symposium 52, 56.