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MALICIOUS PROSECUTION AND MEDICAL MALPRACTICE LEGISLATION IN INDIANA: A QUEST FOR BALANCE

In recent years the number of medical malpractice suits has increased dramatically.¹ This litigious trend has created major problems for the medical community in Indiana.² Medical malpractice

1. For general comments on the subject, see Adler, *Malicious Prosecution Suits as a Counterbalance to Medical Malpractice Suits*, 21 CLEV. ST. L. REV. 51 (1972); Greenbaum, *Physician Countersuits: A Cause Without Action*, 12 PAC. L.J. 745 (1981) [hereinafter cited as Greenbaum]; Comment, *Countersuits to Legal and Medical Malpractice Actions: Any Chance for Success?*, 65 MARQ. L. REV. 93 (1981). Our society's penchant for litigation is by no means limited to medical malpractice suits. See Hurley, *Much Ado About Nothing*, 17 DOCKET CALL, no. 2, Summer 1982 12, 14. From 1940 to 1981, federal civil suits grew six times faster than the population. Some examples of frivolous suits cited in the Hurley article are a lawsuit against Jimmy the Groundhog for mistakenly forecasting an early spring; a suit filed against the Chicago Bears for misrepresenting themselves as a professional football team; and a \$10 million federal class action suit brought against professional baseball on behalf of the fans allegedly injured by the 1981 baseball strike. Reasons cited for the litigation explosion are breakdowns in relationships and the proliferation of attorneys at too great a rate for society to absorb. Attorney Hurley reminds his readers of the admonition of Abraham Lincoln, "Discourage litigation. Persuade your neighbors to compromise whenever you can. Point out to them how the nominal winner is often a real loser—in fees, expenses and waste of time."; Bork, *Dealing With the Overload in Article III Courts*, 70 F.R.D. 231 (1976), concluding that the United States is steadily transforming itself into a welfare state and the proliferation in social policies and regulations somewhat explain the 100% rise in federal court dockets from 1960 to 1975; Mallen, *An Attorney's Liability for Malicious Prosecution, A Misunderstood Tort*, 46 INS. COUNS. J. 407 (1979) [hereinafter cited as Mallen]. One court has characterized America's penchant for litigation as a national pastime. *Bickel v. Mackie*, 447 F. Supp. 1376, 1380, (N.D. Iowa), *aff'd* 590 F.2d 341 (8th Cir. 1978).

2. The severity of the malpractice problem in Indiana is discussed in *Johnson v. St. Vincent Hospital, Inc.*, ___ Ind. ___, 404 N.E.2d 585 (1980). The court states: Premiums had already increased as much as 1200 percent over a period of fifteen years because of the increase in the number and size of claims. Physicians practicing high risk specialties such as anesthesiology were hard pressed or totally unable to purchase insurance coverage. In some rural areas surgery was reported cancelled. Emergency services were discontinued at some hospitals. Health care providers had become fearful of the exposure to malpractice claims and at the same time were unable to obtain adequate malpractice insurance coverage at reasonable prices. *Id.* at 589-90.

Further elucidation of the situation in Indiana is provided by Brief for Appellee at 5, *Mansur v. Carpenter*, ___ Ind. ___, 404 N.E.2d 585 (1980), warning that the difficulty of obtaining adequate malpractice coverage was forcing physicians to retire at early ages or leave the state. For examples of the malpractice problem in other states and nationally, see U.S. Department of Health, Education, and Welfare Report of Secretary's Commission on Medical Malpractice (1973) [hereinafter cited as HEW

suits, once a rarity, have become commonplace and the amount of damages awarded to successful plaintiffs have skyrocketed.³ As a result of the medical malpractice suit explosion, physicians have been forced to pay exorbitant premiums for malpractice insurance.⁴ The cost of malpractice insurance is, to a large degree, passed on to patients in the form of increased medical care costs.⁵ Another unfortunate effect of our society's litigious propensities in the medical malpractice arena is the incidence of baseless malpractice claims filed against health care providers.⁶

Report]; Note, *Malicious Prosecution Liability of Plaintiff's Counsel for an Unwarranted Medical Malpractice Suit—New Developments in Physician Countersuits for Unfounded Medical Malpractice Claims*, 7 N. KY. L. REV. 265 (1980) [hereinafter cited as Note, *Malicious Prosecution Liability*]; Reuter, *Physicians Countersuits: A Catch-22*, 14 U.S.F.L. REV. 203 [hereinafter cited as Reuter].

3. Brief of Appellee, *supra* note 2, at 3-4; Direct examination of William J. Davey, Indiana Commissioner of Insurance, past examiner and chief examiner with Indiana Department of Insurance: "The average settlement for the ten most costly cases in Indiana for the period 1965-1966 was \$10,435, for the period 1969-70 was \$24,850, for the period 1973-74 was \$108,400 and for 1975, \$213,000." See also HEW Report, *supra* note 2, at 2-3. *But see* Gerry, *Malpractice Insurance Premium Ripoff*, 18 TRIAL 6 (June 1982), denying the existence of any medical malpractice crisis and stating that the average verdict in the period 1975-79 decreased 40% from the average verdict in the period 1970-74 in Cook County, Illinois.

4. See *supra* note 2.

5. Fifty cents (\$.50) of the daily hospital costs to patients was for the hospital's malpractice insurance at the time of the HEW study. HEW Report, *supra* note 2, at 13; Ind. House Journal, 99th Gen. Assembly, 1st Sess. at 578 (1975) (concluding "increased insurance costs are being passed on to the patients in the form of higher charges for health care services and facilities.")

6. Mallen, *supra* note 1, at 407; Birnbaum, *Physicians Counterattack: Liability of Lawyers for Instituting Unjustified Medical Malpractice Actions*, 45 FORDHAM L. REV. 1003 (1977) [hereinafter cited as Birnbaum]; HEW Report, *supra* note 2, at 10; the concern over spurious suits has caused an organization called "Lawyers Protecting People from Malicious and Unjustified Lawsuits, Inc." to be created; Reuter, *supra* note 2, n.6; Note, *Malicious Prosecution: An Effective Attack on Spurious Medical Malpractice Claims?*, 26 CASE W. RES. L. REV. 653 (1976). The term "health care provider" as used in this note is defined in IND. CODE ANN. § 16-9.5-1-1(a) (Burns Supp. 1982) as follows:

(a) 'Health Care provider' means:

(1) A person, partnership, corporation, professional corporation, facility or institution licensed or legally authorized by this state to provide health care or professional services as a physician, psychiatric hospital, hospital, dentist, registered or licensed practice nurse, optometrist, podiatrist, chiropractor, physical therapist or psychologist, or an officer, employee or agent thereof acting in the course and scope of his employment;

(2) Any college, university or junior college which provides health care to any student, faculty member, or employee, and the governing

Opinions vary as to the exact frequency of meritless suits.⁷ However, at least one study has concluded that the vast majority of medical malpractice suits are without legal merit.⁸ A profound difference exists between a malpractice action brought despite an improbability of success and a frivolous or meritless suit. Medical malpractice suits often involve complex and technical fact situations in which even the most diligent attorney would be unable to conclusively assign fault. Conversely, a frivolous suit is one brought by an attorney who knows or should know that the defendant physician was incapable of causing the injury to his client.⁹ It is only the latter that result in injustice and need to be discouraged. Injured patients should be afforded open access to courts for vindication of even uncertain medical malpractice claims, however, basic notions of fairness mandate that health care providers be protected against utterly baseless and vexatious lawsuits.

Indiana's state legislature, with the help of a physician governor,¹⁰ responded to the malpractice suit explosion by passing a com-

board, or any officer, employee or agent thereof acting in the course and scope of his employment;

(3) A blood bank, community mental health center, community mental retardation center, or community mental health clinic; or

(4) A home health agency, as defined under IC 16-10-2.5-1.

7. Birnbaum, *supra* note 6, at 105-06; Reuter, *supra* note 2, at 204; HEW Report, *supra* note 2, at 10 citing an insurance study that concluded 54 percent of claims filed were not legally meritorious.

8. Brooke, *Medical Malpractice: A Socio-Economic Problem from a Doctors View*, 6 WILLAMETTE L.J. 225, 229 (1970), cited a Pima County, Arizona Report that concluded 87 percent of claims filed over a twelve (12) year period were without merit.

9. The word "frivolous" is inherently ambiguous. As is aptly pointed out by San Francisco attorney Ronald Mallen: "Frivolity is in the eye of the beholder. One person's frivolity is another person's ingenuity." Quoted in Hurley, *supra* note 1, at 15. Attorney Mallen is the author of *An Attorney's Liability for Malicious Prosecution*, *supra* note 1, and MALLEN, *LEGAL MALPRACTICE* (1981).

In some circles "frivolous suit" has a much broader definition than the one given above. Lyn Buzzard of the Christian Legal Society defines a frivolous suit as "one in which litigation is simply not appropriate." Hurley, *supra* note 1, at 17. A district court sitting in Colorado defined frivolous as "of little weight or importance having no basis in law or fact," *Morton v. Allied Stores Corp.*, 90 F.R.D. 352, 357 (D. Colo. 1981); or "a frivolous action is one in which the plaintiff's realistic chances of success are slight." *Sims v. Zolango*, 481 F. Supp. 388, 391 (D.N.Y. 1979), citing *Clark v. Zimmerman*, 394 F. Supp. 1166, 1178 (M.D. Pa. 1975).

10. The Indiana Medical Malpractice Act was enacted when Governor Otis Bowen was in office. Governor Bowen graduated from the Indiana University School of Medicine and prior to being elected governor maintained a general medical practice in Bremen, Indiana. *How a Country Doctor is Solving Indiana's Malpractice Crisis*, 8 LEGAL ASP. MED. PRAC. 48 (May 1980).

prehensive medical malpractice act.¹¹ This act is designed to protect the interests of the health care industry by such provisions as a \$500,000 limit on liability for health care providers,¹² a shortened statute of limitations for minors,¹³ and the establishment of a mandatory medical review panel to which all malpractice claims must be submitted prior to bringing any action in court.¹⁴ The specific impetus for Indiana's act was the increasing high cost and unavailability of medical malpractice insurance which accompanied the unprecedented increase in medical malpractice suits.¹⁵

11. IND. CODE ANN. §§ 16-9.5-1-1 to 10-5 (Burns Supp. 1982).

12. IND. CODE ANN. § 16-9.5-2-1 (Burns Supp. 1982).

13. IND. CODE ANN. §§ 16-9.5-3-1 to 3-2 (Burns Supp. 1982).

14. IND. CODE ANN. §§ 16-9.5-9-1 to 9-10 (Burns Supp. 1982).

15. See *supra* note 2. The following is part of the legislative history behind the Act contained in Indiana House Journal 99th General Assembly, 1st Sess. 1975 at 578:

SECTION 1. The general assembly finds that:

(a) The number of suits and claims for damages arising from professional patient care has increased tremendously in the past several years and the size of judgments and settlements in connection therewith have increased unreasonably.

(b) The effect of such judgments and settlements, based frequently on now legal precedents, have caused the insurance coverage to uniformly and substantially increase the cost of such insurance coverage.

(c) These increased insurance costs are being passed on to the patients in the form of higher charges for health care services and facilities.

(d) The increased costs of providing health care services, the increased incidents of claims and suits against health care provider [sic], and the unusual size of such claims and judgments, frequently out of proportion to the actual damage sustained, has caused many liability insurance companies to withdraw from the insuring of high risk health care providers.

(e) The rising number of suits and claims is forcing health care providers to practice defensively, viewing each patient as a potential adversary in a lawsuit, to the detriment of both the health care provider and the patient. Health care providers, for their own protection, are often required to employ excessive diagnostic procedures for their patients, unnecessarily increasing the cost of patient care.

(f) Another effect of the increase of suits and claims and the costs thereof is that some health care providers decline to provide certain health care services which in themselves entail some risk of patient injury.

(g) The cost and difficulty in obtaining insurance for health care providers discourages young physicians from entering into the practice of medicine in the state of Indiana, resulting in the loss of physicians to other states.

(h) the inability to obtain or the high cost of obtaining insurance affects the medical and hospital services available in the state of Indiana to the detriment of its citizens.

Other states experiencing malpractice crises have attempted similar legislation only to see their acts fail to survive constitutional scrutiny.¹⁶ Indiana's act has withstood a number of multi-faceted constitutional attacks.¹⁷ However, successful malpractice legislation does not solve all the problems occasioned by the increases in malpractice litigation.

(i) Some health care providers have been forced to curtail the practice of all or a part of their profession because of the non-availability or high cost of liability insurance.

(j) The cumulative effect of suits and claims is working both to the detriment of the health care providers and to the citizens of this state.

SECTION 2. Because of the conditions stated in SECTION 1, it is the purpose of this act to establish a system by which a person who has sustained bodily injury or death, as a result of tort or breach of contract on the part of a health care provider resulting from professional services rendered, or which should have been rendered, can obtain prompt determination and adjudication of his claim and fair and reasonable compensation at a fair and reasonable cost, from financially responsible health care providers who are able to insure their potential liability at reasonably affordable rates.

16. The following cases have struck down major portions of state malpractice legislation: *Wright v. Central DuPage Hospital Ass'n*, 63 Ill. 2d 313, 347 N.E.2d 736 (1976) (abolished a \$500,000 limitation on recovery and mandatory medical review panels as violative of ILL. CONST. art. IV, § 13 (equal protection); ILL. CONST. art. I, § 13 (right to trial by jury); ILL. CONST. art. VI, §§ 1, 9 (guaranty of exclusive and entire judicial power in courts); *State ex rel. Cardinal Glennon Memorial Hospital for Children v. Gaertner*, 583 S.W.2d 107 (Mo. 1979) (invalidated a mandatory medical review board provision as violative of MO. CONST. art. I, § 14 (open access to courts guaranty)); *Carson v. Maurer*, 424 A.2d 825 (N.H. 1980) (invalidated a \$250,000 limitation on liability and a two-year statute of limitations as violative of U.S. CONST. amend. XIV (equal protection); *Arneson v. Olson*, 270 N.W.2d 125 (N.D. 1978) (repealed North Dakota's Malpractice Act *in toto* as violative of U.S. CONST. amend. XIV (equal protection and due process); and a number of state constitutional provisions.); *Simon v. St. Elizabeth Medical Center*, 3 Ohio App. 3d 164, 355 N.E.2d 903 (1976) (struck down compulsory arbitration requirements as violative of U.S. CONST. amend. XIV (equal protection) and OHIO CONST. art. I, § 5 (right to trial by jury); *Mattos v. Thompson*, 421 A.2d 190 (Pa. 1978) (abolished a mandatory review panel system as violative of PA. CONST. art. I, § 6 (right to trial by jury).

17. *Johnson v. St. Vincent Hosp.*, *supra* note 2. (The Act was attacked as violative of U.S. CONST. amend. XIV (equal protection and due process); IND. CONST. art. I, § 20 (right to trial by jury); IND. CONST. art. I, § 12 (open access to courts guaranty); IND. CONST. art. I, § 23 (equal privileges clause); IND. CONST. art. I, § 9 (right to free thought, speech and writing); IND. CONST. art. III, § 1 (separation of powers); IND. CONST. art. IV, § 22 (prohibition of special legislation)); *Hines v. Elkhart Gen. Hosp.*, 465 F. Supp. 421 (D. Ind.), *aff'd*, 603 F.2d 646 (7th Cir. 1979) (attacked as violative of U.S. CONST. amend. VII (right to trial by jury); U.S. CONST. amend. 14 (equal protection); IND. CONST. art. 1, § 20 (right to trial by jury); IND. CONST. art. I, § 23 (equal privileges guaranty); IND. CONST. art. I, § 12 (access to courts guaranty); *Carmichael v. Silbert*, ___ Ind. App. ___, 422 N.E.2d 1330 (1980) (attacked as violative of

Another response to the malpractice suit explosion has been a surge in countersuits by physicians against former patients or their attorneys.¹⁸ The countersuits are brought by health care providers after they have been successful in defending baseless malpractice actions. In theory, countersuits provide physicians with a means to recover money damages for the injuries caused by public accusations of professional negligence.¹⁹ Countersuits generally proceed as tort actions for malicious prosecution.²⁰ However, in most jurisdictions, including Indiana, such suits have been an ineffective retaliatory weapon for injured physicians.²¹

U.S. CONST. amend. XIV (equal protection)); IND. CONST. art. I, § 23 (equal privileges guaranty); *Kravda v. Houser-Norborg Medical Corp.*, ___ Ind. App. ___, 419 N.E.2d 1024 (1981) (court simply cited *Johnson, supra* as binding authority since the same constitutional claims were brought); *Whitaker v. St. Joseph's Hosp.*, ___ Ind. App. ___, 415 N.E.2d 737 (1981) (attacked as violative of U.S. CONST. amend. XIV (equal protection)); IND. CONST. art. I, § 12 (open access to courts guaranty); IND. CONST. art. VII, § 1 (improper delegation of judicial power); *Lee v. Lafayette Home Hosp., Inc.*, ___ Ind. App. ___, 410 N.E.2d 1319 (1980) (court held that since all constitutional issues in the instant case had already been decided in *Johnson, supra* they were moot).

18. See, e.g., *Tappen v. Ager*, 599 F.2d 376 (10th Cir. 1979); *Rodriguez v. Carroll*, 510 F. Supp. 547 (S.D. Tex. 1981); *Bickle v. Mackie*, 447 F. Supp. 1376 (N.D. Iowa 1978); *Weaver v. Superior Court, County of Orange*, 95 Cal. App. 3d 189, 156 Cal. Rptr. 745 (1979); *Lackner v. LaCroix*, 88 Cal. App. 3d 948, 152 Cal Rptr. 221 (1979); *Ammerman v. Newman*, 384 A.2d 637 (D.C. App. 1978); *Fee, Parker & Lloyd v. Sullivan*, 379 So. 2d 412 (Fla. Dist. Ct. App. 1980); *Balthazar v. Dowling*, 65 Ill. App. 3d 824, 382 N.E.2d 1257 (1978); *Berlin v. Nathan*, 64 Ill. App. 3d 940, 381 N.E.2d 1367 (1978); *Lyddon v. Shaw*, 56 Ill. App. 3d 815, 372 N.E.2d 685 (1978); *Brody v. Ruby*, 267 N.W.2d 902 (Iowa 1978); *Raine v. Drasin*, 621 S.W.2d 895 (Ky. 1981); *Spencer v. Burglass*, 337 So. 2d 596 (La. Ct. App. 1976); *Friedman v. Dozorc*, 412 Mich. 1, 312 N.W.2d 585 (1981); *Ackerman v. Lagano*, 412 A.2d 1054 (N.J. 1979); *Petrou v. Hale*, 43 N.C. App. 655, 260 S.E.2d 130 (1979); *Dacters v. Shane*, 64 Ohio App. 2d 196, 412 N.E.2d 399 (1978); *O'Toole v. Franklin*, 279 Or. 513, 569 P.2d 561 (1977); *Jacques v. McLaughlin*, 401 A.2d 430 (R.I. 1979); *Moel v. Sandlin*, 571 S.W.2d 567 (Tex. Civ. App. 1978); *Krieg v. Dayton-Hudson Corp.*, 104 Wisc. 2d 455, 311 N.W.2d (1981).

19. However, in practice physicians have rarely been successful in countersuits. Only three verdicts for physicians against attorneys have been upheld at appellate levels: *Raine v. Drasin*, 621 S.W.2d 895 (Ky. 1981) (a \$37,500 verdict against an attorney was upheld); *Bull v. McCuskey*, 96 Nev. 706, 615 P.2d 957 (1980) (allowed a \$85,000 award against an attorney on an abuse of process theory); *Peerman v. Sidicane*, 605 S.W.2d 242 (Tenn. Ct. App. 1980) (affirmed a \$11,500 jury award to a physician).

20. In one study of thirty-four (34) physician-attorney countersuits, only three did not use a theory of malicious prosecution. *Greenbaum, supra* note 1, at 746. Some courts have held that malicious prosecution is a physician's sole remedy in a counter-suit against an attorney. *Hill v. Willmott*, 561 S.W.2d 331 (Ky. Ct. App. 1978); *Balthazar v. Dowling*, 65 Ill. App. 3d 824, 382 N.E.2d 1257 (1978); *Lyddon v. Shaw*, 56 Ill. App. 3d 815, 372 N.E.2d 685 (1978); see also *infra* note 76 (discussing different theories advanced).

21. See *supra* note 19.

Since the onset of the malpractice crisis attorneys, courts, and lawmakers have struggled to equitably balance the interests of patients attempting to assert valid claims and doctors trying to pursue their profession.²² Three noticeable attempts to find this balance have been medical malpractice legislation, the increase in physician's countersuits, and malicious prosecution counterclaims. This note reviews the effectiveness of the various attempts looking first to several controversial provisions of the Indiana Medical Malpractice Act.²³ All constitutional challenges to the provisions of the act, both state and federal, have been unsuccessful,²⁴ indicating that the judiciary recognizes the enormity of the malpractice problem in Indiana and the need to moderate the crisis despite the debilitating effects on patients' rights.²⁵

Next, the standard that attorneys must meet when deciding to bring suit in Indiana in order to avoid malicious prosecution liability is examined. This standard was recently developed in *Wong v. Tabor*,²⁶ the first physician/attorney countersuit to reach the appellate level in Indiana. The standard does not effectively protect the rights of physicians and needs to be revised. Finally, this note explores the possibility of using malicious prosecution counterclaims as a means for striking the elusive balance of interests between physicians and patients.²⁷

MALPRACTICE LEGISLATION IN INDIANA

Indiana responded to the medical malpractice crisis by passing a comprehensive Medical Malpractice Act in 1975.²⁸ Several constitutionally approved provisions of the Act endow health care providers with procedural safeguards that substantially tip the balance of interests in their favor.²⁹ Constitutional approval of the Act underlines the recognition by both the Indiana legislature and the

22. *Berlin v. Nathan*, 64 Ill. App. 3d 940, 381 N.E.2d 1367 (1978); *O'Toole v. Franklin*, 279 Or. 513, 569 P.2d 561 (1977); see also *Birnbaum*, *supra* note 6, at 1014.

23. IND. CODE ANN. §§ 16-9.5-1-1 to 10-5 (Burns Supp. 1982).

24. See *supra* note 17.

25. See generally *Johnson v. St. Vincent Hospital, Inc.*, ___ Ind. ___, 404 N.E.2d 585 (1980).

26. ___ Ind. App. ___, 422 N.E.2d 1279 (1981).

27. Malicious prosecution counterclaims have been urged by the American Medical Association and have been adopted by the state legislatures in Washington and Tennessee. See *infra* text and accompanying notes 157-82.

28. IND. CODE ANN. §§ 16-9.5-1-1 to 10-5 (Burns Supp. 1982).

29. See Note, *The Indiana Malpractice Act: Legislative Surgery on Patients' Rights*, 10 VAL. U.L. REV. 304 (1976) [hereinafter cited as Note, *Legislative Surgery*]. Sections not discussed in this note but ostensibly favoring physicians' rights over pa-

judiciary of the need to protect physicians from spurious attacks.³⁰ Specific provisions safeguarding health care providers include an absolute \$500,000 limit on recovery in any malpractice action,³¹ a shortened statute of limitations as applied to minors,³² and the use of a mandatory medical review panel of which the voting members are all health care providers.³³ The legislative undermining of patients' rights in favor of those of health care providers is manifest in the irrebutable presumption that injuries experienced by patients, no matter how grievous, cannot exceed \$500,000.³⁴

Limitation on Liability

The \$500,000 limitation of recovery has withstood a number of constitutional attacks.³⁵ The Indiana Supreme Court noted that neither a fundamental right nor a suspect class was involved³⁶ and applied a fair and substantial relationship standard of constitutional review.³⁷ In concluding that the state interest in the promotion of

tients are: IND. CODE ANN. § 16-9.5-5-1 (Burns Supp. 1982) (limiting contingency fee awards to 15%) and IND. CODE ANN. § 16-9.5-1-6 (Burns Supp. 1982) (prohibiting requests of dollar amounts of damages in malpractice complaints).

30. It is safe to say that the executive branch of Indiana's government also recognized the need to protect physicians. Indiana's governor at the time of passage of the Act was Otis Bowen, M.D. See *supra* note 10.

31. IND. CODE ANN. § 16-9.5-2-2(a) (Burns Supp. 1982).

32. IND. CODE ANN. § 16-9.5-3-1 (Burns Supp. 1982).

33. IND. CODE ANN. § 16-9.5-9-1 to 9-10 (Burns Supp. 1982).

34. *Johnson v. St. Vincent Hospital, Inc.*, ___ Ind. ___, 404 N.E.2d 585, 600 (1980), which upheld the validity of the \$500,000 limitation of liability, contains language indicating that the limitation of liability is not a presumption preventing recovery of more than \$500,000, but a policy of the law. Since regardless of the words used to rationalize the limitation, the end result is that patients are limited to a \$500,000 recovery whatever the actual extent of their injuries, the difference between "presumption" and "policy" appears to be one of semantics.

35. See *supra* note 17.

36. *Johnson v. St. Vincent Hospital, Inc.*, ___ Ind. ___, 404 N.E.2d 585, 597 (1980). Fundamental rights are those which have their origins in the express terms of the Constitution or which are necessarily to be implied from those terms. *Sidle v. Majors*, 264 Ind. 206, 341 N.E.2d 763, 769 (1976).

Suspect class is one in which classifications are based upon a trait which itself seems to contravene established constitutional principles so that the use of the classification is suspect (e.g., race, national origin.) J. NOWAK, R. ROTUNDA, J. YOUNG, CONSTITUTIONAL LAW 525 (1978) [hereinafter YOUNG CONSTITUTIONAL LAW]; see also *San Antonio Independent School District v. Rodriguez*, 411 U.S. 1 (1973) (a suspect class is one "saddled with such disabilities, or subjected to such a history of purposeful unequal treatment, or relegated to such a position of political powerlessness as to command extraordinary protection from the majoritarian political process").

37. The exact standard applied by the court required the Act's provisions "be

health care services was substantially furthered by a \$500,000 recovery limitation, the court has bestowed a special benefit³⁸ on health care providers while imposing a unique burden on severely injured patients whose future medical bills and lifetime sustenance costs will exceed the artificial limitation.³⁹ These unfortunate victims of medical malpractice, although denied full compensation for their injuries, will at least be afforded a substantial monetary recovery. Some injured patients, however, because of the change in the statute of limitations, may find their causes of action extinguished before any injury is discovered.

Statute of Limitations

The statute of limitations provided by the Medical Malpractice Act severely curtails the rights of injured patients to file malpractice actions.⁴⁰ The new limitation is especially harsh when applied to minors. Under the provisions of the Act, minors below the age of six have until their eighth birthday to bring a malpractice suit,⁴¹ whereas

reasonable, not arbitrary, and must rest upon some ground of difference having a fair and substantial relation to the object of the legislation." *Johnson v. St. Vincent Hospital, Inc.*, 404 N.E.2d 585, 597 (1980), quoting *Royster Guano Co. v. Virginia*, 253 U.S. 412 (1920).

Had the interest at stake been deemed fundamental rights or the persons adversely affected a suspect class, the court would have applied a stricter test in determining the constitutionality of the provisions. See YOUNG, *CONSTITUTIONAL LAW*, *supra* note 36, at 522-57; Harper, *Which Equal Protection Standard for Medical Malpractice Legislation?*, 8 HASTINGS CONST. L.Q. 125 (1980).

38. No other professionals such as attorneys, accountants, etc., are protected by legislation limiting their malpractice liability.

39. In upholding the limitation, the court in *Johnson v. St. Vincent, Inc.*, ___ Ind. ___, 404 N.E.2d 585, 600 (1980), analogized to *Dandridge v. Williams*, 397 U.S. 471 (1970), in which the Supreme Court upheld a state statute providing for a maximum AFDC disbursement to families based on family size. The impact of the statute was to deny families with more than six (6) members minimum subsistence level support. The *Johnson* court decided that the interest of severely injured patients in receiving full compensation was great, but not any greater than that of children being denied subsistence level support. *Id.* at 600. The flaw in this reasoning is that it is difficult to imagine any interest that is greater than providing children, innocently born into a large, poor family, with survival levels of support.

40. See Note, *Legislative Surgery*, *supra* note 29, at 338-50.

41. IND. CODE ANN. § 16-9.5-3-1 (Burns Supp. 1982) is as follows:

No claim, whether in contract or tort, may be brought against a health care provider based upon professional services or health care rendered or which should have been rendered unless filed within two (2) years from the date of the alleged act, omission or neglect except that a minor under the full age of six (6) years shall have until his eighth birthday in which to file. This section applies to all persons regardless of minority or other legal disability.

minors above six must bring their malpractice claims within two years of the date of the alleged act of malpractice.⁴² Prior to the passage of the act, all minors were given until their twentieth birthday to bring suits.⁴³ Hence, physicians or their insurers were subject to paying malpractice claims resulting from incidents occurring up to twenty years earlier. The long time period between the date of the accident and the resulting liability made it difficult for insurance companies to accurately predict their losses so as to establish premium rates.⁴⁴ By enacting this provision the legislature and, through subsequent constitutional approval,⁴⁵ the courts evince a preference for the interests of the health care industry over those of individual litigants. Minors undoubtedly will be impaired by the strict limitation which eliminates a cause of action for medical malpractice two years after the alleged act of malpractice, whether or not it is discovered within that time.⁴⁶

The difficulties of discovering a latent injury and connecting it with an act of medical malpractice within two years are compounded when the victim is a child.⁴⁷ Indeed, the injuries sustained by minors often cannot be readily detected until maturity is approached.⁴⁸ The paradox of denying a person a remedy before any injury is known to exist can be abated by a statutory provision allowing for a delayed discovery of the injury.⁴⁹

Most states, like Indiana, have altered their statutes of limitations with respect to malpractice actions in an effort to ease the

42. *Id.*

43. *Chaffin v. Nicosia*, 261 Ind. 698, 310 N.E.2d 867 (1974); IND. CODE ANN. § 34-1-67-1(6) (Burns Supp. 1978).

44. *Rohrbaugh v. Wagoner*, ___ Ind. ___, 413 N.E.2d 891, 895 (1980); Appellant's Brief at 34, *Mansur v. Carpenter*, ___ Ind. ___, 404 N.E.2d 585 (1980).

45. *See supra* note 17.

46. The only exception to the strict two-year limitation appears to be when the physician fraudulently conceals the injury. *Guy v. Schult*, 236 Ind. 101, 138 N.E.2d 891 (1956). However, at the time of this writing, the fraud exception has not been re-examined in light of the new statute.

47. *Chaffin v. Nicosia*, 261 Ind. 698, 310 N.E.2d 867 (1974) ("It is not difficult to conceive of situations where the results of medical malpractice upon an infant could remain undiscovered for a number of years."); *see also*, Note, *Legislative Surgery*, *supra* note 29, at 341.

48. This is precisely the rationale behind the legal disability statute which prior to the Malpractice Act, allowed minors a "grace period" after attaining majority in which to pursue a cause of action. *See Chaffin v. Nicosia*, 261 Ind. 698, 310 N.E.2d 867 (1974).

49. The "discovery rule" was rejected in Indiana by *Toth v. Lenk*, ___ Ind. App. ___, 330 N.E.2d 336 (1975).

burdens of physicians and their insurance providers.⁵⁰ However, the statutes of limitations in other jurisdictions are not triggered until a patient discovers or in the exercise of reasonable diligence should have discovered the injury.⁵¹ Such statutes protect health care providers by reducing the time in which most actions can be brought, but also provide patients victimized by unusually hard-to-detect injuries an opportunity to recover damages. Thus, a fair balance is reached, unlike Indiana's statute of limitations which is overly protective of physicians' interests at the expense of denying some injured patients a chance to prove their malpractice claims. Even patients who discover their injuries within the two-year statutory period may have difficulty obtaining a judicial determination of their action due to Indiana's requirement that all claims be submitted to a medical review panel prior to being brought in court.⁵²

Medical Review Panel

In a further attempt to protect the interests of the health care industry, Indiana's Medical Malpractice Act established a medical review panel to which all claims must be submitted as a prerequisite to pursuing a malpractice action in any court.⁵³ The panel is composed of four members, an attorney chairperson and their health care providers.⁵⁴ However, only the health care providers are voting members.⁵⁵ When presented with a proposed malpractice complaint, the panel considers written evidence submitted by all parties and within six months renders an opinion as to the existence or non-existence of medical malpractice.⁵⁶ The opinion is not conclusive of

50. See Chapman and White, *Are the New State Malpractice Laws Working to Protect You?*, 8 LEGAL ASPECTS OF MEDICAL PRACTICE 40-46 (May 1980), listing the following states as changing their statutes of limitations for malpractice actions: Alabama, Arizona, Arkansas, California, Colorado, Connecticut, Delaware, Florida, Georgia, Hawaii, Idaho, Illinois, Indiana, Iowa, Kansas, Kentucky, Louisiana, Maine, Maryland, Massachusetts, Michigan, Mississippi, Missouri, Nebraska, Nevada, New Hampshire, New Jersey, New Mexico, New York, North Carolina, North Dakota, Ohio, Oklahoma, Oregon, Rhode Island, South Carolina, South Dakota, Tennessee, Texas, Utah, Vermont, Virginia, Washington, Wisconsin, and Wyoming.

51. *E.g.*, ALA. CODE § 6-5-482 (1977); CONN. GEN. STAT. ANN. § 52-584 (West Supp. 1982); NEB. REV. CODE § 25-222 (1979); TENN. CODE ANN. § 29-26-116 (1980).

52. IND. CODE ANN. § 16-9.5-9-2 (Burns Supp. 1982).

53. IND. CODE ANN. §§ 16-9.5-9-1 to 9-10 (Burns Supp. 1982); failure to submit a proposed complaint to the medical review panel prior to filing suit results in summary judgment for the defendant health care provider. *Whitaker v. St. Joseph's Hospital*, ___ Ind. App. ___, 415 N.E.2d 737 (1981).

54. IND. CODE ANN. § 16-9.5-9-3 (Burns Supp. 1982).

55. *Id.*

56. "The panel shall render its expert opinion within one hundred eighty (180)

liability but is admissible as expert testimony in any subsequent trial as is the oral testimony of individual panel members.⁵⁷ The medical review panel was attacked on numerous constitutional grounds but, like the shortened statute of limitations and monetary limit on recovery, it survived constitutional scrutiny.⁵⁸

Although, like Indiana, many jurisdictions have upheld mandatory review panel requirements, similar prerequisites in other states have not fared as well.⁵⁹ In declaring the compulsory arbitration requirements of the Ohio Medical Malpractice Act unconstitutional, the court in *Simon v. St. Elizabeth Medical Center*⁶⁰ focused on the plaintiff's added burden of proving malpractice when an unfavorable decision of the review panel is introduced into evidence.⁶¹ The Ohio court pointed to the probability that, in view of the heightened burden, many parties who lose at the arbitration level will decide not to proceed to trial.⁶² The potential for the chilling effect on access to courts for bonafide litigants did not disturb the Indiana Supreme Court which held that the mandatory review panel was valid as a reasonable way of furthering the important goals of malpractice legislation.⁶³ The result of this judicial balancing of interests takes on special importance when viewed against the

days of the selection of its last member." IND. CODE ANN. § 16-9.5-9-3.5(a) (Burns Supp. 1982). "The evidence to be considered by the medical review panel shall be promptly submitted by the respective parties in written form only." IND. CODE ANN. § 16-9.5-9-4 (Burns Supp. 1982).

57. Any report of the expert opinion reached by the medical review panel shall be admissible as evidence in any action subsequently brought by the claimant in a court of law, but such expert opinion shall not be conclusive and either party shall have the right to call, at his cost, any member of the medical review panel as a witness. If called, the witness shall be required to appear and testify.

IND. CODE ANN. § 16-9.5-9-9 (Burns Supp. 1982).

58. The specific grounds of constitutional attack were: U.S. CONST. amend. XIV, § 1, equal protection); IND. CONST. art. I, § 12 (open access to courts guarantee); IND. CONST. art. I, § 20 (right to trial by jury); IND. CONST. art. III, § 1 (separation of powers doctrine). *Johnson v. St. Vincent Hospital, Inc.*, ___ Ind. App. ___, 404 N.E.2d 585 (1980).

59. See, e.g., *Wright v. Central DuPage Hospital Ass'n*, 63 Ill. 2d 313, 347 N.E.2d 736 (1976); *Simon v. St. Elizabeth Medical Center*, 3 Ohio App. 3d 164, 355 N.E.2d 903 (1976); see also Corodemus and Ver Strate, *Dark Victory: The Doom of Medical Malpractice Panels*, 5 SETON HALL LEGIS. J. 31 (1980).

60. 3 Ohio App. 3d 164, 355 N.E.2d 903 (1976).

61. *Id.* at 908.

62. *Id.*; see Wilkinson, *Victimizing the Victim: A Critical Look at Medical Malpractice Acts*, 18 TRIAL, 40 (June 1982).

63. *Johnson v. St. Vincent Hospital, Inc.*, ___ Ind. ___, 404 N.E.2d 585, 597 (1980).

backdrop of the panel composition and empirical data indicating that most plaintiffs submitting proposed complaints to the medical review panel can expect to receive an unfavorable opinion.

A major criticism of the medical review panel in Indiana is the tendency for bias inherent in any system of review that calls upon professionals to judge the conduct of other members of their profession.⁶⁴ In addressing the argument that a panel with a voting membership composed solely of health care providers would result in a natural bias toward physicians, the Indiana Supreme Court responded: "According to Appellants the opinion of the panel will be biased in favor of the health care providers against whom the complaint is lodged. There is a great deal of speculation here."⁶⁵ The actual results of panel decisions disclose that this speculation is well-founded.⁶⁶

Since the inception of the medical review panel, 306 opinions have been rendered.⁶⁷ Of these opinions, only fourteen percent have concluded that malpractice occurred.⁶⁸ The thrust of this statistic is that while all malpractice plaintiffs still have an opportunity to file

64. Cf. Broeder, *Occupational Expertise and Bias as Affecting Juror Behavior: A Preliminary Look*, 40 N.Y.U.L. REV. 1079 (1965) (a study demonstrating that a juror's decision is affected by his occupation); *Wheeler v. Shoemaker*, 78 F.R.D. 218 (D.R.I. 1978).

65. *Johnson v. St. Vincent Hospital, Inc.*, ___ Ind. ___, 404 N.E.2d 585, 593 (1980).

66. Indiana Department of Insurance, PATIENTS COMPENSATION DIVISION DEPARTMENT OF INSURANCE REPORT (1982).

67. *Id.*

68. IND. CODE ANN. § 16-9.5-9-7 (Burns Supp. 1982) delineates four possible opinions that can be rendered by medical review panels. The review panel can render one or more of the following opinions:

- (a) The evidence supports the conclusion that the defendant or defendants failed to comply with the appropriate standard of care as charged in the complaint.
- (b) The evidence does not support the conclusion that the defendant or defendants failed to meet the applicable standard of care as charged in the complaint.
- (c) That there is a material issue of fact, not requiring expert opinion, bearing on liability for consideration by the court or jury.
- (d) The conduct complained of was or was not a factor of the resultant damages. If so, whether the plaintiff suffered: (1) any disability and the extent and duration of the disability, and (2) any permanent impairment and the percentage of the impairment.

The following chart is a year-to-year breakdown of the opinions rendered. (Extrapolated from DEPARTMENT OF INSURANCE REPORT, *supra* note 66.)

suit and attempt to try their case in front of a jury,⁶⁹ to do so successfully the vast majority must negate the written findings of the expert panel.⁷⁰ Additionally, the oral expert testimony of the panel members will have to be rebutted.⁷¹ Although the results of Indiana's medical review panels are not conclusive of a bias, they do suggest that patients' burdens would be lessened by a change in the composition of the voting membership of the panel.⁷² Consequently, the Indiana Medical Malpractice Act taken as a whole places numerous handicaps on patients' rights under the auspices of promoting a burdened health care industry. Furthermore, the Act does not provide a meaningful remedy for physicians who may still be victimized by baseless malpractice suits.

The mandatory medical review panel is not a complete bar to frivolous litigation.⁷³ A finding of "no malpractice" by the panel limits a plaintiff's chances for compensation but does not bar him from pursuing his claim by subsequently filing a malpractice suit. Although a plaintiff with a meritless claim may ultimately be

Year	Opinions Rendered	Malpractice	No Malpractice	Material Issue of Fact	Variations*
1982	58	9	41	3	5
1981	118	16	94	4	4
1980	69	7	55	1	6
1979	40	6	33	1	0
1978	17	3	13	1	0
1977	3	1	2	0	0
1976	1	1	0	0	0
1975	0	0	0	0	0
Total	306	43	238	10	15

*The variation category was used by the Indiana Insurance Department for opinions "not clearly fitting in the other three categories." Telephone interview with Kay Chapman, Office Manager of Patients Compensation Division, Indiana Department of Insurance (Nov. 10, 1982).

69. IND. CODE ANN. § 16-9.5-1-5 (Burns Supp. 1982) specifically reserves [subject to prior panel submission] the right to trial by jury;" a patient or his representative having a claim under this article for bodily injury or death on account of malpractice may file a complaint in any court of law having requisite jurisdiction and demand a trial by jury."

70. See *supra* note 57.

71. *Id.*

72. But see Chapman and White, *supra* note 50, where the authors state that before Florida's medical liability mediation act was declared unconstitutional (in *Aldana v. Holub*, 381 So. 2d 231 (Fla. 1980)), physicians were experiencing a 92% win record at the review panel stage. Florida's review panel was composed of a circuit judge, an attorney, and a physician.

73. See *supra* note 69.

thwarted by the admissibility of the negative panel opinion, the mere filing of such a suit results in damage to a physician's reputation and forces the physician to incur legal expenses. Moreover, the review panel is scheduled to be abolished in 1987⁷⁴ leaving physicians without procedural safeguards to deter spurious suits. In an attempt to find an effective remedy for damages caused by baseless malpractice suits, physicians have turned to malicious prosecution countersuits.

MALICIOUS PROSECUTION COUNTERSUITS

The proliferation of medical malpractice litigation and the corresponding increase in frivolous suits have caused physicians to respond by filing countersuits against attorneys who initiate baseless malpractice actions.⁷⁵ Most countersuits proceed on a tort theory of malicious prosecution.⁷⁶ Due to the inherent difficulties in proving the prima facie elements of malicious prosecution, most countersuits have been remarkably unsuccessful.⁷⁷ This section examines these

74. IND. CODE ANN. § 4-26-3-25 (Burns Supp. 1982).

75. See *supra* note 18.

76. Nearly all countersuits employ a malicious prosecution theory. See *supra* note 20. The only physician countersuit to meet with any success on a different theory is *Bull v. McCuskey*, 96 Nev. 706, 615 P.2d 957 (1980) (\$85,000 recovery for physician), which proceeded as an abuse of process action. Additional theories that have been advanced unsuccessfully are: 1) negligence: *Friedman v. Dozorc*, 83 Mich. App. 429, 268 N.W.2d 673 (1978), *aff'd in part*, 412 Mich. 1, 312 N.W.2d 585 (1981). Success of negligence actions as a countersuit depend on showing that the attorney breached a duty owed to a physician. Attempts have been made to expand the concept of *Lucas v. Hamm*, 56 Cal. 2d 583, 15 Cal. Rptr. 821 (1961), which established that an attorney owes a duty to a third-party beneficiary in a will drafting situation. However, courts have not allowed such an expansion holding that an adverse party is in no way akin to a third-party beneficiary. But see Note, *A Lawyer's Duty to Reject Groundless Litigation*, 26 WAYNE L. REV. 1561 (1980), for an argument advocating the enlargement of third-party duty; 2) prima facie tort: *Drago v. Buonagurio*, 89 Misc. 2d 171, 391 N.Y.S.2d 61 (1977), *rev'd*, 61 App. Div. 2d 282, 404 N.Y.S.2d 250, *rev'd*, 46 N.Y.S.2d 778, 386 N.E.2d 821, 413 N.Y.S.2d 910 (1978); *Hirsh and McCaman, Physicians Countersuits*, 85 CASE AND COMMENT No. 6, 39 (1980); *Reuter, supra* note 2 at 213; 3) invasion of privacy: *Wolfe v. Arroyo*, 543 S.W.2d 11 (Tex. Civ. App. 1976); 4) barratry: *Berlin v. Nathan*, 64 Ill. App. 3d 940, 381 N.E.2d 1367 (1978), *cert. denied*, 396 N.E.2d 575 (1979); *Lyddon v. Shaw*, 56 Ill. App. 3d 815, 372 N.E.2d 685 (1978); *Moiel v. Sandlin*, 571 S.W.2d 567 (Tex. Civ. App. 1978); 5) infliction of emotional distress: *Joseph v. Markovitz*, 27 Ariz. App. 122, 551 P.2d 571 (1976); 6) constitutional violations: *Berlin v. Nathan*, 64 Ill. App. 3d 940, 381 N.E.2d 1367 (1978); 7) civil rights violation: *Rodriguez v. Carroll*, 510 F. Supp. 547 (D.C. Tex. 1981).

77. Although countersuits have enjoyed a reasonable amount of success at trial court levels, e.g., *Fee, Parker & Lloyd v. Sullivan*, 379 So. 2d 412 (Fla. Dist. Ct. App. 1980) (\$75,000 judgment for physicians overturned); *Berlin v. Nathan*, 64 Ill. App.

difficulties and compares Indiana's treatment of such suits with that of other jurisdictions. To properly develop this analysis, a brief review of the elements of malicious prosecution and its historical framework will be helpful.

Malicious prosecution began as a tort remedy for the wrongful initiation of criminal proceedings.⁷⁸ Most jurisdictions have extended the scope of the tort and now recognize it in civil proceedings as well.⁷⁹ To be successful in a suit for malicious prosecution of a civil action, a plaintiff ordinarily must plead and prove five elements:⁸⁰ 1) the initiation or continuance of a prior judicial proceeding by the defendant against the plaintiff; 2) termination of the previous suit in favor of the plaintiff;⁸¹ 3) the initiation or continuance of the initial suit without probable cause;⁸² 4) and with malice;⁸³ and 5) finally, actual damages.⁸⁴ Case law shows that failure to prove the requisite elements of damages and lack of probable cause are the most significant bars to successful malicious prosecution actions.⁸⁵

Damages

American jurisdictions have two distinct and conflicting views

3d 940, 381 N.E.2d 1367 (1978) (\$8,000 jury verdict for physicians overturned). See also Note, *Physician Countersuits: Malicious Prosecution, Defamation and Abuse of Process as Remedies for Meritless Medical Malpractice Suits*, 45 U. CIN. L. REV. 604 (1976). For successful physician countersuits, see *supra* note 19.

78. W. PROSSER, LAW OF TORTS, § 120 (4th ed. 1971) [hereinafter cited as W. PROSSER].

79. W. PROSSER, *supra* note 78, at 851; Birnbaum, *supra* note 6, at 1022; Mallen, *supra* note 1, at 410-11.

80. W. PROSSER, *supra* note 78, at 835, 855.

81. The requirement of a favorable termination has been abrogated by statute in Tennessee and Washington, discussed *infra* notes 156-82 and accompanying text. In the majority of states requiring a favorable termination, the manner in which the initial action is terminated must tend to indicate the innocence of the accused; thus dismissal on technical or procedural grounds does not constitute favorable termination for the purposes of malicious prosecution. *Jaffe v. Stone*, 18 Cal. 2d 146, 114 P.2d 335 (1941), cited in *Weaver v. Superior Court, County of Range*, 95 Cal. App. 3d 166, 156 Cal. Rptr. 745 (1979). But see *Lumpkin v. Friedman*, 131 Cal. App. 3d 450, 182 Cal. Rptr. 378 (1982) (failure to comply with discovery procedures counted as favorable termination).

82. W. PROSSER, *supra* note 78, § 119, at 841-47.

83. W. PROSSER, *supra* note 78, § 119, at 847-50 (Malice is a question of fact to be decided by the jury and can be inferred from a showing of lack of probable cause).

84. When a malicious prosecution action is based on a prior criminal action, damages are presumed. W. PROSSER, *supra* note 78, § 120, at 855. However, damages must be proven in suits for malicious prosecution of civil action.

85. Reuter, *supra* note 2, at 220-21.

on the issue of damages. Indiana, in accord with the majority of states,⁸⁶ follows the more liberal "American Rule" which allows recovery for any and all injuries incurred by plaintiffs.⁸⁷ A sizeable minority of states, however, adhere stubbornly to the much stricter "English Rule" which forecloses recovery in a malicious prosecution action unless the plaintiff can show special injury such as physical arrest, interference with his property or other damages not ordinarily occurring in similar actions.⁸⁸ Since arrest or seizure of property is not likely to result from a baseless suit for professional

86. Twenty-three jurisdictions do not require special damages: *Peerson v. Ashcraft Cotton Mills*, 201 Ala. 348, 78 So. 204 (1917); *Ackerman v. Kaufman*, 41 Ariz. 110, 15 P.2d 966 (1932); *Leek v. Brasfield*, 226 Ark. 316, 290 S.W.2d 632 (1956); *Easton v. Stockton*, 66 Cal. 123, 4 P. 1106 (1884); *Slee v. Simpson*, 91 Colo. 461, 15 P.2d 1084 (1932); *Leek v. Brasfield*, 226 Ark. 316, 290 S.W.2d 632 (1956); *Easton v. Stockton*, 66 Cal. 123, 4 P. 1106 (1884); *Slee v. Simpson*, 91 Colo. 461, 15 P.2d 1084 (1932); *Carlo v. Bartolotta*, 112 Conn. 396, 153 A. 311 (1930); *Tatum Bros. Real Estate & Investment Co. v. Watson*, 92 Fla. 278, 109 So. 623 (1926); *Brodie v. Hawaii Auto. Retail Gasoline Dealers Ass'n, Inc.*, 631 P.2d 600 (Hawaii Ct. App. 1981); *McCardle v. McGinley*, 86 Ind. 538 (1882); *Carbondale Investment Co. v. Burdick*, 67 Kan. 329, 72 P. 781 (1903); *Gafagnini v. Schnaider*, 164 La. 1108, 115 So. 287 (1927); *White v. Dingley*, 4 Mass. 433 (1808); *Brand v. Hinchman*, 68 Mich. 590, 36 N.W. 664 (1888); *O'Neill v. Johnson*, 53 Minn. 439, 55 N.W. 601 (1893); *Harvill v. Tabor*, 240 Miss. 750, 128 So.2d 863 (1961); *Brady v. Ervin*, 48 Mo. 533 (1871); *McCormick v. Willan*, 63 Neb. 391, 88 N.W. 558 (1897); *Johnson v. Moser*, 181 Okla. 75, 72 P.2d 715 (1937); *Cisson v. Pickens*, 258 S.C. 37, 186 S.E.2d 822 (1972); *Teesdale v. Liebschwager*, 42 S.D. 323, 174 N.W. 620 (1919); *Libscomb v. Hofner*, 96 Tenn. 112, 33 S.W. 818 (1896); *Closson v. Staples*, 42 Vt. 209 (1869); *Van Hunter v. Beckley*, 129 W. Va. 302, 40 S.E.2d 332 (1946).

87. The absence of the requirement of proving special damages makes a malicious prosecution action *possible*, but in no way a likely candidate for success. The burden of proving the remaining elements is substantial. *E.g.*, *Kauffman v. A.H. Robins Co.*, 233 Tenn. 515, 448 S.W.2d 400 (1969) ("there is a heavy burden of proof on the plaintiff in malicious prosecution actions in establishing malice and lack of probable cause.").

88. The following cases reflect the latest affirmation of the special injury requirement. For a list of cases that established the rule, see *O'Toole v. Franklin*, 279 Or. 513, 569 P.2d 561, 564 n.3 (1977). Sixteen jurisdictions presently require special damages: *Rodriguez v. Carroll*, 510 F. Supp. 547 (D.C. Tex. 1981) (applying Texas law); *Morowitz v. Marvel*, 423 A.2d 196 (D.C. 1980); *Taylor v. Greiner*, 156 Ga. App. 663, 275 S.E.2d 737 (1980); *Taylor v. Greiner*, 156 Ga. App. 663, 275 S.E.2d 737 (1980); *Berlin v. Nathan*, 64 Ill. App. 3d 940, 381 N.E.2d 1367 (1978); *Brody v. Ruby*, 267 N.W.2d 902 (Iowa 1978); *Hook v. Equitable Credit Corp.*, 402 A.2d 111 (M.D. App. 1979); *Farmers Gin v. Ward*, 389 P.2d 9 (N.M. 1964); *Gross v. Newburger*, 426 N.Y.S.2d 667 (1980); *Koury v. John Meyer of Norwich*, 261 S.E.2d 217 (N.C. 1980); *Dakters v. Shane*, ___ Ohio App. ___, 412 N.E.2d 399 (1978); *O'Toole v. Franklin*, 279 Or. 513, 569 P.2d 561 (1977); *Blumfield v. R.M. Shoemaker*, ___ Pa. Super. ___, 429 A.2d 654 (1981); *Jacques v. McLaughlin*, 401 A.2d 430 (R.I. 1979); *Ayyildiz v. Kidd*, 220 Va. 1080, 226 S.E.2d 108 (1980); *Fenner v. Lyndsay*, 625 P.2d 180 (Wash. App. 1981); *Krieg v. Dayton-Hudson Corp.*, 104 Wis. 2d 455, 311 N.W.2d 641 (1981).

negligence, physicians in "English Rule" jurisdictions have no viable remedy against wrongful malpractice actions.⁸⁹

Commentators and many courts have vigorously criticized the "English Rule"⁹⁰ which began in 1269 in medieval England by the enactment of the Statute of Marlbridge.⁹¹ Prior to this statute, malicious prosecution countersuits were allowed in response to civil as well as criminal actions and no showing of special damages was necessary.⁹² The Statute of Marlbridge eliminated a private cause of action for the malicious prosecution of a civil suit in the absence of special injury.⁹³ A summary remedy for costs, including attorneys' fees, was created for successful defendants in the original maliciously prosecuted action.⁹⁴ However, since the American jurisdictions that follow the "English Rule" do not provide for attorney fees or other court costs to ease the burden of persons wrongfully sued, a great deal more violence is done to an individual's right to be free from unfounded suits than was contemplated by the Statute of Marlbridge.⁹⁵ Moreover, even a provision for attorney's fees is no protec-

89. See Reuter, *supra* note 2, at 255; Note, *Countersuit: A Viable Alternative for the Wrongfully Sued Physician?*, 19 WASHBURN L.J. 450, 456 (1980).

90. See W. PROSSER, *supra* note 78, § 120, at 850-53; Reuter, *supra* note 2, at 220-34; Note, *Malicious Prosecution Liability*, *supra* note 2, at 272. See also *Stopka v. Lesser*, 82 Ill. App. 3d 323, 326, 402 N.E.2d 781, 784 (1980) ("We believe a reassessment of the special damages requirement in this jurisdiction is required."); *Dakters v. Shane*, 64 Ohio App. 2d 196, 199, 412 N.E.2d 399, 401 (1978) (Mahoney, J., concurring) (In a decision affirming the special damages rule, "I concur in this judgment and the unfortunate binding application of stare decisis.").

91. Reuter, *supra* note 2, at 229; Birnbaum, *supra* note 6, at 1021; for an exhaustive inquiry into the history of malicious prosecution, see Note, *Groundless Litigation and the Malicious Prosecution Debate: A Historical Analysis*, 88 YALE L.J. 1218 (1979).

92. Reuter, *supra* note 2, at 229.

93. *Id.*

94. *Id.* However, an award of costs in prior actions are insufficient to fully compensate parties injured by maliciously prosecuted actions, as some American courts have aptly noted: *McCardle v. McGinley*, 86 Ind. 538, 540 (1882) ("[I]t is too clear for discussion that the costs which the law gives a successful party are no adequate compensation for the time, trouble and expense of defending a malicious and groundless suit."); *Lockenour v. Sides*, 57 Ind. 360, 364 (1877) ("[W]e cannot, at this date, shut our eyes to the truth known by everybody, that taxable costs afford a very partial and inadequate remuneration for the necessary expenses of defending an unfounded suit; and of course this remedy is not adequate to repair the injury thus received."); *Kolka v. Jones*, 6 N.D. 461, 71 N.W. 558, 560 (1897) (in dismissing the notion that costs afford full indemnity to victims of malicious prosecution, the court per Corliss, C.J. states: "To our minds this argument does not rise to the dignity of sophistry.").

95. W. PROSSER, *supra* note 78, § 120, at 851; *Lockenour v. Sides*, 57 Ind. 360, 364 (1877).

tion against the damages caused to reputation and by increases in liability insurance premiums commonly experienced by physicians named as malpractice defendants. Although Indiana has long recognized the inequity of requiring special damages,⁹⁶ the burden of concurrently proving the remaining elements serves as a substantial obstacle to physicians contemplating retaliatory malicious prosecution actions.

Probable Cause

In jurisdictions that do not require special damages, the most formidable obstacle facing malicious prosecution plaintiffs is proving that the initial suit was brought without probable cause.⁹⁷ The standard of probable cause to bring suit from a lay litigant's perspective is well-established in Indiana, and includes a duty to make some investigation of the facts before initiating litigation.⁹⁸ However, a standard for reviewing an attorney's decision to bring suit on behalf of his client has only recently been developed in Indiana.⁹⁹ This standard contemplates a lesser test of probable cause for attorneys than is required of lay litigants and renders nugatory the tort of malicious prosecution in a physician/attorney countersuit setting.¹⁰⁰

The first physician/attorney countersuit to reach the appellate

96. *Lockenour v. Sides*, 57 Ind. 360 (1877).

97. No matter what the standard of probable cause in a particular jurisdiction, the plaintiff will always have the difficult task of proving a negative, i.e., want of probable cause. See *Fee, Parker, Lloyd v. Sullivan*, 379 So. 2d 412, 418 (Fla. Dist. Ct. App. 1980).

98. *Wong v. Tabor*, ___ Ind. App. ___, 422 N.E.2d 1279, 1285 (1981). The standard was first developed in *Lacy v. Mitchell*, 23 Ind. 67 (1864):

Probable cause may be defined to be what apparent state of facts found to exist upon reasonable inquiry; that is, such inquiry as the given case rendered convenient and proper, which would induce a reasonably intelligent and prudent man to believe the accused had committed, in a criminal case, the crime charged; and in a civil case, that a cause of action existed.

Subsequent Indiana decisions have employed a similar standard. See *Hutchinson v. Wenzel*, 115 Ind. 49, 56 N.E. 845 (1900); *Paddock v. Watts*, 116 Ind. 146, 18 N.E. 518 (1888); *Hays v. Blizzard*, 30 Ind. 457 (1868); *Yerkes v. Washington Manufacturers*, ___ Ind. App. ___, 326 N.E.2d 629 (1975); *Strivers v. Old National Bank*, 148 Ind. App. 196, 264 N.E.2d 339 (1970); *Dwyer v. McLean*, 133 Ind. App. 454, 175 N.E.2d 50 (1962). *But see Staz v. Koplow*, ___ Ind. App. ___, 397 N.E.2d 1082 (1979) (employing a standard not expressly mentioning investigation).

99. *Wong v. Tabor*, ___ Ind. App. ___, 422 N.E.2d 1279, 1285 (1981).

100. See *Rawson, Wong v. Tabor: The Latest Word in Physician-Attorney Countersuits*, 17 VAL. U. L. REV. ___ (1982) [hereinafter Rawson].

court level in Indiana was *Wong v. Tabor*.¹⁰¹ The malpractice action giving rise to the countersuit in *Wong v. Tabor* was brought by Attorney Glenn J. Tabor on behalf of his client, Mrs. "P", against Dr. Samuel N.T. Wong.¹⁰² Mrs. "P" underwent a neurosurgical procedure known as a cervical anterior fusion¹⁰³ in an apparent effort to stop her persistent headaches.¹⁰⁴ As a result of this surgery, Mrs. "P" was left a quadriplegic.¹⁰⁵ Six months prior to the operation Dr. Wong had rendered gynecological services to Mrs. "P" and had previously functioned as her family physician.¹⁰⁶ However, Dr. Wong did not recommend neurosurgery nor did he refer her to the physician who performed the operation.¹⁰⁷ Dr. Wong rendered no pre-operative care, nor did he assist in the operation.¹⁰⁸ Dr. Wong's only involvement with Mrs. "P" occurred over a month after her operation when he prescribed a mineral oil and soap-suds enema to relieve her constipation.¹⁰⁹

Dr. Wong was sued for medical malpractice even though he was not involved in the surgery that resulted in Mrs. "P's" quadriplegia.¹¹⁰ Moreover, Dr. Wong was retained as a defendant for over eighteen months before he finally obtained summary judgment.¹¹¹ The only mention of his name on the medical records was his medication order for Mrs. "P's" constipation.¹¹² As a result of this baseless malpractice suit, which received local publicity, Dr. Wong's malpractice insurance premiums increased by thirty percent.¹¹³ He received fewer referrals and his income decreased in the year following the suit.¹¹⁴ Consequently, Dr. Wong instituted a malicious

101. ___ Ind. App. ___, 422 N.E.2d 1279 (1981).

102. *Id.* at 1281.

103. Rawson, *supra* note 100, at ___.

104. White, *A Court Widens the Malpractice Net*, MED. ECON. 70 (June 7, 1982) [hereinafter cited as White].

105. Rawson, *supra* note 100, at ___.

106. *Id.*; White, *supra* note 104, at 70.

107. Rawson, *supra* note 100, at ___. *But see* *Wong v. Tabor*, ___ Ind. App. ___, 422 N.E.2d 1274, 1281 (1981) (indicating that Tabor contends that Wong did refer Mrs. P. to the neurosurgeon).

108. Rawson, *supra* note 100, at ___.

109. *Id.*; *Wong v. Tabor*, ___ Ind. App. ___, 422 N.E.2d 1279, 1282 (1981).

110. White, *supra* note 104, at 70 (a total of nine physicians were sued, two of whom never met Mrs. "P" until after her surgery).

111. Despite requests for voluntary dismissal by Dr. Wong's attorney. Rawson, *supra* note 100, at ___.

112. Rawson, *supra* note 100, at ___; White, *supra* note 104, at 70.

113. Rawson, *supra* note 100, at ___; White, *supra* note 104, at 73.

114. Rawson, *supra* note 100, at ___; White, *supra* note 104, at 73.

prosecution suit against attorney Tabor.¹¹⁵

The jury in the malicious prosecution action returned a \$25,000 verdict for Dr. Wong.¹¹⁶ However, the trial judge set aside the jury verdict and entered judgment for attorney Tabor.¹¹⁷ Dr. Wong appealed the trial court's decision. In denying relief,¹¹⁸ the Indiana appellate court established a probable cause standard that encompasses an attorney's decision to bring any suit.¹¹⁹ The standard is as follows:

[W]hether the claim merits litigation against the defendant in question on the basis of the facts known to the attorney when the suit is commenced. The question is answered by determining that no competent and reasonable attorney familiar with the law of the forum would consider that the claim was worthy of litigation on the basis of the facts known by the attorney who instituted the suit.¹²⁰

This newly developed standard fails to require attorneys to conduct any investigation prior to filing suit.¹²¹

By allowing malpractice claims to be filed absent any investigation into the facts, the *Wong* decision effectively eliminates the possibility of recovery by a plaintiff in a malicious prosecution action.¹²² Further, it encourages purposeful ignorance on the part of at-

115. Originally, the malicious prosecution suit named as defendants Mrs. "P", her husband, and attorney Tabor's entire law firm. However, after determining that Tabor had sole responsibility for naming and retaining defendants in the malpractice action, all other defendants were dismissed. White, *supra* note 104, at 73.

116. *Wong v. Tabor*, ___ Ind. App. ___, 422 N.E.2d 1279, 1281 (1981).

117. *Id.*

118. The trial court set the jury verdict aside on grounds of failure to prove favorable termination of the prior suit. The Appellate Court concluded that setting aside the verdict on favorable termination grounds was error, but nevertheless affirmed on grounds of failure to prove lack of probable cause. The probable cause issue was urged by Tabor's attorney as an alternative rationale to sustain the trial court's holding. *Wong v. Tabor*, ___ Ind. App. ___, 422 N.E.2d 1279, 1282 (1981).

119. *Wong*, 422 N.E.2d at 1287.

120. *Id.* at 1288.

121. It is important to note that the *Wong* standard encompasses an attorney's decision to bring *any* suit, not just medical malpractice actions. However, the problems with the no investigation standard are exacerbated in a medical malpractice setting because of the serious injuries that necessarily follow being named a malpractice defendant, albeit subsequent exoneration. For example, the policy of Dr. Wong's insurance company, The Medical Protective Co., was to raise malpractice premiums 30 percent any time a lawsuit was filed against a physician. Record at 277, *Wong*.

122. See White, *supra* note 104 ("The appeals court's negative ruling means that doctors' malicious prosecution suits can probably never be won." Quoting attorney

torneys. In a case of questionable validity, the attorney can simply listen to the facts given him by his client and file suit without further investigation. Undertaking an investigation would risk the discovery of facts subverting the validity of his claim. As long as a reasonable attorney would be satisfied that the claim appeared to be worthy of litigation given as true the client's version of the facts, and these are the only facts known to the attorney at the time of instituting the suit, the attorney cannot be liable for malicious prosecution in the State of Indiana. A higher standard of probable cause has been required by lay litigants.

Private individuals generally have been required to make a reasonable investigation into the facts before pursuing either civil or criminal suits.¹²³ Failure to make any investigation would result in the want of probable cause and provide an injured defendant relief in a subsequent malicious prosecution action.¹²⁴ It is difficult to see why the *Wong* court enunciated a lesser standard of probable cause for attorneys.¹²⁵ This watered-down standard is particularly untenable in the context of a medical malpractice suit. Malpractice actions often involve complex medical circumstances. Thus, it is quite possible that "facts" known by clients will be incorrect. Further, any action that reflects negatively on the professional competence of a physician is likely to cause reputational harm and financial damage and should not be indiscriminately brought.¹²⁶ The question of whether or not to require an attorney to investigate a

Rawson). See also Wills, *Assault with a Deadly Lawsuit: A Wrong in Search of a Remedy*, 51 L.A. BAR J. 499, 501 (1976) ("[I]t would be a feeble and unimaginative attorney indeed who could not show some basis for believing initially that his client had an arguable claim."). Incomplete or inadequate investigation is a major cause of baseless suits. Note, *A Lawyer's Duty to Reject Groundless Litigation*, 26 WAYNE L. REV. 1561 n.9 (1980) and cases cited therein. Consequently, the *Wong* standard does not discourage baseless lawsuits. See Rawson, *supra* note 100, at ____.

123. See *supra* note 98 and accompanying text.

124. *Id.* See also *Peoples Bank & Trust Co. v. Stock*, ____ Ind. App. ____, 392 N.E.2d 505 (1979) (stressing the necessity of inquiry as an element of probable cause and affirming a \$75,000 recovery for a malicious prosecution plaintiff because of a failure to make adequate inquiry into the facts, hence, a lack of probable cause), *reh'g denied*, ____ Ind. ____, 403 N.E.2d 1077 (1980).

125. Unless one takes the cynical attitude that judges, being members of the legal profession, have a natural inclination to favor attorneys. This is clearly the attitude of Dr. Wong. See *White*, *supra* note 104, at 75 ("I think the lawyers and judges are in cahoots.").

126. See *supra* note 122; see also Birnbaum, *supra* note 6, at 101; Daughtry, *The View of the Medical Profession*, 38 INS. COUNS. J. 534 (1971) (Dr. Daughtry explains in unmistakably emotive language the visceral impact of a malpractice suit on physicians and their families).

suit before bringing it in court has generated a substantial amount of judicial response.¹²⁷

Some courts, like *Wong*, have been unwilling to recognize a duty for attorneys to further investigate the facts given to them by their clients.¹²⁸ There are two major reasons for this reluctance. First, "English Rule" jurisdictions rarely reach the issue of probable cause because the failure to allege special damages provides a ready ground to dismiss a malicious prosecution action.¹²⁹ Second, a duty to investigate would connote a duty of ordinary care to an adverse third party, which when breached, would give rise to a common law negligence action against the attorney.¹³⁰ No court has yet extended the scope of duty to this degree.¹³¹

Several "American Rule" jurisdictions have established a duty requiring attorneys to conduct a reasonable investigation.¹³² The standards are worded in a sufficiently restrictive manner to avoid the problems inherent in expanding the concept of third-party negligence.¹³³ The Kentucky Supreme Court recently awarded two physi-

127. See e.g., *Tool Research & Engineering Corp. v. Henigson*, 46 Cal. App. 3d 675, 120 Cal. Rptr. 291 (1975); *Fee, Parker & Lloyd v. Sullivan*, 379 So.2d 412 (Fla. Dist. Ct. App. 1980); *Friedman v. Dozorc*, 83 Mich. App. 429, 268 N.W.2d 673 (1978), *aff'd in part*, 412 Mich. 1, 312 N.W.2d 585 (1981).

128. See e.g., *Ammerman v. Newman*, 384 A.2d 637 (D.C. App. 1978); *Spencer v. Burglass*, 337 So.2d 596 (L.A. App. 1976); *Friedman v. Dozorc*, 83 Mich. App. 429, 268 N.W.2d 673 (1978), *aff'd in part*, 412 Mich. 1, 312 N.W.2d 585 (1981); *Petrou v. Hale*, 43 N.C. App. 655, 260 S.E.2d 130 (1979); *Moll v. Sandlin*, 571 S.W.2d 567 (Tex. Civ. App. 1978).

129. The following cases dismiss malicious prosecution actions for failure to allege special damages and never address whether or not investigation is a necessary element of probable cause: *Bickle v. Mackie*, 447 F. Supp. 1376 (D. Iowa), *aff'd*, 590 F.2d 341 (8th Cir. 1978); *Berlin v. Nathan*, 64 Ill. App. 3d 940, 381 N.E.2d 1367 (1978); *Brody v. Ruby*, 267 N.W.2d 902 (Iowa 1978); *Ackerman v. Lagono*, 172 N.J. Super. 468, 412 A.2d 1054 (1979); *Dacters v. Shane*, ___ Ohio App. ___, 412 N.E.2d 399 (1978); *O'Toole v. Franklin*, 279 Or. 513, 569 P.2d 561 (1977); *Ayyildiz v. Kidd*, 220 Va. 1080, 266 S.E.2d 108 (1980).

130. *Friedman v. Dozorc*, 83 Mich. App. 429, 268 N.W.2d 673 (1978), *aff'd in part*, 412 Mich. 1, 312 N.W.2d 585, 593 n.12 and cases cited therein.

131. *But see Note, A Lawyer's Duty to Reject Groundless Litigation*, 26 WAYNE L. REV. 1561 (1980); *Schunk v. Zeff & Zeff P.C.*, 109 Mich. App. 163, 311 N.W.2d 322 (1981) (MacKenzie, J., dissenting: "[I]t is clear that a duty of reasonable investigation in favor of a potential adversary would not conflict with or restrict a lawyer's duty and obligations to his client, but rather would be complementary to it.").

132. *Tool Research & Engineering Corp. v. Henigson*, 46 Cal. App. 3d 675, 120 Cal. Rptr. 291 (1975); *Fee, Parker & Lloyd v. Sullivan*, 379 So.2d 412 (Fla. Dist. Ct. App. 1980); *Raine v. Drasin*, 621 S.W.2d 895 (Ky. 1981).

133. For a discussion of these problems, see *Friedman v. Dozorc*, 412 Mich. 1, 312 N.W.2d 585 (1981).

cians a total of \$37,500 in a malicious prosecution action.¹³⁴ The court exacted two duties from attorneys. First, to exercise the degree of care which an ordinarily careful, skillful, and prudent attorney would exercise under similar circumstances.¹³⁵ Second, not to institute a legal proceeding without probable cause.¹³⁶

The court distinguished an earlier Kentucky case that refused to recognize a duty of investigation owed to an adverse party in a countersuit proceeding solely on a negligence theory.¹³⁷ In a negligence action, no duty of investigation is owed to an adverse party prior to filing a malpractice action.¹³⁸ However, in a malicious prosecution countersuit, a failure to investigate the facts prior to bringing a malpractice action on a client's behalf is material to the duty to refrain from initiating suit without probable cause.¹³⁹ Thus, Kentucky has found a formula that will reduce the frequency of spurious claims by requiring prior investigation but will not seriously impair patients' ability to bring valid suits.¹⁴⁰ Florida has similarly sought to reduce the incidence of baseless claims by establishing a duty of investigation for attorneys.¹⁴¹

An appellate court in Florida recently established a probable cause standard for attorneys to bring suit on behalf of their clients.¹⁴² In balancing the freedom of access to courts against the need to be free from unfounded suits, the Florida court focused on attorneys' duty to zealously represent their clients within the bounds of law and professional ethics.¹⁴³ This duty, owed solely to a client, was held to include a reasonable investigation into the surrounding facts before initiating suit on the client's behalf.¹⁴⁴ Florida's standard

134. *Raine v. Drasin*, 621 S.W.2d 895 (Ky. 1981).

135. *Id.* at 902.

136. *Id.*

137. *Id.*

138. *Id.* at 901.

139. *Id.* at 902 (quoting *Hill v. Willmott*, 561 S.W.2d 331, 335 (Ky. Ct. App. 1978)).

140. *Raine v. Drasin* is an important victory for physicians because the court also allowed the testimony of a member of the Ethics Committee of the Louisville Bar Association as an expert to determine whether or not the defendants had conducted themselves as ordinary and prudent attorneys. The expert's testimony was that the defendant's actions did not comply with the expected standard and this was used by the court to show the lack of probable cause. See *supra* note 139, at 901.

141. *Fee, Parker & Lloyd v. Sullivan*, 379 So. 2d 412 (Fla. Dist. Ct. App. 1980).

142. *Id.* at 414.

143. *Id.*

144. *Id.*

serves to hinder baseless claims while addressing only the duty of care owed by an attorney to a client.¹⁴⁵ Although the Florida standard and that of *Wong* are diametrically different, both relied on the same California case, *Tool Research & Engineering Corp. v. Henigson*.¹⁴⁶

The California appellate court decision in *Tool Research* provides one of the most often quoted judicial standards used to determine whether an attorney had probable cause to bring suit.¹⁴⁷ The *Tool Research* court recognized the need for attorneys to investigate their case before filing suit in holding that "An attorney has probable cause to represent a client . . . when, after a *reasonable investigation*¹⁴⁸ and industrious search of legal authority he has an honest belief that his client's claim is tenable in the forum in which it is to be tried."¹⁴⁹ The probable cause test of the California court is two-fold. First, the attorney must subjectively believe that the claim has merit.¹⁵⁰ Second, the belief must satisfy an objective standard.¹⁵¹

The *Wong* court adopted a similar two-prong approach.¹⁵² However, in *Tool Research* the court expressly required attorneys to investigate facts before filing suit on their clients' behalf. Conversely, any contemplation of investigation prior to bringing suit is absent from the *Wong* standard. Thus, the *Wong* standard does not accurately reflect the need to protect individuals from unfounded lawsuits evinced in the case it relies on most heavily.

Though Indiana follows the more liberal "American Rule" regarding damages, under *Wong* a successful malicious prosecution action

145. *Id.*

146. 46 Cal. App. 675, 120 Cal. Rptr. 291 (1975). The court in *Fee, Parker & Lloyd*, 379 So.2d at 417, cites from *Norton v. Hines*, 49 Cal. App. 3d 917, 123 Cal. Rptr. 237, 242 (1975). Actually, the language relied on by the Florida court is *Norton v. Hines*, quoting *Tool Research & Engineering Corp.; Wong v. Tabor*, ___ Ind. App. ___, 422 N.E.2d 1279, 1287-88 (1981).

147. *Wong*, ___ Ind. App. at ___, 422 N.E.2d, at 1287. Although the *Wong* court cited no cases relying upon *Tool Research*, independent research indicates *Tool Research* has been relied upon in a number of cases. See, e.g., *Cowles v. Carter*, 115 Cal. App. 3d 350, 171 Cal. Rptr. 269 (1981); *Weaver v. Superior Court of Orange County*, 94 Cal. App. 3d 498, 156 Cal. Rptr. 745 (1979); *Field v. Goldstein*, 379 So. 2d 410 (Fla. Dist. Ct. App. 1980); *Hill v. Willmott*, 561 S.W.2d 331 (Ky. Ct. App. 1978).

148. (Emphasis added).

149. *Tool Research & Engineering Corp. v. Henigson*, 46 Cal. App. 3d 917, 120 Cal. Rptr. 291, 297 (1975).

150. *Id.*

151. *Id.*

152. *Wong v. Tabor*, ___ Ind. App. ___, 422 N.E.2d 1279, 1288 (1981).

against an attorney is very unlikely. In *Wong*, the failure to include a reasonable investigation as part of an attorney's standard of probable cause is inconsistent with Indiana precedent requiring such investigation for private litigants and leaves unshielded notions of individual protection from damaging, baseless lawsuits that are protected in other jurisdictions. The *Wong* standard tips the balance in favor of patients and their attorneys.

Indiana's Medical Malpractice Act may have been an unmentioned factor bearing on the court's decision in *Wong*.¹⁵³ As noted previously, the Act currently provides a number of procedural safeguards designed to protect physicians.¹⁵⁴ Yet, for all the benefits health care providers may enjoy through malpractice legislation, the *Wong* standard serves as a constant reminder that a physician can still fall prey to a debilitating baseless suit and have no meaningful recourse.¹⁵⁵ Moreover, the *Wong* standard encompasses an attorney's decision to bring *any* suit. Other professionals, such as accountants or attorneys, do not benefit from legislatively imposed safeguards. Hence, they are subjected to unchecked malpractice suits and denied any effective relief.

Another problem with Indiana's present treatment of malicious prosecution countersuits is the need to bring the suit, if at all, as an entirely separate action after the termination of the preliminary suit. The enactment of a statute permitting a malicious prosecution counterclaim would serve to discourage baseless claims without seriously hampering the pursuit of valid ones; and thus would be a positive step toward reaching a fair balance of interests between physicians and patients. While the success of malicious prosecution counterclaims would be contingent on the newly articulated standard in *Wong*,¹⁵⁶ the utility of allowing parties to resolve all issues in a single proceeding requires examination.

COUNTERCLAIMING FOR MALICIOUS PROSECUTION

A counterclaim for malicious prosecution would abrogate the

153. Since the alleged malpractice occurred in 1974, prior to the inception of the Act, no procedural safeguards were in existence.

154. See *supra* note 74 and accompanying text.

155. See *supra* notes 73-74 and accompanying text. Further, *Bounds v. Smith*, 430 U.S. 817, 822 (1976), held that the right of access to courts for prisoners must be adequate, effective and meaningful. Surely, physicians and other professionals should be afforded the same considerations.

156. A counterclaim provision would not effect the requisite common law elements of lack of probable cause, malice or damages.

long-standing common law rule that favorable termination of a prior action is a necessary element of a malicious prosecution charge.¹⁵⁷ However, burgeoning numbers of lawsuits, many frivolous, and swollen court dockets are problems unique to modern times and demand a reassessment of the termination rule.¹⁵⁸ The use of malicious prosecution counterclaims, which are presently unavailable in Indiana,¹⁵⁹ would further the interests of convenience to litigants and judicial economy¹⁶⁰ while reducing the incidence of baseless claims. Any potential for abuse that might exist in the use of a counterclaim can be checked by enforcing the remaining elements of the tort and using procedural devices within the discretion of the court.

Despite the logical appeal of allowing all claims between parties to be decided in the same proceeding, most courts have summarily dismissed malicious prosecution counterclaims.¹⁶¹ Abundant case law insists on a favorable¹⁶² termination of a prior action as a prerequisite to a claim of malicious prosecution.¹⁶³ Opponents of malicious

157. See *supra* notes 80-84 and accompanying text.

158. Tort law is dynamic, not static, and the unprecedented increase in malpractice suits resulting in the physician countersuit phenomenon dictates a review of traditional notions of malicious prosecution. See W. PROSSER, *LAW OF TORTS* 1-16 (4th ed. 1971); see also *Munn v. Illinois*, 94 U.S. 113 (1877) ("Indeed, the great office of statutes is to remedy defects in the common law as they are developed, and to adapt it to the changes of time and circumstances.").

159. *Aluminum Co. of America v. City of Lafayette, Indiana*, ___ Ind. App. ___, 412 N.E.2d 312 (1980).

160. See, Note, *Groundless Litigation and Malicious Prosecution Debate: A Historical Analysis*, 88 *YALE L.J.* 1218, 1236 (1979). Cf. *United Mine Workers v. Gibbs*, 383 U.S. 715 (1966) (allowing actions based on state law to be heard along with federal claims in federal court as long as they arose from a common nucleus of fact and hearing all claims together would further notions of judicial economy, convenience and fairness to litigants).

161. *Babb v. Superior Court of Sonoma County*, 3 Cal. 3d 841, 479 P.2d 379, 92 Cal. Rptr. 179, 181 (1971) expressed a common judicial sentiment by saying, "It is horn-book law that the plaintiff in a malicious prosecution action must plead and prove that the prior judicial proceedings of which he complains terminated in his favor." See *infra* notes 162-63.

162. To be "favorable," the prior suit must have terminated in a manner tending to show the innocence of the accused. See *supra* note 81.

163. See 54 C.J.S. *Malicious Prosecution* § 554 (1948) ("As a general rule, a termination of the proceedings on which an action for malicious prosecution is based in favor of the defendant in such proceedings is an essential element of the cause of action.") and cases cited therein. See also *Babb v. Superior Court of Sonoma County*, 3 Cal. 3d 841, 479 P.2d 379, 92 Cal. Rptr. 179 (1971) and cases cited therein. But see *Sonnichsen v. Streeter*, 4 Conn. Cir. Ct. 659, 239 A.2d 63 (1967) (allowing malicious prosecution counterclaim: "There appears to be no practical need for further litigation, and justice will best be served if the residuum of issues be terminated in the present suit."); *Mayflower Industries v. Thor Corp.*, 15 N.J. Super. 139, 83 A.2d 246 (1951)

prosecution counterclaims argue that the action would result in inconsistent judgments, encourage the use of an action disfavored by the law and deteriorate attorney/client relationships.¹⁶⁴ These arguments are ill-founded.

Inconsistent judgments can easily be avoided by careful jury instructions¹⁶⁵ and narrowly drafted counterclaim statutes.¹⁶⁶ There is at least facial merit to the concern that the number of malicious prosecution actions will increase. Counterclaims are easier and less expensive to initiate than separate actions and can be expected to be used with more frequency. However, it does not conclusively follow that counterclaims will be any more successful than countersuits.¹⁶⁷ Difficult obstacles of probable cause and damages still remain to be overcome regardless of the procedural posture of a malicious prosecution claim.

Another common fear is the danger that an attorney's relationship with his client may be impaired by forcing the attorney to defend his actions while simultaneously presenting his client's case.¹⁶⁸

("[D]efendant's counterclaim should not be subjected to summary disposition . . . only to have the action immediately reinstated as an independent suit."); *Herendeen v. Ley Realty*, 75 N.Y.S.2d 836 (1947)

(where a counterclaim is interposed, the entire subjects of whether or not there has been malicious prosecution and what damage, if any, resulted therefrom, may all be tried out and determined efficiently and effectively with a minimum of effort and expense; or, if the circumstances warrant, separate trials and different modes of trial of different issues may be ordered);

Eiteljorg v. Bogner, 502 P.2d 970 (Colo. App. 1972) (allowing defendant to present evidence on malicious prosecution counterclaim after court found for defendant at close of plaintiff's case).

164. *Lyddon v. Shaw*, 56 Ill. App. 3d 815, 372 N.E.2d 685, 688 (1978) ("The considerations underlying the requirement that a complaint for malicious prosecution plead the favorable outcome of the prior cause, are, in effect, broader than the rule itself."). See also *Birnbaum*, *supra* note 6, at 1080.

165. Courts have resorted to interrogatory and other forms of special verdicts in situations that involve complicated and potentially confusing issues. See *e.g.*, *Li v. Yellow Cab Co. of California*, 13 Cal. 3d 804, 532 P.2d 1226, 119 Cal. Rptr. 858 (1975).

166. A statute that defers evidence on a counterclaim until decision on the primary suit would totally eliminate any possibility of inconsistent judgments. See *infra* text at 34.

167. Counterclaimants will still be faced with the burdens of proving that the primary suit was brought without probable cause. Essentially, this same proof is used regularly to defeat malpractice actions. However, in malicious prosecution counterclaims, the standard of proof will be higher. See Note, *Groundless Litigation and the Malicious Prosecution Debate: A Historical Analysis*, 88 YALE L.J., 1218, 1235 (1979).

168. Since counterclaims generally proceed only against the opposing party, absent a special statutory provision allowing a counterclaim against the attorney as well,

This problem can be largely obviated by attorneys researching their cases before filing suit, in which case a malicious prosecution counterclaim would be unsuccessful. If the counterclaim was sufficiently unfounded, it may give rise to a separate malicious prosecution action by the attorney.¹⁶⁹ At least two states have agreed that the arguments of counterclaim opponents are outweighed by the need to provide procedural advantages to wrongfully sued individuals.¹⁷⁰

In legislative actions apparently prompted by the American Medical Association's Model Counterclaim Act,¹⁷¹ both Washington and Tennessee have passed statutes abrogating the common law element of favorable termination and providing specifically for malicious prosecution counterclaims.¹⁷² Proponents of the counter-

the attorney will have to be joined as parties pursuant to Ind. Trial R. 19, 20(A)(2). Since many clients will have a complete defense in advice of counsel, in practice attorneys may be the usual target for a counterclaim. Advice of counsel is a complete defense for defendants in a malicious prosecution charge. The defense relates to probable cause in that if a person, before instituting a prosecution, consults with an attorney, discloses all known facts, and acts upon the attorney's advice, he has probable cause. *Terre Haute & I.R. Co. v. Mason*, 148 Ind. 578, 46 N.E. 332 (1897). But unless the person seeking advice does so in good faith and acts on it for an honest, not improper purpose, the defense does not lie. *Harper v. Goodin*, ___ Ind. App. ___, 409 N.E.2d 1129 (1980). See also *Dwyer v. McLean*, 133 Ind. App. 454, 175 N.E.2d 50 (1961) ("[T]he fact that appellant apparently sought the advice of counsel before the institution of the prosecution [is not] conclusive evidence that he acted without malice or that probable cause existed.").

169. Suits for the malicious prosecution of a malicious prosecution action are very rare. See *Hopke v. O'Byrne*, 148 So.2d 755, 756 (Fla. Dist. Ct. App. 1963) ("Our research has not uncovered any case in this or another jurisdiction involving, as here, an action for maliciously prosecuting another malicious prosecution action.").

170. Tennessee and Washington. See *infra* note 172.

171. See Birnbaum, *supra* note 6, at 1080, setting forth the A.M.A. model counterclaim act:

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.

Professor Birnbaum points out that the term "abuse of process" probably refers to "malicious prosecution" because counterclaims for abuse of process have traditionally been available.

172. WASH. REV. CODE ANN. § 4-24-50 provides:

In any action for damages, whether based on tort or contract or otherwise, a claim or counterclaim for damages may be litigated in the principal action for malicious prosecution on the ground that the action was instituted with knowledge that the same was false, and unfounded, malicious and without probable cause in the filing of such action, or that the same was filed as a part of a conspiracy to misuse judicial process by filing an action known to be false and unfounded.

claims assert that the use of such a procedural device will deter frivolous suits and provide victims of groundless litigation an immediate, complete legal remedy for the harm they have suffered while conserving judicial time and energy by allowing both malpractice and malicious prosecution claims to be decided by the same tribunal.¹⁷³ Passage of the Washington statute was hailed as a major victory for physicians in the fight against frivolous malpractice claims.¹⁷⁴ However, any victory was short-lived as Washington courts have refused to interpret the new statute as eliminating the common law requirement of special damages.¹⁷⁵ An appellate court reasoned that statutes in derogation of the common law were to be strictly construed, and had the legislature intended to eliminate the special injury requirement it would have expressly done so.¹⁷⁶ Since

For a review of Washington's statute, see Note, *Counterclaiming for Malicious Prosecution and Abuse of Process: Washington's Response to Unmeritorious Civil Suits*, 14 WILLAMETTE L.J. 401 (1978) [hereinafter cited as *Counterclaiming for Malicious Prosecution*]. TENN. CODE ANN. § 29-26-116(4)(b) provides:

In any action for damages for personal injury or death, whether based on tort or contract law, or otherwise, a counterclaim for damages for malicious prosecution (on the ground that the principle 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 filing such action may be filed and litigated in the same action; provided, however, that the counterclaim shall be based upon substantial allegations.

173. Birnbaum, *supra* note 6, at 1080.

174. J. Rawson, *Current Issues in Professional Liability Litigation* (June 20, 1979) (unpublished speech given to Protective Medical Association of Lake County, Indiana).

175. *Gem Trading Co. v. Cudahy*, 22 Wash. App. 279, 588 P.2d 1222 (1978), *aff'd*, 92 Wash. 2d 956, 603 P.2d 828 (1979). In affirming the appellate decision, the Supreme Court of Washington specifically declined to rule on whether or not the new counterclaim statute abrogated the need to show special injury and arrest. Noting that if the statute was substantive, it would not apply retroactively, and thus was not pertinent to the case before the court which began prior to the enactment of the statute. Alternatively, if the statute was procedural and applicable retroactively, it could not abrogate a common law element not explicitly eliminated. However, all Washington appellate courts have agreed that the requirements of special injury and arrest remain intact. *Batten v. Abrams*, 28 Wash. App. 736, 626 P.2d 984 (1981); *Fenner v. Lindsay*, 28 Wash. App. 626, 625 P.2d 180 (1981); *Gem Trading Company*, 22 Wash. App. 279, 588 P.2d 1222 (1978).

176. *Gem Trading Co., Inc. v. Cudahy*, 22 Wash. App. 278, 588 P.2d 1222, 1236 (1978). But since the Washington counterclaims statute addresses every common law element except damages, see *supra* note 172, it is equally reasonable to assume that the malicious prosecution standard contemplated by the legislature was exactly that which was reflected in the statute. Cf. *Northwest Airline, Inc. v. Transport Workers Union*, ___ U.S. ___, 101 S. Ct. 1571, 1584 (1981) ("The presumption that a remedy was deliberately omitted from a statute is strongest when Congress has enacted a

the special injury requirement has yet to be satisfied in any physician countersuit,¹⁷⁷ the ability to counterclaim for malicious prosecution is of little benefit to physicians faced with the burden of proving special damages.

The adoption of a counterclaim statute in Indiana, however, could be an effective method of balancing the interests of physicians and malpractice plaintiffs. Since Indiana follows the more liberal "American Rule" and, thus, does not require special damages, the elimination of the termination requirement would not be a totally illusory gain for physicians.¹⁷⁸ Furthermore, if the arguments in favor of malicious prosecution counterclaims do not totally persuade Indiana courts and the legislature that the benefits of allowing counterclaims outweigh the burdens, a compromise position can be reached. A statute could be drafted to allow malicious prosecution counterclaims in the pleading stage of trials but defer the presentation of evidence in their support until after a decision on the merits of the primary suit is reached. This method will essentially preserve the common law rule of prior favorable termination. If the plaintiff is successful in the primary action, the counterclaim will be dismissed automatically. In the presence of unusual circumstances vitiating the usefulness of a counterclaim, a court would retain the power to order that the malicious prosecution issue be tried separately pursuant to Indiana Trial Rule 42(B).¹⁷⁹ Hence, a malicious prosecution could be used effectively to deter frivolous suits¹⁸⁰ with minimum prejudice to good faith litigants.

comprehensive legislative scheme."). *But cf.* *Pierson v. Ray*, 386 U.S. 547, 555 (1967) (saying if Congress had intended judicial immunity to be abrogated, it would have specifically so provided).

177. Both appellate level victories by physicians in countersuits using the malicious prosecution theory have been in "American Rule" jurisdictions. *See supra* note 19.

178. But given the *Wong* standard of probable cause, counterclaims would not be very effective. However, it is easier to revise an appellate court's interpretation of probable cause than it is to abrogate a common law element of a tort.

179. Ind. Trial R. 42(B) (Burns Supp. 1973):

The court, in furtherance of convenience or to avoid prejudice, or when separate trials will be conducive to expedition and economy, may order a separate trial of any claim, cross-claim, counterclaim, or third-party claim, or of any separate issue or of any number of claims, cross-claims, counterclaims, third-party claims, or issues, always preserving inviolate the right of trial by jury.

180. While it is possible that malicious prosecution counterclaims will be no more successful than countersuits, it is more likely that the presence of a counterclaim threat will induce attorneys and clients to be more careful about filing baseless claims. *See also Note, Counterclaiming for Malicious Prosecution, supra* note 172, at 412-13.

The present system requiring that malicious prosecution actions be brought separately is unfair to physicians and other faultless victims of wrongful litigation. The necessity of waiting for a prior termination of one suit and then instituting an entirely new one results in physicians spending years in litigation and thousands of dollars in court costs and attorney fees.¹⁸¹ Even if a physician is successful in a separate, subsequent malicious prosecution action, the fees incurred in the second suit will offset his recovery and thus deny him a full and complete remedy.¹⁸² Malicious prosecution counterclaims, especially in American Rule jurisdictions like Indiana, can be used effectively and are necessary to provide litigants with an opportunity to settle all issues in one judicial proceeding. The establishment of such counterclaims, coupled with a revision of the probable cause standard to include a duty of reasonable investigation, would effectively deter attorneys from bringing baseless suits without discouraging bona fide litigants from initiating valid malpractice actions.

CONCLUSION

The task of striking a fair balance between the rights of physicians and patients is not an easy one. Numerous and conflicting interests abound,¹⁸³ the dominant one being ensuring the existence of adequate health care services.¹⁸⁴ Legislative and judicial efforts to fairly reconcile the competing interests have resulted in a malpractice act that favors physicians and a malicious prosecution standard that denies a person a meaningful opportunity to recover damages for injuries sustained in a wrongfully initiated suit. Indiana has taken an important first step by recognizing the problems caused by the the rise in malpractice litigation and attempting to curb the

181. Wills, *Assault with a Deadly Lawsuit: A Wrong in Search of a Remedy*, 51 L.A. BAR J. 499 (1975) (successful defense of malpractice claim cost physician \$17,500; he was advised not to initiate separate malicious prosecution action although claim was unfounded); White, *A Court Widens the Malpractice Net*, MEDICAL ECONOMICS, 70, 75 (June 7, 1982) (the malicious prosecution action in *Wong v. Tabor* cost Dr. Wong \$6,000). See also Note, *Counterclaiming for Malicious Prosecution*, *supra* note 172, at 413.

182. Note, *Groundless Litigation and the Malicious Prosecution Debate: A Historical Analysis*, 88 YALE L.J. 1218, 1236 (1979).

183. The competing interests stated in their simplest form are the right of open access to courts for litigants versus the right to be free from vexatious litigation for the physicians.

184. *Johnson v. St. Vincent Hospital, Inc.*, ___ Ind. ___, 404 N.E.2d 585, 595 (1980).

crisis before irrevocable damage occurred.¹⁸⁵ However, the first step cannot be the last. Thus, a reassessment of the situation and its corresponding solutions is needed.

The Medical Malpractice Act serves as a strong deterrent to most baseless claims,¹⁸⁶ but may also indirectly discourage good faith litigants from bringing valid claims. Additionally, despite the Act's inclusiveness, physicians who still may be victimized by a wrongful malpractice suit are without a viable remedy. The failure to require any investigation by an attorney prior to instigating legal action encourages the filing of baseless suits against innocent health care providers and other professionals. For the tort of malicious prosecution to have any prophylactic functions as a bar to spurious suits, it must include a duty for attorneys to conduct a reasonable investigation into the facts in issue as an element of probable cause.

Finally, the wisdom of requiring that malicious prosecution be brought, if at all, as an entirely separate action is questionable at best. A carefully drafted statute providing for malicious prosecution counterclaims would serve both patients and physicians by allowing all issues to be decided in one proceeding, thereby reducing the interruption in the personal and professional lives of litigants while easing the overcrowded court dockets. In 1975, the Indiana Legislature responded to the medical malpractice crisis with a comprehensive Medical Malpractice Act. It is time now to reevaluate the effectiveness of that Act and seek additional solutions to strike the balance of interests between health care providers and patients.

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185. See *supra* note 2.

186. See *supra* note 122.

