Countersuits to Legal and Medical Malpractice Actions: Any Chance for Success?

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COMMENTS

COUNTERSUITS TO LEGAL AND MEDICAL MALPRACTICE ACTIONS: ANY CHANCE FOR SUCCESS?

I. INTRODUCTION

Recent years have seen an increase in the number of professional liability actions brought against physicians and attorneys. In addition, there has been an increase in the average size of damage judgments awarded to successful plaintiffs in those actions. Some claim that those two factors have caused the price of professional liability insurance to soar and have caused insurance protection to be unavailable to some professionals at any cost. Thus, these factors are alleged to have produced what is referred to as a "malpractice crisis." Although the malpractice crisis in the medical profession arose earlier, and is generally viewed as being more se-

1. It is estimated that in recent years medical malpractice claims have been increasing at the rate of about 10% per year. Adler, Malicious Prosecution Suits as Counterbalance to Medical Malpractice Suits, 21 CLEV. ST. L. REV. 51 (1972) [hereinafter cited as Adler].

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

3. One major insurer indicated that between 1971 and 1975 the average amount of the attorney professional liability claims paid had more than doubled — from $5,622 to $11,936. Pfennigstorf, Types and Causes of Lawyers' Professional Liability Claims: The Search for Facts, 1980 A.B.F. RES. J. 255, 258.

4. The average medical malpractice insurance premium increased from $1,905 per year in 1973 to $7,787 per year in 1975. Birnbaum, Physicians' Counterattack: Liability of Lawyers for Instituting Unjustified Medical Malpractice Actions, 45 FORDHAM L. REV. 1003, 1016 (1977) [hereinafter cited as Birnbaum].

5. See, e.g., Birnbaum, supra note 4, at 1016.

6. This term is being used to indicate both the "medical malpractice crisis" and the "legal malpractice crisis." See notes 7-8, infra.

7. See generally Adler, supra note 1; HEW MEDICAL MALPRACTICE REPORT OF THE SECRETARY'S COMMISSION ON MEDICAL MALPRACTICE (1973) [hereinafter cited as HEW
vere, the legal profession is currently facing similar problems. This "malpractice crisis" is perceived by some, particularly physicians, as being caused by an unprecedented increase in the amount of unfounded litigation being launched against professionals. To combat this trend, physicians, and more recently attorneys, have brought countersuits against former patients or clients who are believed to have brought suit without just cause. At first these countersuits appeared to be an answer to the malpractice crisis; however, it quickly became evident, particularly from unfavorable decisions in state appellate courts in 1978, that the value of these countersuits as an immediate solution to the crisis was slight, at best. Few appellate courts have upheld a judgment in favor of an attorney or physician in a malpractice countersuit case. Counter-suits have consistently failed because courts have looked unfavorably on such suits for policy reasons and have strictly construed the tort theories upon which the suits have been based.

As the number of legal and medical malpractice suits steadily rises, it becomes increasingly important to determine if malpractice countersuits have any potential for success in the future. This comment will attempt to make that determination. To understand countersuits in the malpractice area, it is necessary for this analysis to begin with a brief examination of how much of the malpractice litigation is, in fact, un-


9. See HEW Report, supra note 7, at 10; Adler, supra note 1, at 53.

10. See Rosenberg, He Sued His Malpractice Accusers Right Back for $3,000,000, Med. Econ., Dec. 8, 1975, at 69, 75.


12. There have been three cases in which an appellate court has upheld a judgment in a countersuit case. See Drasin v. Raine, No. 80-SC-501-DG (Ky. June 16, 1981) (opinion to be published, but unavailable at the time of publication of this comment); Bull v. McCuskey, 615 P.2d 957 (Nev. 1980) (discussed in text accompanying notes 91-93, infra); Peereman v. Sidicaine, No. 799711 (Tenn. App. Feb. 29, 1980).

founded. Next, the competing policy considerations underlying a malpractice countersuit will be set forth. With this background in mind, the analysis will shift to an examination of the specific reasons for which courts have consistently rejected countersuits. This will include analysis of countersuits based on the traditional tort theories of malicious prosecution, abuse of process, defamation, and infliction of emotional distress, as well as the developing theories of professional negligence and prima facie tort. Finally, the future of countersuits will be explored, including any possibilities of success in the courts or through legislative action.

II. UNFOUNDED LITIGATION

While there is little agreement on how many malpractice claims are actually "unfounded" or "frivolous," it is generally conceded that at least some are. Indeed, some physicians allege that the majority of medical malpractice claims are unjustifiably instituted. However, there is little, if any, objective proof of these physicians' charges.

The increase in medical malpractice litigation has been attributed to a number of factors other than an increase in frivolous suits. One commentator concludes that the acceleration in medical malpractice trials results from the general proliferation of civil litigation. Other sources have suggested such factors as the increased use of health services and the utilization of more sophisticated medical procedures and technology. Still another factor which has commonly been cited is the breakdown of the traditional personal relationship between a doctor and his patient. In any case, it is clear that the increase in malpractice litigation has not been caused solely by the increase in frivolous actions.

Little study has been done on what percentage of malpractice claims are unfounded. This is primarily because it is extremely difficult to define what constitutes an "unfounded" or "frivolous" claim. What constitutes a frivolous claim to an in-

14. Birnbaum, supra note 4, at 1017.
15. HEW REPORT, supra note 7, at 10.
17. Birnbaum, supra note 4, at 1007.
18. Id.
surer or physician may be viewed as an entirely valid claim to a patient, who is unfamiliar with certain medical procedures, and may have suffered what he believes to have been an inappropriate medical result.

Lack of study in the area makes reliable statistics rare. A congressional study concluded that the majority of malpractice suits have proved justifiable. However, one insurer indicates that the plaintiff wins only 10% of the cases that go to trial. One alarming statistic was the result of a joint screening panel of Pima County Medical Society and Bar Association of Tucson, Arizona. The panel reviewed 65 cases over a period of twelve years and found that 88% were without merit. These sources demonstrate the variance in estimates on the percentage of malpractice suits which are unfounded.

One study focusing upon the number of malpractice claims which are groundless was the United States Department of Health, Education and Welfare’s Medical Malpractice Commission Report in 1973. The Commission concluded that “[v]iewed together, the number of claims judged to be meritorious by malpractice insurers and the number in which payment was made to the claimant would seem to indicate that the vast majority of malpractice claims are not ‘entirely baseless,’ as often alleged.” This study indicates that although there are some unfounded medical malpractice cases, the number is not nearly as large as many physicians claim.

In the final analysis, all that the various studies demonstrate is that the estimate of the number of frivolous suits will vary depending on the source providing the figure. Insurers and physicians tend to view the problem as being severe, while other sources indicate that the number of unfounded claims is not significant. It is important to note, however, that if the number of unfounded malpractice claims is small, at

21. Id. at 229.
22. HEW Report, supra note 7, at 10.
least part of the reason countersuits have been unsuccessful must lie in the meritoriousness of the original malpractice action.

III. POLICY CONSIDERATIONS

Several policy considerations have had a profound effect on the way courts view malpractice countersuits. Foremost is the essential public policy that all persons must have “free and unfettered access to the courts” in order to settle their grievances.\textsuperscript{24} The courts have consistently adhered to the policy that “the courts should be open to litigants for settlement of their rights without fear of prosecution for calling upon the courts to determine such rights.”\textsuperscript{25} This policy is considered essential to our legal system because without it, access to the courts would be severely limited. Attorneys would be unwilling to undertake representation in close or difficult matters if they were fearful of being held liable as insures of the merits of their clients’ cases.\textsuperscript{26}

Another important policy consideration is the fear that countersuits will lead to endless litigation, with each defendant countersuing his former plaintiff ad infinitum.\textsuperscript{27} This in-terminable litigation would add further problems to an already overburdened court system. Accordingly, the fear of endless litigation and the fear of chilling effect on the free access to the courts have caused courts to view countersuits dis-favorably and to narrowly construe the elements of the tort theories upon which they are based.

The somewhat ironic part of this view of countersuits is that the policy considerations which support the courts’ disfavor are also jeopardized by allowing numerous malpractice claims. Increasing numbers of malpractice claims, at least some of which are unfounded, create additional burdens on the court system by adding congestion to the courts.\textsuperscript{28} It is

\textsuperscript{25} Id. at —, 381 N.E.2d at 1375.
\textsuperscript{26} Id. at —, 381 N.E.2d at 1376; see also Norton v. Hines, 49 Cal. App. 3d 917, 123 Cal. Rptr. 237 (1975).
\textsuperscript{27} Freeman, Endless Litigation: Justice or Revenge?, 45 INS. COUN. J. 238 (1978).
\textsuperscript{28} Birnbaum, supra note 4, at 1016; see also Comment, Counter-claiming for Malicious Prosecution and Abuse of Process: Washington’s Response to Unmeritorious Civil Suits, 14 WILLAMETTE L.J. 401, 414 (1978).
possible that the number of malpractice claims, particularly frivolous ones, would be reduced if the courts allowed more countersuits. Successful countersuits would demonstrate the risks of pursuing an unfounded claim. More significant, however, is the problem of how "free and unfettered access to the courts" can be achieved while effectively denying access to some, i.e., the professionals who have been unjustifiably sued for malpractice. This question has yet to be discussed by the courts. Nonetheless, until now the balance between the social interest in preventing unconscionable suits and the social interest in permitting a person to bring a suit when he believes he has been a victim of malpractice has clearly been struck in favor of the latter.

IV. THEORIES OF RECOVERY

A. Malicious Prosecution

The most popular legal theory upon which countersuits have been based and, therefore, the theory which has been dealt with most often by the courts is malicious prosecution. The action for malicious prosecution originated in the common law of England as a remedy for unjustified criminal proceedings and has now extended itself, in the majority of American courts, into the field of the wrongful initiation of civil suits. Generally, in order to prevail in a malicious prosecution action in a civil case, a plaintiff must prove five elements: (1) the institution or continuance of a prior judicial proceeding by the defendant against the plaintiff; (2) termination of the proceeding in favor of the plaintiff; (3) absence of probable cause for the institution of the proceeding; (4) malice in instituting the proceeding; and (5) damage to the plaintiff as a result of the proceeding. These elements seem to be universally required and if any is lacking it will be fatal to the action. Plaintiffs in malpractice countersuits have encountered the most difficulty with elements (2) - (4) above, and in some jurisdictions, element (5).

30. Id. at 850-56.
Two views have developed in American courts concerning what a plaintiff needs to prove in order to meet the damage requirement of a malicious prosecution action. The minority of jurisdictions have adopted the English common law rule which requires a showing of "special injury" as an element of recovery.\textsuperscript{32} Special injury includes wrongful arrest of the person, seizure of his property, or an injury different than the normal incidents of defending a lawsuit.\textsuperscript{33} Such things as expenses of litigation,\textsuperscript{34} loss of time to defend the suit,\textsuperscript{35} loss of business,\textsuperscript{36} damage to reputation,\textsuperscript{37} and emotional anguish and embarrassment\textsuperscript{38} do not constitute such special injury. As a result, in jurisdictions that have the special injury rule, the tort of malicious prosecution as a countersuit in a civil action is virtually useless.

The majority of jurisdictions have not adopted the requirement of special injury.\textsuperscript{39} Rather, these jurisdictions have recognized the historical development of the special injury rule\textsuperscript{40} and see no purpose for it in American courts. The majority of jurisdictions believe that the difficult burden of proof the plaintiff has in a malicious prosecution action will serve to restrain the frivolous institution of such claims and prevent the resulting problem of endless litigation.\textsuperscript{41} However, this reasoning has caused these jurisdictions to strictly construe the other elements of a malicious prosecution action, particularly

\begin{itemize}
\item \textsuperscript{32} The "special injury" rule arose in England in 1267, when Parliament enacted the Statute of Marlbridge, which gave a right to the prevailing defendant to recover his costs and attorney fees in a summary proceeding at the conclusion of the original lawsuit. Thus, malicious prosecution was limited to cases in which the former defendant could show that he had sustained some "special injury" apart from the costs and expenses of defending the prior suit. Because American courts generally do not allow the recovery of attorney fees by a prevailing party, most states did not adopt the English rule. Singer & Giampietro, The Countersuit, 6 Litigation 18, 19 (1979); see also Prosser, supra note 29, at 851.
\item \textsuperscript{34} Balthazar v. Dowling, 65 Ill. App. 3d 824, _, 382 N.E.2d 1257, 1259 (1978).
\item \textsuperscript{35} Berlin v. Nathan, 64 Ill. App. 3d 940, 381 N.E.2d 1367, 1371 (1978).
\item \textsuperscript{36} Id.
\item \textsuperscript{37} O'Toole v. Franklin, 279 Or. 513, _, 569 P.2d 561, 563 (1977).
\item \textsuperscript{38} Brody v. Ruby, 267 N.W.2d 902, 905 (Iowa 1978).
\item \textsuperscript{39} For a comprehensive list of the states which do and states which do not require the special injury rule, see O'Toole v. Franklin, 279 Or. 513, _, 569 P.2d 561, 564 nn.3 & 4 (1977).
\item \textsuperscript{40} See note 32 supra.
\item \textsuperscript{41} Birnbaum, supra note 4, at 1022.
\end{itemize}
the lack of probable cause and the existence of malice.\textsuperscript{42} This strict construction approach has made the establishment of these elements quite difficult for plaintiffs in the majority of jurisdictions.

A malicious prosecution action may be brought against the patient's or client's attorney as well as against the patient or client himself.\textsuperscript{43} While an attorney owes no specific duty of care to a defendant in a case,\textsuperscript{44} he cannot totally ignore the defendant's rights when instituting a suit.\textsuperscript{45} To prove malicious prosecution against the attorney the same elements must be proved as those which must be proved when the suit is brought against the attorney's client alone.\textsuperscript{46} With this background, the discussion can now shift to an examination of some of the specific problems encountered in proving the elements of malicious prosecution in a malpractice countersuit.

It is well established that the plaintiff in a malicious prosecution action must prove that the prior judicial proceeding of which he complains terminated in his favor.\textsuperscript{47} This requirement necessarily prohibits the initiation of an action for malicious prosecution by way of cross-complaint or counterclaim in the original proceeding.\textsuperscript{48} Several reasons have been advanced to support the favorable termination rule, but the rationale is generally based on three considerations. First, the absence of the termination rule would encourage the expansion of a cause of action which is not favored by the law, since bringing a counterclaim requires less time and expense than

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  \item \textsuperscript{42} See, e.g., Weaver v. Superior Court, 95 Cal. App. 3d 166, 156 Cal. Rptr. 745 (1979).
  \item \textsuperscript{43} Berlin v. Nathan, 64 Ill. App. 3d 940, 381 N.E.2d 1367, 1371 (1978).
  \item \textsuperscript{44} See, e.g., Tappen v. Ager, 599 F.2d 376, 376-79 (10th Cir. 1979).
  \item \textsuperscript{45} See, e.g., Berlin v. Nathan, 64 Ill. App. 3d 940, 381 N.E.2d 1367, 1372 (1978).
  \item \textsuperscript{46} See Birnbaum, suprana note 4, at 1023. For this reason, this comment discusses the malicious prosecution action against the former patient or client and the former patient or client's attorney concurrently, only distinguishing between the two types of actions in areas where they have been treated differently by the courts. For an excellent article specifically dealing with an attorney's liability for malicious prosecution, see Mallen, An Attorney's Liability for Malicious Prosecution, A Misunderstood Tort, 46 INS. COUN. J. 407 (1979).
  \item \textsuperscript{47} See, e.g., Wilson v. Brooks, 369 So. 2d 1221, 1225 (Ala. 1979); Babb v. Superior Court, 3 Cal. 3d 841, 845, 479 P.2d 379, 381, 92 Cal. Rptr. 179, 181 (1971).
  \item \textsuperscript{48} Babb v. Superior Court, 3 Cal. 3d 841, 846, 479 P.2d 379, 381, 92 Cal. Rptr. 179, 181 (1971).
\end{itemize}
does initiation of a separate action.\textsuperscript{49} Second, the favorable termination rule prevents the inconsistent judgments which could result should the defendant win the action for malicious prosecution and lose the original claim.\textsuperscript{50} Third, without the favorable termination rule, allowing both claims to be considered at the same time could prejudice the jury against the plaintiff’s claim since a countersuit in the same case would interfere with the typical plaintiff/defendant relationship in the proceeding.\textsuperscript{51} Despite the general agreement in most jurisdictions that these are strong and practical policy considerations, at least one state has taken legislative action which would allow malicious prosecution counterclaims to be filed in the same action.\textsuperscript{52} Nonetheless, due to the practical policy considerations behind the termination rule, it is unlikely that many states will follow this lead and depart from the rule.

The favorable termination rule does not necessarily require a verdict or final determination on the merits in the principal suit.\textsuperscript{53} Thus, the rule may be met by proving that the action was abandoned or dismissed.\textsuperscript{54} For instance, in \textit{Minasian v. Sapse},\textsuperscript{55} an attorney brought a malicious prosecution action against a former client who allegedly filed a groundless cross-complaint and counterclaim in an action for recovery of attorney’s fees. The California Court of Appeals held that dismissal of the defendant’s cross-complaint and counterclaim for “failure to prosecute” constituted a favorable termination of the proceedings in favor of the plaintiff for purposes of stating a cause of action in malicious prosecution.\textsuperscript{56} The court reasoned that to test whether a termination is favorable when there has not been an adjudication on the merits, it must be determined if the termination “is of such a nature to indicate the innocence of the accused . . . .”\textsuperscript{57}

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  \item \textsuperscript{49} \textit{Id.}
  \item \textsuperscript{50} \textit{Id.} at 846-47, 479 P.2d at 382, 92 Cal. Rptr. at 182.
  \item \textsuperscript{51} \textit{Id.} at 847, 479 P.2d at 382, 92 Cal. Rptr. at 182.
  \item \textsuperscript{53} See, e.g., Minasian v. Sapse, 80 Cal. App. 3d 823, 145 Cal. Rptr. 829 (1978).
  \item \textsuperscript{54} \textit{Id.}
  \item \textsuperscript{55} \textit{Id.}
  \item \textsuperscript{56} \textit{Id.} at 827, 145 Cal. Rptr. at 832 (1978).
  \item \textsuperscript{57} \textit{Id.} at 826, 145 Cal. Rptr. at 831.
\end{itemize}
\end{footnotesize}
Although abandonment or dismissal of an action may meet the requirement of a favorable termination, a settlement or compromise generally will not.\textsuperscript{58} In Wilson v. Brooks,\textsuperscript{59} an attorney brought suit against another attorney and that attorney's law firm alleging malicious prosecution arising out of a prior malpractice counterclaim. The Alabama court noted that although the prior malpractice counterclaim had been dismissed with prejudice, the dismissal was part of a settlement agreement in which the plaintiff reduced his fee demand.\textsuperscript{60} Thus, the court held that termination of the prior proceeding was not favorable to the plaintiff in all respects and the favorable termination requirement was not satisfied for purposes of the malicious prosecution action.\textsuperscript{61}

To succeed in a malicious prosecution action, the complaining attorney or physician must also prove that there was a lack of probable cause for the institution of the malpractice suit.\textsuperscript{62} No single definition of probable cause exists in civil actions. However, probable cause has generally been defined to be "such reason supported by facts and circumstances as will warrant a cautious man in the belief that his action and the means taken in prosecuting it are legally just and proper."\textsuperscript{63} The probable cause standard for an attorney who is being sued for maliciously bringing a malpractice suit on behalf of a client may vary slightly due to an attorney's ethical considerations,\textsuperscript{64} but basically the standard will be whether the attorney has a reasonable belief that the client has a tenable claim.\textsuperscript{65} In either situation, it is obvious that one need not be certain of the outcome of a civil proceeding to have probable cause for instituting such an action.\textsuperscript{66}

A recent Florida case, Fee, Parker & Lloyd, P.A. v. Sulli-
COUNTERSUITS

van, 67 dealt specifically with the probable cause element of a malicious prosecution countersuit. In Fee, an orthopedic surgeon brought a malicious prosecution action against his former patient and the patient's attorney, alleging that they had maliciously prosecuted a malpractice action against him for his treatment of the patient. 68 At the trial court level the jury returned a verdict in favor of the physician in the amount of $175,000. 69 The appellate court reversed, however, holding that the evidence established probable cause for filing a malpractice action against the surgeon and the insufficiency of evidence of lack of probable cause constituted plain error requiring reversal. 70 The court noted that it was not necessary to find that the surgeon was actually guilty of malpractice as a matter of law. It was only necessary to find that there was probable cause to believe that the doctor was guilty of malpractice. 71

A plaintiff in a malicious prosecution action must also prove malice in the institution of the prior proceeding in order to be successful. 72 The term malice has received different interpretations in the various jurisdictions. Some jurisdictions require actual malice, which is generally defined as an evil or sinister purpose, or wicked or malicious intent. 73 Some jurisdictions use a similar standard in which malice exists only where the charge is made with knowledge that it is false or with a reckless disregard as to whether it is false. 74 Although this standard is not quite as strict as that of actual malice, it is still difficult to prove malice in the context of a malpractice action. Other jurisdictions have taken a broader view than those above. Under their view, malice exists when an action is brought primarily for a purpose other than the adjudication of

68. Id. at 414-15. The specific allegation in the original malpractice action was that Dr. Sullivan performed an unsuccessful closed reduction of a fracture of the plaintiff's forearm, necessitating insertion of a rod into the forearm, which later resulted in further surgery when the inserted rod was determined to be too long.
69. Id. at 414. Final judgment was entered for $75,000 plus costs after the trial court ordered a remittitur in the amount of $100,000.
70. Id. at 419.
71. Id.
73. See Birnbaum, supra note 4, at 1025.
the merits. Thus, this standard includes not only suits motivated by actual malice, but also lawsuits initiated to force a settlement or those brought without an honest and reasonable belief in their validity. There are also many jurisdictions which provide that malice may be inferred from the absence of probable cause. The result in these jurisdictions is that generally there will be little problem proving malice once the absence of probable cause is established.

The standard of malice that a jurisdiction uses in a malicious prosecution action is often an indication of the unwillingness to afford a viable countersuit remedy. For instance, in *Spencer v. Burglass*, a physician brought a malicious prosecution action against an attorney as a result of an unsuccessful medical malpractice action brought by the attorney on behalf of his client. As the dissent pointed out, it was alleged that the defendant lawyer had no medical or non-medical evidence of malpractice yet he filed and tried the suit. Nonetheless, the court held that allegations that the attorney "frivolously filed suit," that the attorney failed to interview witnesses prior to trial, and that the attorney failed to obtain competent medical advice did not constitute allegations of malice. Not surprisingly, the court also supported its position by noting the public policy of citizens being able to seek redress in the courts. This strict construction of malice further enables jurisdictions to prevent countersuits. This is especially true in jurisdictions which do not have the protection provided by the special injury requirement.

The final element of a claim for malicious prosecution, and the one which has received the most attention, is the requirement that damage result from the prior proceeding. As noted above, a minority of jurisdictions have adopted the English rule which requires the proof of some special injury. In these

77. 337 So. 2d 596 (La. App. 1976).
78. Id. at 603 (Redmann, J., dissenting).
79. Id. at 599-600.
80. Id. at 601. *See also* text accompanying notes 24-26 supra.
82. *See* text accompanying notes 32-38 supra.
jurisdictions, the special injury rule virtually eliminates the
tort of malicious prosecution and, correspondingly, its use as
an effective countersuit remedy. However, in the majority of
jurisdictions the damage requirement is rarely an obstacle to
recovery. In these jurisdictions the plaintiff in a malicious
prosecution action may recover attorney’s fees and the costs
incurred in defending a groundless action. Thus such items
as loss of reputation and expenditures reasonably necessary to
defend against the proceedings would be recoverable if
proved, satisfying the damage requirement.

The above discussion clearly indicates the problem faced
when an attorney or physician countersues on the basis of ma-
lieous prosecution. Since the malicious prosecution action is
generally disfavored by the courts, the attorney or physician
will have a difficult time relying on the theory in his counter-
suit. In the minority of jurisdictions, the malicious prosecu-
tion action is virtually useless due to the special injury re-
quirement, while in the majority of jurisdictions the malicious
prosecution action is ineffective due to the strict construction
of the elements of probable cause and malice.

B. Abuse of Process

The theory of abuse of process, like the theory of malicious
prosecution, has been largely unsuccessful in countersuits
arising out of malpractice actions. Abuse of process is defined
as the misuse or misapplication of a legal process against an-
other primarily to accomplish a purpose for which it is not
designed. The essence of the tort lies in the use of otherwise
legal process to extort some collateral advantage from the de-
fendant. Abuse of process has often been confused with the
tort of malicious prosecution, however, the two torts are dis-
tinguishable. One court distinguished the two as follows: “The
chief distinction between abuse of process and malicious pros-
ecuting is that the former rests upon the improper use of a

84. Id. at ---, 607 P.2d at 447.
86. See, e.g., Bickel v. Mackie, 447 F. Supp. 1376, 1382 (N.D. Iowa 1978); Wilson
v. Brooks, 369 So. 2d 1221, 1225 (Ala. 1979); PROSSER, supra note 28, at § 121.
87. See Bretz, Abuse of Process — Misunderstood Concept, 20 CLEV. ST. L. REV.
401 (1971).
regularly issued process, whereas the latter has to do with the wrong in the issuance of the process or in causing the process to be issued."\textsuperscript{88} Another distinction between the two actions is that in a malicious prosecution action the plaintiff must show that the prior proceeding has terminated in his favor, whereas this is unnecessary in an action for abuse of process.\textsuperscript{89} Further, in an action for abuse of process, it is unnecessary to prove that the process was obtained without probable cause.\textsuperscript{90}

Given the nature of abuse of process, the tort will seldom occur in the context of a malpractice action. One successful countersuit based on abuse of process has been successful at the appellate court level, however. In \textit{Bull v. McCuskey},\textsuperscript{91} a physician sued an attorney to recover damages for abuse of process. The physician contended that the attorney had instituted a malpractice suit against him for the ulterior purpose of coercing a nuisance settlement, knowing that there was no basis for the claim of malpractice. A jury returned a verdict for the physician, awarding him $35,000 as compensatory and $50,000 as punitive damages. The Nevada Supreme Court upheld the jury verdict.\textsuperscript{92} The court reasoned that the attorney's offer to settle the case for the minimal sum of $750 when considered in light of his failure to adequately investigate before filing suit and the total absence of essential expert evidence supported the jury's conclusion of abuse of process.\textsuperscript{93}

The allegation that a malpractice action constitutes abuse of process because it is brought for the purpose of forcing a settlement has been rejected, however.\textsuperscript{94} In \textit{Brody v. Ruby},\textsuperscript{95} the Iowa Supreme Court denied the allegation, reasoning that "[s]ettlement of actions is a positive goal of courts in order to avoid unnecessary and lengthy litigation."\textsuperscript{96} Thus, an abuse of process action will not lie solely because the malpractice ac-

\textsuperscript{90.} PROSSER, \textit{supra} note 29, at 856.
\textsuperscript{91.} 615 P.2d 957 (Nev. 1980).
\textsuperscript{92.} \textit{Id}.
\textsuperscript{93.} \textit{Id.} at 960.
\textsuperscript{95.} 267 N.W.2d 902 (Iowa 1978).
\textsuperscript{96.} \textit{Id.} at 905; see also Bickel v. Mackie, 447 F. Supp. 1376, 1383 (N.D. Iowa 1976).
tion was brought for the purpose of obtaining a settlement. However, if an attorney knows there was no basis for the claim of malpractice and institutes the action for the ulterior purpose of obtaining a nuisance settlement, then a finding of abuse of process is proper. A malpractice action is seldom instituted simply to obtain a nuisance settlement and this limits the use of abuse of process as a countersuit theory.

One other fact situation in the malpractice context has met the requirements of an abuse of process action.97 A surgeon, unable to collect an overdue bill for performing a myelogram, sued his patient to recover his fee. The patient responded to this action by suing the physician for malpractice in performance of the procedure. The surgeon counterclaimed for abuse of process, alleging the patient had instituted the malpractice action solely to avoid paying the physician’s bill, and that he had sustained damage to his reputation and expenses in defending the malpractice action.98 This situation met the requirement of an abuse of process action since the purpose of the malpractice action was to coerce the physician into discontinuing his valid claim for fees.

Thus it appears that only in rare situations99 where an ulterior purpose is proven will the physician or attorney be able to use abuse of process in a countersuit case. Moreover, even the situation where a malpractice suit is brought solely for the purpose of obtaining settlement, an abuse of process action will still be unsuccessful unless the settlement sought is a nuisance settlement and the defendant knew there was no basis for the claim of malpractice. Once again, the strict construction by the courts reflects their disfavor with countersuits in general.

97. Birnbaum, supra note 4, at 1040; see also Levine, I Beat a Malpractice Blackmailer, MED. ECON., Feb. 23, 1976, at 65, in which the physician involved discusses the case.

98. Shortly after the counterclaim was instituted, the malpractice claim was dropped and the patient settled with the physician. Birnbaum, supra note 4, at 1040 n.251.

99. Another situation that has been suggested when countersuits might be successful in the malpractice context is where a physician was named as a defendant solely for the purpose of obtaining his deposition testimony. Singer & Giampietro, The Countersuit, 6 LITIGATION 18, 22 (1979).
C. Defamation

Defamation is the invasion of one's interest in reputation and good name. It involves a communication to a third person which affects the opinion others in the community may have of another. Under this general definition, it would certainly appear that an attorney or physician would have an action for defamation when he is groundlessly sued for malpractice. However, defamation has been unsuccessful as a countersuit theory regardless of the fact that the wrongfully sued physician or attorney may have been damaged by the litigation. The reason is that nearly all jurisdictions grant an absolute privilege to statements made in a judicial proceeding. Thus, courts have held that in a malpractice case, allegations of malpractice in the complaint and at trial are absolutely privileged as part of the judicial proceedings. As long as the alleged defamatory statements are in some way relevant to the judicial proceeding, an action for libel or slander will not be a successful theory on which to base a countersuit. Apparently the only time defamation will be useful is when the malpractice allegations are made outside the judicial process, such as when statements are given to newspapers concerning the case.

D. Infliction of Emotional Distress

A tort remedy which has occasionally been relied upon by wrongfully sued physicians or attorneys is the theory of infliction of emotional or mental distress. Generally, a party is subject to liability under the theory if, through extreme and outrageous conduct, he intentionally or recklessly causes severe emotional distress to another. However, the conduct involved must be so extreme in degree and so outrageous in character that it goes beyond all possible bounds of de-
cency. Thus, the cause of action would rarely be available to the wrongfully sued physician or attorney unless some type of outrageous conduct surrounded the bringing of the malpractice lawsuit. Most often, when infliction of emotional distress is raised in a countersuit to a malpractice action, it will be given little consideration by the court.

**E. Negligence**

A countersuit theory which has been asserted against attorneys with increasing frequency is negligence in the prosecution of a malpractice claim on behalf of a client. Generally, the alleged negligence involved is that the attorney has not adequately investigated the facts before proceeding with the malpractice claim. Specifically, there are two bases for these allegations of negligence. The first is that the attorney has breached a duty owed to a third person to exercise reasonable care in advising a client to commence a lawsuit against that third person. This type of negligence allegation is more closely akin to the traditional negligence concept than the second type of negligence countersuit. The second is that the attorney has failed to comply with the Code of Professional Responsibility of the American Bar Association, which prohibits an attorney from instituting frivolous litigation. The allegation is that the attorney owes the third party a duty to comply with the Code of Professional Responsibility and that the attorney has breached that duty by failing to comply.

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105. Id. at Comment d.
110. Berlin v. Nathan, 64 III. App. 3d 940, 381 N.E.2d 1367, 1376 (1978). The specific provisions commonly alleged to be violated are DR 7-102(A)(1) and EC 7-10. DR 7-102(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."

111. See, e.g., Brody v. Ruby, 267 N.W.2d 902, 906 (Iowa 1978).
Neither of the two types of negligence theories has proved successful.

Courts have consistently rejected the notion that an attorney has a duty of care to third persons to refrain from bringing an unfounded lawsuit. The position of the courts has been that in the adversary context an attorney's duty is owed to his client and the legal system and that it cannot form the basis for a suit by an opposing party. In Bickel v. Mackie, the court held that negligence was an improper standard on which to base an attorney's liability to an adverse party. The court reasoned that an adverse party cannot, under the law, rely on the opposing lawyer to protect him from harm and noted that the very nature of the adversary process precluded such reliance. In other words, as the Tenth Circuit Court of Appeals noted in rejecting a negligence countersuit: "[N]egligence does not exist in the abstract, it contemplates a legal duty owing from one party to another and the violation of that duty by the person owing it."

Courts which have considered negligence claims based on an attorney's breach of the Code of Professional Responsibility have likewise rejected such claims. These courts have pointed out that the Code of Professional Responsibility explicitly states that it does not undertake "to define the standards for civil liability of lawyers for professional conduct." Thus, it is reasoned that the Code of Professional Responsibility can furnish no basis for a private cause of action; rather, it is suggested that a party who is required to defend a groundless lawsuit should institute disciplinary proceedings against the offending lawyer.

Clearly, there are strong policy reasons for denying the ex-

115. Id. at 1382.
116. Id. at 1381.
117. Tappen v. Ager, 599 F.2d 376, 379 (10th Cir. 1979).
119. MODEL CODE OF PROFESSIONAL RESPONSIBILITY, preliminary statement; see, e.g., Brody v. Ruby, 267 N.W.2d 902, 907 (Iowa 1978).
121. Id. at 908.
istence of a duty to a third party defendant. Unless there is some special circumstance, such as where a third party can claim he is intended to benefit from the attorney's performance,

122 an attorney can be liable for professional negligence only to a client. This is a necessary conclusion due to the responsibility an attorney has in the administration of justice via the adversary system. 123 The lawyer's obligation to represent a client zealously within the bounds of the law, 124 together with the nature of the adversary system, requires that the attorney be immune from liability for negligence in an action by a successful adverse litigant. 125 As the Illinois Appellate Court reasoned in the widely publicized countersuit case of Berlin v. Nathan: 126

[W]e believe it would be contrary to public policy for us to hold that an attorney has a duty to an intended defendant not to file a weak or perhaps "frivolous" lawsuit since we would be creating an insurmountable conflict of interest between the attorney and the client. The attorney owes a duty to his or her client to present the case vigorously. . . . When a tort action is brought he has but one intended beneficiary, his client; the adverse party is certainly not an intended beneficiary of the adverse counsel's client. 127

F. Prima Facie Tort

As a result of the strict construction of the various tort theories mentioned above, a number of countersuits are now being based on the somewhat novel approach of prima facie tort. 128 It has been defined as "the infliction of intentional harm, resulting in damage, without excuse or justification, by an act or series of acts which would otherwise be lawful." 129

124. See ABA Code of Professional Responsibility, EC 7-1.
126. 64 Ill. App. 3d 940, 381 N.E.2d 1387 (1978).
127. Id. at — , 381 N.E.2d at 1376.
By definition, prima facie tort does not fall within the categories of traditional torts. The elements of a cause of action for prima facie tort that have emerged are (1) an intent to harm on the part of the defendant; (2) a lack of justification in so acting; and (3) special damages, alleged with particularity. Basically, the reasons for the failure of prima facie tort in the countersuit context are the courts' fears that allowing the concept could circumvent the special damages requirement in malicious prosecution actions, abrogate the privity requirement of negligence actions brought against an attorney, and preempt legislative action in the area.

The state which has most actively developed and expanded the theory of prima facie tort is New York. A number of countersuits which have reached the appellate courts in that state have pleaded prima facie tort. However, even in New York, countersuit cases have had little success. In Hoppenstein v. Zemek, the court held that the plaintiff had failed to plead special damages. It failed to find that there was "intentional infliction of economic damage without excuse or justification." In Belsky v. Lowenthal, the court refused to accept the prima facie tort rationale in the countersuit context, stating that "this rationale should not be an occasion for setting aside large bodies of case law which have defined our limits, established our guidelines and set forth the essential

in Aikins v. Wisconsin, 195 U.S. 194 (1904), in which he ruled that even lawful conduct can become unlawful when done maliciously. 195 U.S. 194, 205-06 (1904).


131. Martin v. Trevino, 578 S.W.2d 763, 772 (Tex. Civ. App. 1978). Special damage in the prima facie tort area has been held to include injury to professional reputation and harassment in some jurisdictions. See Birnbaum, supra note 4, at 1055-56.


133. See, e.g., Birnbaum, supra note 4, at 1061.


136. Id. at ___, 403 N.Y.S.2d at 544.

elements of traditional tort."  

One countersuit case which did receive some success, albeit short-lived, under the theory of prima facie tort was Drago v. Buonagurio. For this reason, it is important that the decisions in the Drago case be looked at closely. The Drago case presented a rather unique fact situation. Dr. Drago was named in a malpractice action and counterclaimed, asserting that he had been named in the action even though he had no direct or indirect association with the person to whose death his negligence had allegedly contributed. Dr. Drago alleged that he was subjected to a frivolous lawsuit as the result of a malicious disregard for his rights and further alleged that the patient's attorney employed the action as a discovery device to ascertain where the responsibility for the death could be placed. The supreme court, special term, dismissed his complaint for failure to state a cause of action. Specifically, the court ruled that the prima facie tort claim failed because there was no allegation of actual or special damages.

On appeal, the countersuit based on prima facie tort received its brief success when the appellate division reversed the lower court. The appellate division agreed that an action did not lie on the basis of traditional tort theories, but noted that "the law should never suffer an injury and a damage without a remedy." The court recognized that the use of prima facie tort in the countersuit context was novel and then noted that tort law is constantly changing to cope with society's changes. The court also noted the drastic increase in medical malpractice actions during recent years, including many which the medical profession considers baseless. The court concluded that under the facts of the case there was a cause of action since there was an intentional wrong, without excuse or justification, causing apparent and foreseeable harm.

138. Id. at —, 405 N.Y.S.2d at 65.
141. Id. at 173, 391 N.Y.S. at 63.
142. Id.
144. Id. at 286, 402 N.Y.S.2d at 252.
to the plaintiff.\textsuperscript{145}

The brief success of the prima facie tort was ended, however, when the Court of Appeals of New York reversed the appellate division in a brief memorandum opinion.\textsuperscript{146} The court agreed with the supreme court and the appellate division, holding that the complaint did not state a cause of action under traditional tort theories. The court noted that there were proposals before the legislature to create new liabilities in such circumstances, and thus stated that they should exercise "judicial restraint in response to invitations to recognize what is conceded to be perhaps a 'new, novel or nameless' cause of action."\textsuperscript{147}

The three \textit{Drago} decisions give limited hope to those who wish to use prima facie tort as a theory of recovery in the countersuit context. Other appellate courts in New York have been unwilling to accept the prima facie tort rationale, reasoning that relief is available only under traditional tort theories.\textsuperscript{148} Moreover, even the appellate division court that handed down the favorable decision in \textit{Drago}, later refused to accept prima facie tort in the countersuit context in a case where there was no "clearly intentional wrong."\textsuperscript{149} However, given the right fact situations, there is the possibility that prima facie tort will be successful if more courts adopt the broader position of this New York Appellate Division Court.

A theory that is quite similar to that of prima facie tort is one in which the claimed source of remedy is state constitutional provisions which provide that for every wrong there is a remedy.\textsuperscript{150} This theory was the basis of the claim on which the physician successfully relied at the trial court level in the now famous case of \textit{Berlin v. Nathan}.\textsuperscript{151} However, on appeal, the

\begin{itemize}
\item \textsuperscript{145} Id. at __, 402 N.Y.S.2d at 253.
\item \textsuperscript{146} 46 N.Y.2d 778, 386 N.E.2d 821, 413 N.Y.S.2d 910 (1978).
\item \textsuperscript{147} Id. at __, 386 N.E.2d at 822, 413 N.Y.S.2d at 911.
\item \textsuperscript{150} An example of such a constitutional provision is ILL. CONST. art. I, § 12, which provides: "Every person shall find a certain remedy in the laws for all injuries and wrongs which he receives to his person, privacy, property or reputation. He shall obtain justice by law, fully, completely, and promptly." For a similar provision see OR. CONST. art. I, § 10.
\item \textsuperscript{151} 64 Ill. App. 3d 940, 381 N.E.2d 1367 (1978). See generally Birnbaum, supra
\end{itemize}
Illinois Appellate Court rejected the constitutional argument, holding that so long as some remedy for the alleged wrong exists, the constitutional provision does not mandate recognition of any new remedy. The court noted that the provision was just an expression of philosophy and not a mandate that a certain remedy be provided. Other courts have consistently agreed with the Illinois appellate courts that other similar types of constitutional provisions do not provide looser tests of traditional tort theories.

The above analysis of the various tort theories which have been relied on in countersuit litigation and the responses these theories have received from the courts indicates a bleak picture for the attorney or physician who believes he has been wrongfully sued for malpractice. Indeed, many attorneys conclude that the pursuit of countersuit litigation is too time-consuming and expensive given the small likelihood of success.

V. THE FUTURE OF COUNTERSUITS

A. The Courts

The success of countersuit litigation in the immediate future is not encouraging. Courts have consistently disfavored such suits due to strong policy considerations and it is unlikely this view will change swiftly. Moreover, before the courts change their stance, there will have to be a reevaluation of the balance between the policy of open access to the courts and the policy of preventing frivolous litigation. As with any major shift in policy, if the change is to take place, it will be slow and difficult.

For any physician or attorney who believes he has been wrongfully sued for malpractice and is contemplating a countersuit, the following considerations are in order. First, a countersuit should only be instituted where there is an objective belief that the original malpractice action was indeed frivolous. Too often countersuits are brought by physicians and attorneys due to a sense of outrage and revenge. It is likely

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153. Id. at ---, 381 N.E.2d at 1374.
155. Strategy, Countersuits in Malpractice Actions, 22 FOR THE DEFENSE 1, 2 (1980).
that these countersuits never would have been instituted had the allegedly wronged professional made an objective assessment of whether the patient or client had reasonable cause to believe malpractice occurred. Second, from a practical standpoint, given the small likelihood of success of countersuits in general, and the even smaller likelihood of success of a somewhat marginal case, the cost and time involved in instituting a countersuit could likely be prohibitive.156

The tort theories on which to base a countersuit must also be closely considered. Some tort theories have little possibility of success simply because they do not fit the malpractice context well in the first instance. These theories are abuse of process, defamation and intentional infliction of emotional distress. Except for unique circumstances, such as where the malpractice action is brought to coerce a nuisance settlement or where defamatory statements are made outside the judicial proceedings, abuse of process and defamation should not be relied on as the basis of a countersuit. Infliction of emotional distress is an inappropriate basis simply because it is difficult to perceive how the institution of any malpractice action, no matter how frivolous, can be considered conduct so outrageous "as to shock one's conscience."157

The theory of negligence also holds little promise in the malpractice countersuit context. The policy of privity in which an attorney owes a duty only to a client and certain intended beneficiaries of his professional conduct is a formidable one and courts will continue to adhere to it in the future.

A tort theory which fits the countersuit context well is malicious prosecution. However, the requirement of "special injury" has virtually abrogated the use of this theory in minority jurisdictions.158 One possible way of meeting the special injury requirement is to allege that the damage to a professional's reputation resulting from a maliciously prosecuted suit constitutes an injury that does not result from all suits,159 but it is unlikely that courts will accept this rationale. In the

156. Id. See Restatement (Second) of Torts § 46, Comment d (1965).
157. See also text accompanying notes 104-06 supra.
158. See text accompanying notes 32-38 supra.
majority jurisdictions, the chances of success of the theory of malicious prosecution are somewhat better. While the elements of the theory are construed narrowly in these jurisdictions, it would appear that in a truly egregious case the burden of proving the elements of lack of probable cause and malice might be overcome. Until now there has been little case law in these majority jurisdictions concerning malicious prosecution countersuits. One factor which may still weigh heavily against their success in majority jurisdictions is the large body of case law against such actions which has developed in the minority jurisdictions.

The theory of prima facie tort perhaps holds the greatest possibility for success in countersuits. One reason for this is that many jurisdictions have not previously considered it and so it will not be confined by the strictly construed formalistic elements of the traditional tort theories. If prima facie tort is to be successfully argued, however, it will have to be presented in the nature of a balancing approach similar to that used by the New York Appellate Division Court in Drago. That court noted that the tort would not be applicable in every malpractice countersuit but only when there has been a "clear intentional wrong." While this standard might only include a very egregious fact situation such as in Drago, it would be the starting point for providing professionals with protection against baseless malpractice suits.

B. Legislative Action

It appears clear that in the near future there will be no surge by courts to change their positions on countersuits. For that reason, perhaps professionals should turn to the legislature to effect changes which will provide them remedies when they are wrongfully sued for malpractice. This alternative appears especially valid since a number of courts have indicated that they should exercise judicial restraint in the area and leave it to the legislature to determine the policy to be

160. These jurisdictions do not require special injury.
162. See text accompanying notes 143-45 supra.
followed. 164

In minority jurisdictions it might be possible to convince the legislature to abolish the special injury rule in malicious prosecution actions by pointing out the irrationality of retaining it in light of its historical development. 165 While the wronged professional would still have to prove the difficult elements of malice and lack of probable cause, he would at least have a chance of success, which is virtually nonexistent now under the special injury requirement.

Another legislative alternative would be a type of prima facie tort statute. Admittedly, however, a legislature might be hesitant to pass such a statute out of fear that it would foster an innumerable amount of lawsuits.

At least one state has taken legislative action in the area by removing the termination rule in a malicious prosecution action and allowing a countersuit to be brought as a counterclaim in the original action. 166 However, this type of legislation does not solve the difficult proof problems one has under the traditional tort theories, and the statute may in fact cause more problems than it solves by having the effect of creating vexatious litigation. 167

One final approach that has been taken by some legislatures is to award costs and reasonable attorney fees to the party against whom a frivolous claim has been brought. 168 This type of legislation does not affect the possible success of a countersuit. However, it does provide the professional a limited remedy when a frivolous claim is brought against him.

VI. CONCLUSION

It is unknown exactly how large a problem frivolous malpractice actions are. However, it is clear that many physicians and attorneys believe that they have had groundless malprac-

165. See note 32 supra.
168. See, e.g., Wis. STAT. § 814.025 (1979).
tice actions instituted against them and have turned to the courts to redress the perceived wrong. Despite this, courts have generally refused to provide these physicians and attorneys with any remedy due to a fear of infringing on the public policy of open access to the courts. The policy of open access to the courts is a sound one, to be sure, yet it is in obvious conflict with the policy of allowing physicians and attorneys to be free from defending unjustified malpractice suits. Courts have made it clear that they perceive open access to the courts to be the more formidable policy, and it is unlikely this view will change in the near future. If the change is to take place, courts must first reevaluate the balance between the competing policy considerations. Such a reevaluation does not appear imminent, however. The result is that in the immediate future countersuits will likely remain an ineffective means of redressing the legitimate claims of physicians and attorneys wrongfully sued for malpractice.

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