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Malicious Prosecution: A Physician's Need for Reassessment

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MALICIOUS PROSECUTION: A PHYSICIAN'S NEED FOR REASSESSMENT

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The significant increase in medical malpractice suits, as well as the size of individual damage awards in the early seventies, produced what was commonly referred to as a "malpractice crisis."[1] This trend surged to record levels in 1975 and then began to decrease in 1976-1977.[2] However, several commentators are predicting a new rash of malpractice claims for the eighties.[3] This increase has been attributed to various factors,[4] but physicians claim that one of the prime sources of this escalation is the initiation of "unfounded" or frivolous lawsuits.[5] In an effort to curb this perceived medical malpractice crisis, the medical community has resorted to a multifaceted counterattack.[6] Medical associations have sponsored legislation which penalizes the plaintiffs of unfounded suits[7] and have organized countersuit funds for physicians

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1. *See* Comment, *Countersuits to Legal and Medical Malpractice Actions: Any Chance for Success*? 65 MARQ. L. REV. 93 (1981). [hereinafter cited as Comment].

2. Danzon, *The Frequency and Severity of Medical Malpractice Claims*, The Institute for Civil Justice (1982). [hereinafter cited as Danzon].

3. Parker, *Malicious Prosecution Liability of Plaintiff's Counsel For An Unwarranted Medical Malpractice Claims*, 7 N. KY. L. REV. 265 (1980). [hereinafter cited as *Malicious Prosecution*]. *See also* Comment, *supra* note 1 in 1978; Danzon, *supra* note 2. Medical malpractice claims rose from 15,556 in 1977 to 17,238 in 1978 and the median severity per paid claim increased at an average annual rate of roughly 30% between 1975-1978.

4. Numerous commentators have discussed the sources of the acceleration of malpractice suits. *See, e.g.* Sepler, *Professional Malpractice Litigation Crises: Danger or Distortion?* 15 FORUM 493, 506 (1980) (increase in all civil litigation); Birnbaum, *Physicians Counterattack: Liability of Lawyers for Instituting Unjustified Medical Malpractice Actions*, 45 FORDHAM L. REV. 1003, 1007 (1977) [hereinafter cited as Birnbaum] (increase use of health services, utilization of more modern sophisticated medical technology and the breakdown of traditional personal relationships between doctor and patient). *See also* A. HOLDER, MEDICAL MALPRACTICE LAW 402 (2d ed. 1978).

5. SECRETARY'S COMMISSION ON MEDICAL MALPRACTICE, U.S. DEP'T OF HEALTH, EDUC., AND WELFARE, PUB. NO. 73-88, MEDICAL MALPRACTICE (1973) [hereinafter cited as HEW REPORT]. There is some disagreement on how many actual malpractice suits are "unfounded." *See* Comment, *supra* note 1, at 95; *Birnbaum, supra* note 4 at 1016-17.

6. *See* HEW REPORT, *supra* note 5; Adler, *Malicious Prosecution Suits As Counterbalance to Medical Malpractice Suits*, 21 CLEV. ST. L. REV. 51 (1972). [hereinafter cited as Adler].

7. Am. Med. News, June 20, 1980, at 21, col. 1; Nat'l. L. J., July 7, 1980, at 1, col. 4. The Florida Medical Association sponsored a bill requiring the losing party of a medical malpractice action to pay all attorneys' fees. The bill became law in Florida on June 5, 1980. FLA. STAT. § 768.56 (1980).

who become the victims of such litigation.[8] Also, a nonprofit organization was formed to develop public awareness and solutions for the problems of frivolous malpractice suits.[9]

Similarly, the defendants of these actions have not passively accepted the onerous effects[10] of a baseless suit. Many physicians, believing they had been wrongfully sued, instituted countersuits against their patients or their patients' attorney.[11] One such physician countersuit, *Pantone v. Demos*,[12] was in reaction to a suit for malpractice in which two physicians were sued for negligence for medical treatment they did not administer.[13] The malpractice action against the physicians was instituted after a patient died from complications encountered in the course of childbirth.[14] The malpractice suit against the two doctors alleged that they negligently failed to control the patient's vaginal bleeding and to insure that blood was available to supplement her blood loss during childbirth. Although both physicians had treated the patient on the day she died, neither doctor had any contact or responsibility for her care during childbirth.[15]

Despite the fact that neither physician was involved in any treatment that contributed to the patient's death,[16] both physicians were

8. State medical societies in California, Illinois and Michigan have established legal funds to aid physicians in pursuing countersuits. 12 TRIAL, Sept. 1976, at 7. The American Medical Society has also resolved that appropriate assistance should be given to such physicians. Smith, *Medical Malpractice: The Countersuit Fad*, 12 TRIAL, Dec. 1976, at 44.

9. Lawyers Protecting People From Malicious and Unjustified Lawsuits, Inc., c/o 134 N. LaSalle St., Suite 1100, Chicago, Illinois 60601.

10. The acceleration of medical malpractice suits has resulted in rapidly increasing malpractice insurance costs of medical treatment and defensive medicine which results in a misallocation of medical resources. *See* HEW REPORT, *supra* note 5, at 12; Adler, *supra* note 6, at 52; Higgs, *Physician Countersuits—A Solution To The Malpractice Dilemma?*, 28 DRAKE L. REV. 81 (1979) [hereinafter cited as Higgs].

11. Of the twenty-nine malicious prosecution cases examined for this note, all but nine were brought against both the attorney who filed the original suit and his client. Two cases were brought against the client only. Belsky v. Lowenthal, 47 N.Y.2d 820, 392 N.E.2d 560, 418 N.Y.S.2d 573 (1979); Kolka v. Jones, 6 N.D. 461, 71 N.W. 558 (1897). Seven cases were commenced against the attorney only. Umansky v. Urguhart, 84 Cal. App. 3d 368, 148 Cal. Rptr. 547 (1978); Stopka v. Lesser, 82 Ill. App. 3d 323, 402 N.E.2d 781 (1980); Nelson v. Miller, 227 Kan. 271, 607 P.2d 438 (1980); Raine v. Drasin, 621 S.W.2d 895 (Ky. 1981); Spencer v. Burglass, 337 So. 2d 596 (La. Ct. App. 1976), *cert. denied*, 340 So. 2d 990 (La. 1977); Bull v. McCuskey, 615 P.2d 957 (Nev. 1980); Drago v. Buonagurio, 46 N.Y.2d 778, 386 N.E.2d 821, 413 N.Y.S.2d 910 (1978).

12. 59 Ill. App. 3d 328, 375 N.E.2d 480 (1978).

13. *Id.* at 330, 375 N.E.2d at 481.

14. *Id.*

15. *Id.* Dr. Pantone merely supervised the patient's chest X-ray examination upon admittance. The second defendant, Dr. Swerdlow, performed two venous cutdowns without incident prior to the delivery. *Id.*

16. *Id.*

forced to defend a malpractice suit for over three years.[17] However, when the defendants sought relief from the damage to their professional reputation and increased malpractice insurance that arose from defending the wrongful medical malpractice action, their suit was dismissed for failure to prove any special injury.[18] The *Pantone* court refused "to extend the tort liability for the wrongful filing of a lawsuit beyond the ambit of an action for malicious prosecution or abuse of process."[19] This reasoning has created an inequitable situation in which physicians may be subjected to a baseless malpractice suit without adequate judicial relief for their injuries.

Physicians have relied predominantly on malicious prosecution as a theory of recovery for their countersuits.[20] However, many actions initiated by physicians have been premised on abuse of process,[21] negligence,[22] defamation,[23] barratry[24] and prima facie tort.[25] A few physi-

17. The malpractice action against the two doctors was filed and was later dismissed when their motions for summary judgment were sustained by the court. *Id.*

18. *Id.* at 336-37, 375 N.E.2d at 486.

19. *Id.* at 331, 375 N.E.2d at 482 (quoting Lyddon v. Shaw, 56 Ill. App. 3d 815, 822, 372 N.E. 2d 685, 690 (1978)).

20. Bickel v. Mackie, 447 F. Supp. 1376 (N.D. Iowa 1978); Carroll v. Kalar, 112 Ariz. 595, 545 P.2d 411 (1976); Babb v. Super. Ct. of Sonoma Co., 3 Cal. 3d 841, 479 P.2d 379, 92 Cal. Rptr. 179 (1971); Weaver v. Superior Ct., 95 Cal. App. 3d 166, 156 Cal. Rptr. 745 (1979); Ammerman v. Newman, 384 A.2d 637 (D.C. 1978); Davis v. Ruff, 83 Ill. App. 3d 651, 404 N.E.2d 405 (1980); Stopka v. Lesser, 82 Ill. App. 3d 323, 402 N.E.2d 781 (1980); Balthazar v. Dowling, 65 Ill. App. 3d 824, 382 N.E.2d 1257 (1978); Pantone v. Demos, 59 Ill. App. 3d 328, 375 N.E.2d 480 (1978); Brody v. Ruby, 267 N.W.2d 902 (Iowa 1978); Nelson v. Miller, 227 Kan. 271, 607 P.2d 438 (1980); Raine v. Drasin, 621 S.W.2d 895 (Ky. 1981); Spencer v. Burglass, 337 So. 2d 596 (La. Ct. App. 1976), *cert denied*, 340 So. 2d 990 (La. 1977); Gasis v. Schwartz, 80 Mich. App. 600, 264 N.W. 2d 76 (1978); Belsky v. Lowenthal, 47 N.Y.2d 820, 392 N.E.2d 560, 418 N.Y.S.2d 573 (1979); Drago v. Buonagurio, 46 N.Y.2d 778, 386 N.E.2d 821, 413 N.Y.S.2d 910 (1978); Hoppenstein v. Zemek, 62 A.D.2d 979, 403 N.Y.S.2d 542 (1978); Kolka v. Jones, 6 N.D. 461, 71 N.W. 558 (1897); O'Toole v. Franklin, 279 Or. 513, 569 P.2d 561 (1977); Peerman v. Sidicane, 605 S.W.2d 242 (Tenn. App. 1980); Martin v. Trevino, 578 S.W.2d 763 (Tex. Civ. App. 1978); Moiel v. Sandlin, 571 S.W.2d 567 (Tex. Civ. App. 1978).

21. Bickel v. Mackie, 447 F. Supp. 1376 (N.D. Iowa 1978); Weaver v. Super. Ct. of Orange Co., 95 Cal. App. 3d 166, 156 Cal. Rptr. 745 (1979); Stopka v. Lesser, 82 Ill. App. 3d 323, 402 N.E.2d 781 (1980); Berlin v. Nathan, 64 Ill. App. 3d 940, 381 N.E.2d 1367 (1978), *cert. denied*, 444 U.S. 828, *reh'g denied*, 444 U.S. 975 (1979); Balthazar v. Dowling, 65 Ill. App. 3d 824, 382 N.E.2d 1257 (1978); Pantone v. Demos, 59 Ill. App. 3d 328, 375 N.E.2d 480 (1978); Brody v. Ruby, 267 N.W.2d 902 (Iowa 1978); Nelson v. Miller, 227 Kan. 271, 607 P.2d 438 (1980); Spencer v. Burglass, 337 So. 2d 596 (La. Ct. App. 1976), *cert denied*, 340 So. 2d 990 (La. 1977); Gasis v. Schwartz, 80 Mich. App. 600, 264 N.W.2d 76 (1978); Drago v. Buonagurio, 46 N.Y.2d 778, 386 N.E.2d 821, 413 N.Y.S.2d 910 (1978); O'Toole v. Franklin, 279 Or. 513, 569 P.2d 561 (1977); Martin v. Trevino, 578 S.W.2d 763 (Tex. Civ. App. 1978); Moiel v. Sandlin, 571 S.W.2d 567 (Tex. Civ. App. 1978).

22. Bickel v. Mackie, 447 F. Supp. 1376 (N.D. Iowa 1978); Umansky v. Urguhart, 84 Cal. App. 3d 368, 148 Cal. Rptr. 547 (1978); Brody v. Ruby, 267 N.W.2d 902 (Iowa 1978); Raine v. Drasin, 621 S.W.2d 895 (Ky. 1981); Bull v. McCuskey, 615 P.2d 957 (Nev. 1980); Hoppenstein v. Zemek, 62 A.D.2d 979, 403 N.Y.S.2d 542 (1978); Peerman v. Sidicane, 605 S.W.2d 242 (Tenn. App. 1980); Martin v. Trevino, 578 S.W. 763 (Tex. Civ. App. 1978); Moiel v. Sandlin, 571 S.W.2d 567 (Tex. Civ. App. 1978).

23. Umansky v. Urguhart, 84 Cal. App. 3d 368, 148 Cal. Rptr. 547 (1978).

cians have also relied upon the theory that the attorney breached the Code of Professional Responsibility[26] or that a new cause of action for willful and wanton filing of a lawsuit is mandated by state constitutions which provide that for every wrong there is a remedy.[27]

Although the number of physician countersuits has steadily increased, only three of these suits have been successful.[28] To understand the hindrance a physician encounters in a malpractice countersuit, this note will explore the difficulty in proving the elements under each theory of liability and the policy considerations which seem to disfavor these actions. Primary focus will be placed on malicious prosecution since it is the most frequently employed theory in physician countersuits.[29] This note then will examine the development of malicious prosecution within Illinois and the inequities which result from the use of an artificial standard which requires some form of special injury beyond that normally incurred in a suit. Finally, this article will advocate the need for the reconsideration of the special injury requirement within Illinois and discuss various alternatives the court could utilize in its determination of this issue.

Although this note will focus primarily on the malicious prosecution of malpractice suits against physicians, it is equally applicable to other unfounded professional malpractice suits. Just as physician malpractice suits have consistently increased in number, so too have malpractice actions against attorneys.[30] The need to limit these suits to

24. Berlin v. Nathan, 64 Ill. App. 3d 940, 381 N.E.2d 1367 (1978), *cert. denied*, 444 U.S. 828, *reh'g denied*, 444 U.S. 975 (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).

25. Belsky v. Lowenthal, 47 N.Y.2d 820, 392 N.E.2d 560, 418 N.Y.S.2d 573 (1979); Drago v. Buonagurio, 46 N.Y.2d 778, 386 N.E.2d 821, 413 N.Y.S.2d 910 (1978); Hoppenstein v. Zemek, 62 A.D.2d 979, 403 N.Y.S.2d 542 (1978); Martin v. Trevino, 578 S.W.2d 763 (Tex. Civ. App. 1978).

26. Bickel v. Mackie, 447 F. Supp. 1376 (N.D. Iowa 1978); Berlin v. Nathan, 64 Ill. App. 3d 940, 381 N.E.2d 1367 (1978), *cert. denied*, 444 U.S. 828, *reh'g denied*, 444 U.S. 975 (1979); Lyddon v. Shaw, 56 Ill. App. 3d 815, 372 N.E.2d 685 (1978); Martin v. Trevino, 578 S.W.2d 763 (Tex. Civ. App. 1978).

27. Berlin v. Nathan, 64 Ill. App. 3d 940, 381 N.E.2d 1367 (1978), *cert. denied*, 444 U.S. 828, *reh'g denied*, 444 U.S. 975 (1979); Pantone v. Demos, 59 Ill. App. 3d 328, 375 N.E.2d 480 (1978); Lyddon v. Shaw, 56 Ill. App. 3d 815, 372 N.E.2d 685 (1978). The physicians in *Berlin* and *Lyddon* alleged that the defendants had a duty to refrain from willfully and wantonly bringing suit without probable cause. However, the courts treated this allegation as one for malicious prosecution.

28. Raine v. Drasin, 621 S.W.2d 895 (Ky. 1981); Bull v. McCuskey, 615 P.2d 957 (Nev. 1980); Peerman v. Sidicane, 605 S.W.2d 242 (Tenn. App. 1980).

29. Twenty-two of the twenty-seven cases examined for this note plead a theory of malicious prosecution. *See supra* note 20. The courts in two of the five suits which did not plead malicious prosecution still utilized this theory in their determination of the plaintiffs' allegations. *See supra* note 27. The three suits which did not raise the issue of malicious prosecution were Umansky v. Urguhart, 84 Cal. App. 3d 368, 148 Cal. Rptr. 547 (1978); Bull v. McCuskey, 615 P.2d 957 (Nev. 1980); Wolfe v. Arroyo, 543 S.W.2d 11 (Tex. Civ. App. 1976).

30. Representatives of the insurance industry and independent observers have indicated that

only those actions which are justified is just as great with attorneys and other professionals as it is with physicians. The issues and recommendations discussed in this note are equally significant to all professionals who are subject to malpractice actions.

I. MALICIOUS PROSECUTION

Malicious prosecution is a tort action for the institution, maliciously and without probable cause, of an unfounded civil[31] or criminal proceeding.[32] The origins of an action of this theory are based on the early common law of an action on the case.[33] Case was an action which punished the "manifest vexation" which results from the wrongful initiation of the legal process rather than an action for the initiation of the suit.[34] Case was developed as a remedy for the consequential damages incident to a suit. These damages were not compensated by the internal sanctions of the cost statutes which were limited to the direct expense of the litigation.[35]

In 1267, the common law was modified by the Statute of Marleberge.[36] This statute eliminated an independent civil action for malicious prosecution and gave a summary remedy for costs and damages to a defendant who prevailed in a maliciously prosecuted action. As a result of this statute, a defendant who was maliciously prosecuted was seen as having a full remedy and thus had no need to seek redress in an independent action. Since the Statute of Marleberge was a substitute remedy for the action of malicious prosecution, English courts have refused to extend the tort to a civil action unless there has been an arrest to the person or seizure of property which constitutes special

the attorney professional liability claims frequency quadrupled between 1973 and 1976, from about 1.8 claims to about 7.2 claims per 100 insurance policies; that in 1977 claims would be filed against an estimated 8 out of every 100 practicing attorneys; and that the latest figures available in August 1979 indicated a ratio of 10 claims per 100 policies in 1979. Pfennigstorf, *Types and Causes of Lawyers' Professional Liability Claims: The Search for Facts*, 1980 A.B.F. RES. J. 255, 258.

31. Originally malicious prosecution was utilized to recover damages for the institution of an unjust criminal proceeding. However, this was later expanded to civil actions. Comment, *supra* note 1, at 98.

32. W. PROSSER, HANDBOOK OF THE LAW OF TORTS § 119, at 834-35 (4th ed. 1971) [hereinafter cited as PROSSER].

33. Note, *Groundless Litigation and the Malicious Prosecution Debate: A Historical Analysis*, 88 YALE L.J. 1218 (1979) [hereinafter cited as *Groundless Litigation*].

34. *See* Savile v. Roberts, 1. Ld. Raym. 374, 380, 91 Eng. Rep. 1147, 1151 (1698). In *Savile*, Lord Holt, in dicta, established the guidelines that have become the modern English Rule.

35. *See* Goodhart, *Costs*, 38 YALE L.J. 849, 856-59 (1929). The costs statutes provided some measure of compensation to wronged defendants, but these were limited to direct expenses of the litigation. Taxable costs did not extend to damages arising from arrest of person or attachment of property.

36. 52 Hen. 3, c. 6, § 2 (1267).

injury.[37]

This requirement of some special injury beyond that which is ordinarily incurred in a civil action has created a split in the American courts. A minority of jurisdictions[38] have maintained the English requirement of special injury[39] as one of the elements of malicious prosecution. However, the majority of jurisdictions[40] recognize that the early common law did not require special injury and, while appreciating the historical developments of the special injury rule in England, choose not to follow it. As a result, the majority of jurisdictions in the United States have eliminated the special injury requirement.

By eliminating the special injury requirement, the courts in the majority of jurisdictions have acknowledged the significant differences between the traditional American concept of costs[41] and those available to a successful litigant in England. The majority of jurisdictions have determined that the costs in the United States are totally inadequate compensation for the time, effort and expense of defending a baseless suit.

Although the majority of jurisdictions have eliminated the special injury requirement, malicious prosecution is an action not favored in

37. Special injury has been defined as arrest of the person, interference with defendant's property or some extraordinary injury which is ordinarily not an incident of defending similar actions. However, the usual expenses of litigation, annoyance and inconvenience are insufficient to form the basis of a claim of special injury. The loss of reputation, income, increased malpractice insurance rates and mental suffering caused by the suit are not considered adequate to constitute special damages in the minority jurisdictions. Balthazar v. Dowling, 65 Ill. App. 3d 824, 382 N.E.2d 1257 (1978); Pantone v. Demos, 59 Ill. App. 3d 328, 375 N.E.2d 480 (1978); Alswang v. Claybon, 40 Ill. App. 3d 147, 351 N.E.2d 285 (1976); Moiel v. Sandlin, 571 S.W.2d 567 (Tex. Civ. App. 1978). The types of interferences recognized by special injury jurisdictions are proceedings in lunacy, contempt, bastardy, juvenile delinquency, arrest under civil process, institution of bankruptcy, attachment, garnishment, replevin, search of premises under a warrant, injunctions and proceedings for dissolution of partnership. PROSSER, *supra* note 32, § 120, at 851-52.

38. Seventeen jurisdictions follow the minority English Rule: District Of Columbia, Georgia, Illinois, Iowa, Kentucky, Maryland, New Jersey, New Mexico, New York, North Carolina, Ohio, Oregon, Pennsylvania, Rhode Island, Texas, Washington and Wisconsin. *See* O'Toole v. Franklin, 279 Or. 513, 518, 569 P.2d 561, 564 (1977), for a listing of cases for each state.

39. However, a few jurisdictions have broadened the English special injury rule to include the loss of the right to practice a profession or business losses resulting from a suit. Rivers v. Dixie Broadcasting Corp., 88 Ga. App. 131, 76 S.E.2d 229 (1953); Carver v.Lykes, 262 N.C. 345, 137 S.E.2d 139 (1964).

40. Twenty-three states follow the majority rule: Alabama, Arizona, Arkansas, California, Colorado, Connecticut, Florida, Indiana, Kansas, Louisiana, Massachusetts, Michigan, Minnesota, Mississippi, Missouri, Nebraska, North Dakota, Oklahoma, South Carolina, South Dakota, Tennessee, Vermont and West Virginia. *See* O'Toole v. Franklin, 279 Or. 513, 518, 569 P.2d 561, 564 (1977).

41. PROSSER, *supra* note 32 § 120, at 851. In America, the elimination of attorneys' fees as an element of costs renders the English remedy of little value to the successful defendant who must rely on malicious prosecution to recover his losses from the unjustified suit.

the law.[42] These courts reason that the heavy burden of proof a plaintiff must sustain in order to establish the elements of malicious prosecution will deter the problem of interminable litigation. Therefore, the courts strictly construe the elements of malicious prosecution.

This strict construction approach has made it difficult for a plaintiff to establish the elements of malicious prosecution. The plaintiff in a malicious prosecution action in both the minority and majority jurisdictions must prove the elements of: (1) lack of probable cause for the prior suit; (2) malice in instituting the original suit; and (3) termination of the prior suit in favor of the original defendant. However, the majority and minority jurisdictions conflict on the requirement of special injury; unlike the minority jurisdiction, the courts in the majority jurisdiction do not require this element.[43]

A. Elements

1. Lack of Probable Cause

The absence of probable cause is an essential element of an action for malicious prosecution. Any showing of probable cause is an absolute defense barring recovery even if malice is proven.[44] Probable cause for instituting a proceeding within a civil context exists when "there is a reasonable ground for suspicion, supported by circumstances sufficiently strong in themselves to warrant a cautious, or prudent, man[45] in the belief that the party committed the act of which he is complaining."[46] A successful malicious prosecution is dependent on the plaintiff sustaining the burden of proving beyond a preponderance of the evidence[47] that the original claimant instituted an action without a reasonable belief in the viability of his claim. This issue is determined with regard to both the objective reasonableness of the claimant and

42. 52 AM. JUR. 2d *Malicious Prosecution* § 5 (1970).

43. *See supra* notes 37-39 and accompanying text for the differences in the damage requirement between the majority and minority jurisdictions.

44. Ammerman v. Newman, 384 A.2d 637 (D.C. 1978).

45. The courts have utilized both the words "cautious" and "reasonable" in determining the requirements of probable cause. The use of cautious seems to imply a more rigid standard of inquiry, but this may simply be a careless use of terminology. *See* Note, *Liability for Proceeding with Unfounded Litigation*, 33 VAN. L. REV. 743, 747 (1980); Ammerman v. Newman, 384 A.2d 637 (D.C. 1978); Nelson v. Miller, 227 Kan. 271, 607 P.2d 438 (1980) (cautious man). Carrol v. Kalar, 112 Ariz. 595, 545 P.2d 411 (1976); Weaver v. Super. Ct. of Orange Co., 95 Cal. App. 3d 166, 156 Cal. Rptr. 745 (1979) (reasonable man).

46. Nelson v. Miller, 227 Kan. 271, 277, 607 P.2d 438, 443-44 (1980); *accord* PROSSER, *supra* note 22, § 119, at 841.

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

his actual subjective belief in his claim.[48] If the facts are disputed, the determination of probable cause is left to the jury. Otherwise, it is a question of law to be resolved by the court.[49]

The attorney representing the patient in the malpractice action is also liable for the malicious prosecution of a baseless suit. Therefore, it is necessary to examine the belief of both the patient and the attorney to assess the basis for the lack of probable cause in instituting the action. The plaintiff who instigates the original suit can show probable cause by proving the action was instituted on the advice of competent counsel after full and truthful disclosure of the facts.[50] Patients' good faith reliance upon the advice of counsel immunizes them against liability for an attorney's derelictions or mistaken advice.[51] The client, nevertheless, will fail to meet the test of probable cause by acting in bad faith; either through the failure to reveal all relevant facts, the improper disclosure of false information,[52] or the initiation of a claim which in good faith is known to be unjustified.[53] However, a voluntary dismissal by the plaintiff also can raise a presumption of want of probable cause.[54]

In contrast, an attorney has the duty[55] to zealously pursue a client's interests, although unsure of whether the client or the client's adversary is truthful, as long as the issue is genuinely in doubt.[56] Thus, an attorney may rely in good faith upon the facts that the client relates to him.[57] However, if an attorney prosecutes a claim which "a reasonable lawyer would not regard as tenable or by unreasonably neglecting to investigate the facts and law in making his determination to pro-

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

49. *See* Carrol v. Kalar, 112 Ariz. 595, 598-99, 545 P.2d 411, 412 (1976); Nelson v. Miller, 227 Kan. 271, 277-78, 607 P.2d 438, 444 (1980).

50. Sazdoff v. Bourgeois, 301 So. 2d 423 (La. Ct. App. 1974); Williams v. Frey, 78 P.2d 1052 (Okla. 1938).

51. *See* Note, *Malicious Prosecution: An Effective Attack on Spurious Medical Malpractice Claims*, 26 CASE W. RES. L. REV., 653, 666-67 (1976) [hereinafter cited as *Effective Attack*].

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

53. Bertero v. National Gen. Corp., 13 Cal. 3d 43, 529 P.2d 608, 118 Cal. Rptr. 184 (1975).

54. *E.g.*, Ray v. City Bank & Trust Co., 358 F. Supp. 630 (S.D. Ohio 1973); Wetmore v. Mellinger, 64 Iowa 741, 14 N.W. 722 (1883); Kolka v. Jones, 6 N.D. 461, 71 N.W. 558 (1897); Brown v. Liquidators, 152 Or. 215, 52 P.2d 187 (1935).

55. ABA CODE OF PROFESSIONAL RESPONSIBILITY DR 7-101(A)(1) and EC 7-1 (1981).

56. Tool Research & Eng'r. Corp. v. Henigson, 46 Cal. App. 3d 675, 683-84, 120 Cal. Rptr. 291, 297 (1975).

57. Moiel v. Sandlin, 571 S.W.2d 567, 570 (Tex. Civ. App. 1978). An attorney may assume the accuracy of facts related by his client unless lack of probable cause is obvious. *Id.*

ceed,"[58] then the lack of probable cause may be established. If the question of probable cause is unclear, the court will most likely defer to the attorney's judgment.[59] As a result, a plaintiff in a malicious prosecution action will encounter great difficulty in proving absence of probable cause. The client will be sheltered by the absolute defense of good faith reliance on the counsel's advice, and the attorney will be immune because of the duty to be the client's advocate, a good faith reliance on the client's assertions of the facts, or the existence of a debatable legal issue which has been submitted for litigation.[60]

2. Malice

Malice and absence of probable cause clearly are separate and absolute requirements which must be proven before an action for malicious prosecution can be sustained. Generally, however, courts have determined that malice may be inferred by showing a lack of probable cause.[61]

A jurisdiction's attitude toward malicious prosecution is frequently evinced by the standard of malice it utilizes in such actions.[62] Some jurisdictions require actual malice which is generally evidenced by a claimant's ill will, anger or desire to vex,[63] although it is not necessary to prove actual malice in the sense of hatred.[64] Actual malice can be shown when the original action was instituted with an improper motive.[65] An improper motive would be any purpose other than the adju-

58. Tool Research & Eng'r. Corp. v. Henigson, 46 Cal. App. 3d 675, 683-84, 120 Cal. Rptr. 291, 297 (1975).

59. Comment, *Attorneys' Liability To Clients' Adversaries For Instituting Frivolous Lawsuits: A Reassertion Of Old Values*, 53 ST. JOHN'S L. REV. 775, 777-78 (1979) [hereinafter cited as *Attorney's Liability*].

60. Birnbaum, *supra* note 4, at 1025; *Malicious Prosecution, supra* note 3.

61. Weaver v. Super. Ct. of Orange Co. 95 Cal. App. 3d 166, 188, 156 Cal. Rptr. 745, 757 (1979); *See also* Comment, *Attorney Liability for Malicious Prosecution and Legal Malpractice: Do They Overlap?*, 8 PAC. L.J. 897, 904 (1977) ("Regardless of the theory on which a court relies to find malice, a close factual analysis of the cases suggests that malice is almost always found from the same facts as those which establish lack of probable cause.") The converse inference, i.e., finding a lack of probable cause from facts establishing a motive of ill will, is not permitted generally. *See* PROSSER, *supra* note 32, at § 119, at 841.

62. Comment, *supra* note 1, at 104.

63. Birnbaum, *supra* note 4, at 1025.

64. An attorney need not be personally motivated by malice. It is sufficient if he proceeded with a suit knowing of his client's malicious motive. Munson v. Linnick, 255 Cal. App. 2d 589, 63 Cal. Rptr. 340 (1967); Burnap v. Marsh, 13 Ill. 535 (1852), Hoppe v. Klapperich, 224, Minn. 224, 28 N.W.2d 780 (1947).

65. Ammerman v. Newman, 384 A.2d 637 (D.C. 1978); Nelson v. Miller, 227 Kan. 271, 607 P.2d 438 (1980); Kolka v. Jones, 6 N.D. 461, 71 N.W. 558 (1897). When a proceeding is intentionally instituted with any other motive than to bring a party to justice, it is in law a malicious prosecution. Thus a suit is initiated for an improper purpose when the party bringing the suit knows his claim is not meritorious.

dication of the merits, such as filing for settlement value, delay or resolution of an outstanding debt.

Legal or implied malice has also been deemed sufficient to sustain a malicious prosecution action. Legal malice is evidenced by "the intentional doing of a wrongful act without just cause or excuse."[66] A wanton or reckless refusal to reasonably investigate, or the refusal to terminate an action upon notice that it is groundless would according to some courts, constitute evidence of legal malice.[67]

3. Favorable Termination

The plaintiff in a malicious prosecution must be able to demonstrate that the proceeding on which the suit is based has terminated[68] in his favor.[69] There are four principal reasons the courts have espoused for this requirement. First, the termination of a civil proceeding without a judicial determination of the factual issues is not evidence of lack of probable cause since there is no preliminary determination regarding the sufficiency of the evidence to justify the suit.[70] Therefore, dismissal on a technical procedural ground, or as a result of settlement or consent,[71] a cross-claim or counter-claim,[72] or the mere institution of a

66. Lyons v. St. Joseph Belt Ry. Co., 232 Mo. App. 575, 584, 84 S.W.2d 933, 944 (1935).

67. Ray v. City Bank & Trust Co., 358 F. Supp. 630, 638 (D.C. Ohio 1973). *Contra*, Spencer v. Burglass, 337 So. 2d 596 (La. Ct. App. 1976) *cert. denied* 340 So. 2d 990 (La. 1977). The court in *Spencer* stated that "malice exists where the charge is made with knowledge that it is false or with reckless disregard as to whether it is false or not." *Id.* at 599. The court rejected the argument that failure to investigate could entail reckless disregard of the truth. The court concluded that "[a]t worst, the allegation is that defendant went to trial with a poor case and got his just desserts, to wit, he lost." *Id.* at 600.

68. Weaver v. Super. Ct. of Orange Co., 95 Cal. App. 3d 166, 184, 156 Cal. Rptr. 745, 755 (1979) (*quoting*, Jaffe v. Stone, 18 Cal. 2d 146, 150, 114 P.2d 335, 338 (1941)) (emphasis in original).

> The theory underlying the requirement of favorable termination *is that it tends to indicate the innocence of the accused, and coupled with the other elements of lack of probable cause and malice, establishes the tort*, that is, the malicious and unfounded charge of crime against an innocent person. . . . The same fundamental theory is applied in testing a dismissal or other termination without a complete trial on the merits. *If it is of such a nature as to indicate the innocence of the accused, it is a favorable termination sufficient to satisfy the requirement. If, however, the dismissal is on technical grounds, for procedural reasons, or any other reason not inconsistent with his guilt, it does not constitute a favorable termination.*

69. Babb v. Super. Ct. of Sonoma Co., 3 Cal. 3d 841, 845, 479 P.2d 379, 381, 92 Cal. Rptr. 179, 181 (1971); Gasis v. Schwartz, 80 Mich. App. 600, 602, 264 N.W.2d 76, 77 (1978); Hoppenstein v. Zemek, 62 A.D.2d 979, 979, 403 N.Y.S.2d 542, 543 (1978); Drago v. Buonagurio, 46 N.Y.2d 778, 386 N.E.2d 821, 413 N.Y.S.2d 910 (1978).

70. Savage v. Seed, 81 Ill. App. 3d 744, 401 N.E.2d 984 (1980).

71. Weaver v. Super. Co. of Orange Co., 95 Cal. App. 3d 166, 184, 156 Cal. Rptr. 745, 755 (1979) (voluntary dismissal with prejudice of a malpractice action is not *per se* unfavorable termination). *See supra* note 68.

72. Babb v. Super. Ct. of Sonoma Co., 3 Cal. App. 3d 841, 846, 479 P.2d 379, 381, 92 Cal. Rptr. 179, 181 (1971) (dicta).

civil action by summons and complaint[73] does not constitute favorable termination since such actions do not lend "credence to the claim that the assertions (in the original complaint) were baseless."[74] Although judicial opinion is not uniform in its characterization of what constitutes termination "in favor" of the original defendant, it is not essential that the previous action conclude on the merits.[75] Either a termination not adverse to, or a decision favorable to the defendant (as distinguished from judgment on the merits) is sufficient evidence of favorable termination. Thus, dismissal for failure to prosecute or abandonment would constitute favorable termination.

A second reason for requiring favorable termination prior to a malicious prosecution action, is to prevent the possibility of inconsistent judgments that would result if the plaintiff prevailed in the original action but lost in the malicious prosecution suit.[76] Courts have attempted to eliminate conflicting verdicts where a plaintiff in a malicious prosecution action could recover for the defendant's initiation of the original suit which later is found to be justified.[77]

Third, since the courts do not favor the action of malicious prosecution, the rule of favorable termination supports the public policy considerations which the courts have examined. Favorable termination discourages malicious prosecution actions,[78] prevents unnecessary litigation,[79] and prevents any possibility of prejudice to the plaintiff in the original suit.[80]

Finally, without the termination requirement, concurrent actions "would tend to drive a wedge between the malpractice plaintiff and his

73. Hoppenstein v. Zemek, 62 A.D.2d 979, 979, 403 N.Y.S.2d 542, 546 (1978).

74. Savage v. Seed, 81 Ill. App. 3d 744, 748, 401 N.E.2d 984, 988 (1980) (*quoting*, Siegel v. City of Chicago, 127 Ill. App. 2d 84, 108, 261 N.E.2d 802, 814 (1970)).

75. *See, e.g.*, Minasian v. Sapse, 80 Cal. App. 3d 823, 145 Cal. Rptr. 829 (1978).

76. Babb v. Super. Ct. of Sonoma Co., 3 Cal. 3d 841, 846-47, 479 P.2d 379, 382, 92 Cal. Rptr. 179, 182 (1971). *See also* Raine v. Drasin, 621 S.W.2d 895, 900 (Ky. 1981); Gasis v. Schwartz, 80 Mich. App. 600, 602, 264 N.W.2d 76, 77 (1978).

77. The court in Savage v. Seed, 81 Ill. App. 3d 744, 401 N.E.2d 984 (1980), considered this possibility when it rejected the plaintiff's argument that a voluntary dismissal would constitute favorable termination.

78. Abolition of the favorable termination rule would encourage malicious prosecution since defendants would utilize counterclaims more readily than instituting a separate action. Counterclaims are seen as expanding the cause of action since they are less time consuming and less expensive. Babb v. Super. Ct. of Sonoma Co., 3 Cal. 3d 841, 849-50, 479 P.2d 379, 383-84, 92 Cal. Rptr. 179, 183-84 (1971). *See Effective Attack, supra*, note 51.

79. Babb v. Super. Ct. of Sonoma Co., 3 Cal. 3d 841, 479 P.2d 379, 92 Cal. Rptr. 179 (1971). A defendant who loses in a malpractice action will not institute a malicious prosecution suit since the adverse judgment conclusively establishes that the plaintiff had probable cause.

80. Without the termination rule, a plaintiff would be prejudiced by the introduction of lack of probable cause or malice in the original proceeding. *Id.* at 847-48, 479 P.2d at 382, 92 Cal. Rptr. at 182.

attorney."[81] The attorney would be unable to adequately prepare his client's case since he would be consumed in preparation of his own defense and possibly could be forced to withdraw from the malpractice action.[82] Thus, the favorable termination requirement eliminates any conflict of issues between the attorney and his client which would result if they were placed in adverse positions as cross-defendants.

4. Conflicting Views Regarding Damages

Public policy considerations have been the determinative factor in the courts' decisions regarding the requirement of special injury. The minority jurisdictions require special damages because of the need for "free and unfettered access to the courts."[83] These jurisdictions fear that the threat of a countersuit will deter the honest claimants from a vindication of their rights. They are also concerned that a litigant's access to the courts will be extremely limited since attorneys, "fearful of being held liable as insurers of the merits of their client's case,"[84] will refuse to undertake representation in close or difficult matters.[85]

Another policy consideration commonly cited for the special injury rule has been the belief that countersuits will result in an endless stream of litigation.[86] The courts have determined that the special injury requirement facilitates judicial economy and places a restraint on interminable litigation. "Otherwise litigation could lead, not to an end of disputing, but to its beginning."[87]

A third reason the minority jurisdictions espouse for retaining the

81. Lyddon v. Shaw, 56 Ill. App. 3d 815, 820, 372 N.E.2d 685, 688 (1978). *E.g.*, Babb v. Super. Ct. of Sonoma Co., 3 Cal. 3d 841, 479 P.2d 379, 92 Cal. Rptr. 179 (1971).

82. *Id.*

83. Berlin v. Nathan, 64 Ill. App. 3d 940, 946, 381 N.E.2d 1367, 1375 (1978), *cert. denied*, 444 U.S. 828, *reh'g denied* 444 U.S. 974 (1979). *See also* Ammerman v. Newman, 384 A.2d 637 (D.C. 1978); Pantone v. Demos, 59 Ill. App. 3d 328, 375 N.E.2d 480 (1978); Lyddon v. Shaw, 56 Ill. App. 3d 815, 372 N.E.2d 685 (1978); Raine v. Drasin, 621 S.W.2d 895 (Ky. 1981); Drago v. Buonagurio, 46 N.Y.2d 778, 386 N.E.2d 821, 413 N.Y.S.2d 910 (1978).

84. Lyddon v. Shaw, 56 Ill. App. 3d 815, 822, 372 N.E.2d 685, 690 (1978). *See also* Norton v. Hines, 49 Cal. App. 3d 917, 123 Cal. Rptr. 237 (1975); Berlin v. Nathan, 64 Ill. App. 3d 940, 381 N.E.2d 1367 (1978), *cert. denied*, 444 U.S. 848, *reh'g denied*, 444 U.S. 974 (1979); Pantone v. Demos, 59 Ill. App. 3d 328, 375 N.E.2d 480 (1978); Drago v. Buonagurio, 46 N.Y.2d 778, 386 N.E.2d 821, 413 N.Y.S.2d 910 (1978).

85. The court in Norton v. Hines stated:

> The attorney owes a duty to his client to present his case vigorously in a manner as favorable to the client as the rules of law and professional ethics will permit. He is an advocate and an officer of the court . . . The attorney must have the same freedom in initiating his client's suit as the client. If he does not, lawsuits now justifiably commenced will be refused by attorneys, and the client, in most cases, will be denied his day in court.

49 Cal. App. 3d 917, 922-23, 123 Cal. Rptr. 237, 240-41 (1975).

86. *See, e.g.*, Ammerman v. Newman, 384 A.2d 637 (D.C. 1978).

87. Melvin v. Pence, 130 F.2d 423, 426 (1942).

special damages rule is that the award of costs is a sufficient remedy for a defendant who successfully defends a groundless suit.[88] Therefore, these courts have decided that a defendant in a frivolous lawsuit is not justified in seeking additional relief unless he has sustained some extraordinary injury.

The final justification which the state appellate courts have given for the special injury requirement is that the responsibility for altering the old common law rule is for the legislature and not the courts.[89] Although the courts were responsible for the original rule and in many ways are institutionally better equipped for the rational and systematic development of private law,[90] the minority jurisdictions have deemed that the legislative process is the appropriate means for any modification of the special injury rule. The minority jurisdictions cite two reasons for this conclusion. First, they contend that the legislature can utilize certain techniques, such as specifying minimum or maximum amounts of recovery, which are not available to the courts. Second, these jurisdictions argue that an appeal briefed by two parties does not equal the public participation present in legislative hearings.

The courts which have rejected the special injury requirement have found no merit in the policy considerations advocated by the minority jurisdictions. The Restatement of Torts has also rejected the minority jurisdictions' policy arguments and the special injury requirement.[91] While concurring that the courts should be open for the vindication of justifiable claims, the proponents of the Restatement Rule advocate the need for deterring meritless suits[92] and compensating those burdened with the defense of such actions.[93] These courts have concluded that the risk of indiscriminate, endless litigation is sufficiently minimized by the difficulty a plaintiff incurs in proving the basic elements of the tort. Therefore, the additional hindrance of spe-

88. Perry v. Arsham, 101 Ohio App. 285, 136 N.E.2d 141 (1956).

89. Bickel v. Mackie, 447 F. Supp. 1376 (N.D. Iowa 1978); O'Toole v. Franklin, 279 Or. 513, 569 P.2d 561 (1977).

90. Peck, *The Role of the Courts and Legislatures in the Reform of Tort Law*, 48 MINN. L. REV. 265 (1963). Legislatures are said to give attention to the development of malicious prosecution only sporadically at the initiative of special interests. Also, future claimants in civil litigation rarely perceive a common interest in the law in advance of such litigation. Professor Peck contended that the courts are best suited to make reforms in private law since they are more familiar with the actual functions of legal rules in litigation.

91. RESTATEMENT (SECOND) OF TORTS § 674, Comment e (1977) (the wronged party must show material harm or violation of a legal right that would itself support action for damages) [hereinafter cited as RESTATEMENT].

92. *See, e.g.*, Norton v. Hines, 49 Cal. App. 3d 917, 922, 123 Cal. Rptr. 237, 240 (1975).

93. *See, e.g.*, Whipple v. Fuller, 11 Conn. 582, 585 (1836); Closson v. Staples, 42 Vt. 209, 215-22 (1869).

cial injury is unnecessary.[94]

The advocates of the Restatement Rule also have challenged the minority's concern for the "free and unfettered access" to the courts since these very courts have barred any possibility of recovery for those physicians damaged by a maliciously prosecuted malpractice suit.[95] The majority of jurisdictions have also rejected the minority's position that potential countersuits in malicious prosecution will deter honest claimants from seeking judicial redress since there was a scarcity of empirical evidence to support this fear.[96] These courts have decreed that the judicial process must be available to both plaintiffs and defendants who are seeking vindication of their rights.

The courts in the majority jurisdictions have also rejected the theory that the award of costs constituted adequate compensation for one subjected to a groundless suit. Not only are court costs relatively trivial in comparison with the total expense of defending a suit,[97] but the general statutes regulating costs make no distinction between an honest suitor with a valid claim and the litigant who maliciously files a baseless suit.[98] Thus, with costs alone as a redress for the expense necessary to a defense, both those who lawfully and maliciously sue would stand on exactly the same footing in regard to their liability for their acts.[99] The proponents of the Restatement Rule agree that the courts should be available for those seeking redress for their injuries. However, these advocates urge that this policy does not demand that malicious plaintiffs should be encouraged, by the assurance of protection in advance, to "vex, damage, and even ruin a peaceful citizen by the illegal prosecution of an action upon an unfounded claim."[100]

Once actual damages exceeding recoverable costs in the original

94. *See, e.g.*, Note, *Physicians Countersuits: Malicious Prosecution, Defamation and Abuse of Process As Remedies For Meritless Medical Malpractice Suits*, 45 U. CIN. L. REV., 604, 608 (1976).

95. *See* Comment, *supra* note 1, at 98. In jurisdictions that continue to apply the strict requirement of proof of special injury, the physician's ability to assert a cause of action for malicious prosecution is illusory, in most cases, because the patient's suit against a physician for malpractice does not usually involve a civil arrest of the physician, seizure of the physicians' property, or any recognized special injury to the physician which would not ordinarily result in all suits prosecuted for like causes of action. Birnbaum, *supra* note 4, at 1022-23.

96. *See Effective Attack, supra* note 51. There is no indication of any marked decline in the jurisdictions which have adopted the liberal majority. For a study of malicious prosecution actions in a state adopting the liberal view, see Comment, *Malicious Prosecutions in Tennessee*, 29 TENN. L. REV. 552 (1962).

97. *See* McCormick, *Counsel Fees and Other Expenses of Litigation as an Element of Damages*, 15 MINN. L. REV. 619, 620-21 (1931). *See also* Peerson v. Ashcraft Cotton Mills, 201 Ala. 348, 78 So. 204 (1917); Kolka v.Jones, 6 N.D. 461, 71 N.W. 558 (1897).

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

99. *Id.*

100. *Id.*, 71 N.W. at 560.

action are shown, both the English and the Restatement Rule allow for recovery of all expenses and damage incurred by reason of the wrongful litigation.[101] These damages include any loss of income,[102] reasonable legal fees incurred in defending the malpractice suit,[103] harm to reputation,[104] mental suffering[105] and any consequential damages.[106] Punitive damages may also be recovered where there is proof of actual malice.[107]

B. Successful Actions for Malicious Prosecution

Two physician countersuits for malicious prosecution have been successful.[108] In *Raine v. Drasin*,[109] two physicians recovered for the malicious prosecution of a medical malpractice suit which was filed by an attorney, Raine. The malpractice suit charged that the physicians negligently broke their patient's shoulder. The suit was commenced and continued despite the attorney's knowledge that neither of the physicians had any contact with the patient until after the injury had already occurred.

The court determined that the allegation made in the malpractice case regarding the physicians' "careless and negligent manner" was a sufficient basis for the finding that the doctors' reputations had been assailed.[110] The court stated that the accusation of negligence in the exercise of one's profession can certainly result in "mortification, humiliation, injury to the reputation, character and health, mental suffering, and general impairment of social and mercantile standing—all of which are elements of damage in a malicious prosecution action."[111] Since all of the elements of malicious prosecution were present,[112] the

101. RESTATEMENT, *supra* note 91, at § 681.

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

103. Annot., 21 A.L.R.3d 1068 (1968).

104. Nelson v. Miller, 227 Kan. 271, 607 P.2d 438 (1980); Raine v. Drasin, 621 S.W.2d 895 (Ky. 1981). It has been argued that damage to reputation resulting from a malicious prosecution action should be considered a special injury in those states that follow the minority rule. *See* Note, *Malicious Prosecution—Injury to Reputation as a Basis for Recovery*, 6 WILLIAMETTE L.J. 173 (1970).

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

106. Babb v. Super. Co. of Sonoma Co., 3 Cal. 3d 841, 847-48 at n.4, 479 P.2d 379, 382-83 & n.4, 92 Cal. Rptr. 179, 182-83 & n.4 (1971).

107. Richards v. Super. Ct. of Los Angeles Co., 86 Cal. App. 3d 265, 150 Cal. Rptr. 77 (1978).

108. Raine v. Drasin, 621 S.W.2d 895 (Ky. 1981); Peerman v. Sidicane, 605 S.W.2d 242 (Tenn. App. 1980).

109. 621 S.W.2d 895 (Ky. 1981).

110. *Id.* at 900.

111. *Id.*

112. Favorable termination was proven since the dismissal with prejudice "did not entail any compromise or settlement; it simply and effectively terminated the lawsuit. . . ." *Id.* at 899. Ab-

court ruled that the defendant was responsible for all damages sustained, in addition to loss of time, expense incurred and punitive damages.[113]

Peerman v. Sidicane[114] was the second successful malicious prosecution action. In *Peerman*, a physician was awarded damages in an action for malicious prosecution and abuse of process. The physician was sued for malpractice by his patient who alleged that he had negligently diagnosed and treated her condition. She also alleged that he had delayed advising her of his misdiagnosis since the laboratory tests he administered were delayed because the doctor used a lab where he received a "kickback" of a portion of the fees.[115] However the court found that after filing the suit, the attorney made substantially no investigation of the case[116] and that there was actually ample evidence to indicate that the physician conformed to the highest standard of the medical profession in the treatment of his patient.[117] The court determined that the attorney was liable for malicious prosecution and abuse of process because he had continued the suit without his client's knowledge or consent, had made allegations in the complaint which were pure speculation on his part and had prosecuted a groundless appeal without the consent of his client.[118]

II. ALTERNATE THEORIES OF RECOVERY

Since the problems in proving the elements of malicious prosecution and the requirement of special injury in the minority jurisdictions have proven to be formidable obstacles to a physician seeking recovery in a malicious prosecution suit, many doctors have sought alternate

sence of probable cause was shown through the expert testimony that the attorney did not comply with the standard of care for ordinary and prudent lawyers. *Id.* at 901. The attorney's failure to investigate the facts and law prior to filing the suit was also material as to the question of probable cause. *Id.* at 902. Although the court did not specify the basis of its determination of malice, it did state that malice could be inferred from lack of probable cause. *Id.* at 901. *See supra* notes 110-11 and accompanying text for a discussion of damages.

113. *Id.* at 900.

114. 605 S.W.2d 242 (Tenn. App. 1980).

115. *Id.* at 243.

116. *Id.* at 244-45. The attorney did not take the physician's or any other person's deposition. He made no effort to prove or support the allegation of fee-splitting. He also did not consult any physician regarding the standard of medical treatment in the community concerning the type of treatment given.

117. *Id.* at 245. The physician had given the patient the most reliable medical laboratory test with results available within 48 hours; any delay in the patient's learning of these results was due to her own failure to consult the doctor two days after her first visit. There was also no factual basis for the allegation of fee-splitting and expert testimony was given regarding the doctor's standard of care.

118. *Id.* at 245.

theories of recovery. Physicians have relied on alternate theories such as abuse of process, defamation, barratry, prima facie tort and, most frequently, negligence.[119] However, these causes of action have not proven any more successful than malicious prosecution. The courts have rejected the alternate theories and have referred the physician to the appropriate action of malicious prosecution. Of these alternatives, abuse of process is the most successful, even though this success has been extremely limited.[120]

A. Abuse of Process

Abuse of process has been defined as a misuse or perversion of regularly issued legal process, after it has been issued, to achieve some collateral purpose not justified by the nature of the process.[121] In order to recover for this action, a plaintiff must plead and prove three elements: (1) that the defendant made an illegal, improper or perverted use of the process—a use neither warranted nor authorized by the process; (2) that the defendant had an ulterior motive or purpose in exercising such illegal, perverted or improper use of the process; and (3) that damage resulted to the plaintiff as a result of such irregular acts.[122]

Abuse of process and malicious prosecution are similar in that they both originated from the action on the case,[123] resulted from an improper use of the legal process,[124] allow for the same compensatory damages[125] and require that special injury be proven.[126] However, there are several major distinctions between the two actions. The fundamental difference between malicious prosecution and abuse of process is that in the latter the original use of the legal process is justified, but the process itself is later employed for a purpose not contemplated

119. *See* Comment, *Physician Countersuit: A Cause Without Action*, 12 PAC. L.J. 745 (1981) [hereinafter cited as *Countersuit*].

120. Of the three successful physician countersuits, the plaintiffs in two of these suits prevailed on the theory of abuse of process. Bull v. McCuskey, 615 P.2d 957 (Nev. 1980) (abuse of process only); Peerman v. Sidicane, 605 S.W.2d 242 (Tenn. App. 1980) (both abuse of process and malicious prosecution); Raine v. Drasin, 621 S.W.2d 895 (Ky. 1981) (recovery was granted for the malicious prosecution but the abuse of process action was dismissed).

121. Brody v. Ruby, 267 N.W.2d 902, 905 (Iowa 1978). *See* RESTATEMENT, *supra* note 91, at § 682; Birnbaum, *supra* note 4, at 1033-34.

122. Martin v. Trevino, 578 S.W.2d 763, 769 (Tex. Civ. App. 1978).

123. *See* note 33 *supra* and accompanying text.

124. *See* Birnbaum, *supra* note 4, at 1034.

125. Bull v. McCuskey, 615 P.2d 957, 960 (Nev. 1980).

126. Drago v. Buonagurio, 46 N.Y.2d 778, 386 N.E.2d 821, 413 N.Y.S.2d 910 (1978). The similarity between malicious prosecution and abuse of process, with regard to the special injury requirement, only applies to those jurisdictions which follow the English Rule.

by the law.[127] The basis of malicious prosecution, however, is that the process is initiated maliciously and without any justification.

Another distinction between the two actions is that abuse of process does not require two of the elements of malicious prosecution: the termination of the initial proceeding in the defendant's favor[128] or absence of probable cause in the original suit.[129] Although abuse of process does require malice, it is not the ill will or absence of possible success required in malicious prosecution suits.[130] Rather, it is the use of the legal process for an ulterior purpose. This is evidence of a defendant's willful, intentional misuse of the process proper to the proceeding.[131] The essence of the tort lies in the use of otherwise legal process to extort some collateral advantage from the defendant, frequently to force a nuisance settlement.

Abuse of process has not been a widely successful alternative for a physician maliciously prosecuted for malpractice. In all but two cases,[132] the courts have rejected this theory in physician countersuits. The courts have determined that an allegation of instituting a groundless suit is not sufficient to state a cause of action for abuse of process. The courts have determined that when the judicial process is used in a technically appropriate manner, such as initiating a suit, the process has not been abused. Consequently, the filing of a medical malpractice suit, even though meritless, is seen as a proper use of the legal process since the purpose of such a suit is the settlement of the alleged damages and this would be within the goals of proper process.[133] Thus, unless physicians were able to allege that the malpractice action was misused after it was instituted, the courts have rejected the abuse of process theory and have recommended malicious prosecution as the proper cause of action.

Peerman v. Sidicane[134] and *Bull v. McCuskey*[135] are two cases in which a physician relying on abuse of process has successfully recov-

127. Bickel v. Mackie, 447 F. Supp. 1376, 1382 (N.D. Iowa 1978); Raine v. Drasin, 621 S.W.2d 895, 902 (Ky. 1981).

128. Bickel v. Mackie, 447 F. Supp. 1376, 1382 (N.D. Iowa 1978).

129. *See* PROSSER, *supra* note 32, § 121, at 856.

130. *See* Higgs, *supra* note 10, at 90.

131. Bull v. McCuskey, 615 P.2d 957, 961 (Nev. 1980).

132. *Id. See also* Peerman v. Sidicane, 605 S.W.2d 242 (Tenn. App. 1980).

133. Bickel v. Mackie, 447 F. Supp. 1376, 1383 (N.D. Iowa 1978).

134. 605 S.W.2d 242 (Tenn. App. 1980). The court did not discuss the malicious prosecution and abuse of process actions separately. Therefore, for a discussion of *Peerman* and the court's reasoning for awarding of damages in the abuse of process action, see *supra* notes 114-18 and accompanying text.

135. 615 P.2d 957 (Nev. 1980).

ered for the damages resulting from a malpractice suit. In *Bull*, the physician alleged that the attorney instituted the malpractice action for the ulterior purpose of coercing a nuisance settlement because he knew there was no basis for the claim of malpractice. The attorney did not examine the medical records prior to filing the malpractice suit, did not confer with another doctor regarding the standard of care administered, nor did he take the deposition of the physician sued.[136] The court determined that the attorney's offer to settle the case for the minimal amount of $750 when combined with his failure to adequately investigate prior to filing the malpractice suit, as well as the total absence of the necessary expert evidence, supported a finding for abuse of process.[137]

An abuse of process action, similar to *Bull*, was upheld in *Peerman*. A Tennessee appellate court based its decision on the attorney's prosecution of a groundless appeal without the consent of his client, his failure to reasonably investigate the malpractice action, and the filing of a complaint in which certain allegations were pure speculation on his part.[138]

B. Defamation

Another theory physicians have used to counterattack perceived unfounded malpractice suits is the tort of defamation. Defamation is the invasion of one's interest in reputation and good name. To constitute a cause of action, a physician must prove: (1) that the defamatory matter was communicated to a third person; (2) that it was understood to be referring to the physician and as being defamatory to him; and (3) that it resulted in damage to the physician.[139]

A strong argument exists that a physician would have a cause of action for defamation because an unfounded malpractice action wrongfully attacks his or her professional reputation by alleging that he or she lacked reasonable professional skill. However, to date, defamation has not been a successful theory for a physician damaged by an unfounded malpractice suit.

The absolute privilege which exists for judicial proceedings immunizes the patients from liability for any communications[140] which are a

136. *Id.* at 959.
137. *Id.* at 960.
138. Peerman v. Sidicane, 605 S.W.2d at 245.
139. *See generally*, PROSSER, *supra* note 32, §§ 111-16.
140. Most American courts do not extend an absolute privilege to all statements made within the judicial proceeding. Rather, they extend immunity only for statements made in good faith

part of, and relevant to, a judicial proceeding.[141] The purpose of this privilege is to allow free access to the courts, for "to decide otherwise would be to create an unnecessary chilling effect upon lawyers."[142]

C. *Barratry*

Three physician countersuits have alleged barratry as a cause of action.[143] Barratry is the offense of "frequently exciting and stirring up quarrels and lawsuits."[144] This action did not succeed in any of the three cases.

The Illinois Appellate Court dismissed two of the barratry claims by stating that the filing of a civil suit did not constitute common barratry because several acts of barratrous nature were required by the statute,[145] not merely a single act.[146] The other barratry claim, brought under the Texas barratry statute,[147] was dismissed because it was regarded as a public remedy and not a private one since it provided for a criminal sanction to supplement the tort remedy available for malicious

which are relevant to the issues in the case. *Id.* at § 118, at 831-32. *See* Wolfe v. Arroyo, 543 S.W.2d 11, 13 (Tex. Civ. App. 1976).

141. PROSSER, *supra* note 32, at § 118, at 831-32. *See, e.g.*, Umansky v. Urquhart, 84 Cal. App. 3d 368, 371-72, 148 Cal. Rptr. 547, 549 (1978); Wolfe v. Arroyo, 543 S.W.2d 11, 13 (Tex Civ. App. 1976).

142. Umansky v. Urquhart, 84 Cal. App. 3d 368, 372, 148 Cal. Rptr. 547, 549 (1978). Defamation has offered physicians no real remedy for any slanderous statements made regarding their incompetence during a malpractice suit. The only situation where a physician could sustain such a claim is if the defamatory statement was made outside the judicial process to other persons. Jankelson v. Cisel, 3 Wash. App. 139, 473 P.2d 202 (1970).

143. Berlin v. Nathan, 64 Ill. App. 3d 940, 381 N.E.2d 1367 (1978), *cert. denied*, 444 U.S. 828, *reh'g denied*, 444 U.S. 974 (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).

144. BLACK'S LAW DICTIONARY 137 (5th ed. 1979).

145. The Illinois statute provides:

> Barratry-Violation § 26. If any person shall wickedly and willfully excite and stir up any suits or quarrels between the people of this state with a view to promote strife and contention, he shall be deemed guilty of the petty offense of common barratry; and if he be an attorney or counselor at law, he shall be suspended from the practice of his profession, for any time not exceeding 6 months.

ILL. REV. STAT. ch 13, § 21 (1976).

146. Berlin v. Nathan, 64 Ill. App. 3d 940, 956, 381 N.E.2d 1367, 1378 (1978), *cert. denied*, 444 U.S. 828, *reh'g denied*, 444 U.S. 974 (1979); Lyddon v. Shaw, 56 Ill. App. 3d 822, 372 N.E.2d 685, 690 (1979). The court did not consider the filing of an allegedly baseless suit as constituting barratry. However, the contributors of countersuit funds to aid physicians in their malpractice suits could be sued for "stirring up" and "exciting" lawsuits. Since the trend has been towards a more rigorous application of the laws of barratry, champerty and maintenance, such a suit would probably be unsuccessful. *See supra* note 8; Note, *Countersuit: A Viable Alternative for the Wrongfully Sued Physician?*, 19 WASHBURN L.J. 450, 460-61 (1980).

147. TEX. PENAL CODE ANN. § 38.12(a)(2)(Vernon 1974) provides that a person is guilty of the offense of barratry if, "with intent to obtain a benefit for himself or to harm another he institutes any suit or claim that he knows is false." The court determined that this language provides a criminal sanction to supplement the tort remedy available for malicious prosecution.

prosecution.[148]

D. Prima Facie Tort

A novel approach of prima facie tort has been utilized by several physicians as an alternative to malicious prosecution.[149] A prima facie tort is the infliction of an intentional harm without excuse or justification by an act or series of acts which otherwise would be lawful and which results in special damages.[150] The basic elements of prima facie tort are: (1) an intent to injure on the part of the defendant; (2) a lack of justification in so acting; and (3) special damages, alleged with particularity.[151]

Prima facie tort has not been a successful alternative to a physicians' countersuit to a baseless malpractice suit. The courts have rejected a prima facie claim for various reasons. The most prevalant reason given is that a prima facie tort should not be utilized to circumvent the requirements of establishing a traditional tort.[152] The courts have once again stressed the need for open access to the courts and have thus stated that "[p]rima facie tort should not become a 'catch-all' alternative for every cause of action which cannot stand on its legs."[153] Since prima facie tort is one which, by definition, does not fall within the categories of the traditional torts,[154] the courts have refused to accept such a claim when relief is available under malicious prosecution.[155]

Another justification for the courts rejection of a prima facie tort is the courts' belief that the cause of action should be mandated by the

148. Moiel v. Sandlin, 571 S.W.2d 567, 571 (1978).

149. Drago v. Buonagurio, 46 N.Y.2d 778, 386 N.E.2d 821, 413 N.Y.S.2d 910 (1978); Hoppenstein v. Zemek, 62 A.D.2d 979, 403 N.Y.S.2d 542 (1978); Belsky v. Lowenthal, 47 N.Y.2d 820, 392 N.E.2d 560, 418 N.Y.S.2d 573 (1979); Martin v. Trevino, 578 S.W.2d 763 (Tex. Civ. App. 1978).

150. Drago v. Buonagurio, 46 N.Y.2d 778, 386 N.E.2d 821, 413 N.Y.S.2d 910 (1978). Prima facie tort appears to have first been enunciated in 1904 by Mr. Justice Holmes in Aikins v. Wisconsin, 195 U.S. 194 (1904), in which he ruled that even lawful conduct can become unlawful when done maliciously. *Id.* at 205-06.

151. Martin v. Trevino, 578 S.W.2d 763, 772 (Tex. Civ. App. 1978). *See also*, Birnbaum, *supra* note 4, at 1054; Annot., 16 A.L.R. 3d 1191, 1215-20 (1967).

152. Martin v. Trevino, 578 S.W.2d 763, 772 (Tex. Civ. App. 1978); *see also* Drago v. Buonagurio, 46 N.Y.2d 778, 386 N.E.2d 821, 413 N.Y.S.2d 910 (1978).

153. Belsky v. Lowenthal, 62 A.D.2d 319, 323, 405 N.Y.S.2d 62, 65 (1978), *aff'd* 47 N.Y.2d 820, 392 N.E.2d 560, 418 N.Y.S.2d 573 (1979).

154. *Id.* at 322, 405 N.Y.S.2d at 64. *See also* Martin v. Trevino, 578 S.W.2d 763, 772 (Tex. Civ. App. 1978).

155. Hoppenstein v. Zemek, 62 A.D.2d 979, 403 N.Y.S.2d 542 (1978); Belsky v.Lowenthal, 62 A.D.2d 319, 405 N.Y.S.2d 62 (1978), *aff'd*, 47 N.Y.S.2d 820, 392 N.E.2d 560, 418 N.Y.S.2d 573 (1979).

legislature as a matter of public policy, and not by the courts.[156] The requirement of proving special injury has also served as an insurmountable barrier to recovery under prima facie tort.[157]

E. Constitutional Mandate of a Remedy

Several suits have utilized a different approach in an action in the nature of prima facie tort.[158] These suits have been premised on Article I, Section 12 of the Illinois Constitution which guarantees a remedy for every wrong.[159] The physicians in these suits claimed that a rejection of a prima facie tort suit deprived them of a constitutional right to a redress for all injuries.[160] The Illinois Appellate Courts have rejected this argument, stating that the constitutional provision is "an expression of philosophy, and not a mandate that a 'certain remedy' be provided in any specific form."[161]

The Illinois courts have also decreed that as long as some redress for the alleged wrong exists, Section 12 does not mandate a recognition of any new remedy.[162] The courts have determined that the inability of the plaintiffs to meet the onerous burden of proof under recognized remedies or the limited relief provided by such remedies is irrelevant.[163] According to the courts, the failure to state a cause of action cannot be cured by alleging a new remedy and dismissal of such an action does not infringe on any constitutional rights.[164] As a result, physicians suing under a constitutional theory were referred to the proper remedies of malicious prosecution, abuse of process, recovery of attorney fees[165] and institution of disciplinary proceedings against the

156. Drago v. Buonagurio, 46 N.Y.2d 778, 368 N.E.2d 821, 413 N.Y.S.2d 910 (1978); Martin v. Trevino, 578 S.W.2d 763, 773 (Tex. Civ. App. 1978).

157. Hoppenstein v. Zemek, 62 A.D.2d 979, 403 N.Y.S.2d 542 (1978).

158. Berlin v. Nathan, 64 Ill. App. 3d 940, 381 N.E.2d 1367 (1978), *cert. denied*, 444 U.S. 828, *reh'g denied*, 444 U.S. 974 (1979); Pantone v. Demos, 59 Ill. App. 3d 328, 375 N.E.2d 480 (1978); Lyddon v. Shaw, 56 Ill. App. 3d 815, 372 N.E.2d 685 (1978).

159. "Every person shall find a certain remedy in the laws for all injuries and wrongs which he recieves to his person, privacy, property or reputation. He shall obtain justice by law, freely, completely, and promptly." ILL. CONST. art I § 12.

160. Berlin v. Nathan, 64 Ill. App. 3d 940, 950, 381 N.E.2d 1367, 1374, *cert. denied*, 444 U.S. 828, *reh'g denied*, 444 U.S. 974 (1979); Pantone v. Demos, 59 Ill. App. 3d 328, 332, 375 N.E.2d 480, 483 (1978); Lyddon v. Shaw, 56 Ill. App. 3d 815, 823, 372 N.E.2d 685, 690-91 (1978).

161. Pantone v. Demos, 59 Ill. App. 3d 328, 332, 375 N.E.2d 480, 483 (1978).

162. *Id.*

163. *Id.*; Berlin v. Nathan, 64 Ill. App. 3d 940, 381 N.E.2d 1367 (1978), *cert. denied*, 444 U.S. 828, *reh'g denied*, 444 U.S. 974 (1979).

164. *Id.* at 951, 381 N.E.2d at 1374. (1978).

165. Attorney fees can be recovered in Illinois under section 2-611 Ill. Code of Civil Procedure, ILL. REV. STAT. ch. 110, § 2-611 (1982). This act was established as an additional remedy for unfounded malpractice suits in an effort to curb the malpractice crisis. *See Attorney's Liability, supra* note 59, at 802 n.159.

offending attorney.[166]

F. Negligence

The remedies up to this point have discussed physician countersuits against the patient and his attorney. However, one alternative action, negligence, is directed solely against the patient's attorney. The attorney's alleged liability for negligence is based upon a violation of the Code of Professional Responsibility[167] and a breach of duty to a third party not to file a malpractice suit which the attorney knew or should have known would be unsuccessful.[168]

The courts, however, have rejected the theory that attorneys owe a duty of care to adverse parties in litigation.[169] Although attorneys have been held liable to third parties who were intended beneficiaries of the attorneys' actions,[170] the courts have determined that the adversary process precludes any possibility of reliance by opposing parties.[171] Since an adverse party is clearly not an intended beneficiary of the adverse counsel's client,[172] the attorney owes his primary and paramount duty to his own client and not the adverse party.[173]

Public policy considerations have also been provided as justification for the courts' refusal to further extend the tort of negligence. The courts fear that the imposition of third party negligence on an attorney would "place an attorney in a position where his own interests would conflict directly with his client's interests."[174] This conflict of interest

166. Berlin v. Nathan, 64 Ill. App. 3d 940, 381 N.E.2d 1367 (1978), *cert. denied*, 444 U.S. 828, *reh'g denied*, 444 U.S. 974 (1979); Lyddon v. Shaw, 56 Ill. App. 3d 815, 823, 372 N.E.2d 685, 691 (1978).

167. ABA CODE OF PROFESSIONAL RESPONSIBILITY, DR 7-102(A)(1) and EC 7-10. *See also, infra* note 178. DR 7-10(A)(1) provides:

> In his representation of a client, a lawyer shall not: (1) File a suit, assert a position, conduct a defense, delay a trial, or take other action on behalf of his client when he knows or when it is obvious that such action would serve merely to harass or maliciously injure another.

EC 7-10 provides:

> The duty of a lawyer to represent his client with zeal does not militate against his concurrent obligation to treat with consideration all persons involved in the legal process and to avoid the infliction of needless harm.

168. *See supra* note 22.

169. *Id.* The negligence claims were rejected in all cases.

170. Norton v. Hines, 49 Cal. app. 3d 917, 923, 123 Cal. Rptr. 237, 240 (1975); Brody v. Ruby, 267 N.W.2d 902, 906 (Iowa 1978).

171. Bickel v. Mackie, 447 F. Supp. 1376, 1381 (N.D. Iowa 1978).

172. Norton v. Hines, 49 Cal. App. 3d 917, 921, 123 Cal. Rptr. 237, 240 (1975).

173. Bickel v. Mackie, 447 F. Supp. 1376, 1381 (N.D. Iowa 1978).

174. Weaver v. Super. Ct. of Orange Co., 95 Cal. App. 3d 166, 179, 156 Cal. Rptr. 745, 751 (1979).

would simultaneously deny the client's right to effective counsel[175] and his right to free access to the courts.[176] Since the attorney has a duty to represent his client zealously within the bounds of the law,[177] the courts have consistently refused to impose a duty of care to an adverse third party. The courts have determined that such an imposition would result in attorneys refusing lawsuits now justifiably commenced, and thus, the client would be denied his day in court.[178]

The courts also have rejected physicians' negligence claims against attorneys based on a violation of the Code of Professional Responsibility adopted by the American Bar Association. Physicians have argued that the Code prohibits an attorney from asserting claims which he or she knows to be groundless, or when it is obvious that such actions would serve merely to harass or maliciously injure another. However, the courts have determined that the Code does not set professional standards of civil liability[179] or establish a private remedy for such violations.[180] Since the Code merely delineates minimum levels of competency and not a private cause of action,[181] the courts have determined that a violation of the Code was not tantamount to a tortious act, particularly with regard to liability to a nonclient.[182]

Courts have also affirmed the basic adversary nature of the legal profession and an attorney's duty to zealously advocate a client's interests.[183] In *Brody v. Ruby*, the court denied recovery under a claim of a violation of the Code, for to do so, "would be to destroy [the attorney's]

175. *Id.* at 179, 156 Cal. Rptr. at 750-51.

176. *Id. See also*, Norton v. Hines, 49 Cal. App. 3d 917, 123 Cal. Rptr. 237 (1975); Pantone v. Demos, 59 Ill. App. 3d 328, 375 N.E.2d 480 (1978); Drago v. Buonagurio, 46 N.Y.2d 778, 386 N.E.2d 821, 413 N.Y.S.2d 910 (1978).

177. Brody v. Ruby, 267 N.W.2d 902 (Iowa 1978); Norton v. Hines, 49 Cal. App. 3d 917, 123 Cal. Rptr. 237 (1975).

178. Norton v. Hines, 49 Cal. App. 3d 917, 923, 123 Cal. Rptr. 237, 241 (1975).

179. Bickel v. Mackie, 447 F. Supp. 1376 (N.D. Iowa 1978); Berlin v. Nathan, 64 Ill. App. 3d 940, 381 N.E.2d 1367 (1978), *cert. denied*, 444 U.S. 828, *reh'g denied*, 444 U.S. 974 (1979); Lyddon v. Shaw, 56 Ill. App. 3d 815, 372 N.E.2d 685 (1978); Brody v. Ruby, 267 N.W.2d 902 (Iowa 1978); Nelson v. Miller, 227 Kan. 271, 607 P.2d 438 (1980); Spencer v. Burglass, 337 So.2d 596 (La. Ct. App. 1976), *cert. denied*, 340 So.2d 990 (La. 1977); O'Toole v. Franklin, 270 Or. 513, 569 P.2d 561 (1977); Martin v. Trevino, 578 S.W.2d 763 (Tex. Civ. App. 1978). *See also, supra* note 165. Several cases also alleged violations of the state codes. Berlin v. Nathan, 64 Ill. App. 3d 940, 381 N.E.2d 1367 (1978), *cert. denied*, 444 U.S. 828, *reh'g denied*, 444 U.S. 974 (1979); Lyddon v. Shaw, 56 Ill. App. 3d 815, 372 N.E.2d 685 (1978); Brody v. Ruby, 267 N.W.2d 902 (Iowa 1978); O'Toole v. Franklin 279 Or. 513, 569 P.2d 561 (1977); Martin v. Trevino, 578 S.W.2d 763 (Tex. Civ. App. 1978).

180. Brody v. Ruby, 267 N.W.2d 902, 907 (Iowa 1978).

181. Martin v. Trevino, 578 S.W.2d 763, 770 (Tex. Civ. App. 1978).

182. Bickel v. Mackie, 447 F.Supp. 1376, 1383 (N.D. Iowa 1978).

183. Brody v. Ruby, 267 N.W.2d 902, 907 (Iowa 1978).

efficacy as advocate of his client and his value to the court. . . ."[184] The courts decreed that the sole remedial method for a violation of the Code is the imposition of disciplinary measures[185] and recommended that the physicians seek such redress through the appropriate proceedings.[186]

III. SUMMARY OF PHYSICIAN COUNTERSUITS

Malicious prosecution, with a few exceptions,[187] is the sole cause of action available to the victims of baseless suits.[188] The courts have rejected every other remedy utilized by physicians in a countersuit for unjustified malpractice suit, except abuse of process.[189] The courts have continued to articulate the fear that such countersuits will have a "chilling effect" on both the plaintiff's ability to seek vindication for any injuries sustained and the attorney's willingness to accept cases. Thus, with free access to the courts as a prime consideration, the courts have restricted the victims of unjustified suits to a remedy of malicious prosecution which offers little hope of complete relief.

IV. HISTORY OF MALICIOUS PROSECUTION IN ILLINOIS

A. SMITH V. MICHIGAN BUGGY CO.

Illinois follows the minority jurisdiction requirement of proof of special injury to sustain a cause of action for malicious prosecution. This action was first considered by the Illinois Supreme Court in *Smith v. Michigan Buggy Co*.[190] Smith, the plaintiff in the malicious prosecution action, was sued in the original action for fraudulent misrepresentation. His employer alleged that, due to Smith's misrepresentation regarding his past sales record and his ability to procure future sales, he had entered into an employment contract with Smith and had suffered

184. Berlin v.Nathan, 64 Ill. App. 3d 940, 953, 381 N.E.2d 1367, 1376 (1978), *cert. denied*, 444 U.S. 828, *reh'g denied*, 444 U.S. 974 (1979).

185. *See* Martin v. Trevino, 578 S.W.2d 763, 770 (Tex. Civ. App. 1978). The disciplinary measures taken are discretionary and an attorney may be disbarred, suspended or censured depending on the character of the offense. *See also* Birnbaum, *supra* note 4, at 1074-77.

186. Brody v. Ruby, 267 N.W.2d 902, 908 (Iowa 1978); Lyddon v. Shaw, 56 Ill. App. 3d 815, 823, 372 N.E.2d 685, 691 (1978); Martin v. Trevino, 578 S.W.2d 763, 770 (Tex. Civ. App. 1978). A grievance can be filed under procedures enumerated in the State Bar Rules for the redress of an alleged professional misconduct.

187. Under certain circumstances abuse of process has been a feasible physician countersuit. *See supra* notes 134-37 and accompanying text.

188. *See, e.g.*, Bickel v. Mackie, 447 F. Supp. 1376, 1384 (N.D. Iowa 1978).

189. *See supra* notes 134-37 and accompanying text.

190. 175 Ill. 619, 51 N.E. 569 (1898).

financial losses.[191] After the fraudulent misrepresentation suit was resolved in Smith's favor, he sued his employer alleging that the suit was a malicious prosecution without probable cause.

The court determined that Smith had established all the elements of malicious prosecution except special injury.[192] In adopting special injury as an essential element of the action, the court concluded that it was its "duty to be governed by the weight of authority," rather than by the able and ingenious reasoning of the advocates opposing the English Rule which also required the element of special injury.[193]

In accepting the special injury requirement, the *Smith* court balanced the injuries which a victim of an unfounded suit must bear without any remedy, against the need to keep the courts open to every citizen, and found the latter to be more imperative.[194] It has been stressed that the courts must be open to litigants for settlement of their rights without fear of prosecution for calling upon the courts to determine such rights.[195]

The Illinois Supreme Court also justified the special injury mandate on the basis of deterring interminable litigation. The court feared that "the conclusion of one suit would be but the beginning of another."[196] It foresaw a future where every unsuccessful litigation would be followed by another alleging malice in the prosecution of the former action. According to the court, special injury would insure against these dangers.

B. Special Injury

Special injury, as defined by the Illinois courts, is the arrest of a person or seizure of his property, or injury not necessarily resulting in all suits, such as the loss of the right to practice a profession or business losses resulting from the suit.[197] Special injury has been proven in Illinois in several situations. The Illinois Supreme Court determined that the defendant's property rights were sufficiently restricted to constitute special injury where a petition for involuntary bankruptcy was wrongfully filed. During the adjudication of the bankruptcy, all the property of the debtor became subject to the control of the court and the debtor's

191. *Id.* at 621, 51 N.E. at 570.
192. *Id.* at 624, 51 N.E. at 571.
193. *Id.* at 626, 51 N.E. at 571.
194. *Id.* at 628, 51 N.E. at 571.
195. Schwartz v. Schwartz, 366 Ill. 247, 8 N.E.2d 668 (1937).
196. Smith v. Michigan Buggy Co., 175 Ill. 619, 629, 51 N.E. 569, 572 (1898).
197. Schwartz v. Schwartz, 366 Ill. 247, 8 N.E.2d 668 (1937).

right to free use of his own property was suspended.[198] The requisite damage was also shown when a suit was repeatedly filed simply to harass the defendant.[199] Special injury was also sustained in situations where a civil suit charged a person with being of unsound mind and the person was arrested,[200] and where a physician falsely certified a patient for emergency admission to a mental hospital.[201] The defendant of a creditor suit also sustained the requisite special injury when she was forced to forfeit her home after she was unable to make the mortgage payments because a temporary injuction prevented her from using the proceeds of her husband's life insurance policy.[202]

In each of the above situations where special injury was proven, the plaintiff was able to show actual interference with the person or seizure of property. However, unless a physician loses his license, it is almost impossible for a physician in a malpractice suit to sustain an injury within these narrowly defined limits. Nevertheless, this does not mean that the physician does not suffer damage as a result of a maliciously prosecuted suit.

The injuries physicians may sustain when forced to defend an unfounded suit include damage to professional reputation,[203] mental anguish,[204] loss of time and income from their professional practice,[205] payment of increased malpractice insurance premiums[206] and an alteration in the manner in which they practice medicine.[207] Despite these injuries, the courts have held that each of these damage elements are incident to all malpractice litigation. Therefore, these damages fall within the "ordinary injury" Illinois courts expect defendants to suffer

198. Norin v. Scheldt Mfg. Co., 297 Ill. 521, 130 N.E. 791 (1920).

199. Shedd v. Patterson, 302 Ill. 355, 134 N.E. 705 (1922).

200. Brandt v. Brandt, 297 Ill. App. 306, 17 N.E.2d 535 (1938).

201. Olsen v. Karwaski, 68 Ill. App. 3d 1031, 386 N.E.2d 444 (1979).

202. Bank of Lyons v. Schultz, 78 Ill. 2d 235, 399 N.E.2d 1286 (1980).

203. Lyddon v. Shaw, 56 Ill. App. 3d 815, 372 N.E.2d 685 (1978); Berlin v. Nathan, 64 Ill. App. 3d 940, 381 N.E.2d 1367 (1978), *cert. denied*, 444 U.S. 828, *reh'g denied*, 444 U.S. 974 (1979); Stopka v. Lesser, 82 Ill. App. 3d 323, 402 N.E.2d 781 (1980); Davis v. Ruff, 83 Ill. App. 3d 651, 404 N.E.2d 405 (1980).

204. Lyddon v. Shaw, 56 Ill. App. 3d 815, 372 N.E.2d 685 (1978); Berlin v. Nathan, 64 Ill. App. 3d 940, 381 N.E.2d 1367 (1978), *cert. denied*, 444 U.S. 828, *reh'g denied*, 444 U.S. 974 (1979); Balthazar v. Dowling, 65 Ill. App. 3d 824, 382 N.E.2d 1257 (1978); Stopka v. Lesser, 82 Ill. App. 3d 323, 402 N.E.2d 781 (1980); Davis v. Ruff, 83 Ill. App. 3d 651, 404 N.E.2d 405 (1980).

205. *Id.*

206. Lyddon v. Shaw, 56 Ill. App. 3d 815, 372 N.E.2d 685 (1978); Berlin v. Nathan, 64 Ill. App. 3d 940, 381 N.E.2d 1367 (1978), *cert. denied*, 444 U.S. 828, *reh'g denied*, 444 U.S. 974 (1979); Pantone v. Demos, 59 Ill. App. 3d 328, 375 N.E.2d 480 (1978); Balthazar v. Dowling, 65 Ill. App. 3d 824, 382 N.E.2d 1257 (1978); Stopka v. Lesser, 82 Ill. App. 3d 323, 402 N.E.2d 781 (1980); Davis v. Ruff, 83 Ill. App. 3d 651, 404 N.E.2d 405 (1980).

207. Davis v. Ruff, 83 Ill. App. 3d 651, 404 N.E.2d 405 (1980).

as a result of such suits, whatever the merits.[208]

By requiring special injury as an essential element of a malicious prosecution action, the Illinois courts have dismissed a suit in which the physician was sued for malpractice without ever having treated the patient.[209] The physician, who was an inactive hospital staff member and had no connection with the patient's treatment, was added as a defendant five months after the complaint was filed. The hospital records which were available during discovery clearly indicated that the physician did not have any contact with the patient, and thus, the attorney should have known that probable cause to sue the physician was absent. A physician was also sued for malpractice in failing to control the decedent's bleeding when the sole care he had rendered was the taking of a chest X-ray.[210] The courts have also ignored situations where an attorney has continued to prosecute a malpractice action without ever examining the relevant medical records[211] or obtaining an opinion of a qualified expert as to a deviation from a proper standard of care.[212] Each of these factual circumstances indicate that Illinois physicians may be subject to meritless and malicious prosecutions without adequate remedy for their injuries.

C. *Berlin v. Nathan*

Illinois had a brief period where recovery was allowed for an unjustly accused malpractice defendant when an Illinois trial court sustained a physician's malicious prosecution action in *Berlin v. Nathan*.[213] The physician in *Berlin* was sued for malpractice alleging that he had negligently taken X-rays and improperly diagnosed a finger injury. Dr. Berlin filed a cross-complaint prior to the termination of the original malpractice action. In the complaint, he alleged that his patient, her husband and their attorneys had breached a duty owed to him to refrain from willfully and wantonly bringing suit against him without having reason to believe that he had been guilty of malpractice.[214] Dr. Berlin contended that section 12 of the Illinois Constitution, which provides that every person shall find a certain remedy in the laws, man-

208. Berlin v. Nathan, 64 Ill. App. 3d 940, 381 N.E.2d 1367 (1978), *cert. denied*, 444 U.S. 828, *reh'g denied*, 444 U.S. 974 (1979).

209. Stopka v. Lesser, 82 Ill. App. 3d 323, 402 N.E.2d 781 (1980).

210. Pantone v. Demos, 59 Ill. App. 3d 328, 375 N.E.2d 480 (1978).

211. Lyddon v. Shaw, 56 Ill. App. 3d 815, 372 N.E.2d 685 (1978).

212. *Id.*; Davis v. Ruff, 83 Ill. App. 3d 651, 404 N.E.2d 405 (1980).

213. 64 Ill. App. 3d 940, 381 N.E.2d 1367 (1978), *cert. denied*, 444 U.S. 828, *reh'g denied*, 444 U.S. 974 (1979).

214. *Id.* at 943, 381 N.E.2d at 1369.

dated a new remedy for willful and wanton filing of an unjustified lawsuit.

On appeal, the Illinois Court of Appeals reversed the trial court decision in *Berlin*. The appellate court rejected the claim that the Illinois Constitution mandated a new remedy of willful and wanton filing of an unjustified lawsuit[215] and applied the elements of malicious prosecution to Dr. Berlin's allegations. The court determined that Dr. Berlin had failed to state a claim for malicious prosecution since he had not sustained special injury[216] and had not alleged favorable termination of the original suit or that the prior suit had been initiated maliciously.[217]

The court in *Berlin* also rejected the allegation that the patient's attorney had negligently filed a weak or frivolous case and thus had breached a duty to Dr. Berlin.[218] The court concluded that such an imposition of liability was against public policy and would create an insurmountable conflict between the attorney and his client.[219] The court also denied the claim of barratry as the defendant's conduct did not constitute the several acts necessary to sustain such a claim.[220]

As one commentator has stated, the court of appeals has created a catch-22 situation within physician countersuits.[221] The court has rejected alternate theories of recovery on the basis that the physician had the available remedy of malicious prosecution, and in a few circumstances, abuse of process.[222] Yet, malicious prosecution is hardly a readily available cause of action since Illinois and other minority jurisdictions restrict the possibility of success by requiring special injury.

D. Stopka v. Lesser

This restriction went unquestioned until *Stopka v. Lesser*.[223] The physician in *Stopka*, who had never treated the plaintiff in the original malpractice suit, filed a malicious prosecution and negligence action

215. *Id.* at 950-51, 381 N.E.2d at 1374.

216. *Id.* at 946, 381 N.E.2d at 1371. The court stated that damage to reputation, mental anguish, time away from practice and increased premiums are common to all malpractice defendants.

217. *Id.* at 947, 381 N.E.2d at 1372.

218. *Id.* at 952-53, 381 N.E.2d at 1376.

219. *Id.*

220. *Id.* at 955-56, 381 N.E.2d at 1377.

221. Reuter, *Physician Countersuits: A Catch-22*, 14 U.S.F.L. Rev. 203 (1980) [hereinafter cited as Reuter].

222. Berlin v. Nathan, 64 Ill. App. 3d 940, 950, 381 N.E.2d 1367, 1374 (1978), *cert. denied*, 444 U.S. 828, *reh'g denied*, 444 U.S. 947 (1979).

223. 82 Ill. App. 3d 323, 402 N.E.2d 781 (1980).

against the attorney in the prior suit. Dr. Stopka alleged that if the attorney had consulted hospital records available to him though discovery, he would have known that the physician had no connection with the attorney's client.[224] Although the court denied the physician's claim stating that he had not demonstrated any special injury, the court did so reluctantly.[225] The court stated that despite its own reservations, it was compelled to hold that the injury allegation failed to satisfy the current special injury requirements.[226]

The *Stopka* court advocated the need for reassessment of the Illinois special damage requirement. According to the court,

> An attorney who files a clearly meritless suit should not be protected. At present, a majority of American jurisdictions do not condition recovery for wrongful litigation upon proof of extraordinary injury. We believe a reassessment of the special damages requirement in this jurisdiction is appropriate. It should result in the establishment of an alternative that would impose a meaningful duty upon attorneys to ascertain whether the party sued is possibly liable for a wrong committed and, absent any exigency, where that possibility does not exist, to effectively deter meritless litigation by providing a recovery from the attorney to the victim without the requirement of special damages.[227]

The court urged that the public policy of open access to the courts would not be offended by a requirement that attorneys investigate whether a defendant in fact treated the patient. The court reasoned that the judicial system should not set up and maintain an inequitable, artificial standard which can permit unprincipled attorneys to file meritless lawsuits. In fact, the court exhorted that a modification of the special injury rule could act as a restraint to the rampant increase in meritless lawsuits since it is obvious that the special injury standard has failed to do so.

V. RECOMMENDATIONS

Although a malicious prosecution action has not been appealed to the Illinois Supreme Court since *Stopka* was decided, the needed reforms of this action are long overdue. The supreme court needs to reexamine the policy consideration it has adopted, as well as the lack of support for its contention regarding the harm a more liberal attitude

224. *Id.* at 324, 402 N.E.2d at 782.

225. *Id.* at 326-27, 402 N.E.2d at 784.

226. *Id.* at 326, 402 N.E.2d at 783-84. The physician in *Stopka* alleged damage to reputation, mental anguish, loss of time due to defense preparation and increased medical malpractice premiums. *Id.* at 324, 402 N.E.2d at 782.

227. *Id.* at 326-27, 402 N.E.2d at 784 (footnotes omitted).

will foster. The court has adopted the reasons for limiting malicious prosecution actions by judicial notice only and has not supported it by practical results. In reconsidering its stand concerning the elements of malicious prosecution, the court should consider the alternatives recommended by various commentators.

One worthwhile recommendation has been the abolishment of the favorable termination requirement.[228] This alternative would provide the physician with a less expensive and more immediate remedy of a cross-claim. It could also deter the initiation of groundless claims. The concern over prejudicing the plaintiff in the original suit, the need for a predetermination of the sufficiency of the evidence to justify the prior suit, as well as the conflict of inconsistent judgments, could easily be avoided by delaying the counterclaims until the disposition of the original claim.

It is unlikely, however, that the courts would alter the favorable termination standard, because, as one commentator has noted,[229] this requirement is firmly entrenched in both the majority and minority jurisdictions after many years of case law. A more probable source of change would be the legislature. In fact, the Washington legislature has already made this innovation by eliminating the requirement of favorable termination.[230]

A second alternative, also requiring legislative action, would be the adoption of certificate of merit similar to that required in California.[231] In California, the plaintiff's attorney must file a certificate on or before the date of service on any defendant[232] which states that the attorney has reviewed the facts, has consulted with another physician regarding the defendant's professional conduct and has concluded that the case is meritorious.[233] The case may result in a demurrer or the attorney may be liable for disciplinary measures for any violation of

228. *Effective Attack, supra* note 51, at 656, 684. *See also, Groundless Litigation, supra* note 33, at 1233.

229. Reuter, *supra* note 219, at 236.

230. WASH. REV. CODE ANN. § 4.24.350 (Supp. 1978). The statute makes no reference to the fact that Washington is a minority jurisdiction or to the requirement for interference with person or property. The statute does remove the requirement for favorable termination and has allowed a countersuit to be brought as a cross-complaint in the original action.

231. *See* CAL. CIV. PROC. CODE § 411.20 (West 1981). The Section is to be repealed in January, 1984, in accordance with its own provisions; *Id.* § 411.30(j); *Countersuit, supra* note 119, at 760. *See generally*, Birnbaum, *supra* note 4, at 1077-84.

232. CAL. CIV. PROC. CODE § 411.30(a) (West 1981).

233. The physician can also declare that he was unable to complete such steps due to the expiration of the statute of limitations (411.30(b)(2)) or was unable to obtain such verification after three good faith attempts with three separate experts. (411.30(b)(3)).

the provision of this section.[234] This requirement would help insure that groundless suits were not filed without investigation or evidence to support the allegation of negligence.

Changes which are readily within the realm and authority of the Illinois Supreme Court are those suggested by the *Stopka* court regarding the duty of attorneys to investigate prior to commencing a suit.[235] This duty would not conflict with the attorney's obligation to his client and would protect the defendant's rights, while guaranteeing the public's desire to curb spurious claims. As stated in *Stopka*, the actions of unprincipled attorneys who fail to reasonably investigate, and the resulting meritless lawsuits, should not be fostered.[236] The Illinois Supreme Court should employ the Stopka recommendations and eliminate the special injury requirement, or at the very least, expand this standard of damage to include damage to professional reputation. This modification would provide an equitably remedy to all while still preserving the public policy considerations the minority jurisdiction courts seem to cherish so strongly.

VI. CONCLUSION

The anomaly of the minority jurisdiction requirement of special injury must be cured. The courts must accept that the fears they have maintained regarding the liberalization of malicious prosecution have not occurred in the majority jurisdictions. There has not been a widespread plague of physician countersuits in the majority jurisdictions, but rather, the minority jurisdictions have maintained an unfair artificial barrier, special injury, to deny recovery for the casualties of spurious suits. The courts have articulated the need for balancing of interests between the plaintiff and the public and those of the defendant who has suffered the burdens of an illegitimate suit. However, it is time that the scales of justice be truly balanced and unjustly accused malpractice defendants be given an adequate opportunity to seek judicial redress for their wrongs. The courts have stressed the need to maintain open access to the courts for all, and yet, have blocked recovery for these defendants. It is time that the courts truly open their doors, not only for the vindication of plaintiffs' rights, but also for the defendants who frequently suffer the onerous burdens of a maliciously prosecuted suit.

234. *Id.* at § 411.30(g).
235. *See supra* note 225 and accompanying text.
236. Stopka v. Lesser, 82 Ill. App. 3d 323, 326, 402 N.E.2d 781, 784 (1980).