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Attorney Liability for Malicious Prosecution and Legal Malpractice: Do They Overlap?

At the February, 1976, meeting of the California Medical Association, that organization’s House of Delegates adopted a resolution whereby physicians may get monetary support from the Association to enable them to take legal action against attorneys whom the physicians believe have wrongfully brought malpractice suits against them.\(^1\) In Illinois, the State Medical Society has announced the establishment of a fund to pay the legal costs of doctors who wish to fight malpractice suits or take legal action against malpractice plaintiffs and their attorneys alleging the initial actions were frivolous.\(^2\) Malicious prosecution, the tort that forms the basis for the majority of the doctors’ suits against attorneys, is not a new cause of action.\(^3\) Malicious prosecution suits aimed at attorneys as well as at the opposing litigants are not unique\(^4\) and might have passed almost unnoticed were it not for the present medical malpractice controversy that has focused national attention on this particular type of case.\(^5\) In California, a growing number of malicious prosecution cases have appeared in recent months,\(^6\) indicating the possibility of an all-out counterattack by medical malpractice defendants. The concern caused by this development is aggravated by the fact that it comes at a time when attorneys are experiencing a malpractice crisis of their own.\(^7\) One question that arises is whether or not the success of malicious prosecution plaintiffs will force attorneys to be so cautious in naming defendants that they will inadequately represent their clients and thus become vulnerable to suits for legal malpractice.

The purpose of this comment is to explore the relationship of malicious prosecution and legal malpractice. To this end it is necessary to define the

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5. See note 2 supra.
6. See note 1 supra.
7. Henry Nussbaum, a senior program editor for Continental National Insurance Co., has noted that claims against attorneys “have just about doubled” in four years. N.Y. Times, June 18, 1975, §1, at 44, col. 1.
scope of both malicious prosecution and legal malpractice. Specifically, this will involve a discussion of the attorney’s duty to refrain from injuring innocent third parties (malicious prosecution) and the attorney’s duty to his client to maximize the client’s chance of recovery by naming proper defendants (legal malpractice). From this discussion it will be possible to determine whether the two actions overlap and whether attorneys will be able to conduct litigation with any degree of assurance that they will not become liable for either malicious prosecution or legal malpractice.

THE SCOPE OF THE TORTS

A. Malicious Prosecution

Malicious prosecution, as the name implies, originally applied only to criminal prosecutions. Modernly it applies equally to civil litigation. The elements of malicious prosecution are generally agreed to be: (1) a proceeding instigated by the defendant against the plaintiff; (2) termination of the prior proceeding in favor of the accused; (3) absence of probable cause for the prior proceeding; and (4) malice or improper purpose. To understand how this tort is used by medical malpractice defendants in subsequent actions against plaintiffs’ attorneys, it is necessary to examine each of the elements as they may be applied in evaluating attorney conduct.

1. Instigation

The plaintiff in a malicious prosecution action must show that the defendant instigated the prior action. An action is regarded as having been “instigated” when the proceeding has been treated by the court as a proper one, that is, where the case has proceeded to the point that it involves official action. Under certain circumstances, the plaintiff’s attorney may be considered the instigator of the previous lawsuit. Attorneys have been held to be the instigator in cases where they have assisted in prosecuting cases knowing that there was no sufficient basis for the action. In addition, a comment to Section 674 of the Restatement of Torts states that

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8. PROSSER, supra note 3, §120, at 850.
9. Id. at 853. “The majority of the American courts ... permit an action to be founded on any ordinary civil suit ... .” In the minority of jurisdictions where malicious prosecution may not be founded on a civil suit, the potential malpractice/malicious prosecution dilemma discussed in this comment would, of course, not exist.Id.
10. PROSSER, supra note 3, §120, at 853-56.
11. Id.
12. See Shaul v. Brown, 28 Iowa 37 (1869); Mask v. Rawls, 57 Miss. 270 (1879).
13. See Halberstadt v. New York L. Ins. Co., 194 N.Y. 1, 86 N.E. 801 (1909); Mitchell v. Donanski, 28 R.I. 94, 65 A. 611 (1906). It is not entirely clear whether the mere filing of a complaint would constitute instigation. Under Halberstadt, it would constitute instigation, but under Mitchell it would not. Under either, however, once service of process has been achieved, instigation is established.
“[t]he person who initiates civil proceedings, is the person who sets the machinery in motion whether he acts in his own name, or that of a third person . . . .” Thus it seems clear that an attorney who files a complaint with knowledge that it has no merit will not be able to exculpate himself by pointing to the fact that he was acting as an agent for the plaintiff. Therefore, in a malicious prosecution action against an attorney, it is possible to establish the first element of the cause of action by showing that the attorney was the instigator of a prior action wrongfully commenced.

2. Termination

To prevail in a malicious prosecution action the plaintiff must also show that the prior action, in which he was a defendant, was terminated in his favor. In the context of a civil case involving the naming of a doubtful defendant, the rules for determining whether or not the proceeding has terminated in favor of that defendant seem clear and easy to apply. Obviously a defense verdict or a dismissal on the merits will constitute favorable termination. In addition, a malicious prosecution plaintiff may establish favorable termination by showing that the previous action was abandoned by the person bringing it. On the other hand, a plaintiff’s verdict in the previous action raises a complete bar to a malicious prosecution action.

The effect of an out-of-court settlement is also clear. The rule is that termination of the action by way of compromise will bar an action for malicious prosecution. This is true notwithstanding the fact that it is clearly regarded as wrongful to bring an action without probable cause for the purpose of causing the defendant to pay a sum of money to avoid the financial or other burdens which a defense would put upon him when the proceedings are based upon alleged facts so discreditable as to induce the defendant to pay a sum of money in order to avoid the notoriety of a public trial.

Thus, while the plaintiff is wrong in using these pressures to induce settlement, the defendant, if he succumbs to them, loses his cause of action for malicious prosecution.
While favorable termination is an essential element of the tort of malicious prosecution, its rules are clear in cases against attorneys involving the naming of doubtful defendants. Thus, it is unlikely that this matter will be in dispute. Usually the termination element will be established easily or not at all. The principal matter in contention is likely to be whether or not the attorney had probable cause to name the doubtful defendant in the prior action.

3. Probable Cause

The plaintiff in a malicious prosecution action has the burden of showing that the prior action against him was initiated without probable cause.\textsuperscript{23} A plaintiff in a civil action has probable cause to bring the suit if he reasonably believes he has a good chance of convincing the court or jury that he ought to prevail.\textsuperscript{24} This criterion, however, may be more rigid than the cases require. Probable cause in criminal cases does not demand a belief on the part of the prosecutor that he can obtain a conviction, but only a belief that the accused is guilty of the crime.\textsuperscript{25} By analogy, it would seem that a civil litigant need not believe that he has a chance of winning, much less a good chance, but only that he has been wronged and ought to prevail on the facts even though the law and precedent are against him.\textsuperscript{26} Even under the view requiring belief on the part of the plaintiff that he has a good chance of winning, it is clear that probable cause does not mean that the plaintiff will probably prevail.\textsuperscript{27} Probable cause in a civil case has been defined by one court to be "a belief in the cause of action or facts alleged, based on sufficient circumstances to reasonably induce such belief. . . ."\textsuperscript{28} Many such could not constitute a bar to a malicious prosecution action. This result, however, is contrary to the weight of authority as discussed at length in Leonard v. George, 178 F.2d 312, 314 (4th Cir. 1949), \textit{cert. denied}, 339 U.S. 965 (1950). On the other hand, it does not appear that settlement by an insurance company against the will of the insured would constitute a bar even if the insurance contract allows the company such discretion. \textit{Restatement (Second) of Agency} \textsection{33} (1957). This section imposes a duty on the agent to obey the will of the principal even if the principal, in imposing his will, violates the contract between himself and the agent. No case was discovered in which the defendant argued that the plaintiff should be barred by an insurance company settlement. It would seem that this rule of agency would preclude such bar being raised by a defendant who knew the insurance company was settling against the will of the plaintiff.

\textsuperscript{23} Garfield v. People's Fin. & Thrift Co. of Riverside, 24 Cal. App. 2d 144, 145, 74 P.2d 1061, 1063 (1937).
\textsuperscript{24} Smith v. Smith, 296 Ky. 785, 788, 178 S.W.2d 613, 614 (1944).
\textsuperscript{25} Michael v. Matson, 81 Kan. 360, 364, 105 P. 537, 539 (1909).
\textsuperscript{26} \textit{Restatement of Torts} \textsection{675(b), comment f (1938).
\textsuperscript{27} To hold that the person initiating civil proceedings should be liable, unless the claim prove valid, would throw an undesirable burden upon those who by advancing claims not heretofore recognized nevertheless aid in making the law consistent with changing conditions and changing opinions. \textit{Id.} at 449.
\textsuperscript{28} See \textit{Tool Research & Eng'r. Corp. v. Henigson}, 46 Cal. App. 3d 675, 120 Cal. Rptr. 291 (1975). Even in criminal prosecutions, the burden of showing lack of probable cause has been historically the most difficult part of proving a case of malicious prosecution. Professor Prosser stated that it is "hedged with restrictions that make it difficult to maintain." \textit{Prosser, supra}, note 3, \$119, at 841.
\textsuperscript{28} Linsay v. Evans, 174 S.W.2d 390, 396 (Mo. App. 1943).
other courts have defined the term in substantially similar language, making it apparent that the issue comes down to a determination of whether or not the plaintiff acted reasonably in the first action.

The reasonableness of any conduct is, of course, subject to varying interpretations. It appears that there is no liability for malicious prosecution if the prior action was founded upon misinformation, so long as the original information was derived from sources a reasonable person would regard as trustworthy. The instigator is not required to exhaust all sources of information, but is required to make such inquiry as the case renders reasonable and proper. As long as appearances would lead a reasonable person to believe that the case has merit, it is unlikely that an inquiry would be required. These standards apply to the party bringing the action. If the attorney has knowledge of all the facts known to his client, he would, of course, be culpable to the same degree as his client. However, it appears an attorney may rely on information given to him by his client so long as that information is at least plausible. One court has stated that:

It would be inimical to the administration of justice if an attorney were held liable for malicious prosecution action, where after honest, industrious search of the authorities, upon facts stated to him by his client, he advises the latter that he has a good cause of action . . . .

Another court qualifies this apparent blanket authorization to regard a client’s allegations as true by imposing the requirement that the attorney have a reasonable belief that the claim is tenable. Apparently, it is sometimes unreasonable to believe the facts as stated by a client. However, a lawyer is not required to believe that a client’s cause is just; therefore, if

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29. See, e.g., Lantay v. McLean, 2 Ariz. App. 22, 406 P.2d 224 (1965) (reasonable ground to warrant ordinarily prudent man in believing accused is guilty); Malvern Brick & Tile Co. v. Hill, 232 Ark. 1000, 342 S.W.2d 305 (1961) (state of facts as would induce a man of ordinary caution and prudence to believe the accused was guilty).
35. PROSSER, supra note 3, §120, at 854.
38. Burnap v. Marsh, 13 Ill. 335, 538 (1852). CAL. BUS. & PROF. CODE §6068 provides in pertinent part: “It is the duty of an attorney to maintain such actions, proceedings or defenses only as appear to him legal or just . . . .” (emphasis added).
a malicious, spiteful plaintiff wishes to pursue a weak but tenable claim, an attorney may represent him without becoming liable for malicious prosecution.\textsuperscript{39}

When an attorney brings an action where the liability of the defendant is questionable, he is faced with the likelihood that the defendant will achieve a favorable termination through a dismissal or a defense verdict. Should this occur, a malicious prosecution plaintiff may still have considerable difficulty showing that the action was brought without probable cause. However, there is one circumstance in which defense verdicts are likely and lack of probable cause for bringing the action will be apparent. Specifically, when a defendant to an action is named for the tactical purpose of coercing his testimony against other defendants, liability for malicious prosecution will depend upon whether this tactic constitutes an improper purpose. This will be discussed below.\textsuperscript{40}

Defense verdicts and dismissals, in some respects, pose fewer risks for an attorney than abandonment of the action altogether. This is because the former establishes only the element of favorable termination and leaves the malicious prosecution plaintiff with the burden of showing that the prior action was brought without probable cause. However, once an action has been abandoned, or a defendant has been dropped and the matter has gone to judgment without him, not only will the element of favorable termination be established, but the abandonment also gives rise to a strong inference that the action was brought without probable cause.\textsuperscript{41} California case law follows the \textit{Restatement of Torts} view on the inference to be drawn from abandonment of an action.\textsuperscript{42} The \textit{Restatement} makes it clear that abandonment establishes the element of favorable termination and is evidence of lack of probable cause.\textsuperscript{43} A \textit{Restatement} comment goes further, stating that the inference in a civil action has the effect of imposing a duty on the defendant to introduce rebuttal evidence. Therefore, this would seem to raise the inference to the status of a presumption.\textsuperscript{44}

The seriousness of the problem facing an attorney wishing to abandon an action will depend upon the availability of evidence to rebut the inference of lack of probable cause resulting from the abandonment. Another \textit{Restatement} comment states that:

\begin{quote}
[i]The private prosecutor . . . can make this fact (the withdrawal) immaterial [as evidence of lack of probable cause] by showing his\end{quote}

\begin{itemize}
  \item \textsuperscript{39} Peck v. Chouteau, 91 Mo. 138, 150, 3 S.W. 577, 580 (1887).
  \item \textsuperscript{40} See text accompanying notes 70-71 \textit{infra}.
  \item \textsuperscript{41} \textit{RESTATEMENT OF TORTS} §674(b), comment g (1938). In order to reach the conclusion that abandonment gives rise to an inference of lack of probable cause, it is necessary to follow a path from \textit{RESTATEMENT OF TORTS} §674 to §660 to §665.
  \item \textsuperscript{42} See Williams v. California Milk Producers Ass'n, 136 Cal. App. 172, 28 P.2d 59 (1934) (complaint dismissed because of private prosecutor's failure to press prosecution; held evidence of lack of probable cause).
  \item \textsuperscript{43} See note \textsuperscript{41} supra.
  \item \textsuperscript{44} \textit{RESTATEMENT OF TORTS} §665(1), comment a (1938).
\end{itemize}
reasons for doing so were such that from them no inference of a lack of probable cause can properly be drawn. Thus, he can show that the charge was withdrawn because of after discovered exculpatory facts [after commencing the action] or because the information on which the charge was based was found to be unreliable.\footnote{45}

It seems clear that the attorney is not relieved of the responsibility of insuring that the initial complaint is filed with probable cause. The proviso that the exculpatory facts be discovered after the action has been initiated indicates that an attorney who decides, upon later reflection on the same facts that caused him to initiate the suit, that he does not have a case will not be excused from having acted without probable cause. Furthermore, while the attorney might escape liability on the ground that his client has willfully or negligently provided him with unreliable information, this defense may not be effective unless he has made a reasonable effort to ascertain the truth and thereafter promptly released the defendant from the suit.\footnote{46}

In light of the above discussion, it appears that an attorney is permitted to bring only those actions that a reasonable lawyer would regard as tenable and to name only those defendants he reasonably believes may be liable.\footnote{47} A standard of reasonableness does not seem likely to place an undue burden on an attorney. Even if the attorney abandons an action under circumstances giving rise to an inference of want of probable cause, he should have little problem rebutting the inference if he has conducted himself reasonably in naming the defendant initially. On the other hand, if the attorney does not conduct himself reasonably and want of probable cause is established, he may find the situation particularly troublesome because, as discussed in the next section, malice may be inferred from want of probable cause.

\section{4. Malice or Improper Purpose}

The final element that the malicious prosecution plaintiff must show is that the plaintiff in the first action initiated the action maliciously or with an improper purpose.\footnote{48} This element, in theory, makes malicious prosecution an intentional, rather than a negligence cause of action.\footnote{49} Actual ill will constitutes malice;\footnote{50} however, actual ill will on the part of an attorney will seldom be present. More frequently, malice will be found when the purpose for initiating the action is something other than adjudication of the claim on

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\footnote{45. \textit{Id.} at 415 (emphasis added).}
\footnote{46. See text accompanying notes 27-32 \textit{supra}.}
\footnote{47. See text accompanying notes 30-39 \textit{supra}.}
\footnote{48. Tool Research \& Eng'r. Corp. v. Henigson, 46 Cal. App. 3d 675, 682, 120 Cal. Rptr. 291, 296 (1975); \textit{PROSSER, supra} note 3, \S 119, at 847.}
\footnote{50. Smith v. Kidd, 246 S.W.2d 155, 159 (Ky. 1952).}
\end{footnotes}
which the action is based.\textsuperscript{51} Malice has been found when the attorney has acted in reckless disregard for the defendant's rights\textsuperscript{52} and where the action was brought to bluff the plaintiff.\textsuperscript{53}

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.\textsuperscript{54} Many cases include statements to the effect that malice may be inferred from lack of probable cause,\textsuperscript{55} with some courts going so far as to say malice will be presumed under these circumstances.\textsuperscript{56} Section 669 of the Restatement of Torts states that

\begin{quote}
[lack of probable cause for the initiation of civil proceedings, in so far as it tends to show that the accuser did not believe in the guilt of the accused is evidence that he did not institute the proceedings, for a proper purpose.]
\end{quote}

California case law is replete with cases in accord with this statement.\textsuperscript{58}

Even though lack of probable cause and malice seem to arise from the same facts, most courts continue to specify that malice is an essential and separate element of malicious prosecution.\textsuperscript{59} However, in discussing the tort, courts mention malice but dwell on probable cause and use language normally applicable to negligence causes of action.\textsuperscript{60} There is frequent

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\textsuperscript{52} E.g., Blunk v. Atchison T. & S.F. R.R. Co., 38 F. 311 (C.C.W.D. Mo. 1889); Holden v. Merritt, 92 Iowa 707, 61 N.W. 390 (1894).
\textsuperscript{53} E.g., Munson v. Linnick, 255 Cal. App. 2d 589, 63 Cal. Rptr. 340 (1967), overruled on other grounds, 3 Cal. 3d 841, 850, 497 P.2d 379, 384, 92 Cal. Rptr. 179, 184 (1971).
\textsuperscript{55} E.g., Masterson v. Pig'n Whistle Corp., 161 Cal. App. 2d 323, 326 P.2d 918 (1958): "Whether malice existed was a question of fact to be resolved by the jury . . . . The jury could have inferred malice from the want of probable cause." See also cases collected at Annot., 10 A.L.R.2d 1199 (1949).
\textsuperscript{56} Brand v. Hinchman, 68 Mich. 590, 601, 36 N.W. 664, 669 (1888). Contra, Johnson v. Huhner, 76 N.D. 13, 27, 33 N.W.2d 268, 275 (1948). Even in the minority of jurisdictions ostensibly requiring actual malice, it is not entirely clear whether or not malice may be inferred. In Foster v. McClain, 251 So. 2d 179 (La. 1974), the court in a libel action against attorneys which under Louisiana law is similar to malicious prosecution and in which actual malice must be shown, found no actual malice. Interestingly, in commenting on this matter, the court did not say that there was no evidence that the attorneys knew their allegations were false but that "[n]othing in the record indicates . . . the attorneys had reason to doubt . . . statements . . . . The record fails to indicate that the attorneys could have known that the allegations were untrue . . .." Id. at 181-82 (emphasis added).
\textsuperscript{57} RESTATEMENT OF TORTS §669 (1938).
\textsuperscript{60} See Palermo v. Cottom, 525 S.W.2d 758 (Mo. App. 1975); Engelgau v. Walter, 181 Or. 481, 182 P.2d 987 (1947). Palermo is particularly illustrative of the general confusion between intent and negligence in malicious prosecution. The court states that malice is an element of malicious prosecution and that all elements "must be strictly construed." 525 S.W.2d at 763. Later the court states that "probable cause is reasonable cause, not necessarily actual cause. We must consider the facts as the prosecuting attorney could have reasonably believed them to
reference to the reasonable person, the cautious person, and the prudent person, all of which seem inappropriate to a discussion of an intentional tort. In the California case of Norton v. Hines, the court rejected the plaintiff’s argument that attorneys owe a duty of reasonable care to defendants in advising a client to commence a lawsuit against that defendant. The court specifically distinguished malicious prosecution from simple negligence, saying that the latter “requires a different and less demanding standard of proof.” But then the court went on to say that “a cause of action for malicious prosecution exists if the attorney prosecutes a claim which a reasonable lawyer would not regard as tenable . . . by unreasonably neglecting to investigate the facts and the law.” Thus, in Norton the court denied that attorneys owe a duty of care to defendants and affirmed that attorneys must exercise reasonable care in deciding whether or not to prosecute a claim. If there is any difference between the duty that the court denies and the duty implicit in the requirement that the attorney conduct a reasonable investigation of the facts and law, that difference is not readily apparent. One commentator, referring to Norton, has argued that the tort of malicious prosecution should be modified to allow a negligence action by imposing upon attorneys a duty to investigate a client’s allegations before filing suit. However, such a modification would appear to constitute judicial recognition of the law as presently applied rather than any change in the law. An attorney is already required to have probable cause before bringing an action, and probable cause does not exist if he has unreasonably failed to investigate. Furthermore, once want of probable cause has been established, a finding of malice almost inevitably follows.

Other courts have had no less difficulty separating the elements of lack of probable cause and malice. Malice is sometimes defined in terms of knowledge that the claim is false but this definition cannot be reconciled with a

be under the circumstances at the time.” Id. at 764. Finally, the court states that “malice . . . may be inferred from the absence of probable cause.” Id. at 765.


63. Id. at 923, 123 Cal. Rptr. at 241.

64. Id.

65. Id. at 924, 123 Cal. Rptr. at 242 (emphasis added).

66. Comment, Malicious Prosecution: An Effective Attack On Spurious Medical Malpractice Claims?, 26 CASE W. RES. L. REV. 653 (1976). The author goes on to suggest that malice should be defined as reckless disregard to make malicious prosecution easier to prove. Id. at 685. However, it seems that even less than recklessness, i.e. ordinary negligence, is presently all that is required to support a finding of malice.

67. See text accompanying notes 23-47 supra.

68. In fact, a review of the cases revealed no case in any jurisdiction in which the defendant was found to have acted without probable cause and without malice. In every case reviewed in which the malicious prosecution action resulted in a defense verdict because the defendant did not act with malice, it was also found that he had acted with probable cause.

definition of malicious prosecution that includes the element of lack of probable cause. If the plaintiff must show actual knowledge that the claim is false to establish malice, any discussion of probable cause is meaningless. Thus, this definition of malice results in a complete merger with the element of lack of probable cause. The difficulty in separating the two elements arises because it is almost impossible to hypothesize a situation where there is a proper purpose to bring an action without probable cause. For example, consider medical malpractice cases where a defendant is named not because he is reasonably believed to be liable, but to coerce his testimony against other defendants whose liability is probable. Although there does not appear to be a case in which the malicious prosecution defendant has argued that this purpose is proper, such a defense would fail because any purpose for bringing proceedings other than "securing the adjudication of the claim on which they are based" is improper. The claim against a defendant thought to be liable is, of course, separate from the claim against a defendant whose testimony is being coerced. Therefore, adjudication of the claim against the defendant thought to be liable cannot be used to justify the action against a coerced defendant.

There may be a useful distinction between the elements of probable cause and malice in special circumstances. If an attorney has neither a belief in his client’s claim necessary to establish probable cause nor any actual knowledge that it is false, it may be possible to argue lack of malice even though probable cause is clearly not present. Such a situation could arise where, because of the imminent running of the statute of limitations, the attorney names a defendant he later discovers cannot possibly be liable. The purpose, to prevent the possible loss of the cause of action, may be held proper. In most other circumstances, however, an attorney charged with malicious prosecution will have difficulty defending the action once lack of probable cause is shown.

The above discussion of malicious prosecution and its elements indicates a general consistancy among courts in stating the law of malicious prosecution and a corresponding consistency in applying different law to the factual situations that have been presented. Malicious prosecution is an action disfavored in the law of most jurisdictions because it runs counter to the public policy favoring recourse to the courts by citizens seeking justice. Accordingly, a plaintiff wishing to bring an action for malicious prosecution must satisfy a series of exacting requirements. He must prove the defendant initiated the prior action against him without probable cause and that the

70. See text accompanying notes 23-38 supra.
71. RESTATEMENT OF TORTS §676 (1938).
72. See text accompanying notes 117-122 infra.
73. See note 68 supra.
74. PROSSER, supra note 3, §119, at 841.
prior action terminated in his favor. The final requirement is that the prior action be brought with malice.\textsuperscript{75} This is consistent with courts' characterization of malicious prosecution as an intentional tort. However, most courts do not seem to require actual malice to support the action. The finder of fact is sometimes allowed to presume malice and is frequently allowed to infer malice from want of probable cause and, as a practical matter, almost surely does one or the other whether or not either is specifically permitted. Therefore, a standard of care to avoid injuring innocent defendants is imposed upon attorneys in fact, if not in theory. That standard appears to be one based on reasonableness. This is the same standard that is imposed upon attorneys in discharging their duties to their clients, with the result that the acts and omissions giving rise to malicious prosecution are strikingly similar to those that give rise to an action for legal malpractice.

B. Legal Malpractice

An attorney has a duty to his client to exercise that "skill, prudence, and diligence as lawyers or ordinary skill and capacity commonly possess and exercise in the performance of tasks which they undertake."\textsuperscript{76} He is required to conduct himself honestly and in good faith and to represent his client's interests to the best of his ability.\textsuperscript{77} If he falls below this standard of care he may be liable for professional negligence, more commonly referred to as malpractice. The elements of legal malpractice as in other negligence actions, are: (1) duty; (2) breach of that duty; (3) proximate causal relation between the breach and the resulting injury; and (4) actual damage.\textsuperscript{78}

Legal malpractice has, of course, been found in a wide variety of circumstances; however, here we are concerned only with the question of whether there are situations, actual or potential, in which an attorney may be liable for malpractice in failing to name a defendant to an action when that defendant's liability is questionable. This is the threshold question in determining whether or not the attorney will find himself trapped between the conflicting interests of an \textit{inadequately represented} client and the outraged victim of a frivolous complaint.

The advantages to an attorney and his client in naming a large number of defendants is such that, in the absence of any substantial countervailing incentive not to do so, attorneys normally name as many as possible. First, in many cases, the defendant who is primarily liable may be insolvent and a

\textsuperscript{75} \textit{Id.} at 835.


\textsuperscript{77} Silver v. Shemanski, 89 Cal. App. 2d 520, 546, 201 P.2d 418, 435 (1949), quoted in Gay v. Heller, 252 F.2d 313, 316, 317 (5th Cir. 1958): "If the issue which the attorney is called upon to decide is fairly debatable, then . . . he is not only authorized but obligated to . . . urge his client's claim."

judgment against him would be worthless. Second, target or "deep pocket" defendants are diligently sought not only to provide a greater source of funds with which to satisfy a judgment but also to counterbalance jury sympathy for a defendant upon whom an adverse judgment will visit great hardship. Third, coercing testimony of one defendant against another, as mentioned previously,\(^7\) obviously makes it far easier for the attorney to prove his case. Finally, naming everyone remotely involved insures that the statute of limitations will not run against one whose liability is not promptly discovered.

Since the success of the client's cause of action may turn upon whether or not the attorney has secured one or more of the above named advantages stemming from the naming of doubtful defendants, the question the attorney must answer is whether or not in the particular case a failure to avail himself of these advantages will be regarded as malpractice. In theory, it is clear that the duty of an attorney to his client does not extend so far as to require him to name a defendant under circumstances that would render the attorney liable for malicious prosecution.\(^8\) Such a rule would impose a duty to commit a tort and would be without precedent in the law. However, while there may not be a problem in theory, there may be one in fact since it is often easier to state a legal principle than to apply it. For this reason, an attorney faced with an uncertain choice of defendants will need some practical guidance upon which he can base his decision to name or omit to name a defendant.

The essence of an action alleging malpractice for failing to name a defendant is a showing that the client could have won had the omitted defendant been named.\(^8\)\(^1\) In order to know whether he is omitting a defendant against whom he could win a judgment, the attorney must know both the law and the facts involved. If he fails to name a defendant he should have named through ignorance of either, his liability for malpractice will be determined by whether or not his ignorance resulted from a failure to conform to the applicable standard of care.\(^8\)\(^2\) Traditionally, that standard has not required an attorney to have a perfect knowledge of the law;\(^8\)\(^3\) even if he has made a mistake that has been costly for his client, the courts have been generous in not assessing liability if the mistake was one other attorneys of ordinary skill might have made.\(^8\)\(^4\) There is, however, some indication that this tolerant attitude is waning.

\(^7\) See text accompanying notes 69-70 supra.
\(^8\)\(^4\) Id.
In the case of Smith v. Lewis, the California Supreme Court imposed liability on an attorney for failing to know principles of law that could have been ascertained by a well-informed attorney using standard research techniques. This case did not involve a doubtful defendant but it requires little imagination to extend that decision and apply it to a case where an attorney fails to name a defendant through ignorance of a law that would make that defendant liable. The practice of naming everyone remotely connected with the case would preclude this from happening; however, if the attorney is dissuaded from naming doubtful defendants by the threat of a malicious prosecution action, his vulnerability is increased. For example, if an attorney fails to discover an intricate rule of agency, that failure could be the basis of a malpractice action by a client. If the client might have prevailed against either a solvent or an insolvent defendant on the same facts and the solvent defendant is omitted, a legal malpractice action may very well follow.

Whether the client will be successful in the malpractice action may depend upon a court determination that the attorney has a duty to name doubtful defendants in order to avoid the consequences of a mistake of law. If Smith stands for the proposition that an attorney who unreasonably fails to discover matters of law can be liable for malpractice, then it seems the client is adequately protected against such a failure and does not need the additional protection of a rule imposing a duty on the attorney to name doubtful defendants. In fact, a rule that required the naming of doubtful defendants to avoid damages flowing from the attorney’s unreasonable failure to discover matters of law would not impose any additional duty on the attorney, but would give him license to protect himself from liability for his own negligence by injuring innocent parties. Furthermore, if the mistake of law causing the attorney to fail to name a defendant is one that would not be regarded as malpractice under the Smith standard, that is, a non-negligent mistake of law, it does not seem likely that the client could successfully maintain that the attorney was negligent in failing to protect the client against the attorney’s non-negligent mistakes. An attorney, having done the research required by the Smith standard and not discovering principles giving him probable cause to name a defendant, should not be required or even allowed to avoid the risk that he has missed some obscure point by naming defendants who from all appearances are not liable.

86. Id. at 358, 530 P.2d at 595, 118 Cal. Rptr. at 627.
87. But see O’Neill v. Gray, 30 F.2d 776 (2d Cir. 1929), cert. denied, 279 U.S. 865 (1929). The attorney misnamed a party, calling it a corporation rather than a co-partnership and as a result lost the cause of action. In a malpractice suit, the court rejected the attorney’s argument that he had acted reasonably in considering the defendant’s response to be a general appearance. The point was apparently validly disputed because it was decided in favor of the attorney at the trial level and reversed by a divided appellate court. Yet in the malpractice action the
Mistakes of fact create a somewhat more difficult problem because they may occur with or without fault on the part of an attorney. Like mistakes of law, mistakes of fact may occur because the attorney unreasonably fails to investigate, but mistakes of fact may also occur because inaccurate or inadequate information is provided by the client. Also, mistakes of fact may occur merely because information is not readily available. A professional person is generally required to exercise reasonable care in ascertaining the facts upon which he bases his actions. If the professional fails to exercise reasonable care, there is no reason to treat this omission any differently than a mistake of law. On the other hand, if the mistake is a result of inadequate information provided by the client, the attorney may be liable if the unknown fact is one about which he ought to have inquired in light of the surrounding circumstances. It seems to follow that an attorney will not be liable for malpractice if he has made a reasonable effort to ascertain the facts and decides, based on these facts, not to name a doubtful defendant. If he fails to make a reasonable effort to determine the facts, he should not be allowed to avoid the consequences of his unreasonable conduct by putting innocent parties to the trouble of defending groundless suits.

The attorney's most troublesome problem arises when he has insufficient information to determine who should be named as a defendant but must initiate immediate action to avoid being barred by the statute of limitations. Suppose, for example, a client presents himself a few hours before the statute will run and advises the attorney that he was injured under circumstances indicating that any one of 30 people may have been responsible. The attorney, knowing that only one of the 30 people caused the harm, may wonder if he must name them all to insure that the culpable party does not escape liability. In California, it is permissible to name fictitious defendants and later substitute the names of persons who are discovered to be the actual tortfeasors. This procedure would no doubt be used to avoid this dilemma. In jurisdictions where the naming of fictitious defendants is not allowed, however, the problem is more difficult. It is clear that failure to name everyone will create a grave risk of losing the cause of action. If the culpable party is not named and the statute of limitations expires, the question arises as to whether or not the client may prevail in a malpractice action. If the client can show that naming a particular defendant would have

court said that "the point was doubtful [whether there had been a general appearance] and could have been eliminated from the case by prompt action.... Skillful conduct requires avoidance of wholly unnecessary risks." Id. at 780.

88. See Clark v. United States, 402 F.2d 950 (4th Cir. 1968); Stevens v. United States, 294 F. Supp. 446 (D.S.C. 1968); Hicks v. United States, 368 F.2d 626 (4th Cir. 1966), overruled on other grounds, 419 F.2d 337, 339 (1969). These cases all involve doctors rather than lawyers but the principle appears equally applicable.

89. See Hicks v. United States, 368 F.2d 626 (4th Cir. 1966), overruled on other grounds, 419 F.2d 337, 339 (1969). "Only if a patient is adequately examined, is there no liability for an erroneous diagnosis." 368 F.2d at 630.

90. CAL. CODE CIV. PROC. §474.
preserved the cause of action, and that later investigation could have established that the unnamed defendant was the culpable party, the result of the malpractice action will most likely turn upon whether the attorney acted reasonably. This is a factual determination upon which two juries might give different answers. Furthermore, it is certain that even if it is decided that an attorney should name 30 people, at some point the naming of multiple defendants merely because the group is known to include the tortfeasor becomes unreasonable. For example, the mere fact that the population of a city is known to include the tortfeasor does not justify naming everyone in that city as a defendant. Also, it is apparent that if any very large group is named, most of that group could successfully maintain that the action was brought without probable cause. This is, therefore, one area in which the same act could be argued to constitute malpractice or malicious prosecution depending upon whether it is performed or omitted.91

An attorney has a duty to his client to present the client’s case vigorously and in a manner as favorable to the client as the rules of law and professional ethics permit.92 The duty requires only such conduct as is reasonable under the circumstances. The attorney must make reasonable inquiry to determine the state of the law and in ascertaining facts upon which a cause of action is based. The attorney will not be liable for failing to name defendants if reasonable inquiry does not reveal a basis for recovery against potential defendants beyond the mere nuisance value of the action itself.93 Therefore, the standard of conduct required of an attorney to avoid a charge of legal malpractice is similar to that to which an attorney must adhere in deciding if probable cause exists to name a defendant to an action, that is, the care of a reasonable attorney under like circumstances.94

THE RANGE OF ACCEPTABLE CONDUCT

As we have seen, the essence of an action for malicious prosecution is the ability of the plaintiff to show that a prior action was brought against him without probable cause.95 The essence of an action for legal malpractice, as it relates to naming possible defendants, is a showing by the plaintiff that he could have recovered but for the failure of his attorney to name a particular

91. A less difficult question, because it appears to have been answered, is whether or not failure to bring an action for its nuisance value can constitute malpractice. In the California case of Campbell v. Magana, 184 Cal. App. 2d 751, 8 Cal. Rptr. 32 (1960), the court specifically rejected the plaintiff’s argument that her attorney was liable for negligently causing her to lose the nuisance value of her cause of action even though she might not have been able to obtain a judgment. The court said that “[o]ne who establishes malpractice on the part of his attorney . . . must also prove that careful management of [the cause of action] would have resulted in recovery of a favorable judgment . . . .” Id. at 754, 8 Cal. Rptr. at 33.
92. ABA CODE OF PROFESSIONAL RESPONSIBILITY, Canon 7, EC 7-1, Dr 7-101(A)(1).
94. See text accompanying notes 17-34 supra.
95. See text accompanying notes 61-74 supra.
defendant. If there are any factual situations that will satisfy the elements of both torts, the two torts can be said to overlap. Both actions are beset with difficulties for the plaintiff since in each, the plaintiff must allege facts that are difficult to prove. Furthermore, in an action for malicious prosecution the plaintiff runs afoul of policies "encouraging recourse to the courts by honest citizens seeking justice."

The standards that apply in determining whether the malicious prosecution or malpractice plaintiff has sustained his burden of proof are remarkably similar. An attorney who makes a mistake will not be liable for either tort so long as he has made a reasonable effort to ascertain the state of the law and determine the relevant facts of his case. The standards applicable to both torts allow for human fallibility and exercise of judgment. If the attorney has an honest and reasonable belief in the propriety of the cause of action he elects to pursue in behalf of his client, he will not be liable for an error of judgment. In theory, it appears attorney conduct which will cause liability to attach for malicious prosecution on the one hand or for legal malpractice on the other occurs at opposite ends of a spectrum of conduct that will be regarded as reasonable. At one end of the spectrum it is unreasonable to name a defendant and at the other it is unreasonable not to name a defendant. If the principles discussed relative to each of the torts are valid, the range of conduct that courts will regard as reasonable is wide. If a malicious prosecution plaintiff can show that a prior action was brought against him without probable cause, it seems that a malpractice plaintiff would find it impossible to show he would have prevailed but for his attorney's negligent failure to bring the action. Conversely, if a malpractice plaintiff can show that he would have prevailed but for his attorney's failure to name a doubtful defendant then, had the doubtful defendant been named, that defendant would find it impossible to show want of probable cause in a malicious prosecution action.

The empirical data suggest that what is true in theory is also true in practice, at least with regard to malicious prosecution cases. A review of

97. See Tool Research & Eng'r. Corp. v. Henigson, 46 Cal. App. 3d 675, 683, 120 Cal. Rptr. 291 (1975). Even in criminal prosecutions the burden of showing lack of probable cause has been historically the most difficult part of proving a case of malicious prosecution. Professor Prosser stated that malicious prosecution is "hedged with restrictions that make it difficult to maintain." PROSSER, supra note 3, §119, at 841. Correspondingly, with regard to legal malpractice the court in Campbell v. Magana, 184 Cal. App. 2d 751, 8 Cal. Rptr. 32 (1960), said that "[o]ne who establishes malpractice on the part of his attorney . . . must also prove that careful management of [the cause of action] would have resulted in recovery of a favorable judgment . . . ." Id. at 754, 8 Cal. Rptr. at 33.
98. PROSSER, supra note 3, §120, at 851.
99. See text accompanying notes 30-39 and 82-89 supra.
101. See, e.g., Masterson v. Pig'n Whistle Corp., 161 Cal. App. 2d 323, 326 P.2d 918 (1958); Palermo v. Cottom, 525 S.W.2d 758 (Mo. App. 1975); La Font v. Richardson, 119 S.W.2d 25 (Mo. App. 1938).
the reported cases reveals no instances involving successful malicious prosecution actions in which it appears that the client would have been successful in a malpractice action had the attorney failed to name the defendant in question.\textsuperscript{102} In most of the cases, the principal issue was whether or not the defendant could show justification for having brought the prior action.\textsuperscript{103} Since he was unable to show justification for bringing the action it seems clear that his client would be unable to show he could have won. Thus, a client would surely have floundered in any attempt to show he could have recovered but for the attorney’s negligent failure to bring the action. Therefore, with the possible exception of cases brought with insufficient information because of the imminent expiration of the statute of limitations, finding the middle ground between the two torts will pose no problem for the prudent attorney.

In order for an attorney confronted with a statute of limitations that is about to expire to know whether or not he may name a doubtful defendant,\textsuperscript{104} it is useful to consider whether or not the exigent circumstances will constitute a good defense in the event he is charged with either malpractice or malicious prosecution. No case or comment appears directly to address this matter with respect to either tort. Therefore, the state of the law must be postulated by reference to analogous situations.

With regard to legal malpractice, an analogy may be made to other types of negligence. Emergency circumstances have long been considered in defining the standard of care to be imposed on the defendant in a negligence action.\textsuperscript{105} The theory that one faced with an emergency should be allowed more latitude of action is usually applied in circumstances in which time to reflect is not available. The doctrine contemplates a "sudden or unexpected event which calls for immediate action."\textsuperscript{106} The emergency doctrine provides that errors resulting when an actor must make a decision without time to process relevant information, even though the information may be readily available, may be excused.\textsuperscript{107} The attorney faced with an impending statute of limitations may have more time but inadequate information. Both actors must take action before they are ready and in both cases the result is a potentially erroneous decision brought about through excusable error. It follows that the reasonableness of the attorney’s action will be determined in

\textsuperscript{102} Since there are few, if any, successful malpractice actions against an attorney for failing to name a defendant, it is not possible to approach this matter from the other direction, \textit{i.e.}, whether an attorney successfully sued for malpractice could have been liable for malicious prosecution. See text accompanying notes 77-81 \textit{supra}.

\textsuperscript{103} See text accompanying notes 22-47 \textit{supra}.

\textsuperscript{104} This a problem that will arise only in jurisdictions that do not allow the fictitious naming of defendants and in which filing the complaint constitutes initiation.


\textsuperscript{106} \textit{Prosser, supra} note 3, §33, at 169.

\textsuperscript{107} \textit{Id.} Professor Prosser also made the point that the standard is not really different as it is still "the conduct of a reasonable man under the circumstances." \textit{Id.}
light of the information he has available when he is forced to make his decision. If this is so, no more should be required of the attorney than that his conduct be reasonable in light of the circumstances.\textsuperscript{108}

With regard to malicious prosecution, the comment to Section 675 of the \textit{Restatement of Torts} states that less in the way of probable cause is required to initiate a civil action as opposed to a criminal action because "\textit{[i]n many cases civil proceedings, to be effective, must be begun before the relevant facts can be ascertained to any degree of certainty.}"\textsuperscript{109} That comment makes specific distinction between criminal and civil actions as follows:

A private prosecutor does not have reasonable grounds for believing that the accused has conducted himself in a particular manner, if he merely entertains a suspicion \textit{even though he reasonably believes it may be verified upon further investigation}. On the other hand, where proceedings are civil, it is enough that the person initiating them believes that he can establish the existence of such facts to the satisfaction of the court and jury.\textsuperscript{110}

Therefore, it follows that the imminent expiration of the statute of limitations would constitute a defense to malicious prosecution as long as an attorney has at least a suspicion that the named defendant may be liable and some rational basis for that suspicion. If the above statement is correct, there is no narrowing of the range of acceptable conduct between malicious prosecution and legal malpractice when an attorney acts in the face of a statute of limitations that is about to expire. On the contrary, he would be allowed greater latitude and find even a wider range of acceptable conduct.

In view of the foregoing discussion, traditional standards of conduct applied in both malpractice and malicious prosecution actions leave a broad range of acceptable conduct between the two torts. All that has been required to avoid liability for either tort is that the attorney conduct himself reasonably.\textsuperscript{111} Courts, in discussing whether or not specific conduct was reasonable, have used substantially similar language relative to each tort and allowed latitude for normal human error. Therefore, if traditional standards apply, there is no overlap of liability between legal malpractice and malicious prosecution.

\textbf{CONCLUSION}

The recent publicity surrounding the increase of malicious prosecution actions filed by doctors against attorneys who have named them as defendants in malpractice actions may have encouraged others who feel they have been victimized by frivolous lawsuits to bring malicious prosecution actions.\textsuperscript{112} This fact, considered in light of the growing number of malpractice actions filed by doctors against attorneys who have named them as defendants in malpractice actions may have encouraged others who feel they have been victimized by frivolous lawsuits to bring malicious prosecution actions.\textsuperscript{112} This fact, considered in light of the growing number of malpractice actions.

\begin{footnotesize}
\begin{enumerate}
\item[108.] \textit{Id.}
\item[109.] \textit{Restatement of Torts} §675, comment on clause (a), comment d at 448 (1938).
\item[110.] \textit{Id.} (emphasis added).
\item[111.] See text accompanying notes 30-39 and 82-89 \textit{supra}.
\item[112.] See text accompanying notes 1-7 \textit{supra}.
\end{enumerate}
\end{footnotesize}
actions filed against lawyers appears on the surface to portend new problems for practicing attorneys. A potential dilemma is created whereby naming a defendant gives rise to a charge of malicious prosecution while failing to name him gives rise to a charge of malpractice. However, this dilemma is illusory. The standard of conduct required of an attorney to avoid either charge is reasonableness. In fact the two torts are so similar in most respects that the only difference seems to be the identity of the injured party. In theory, the similarity is not complete since malpractice is a form of negligence while malicious prosecution is an intentional tort requiring either actual intent or reckless disregard of the plaintiff’s rights. In practice, however, intent may be inferred not only from reckless disregard of the plaintiff’s rights but from mere failure to exercise reasonable care, thus making malicious prosecution indistinguishable from a negligent tort. Furthermore, the standards of reasonableness that have been imposed by the courts relative to legal malpractice and malicious prosecution seem to be identical.

The range of acceptable conduct between the torts is wide. To sustain an attack for malicious prosecution, the plaintiff must show that there was no possibility he would have lost while the malpractice plaintiff must show he surely would have won. It is almost inconceivable that the facts supporting one tort would also be found to support the other. Therefore, even if the recent upsurge in malicious prosecution actions by doctors against attorneys should continue unabated, it is unlikely that these actions will drive attorneys to the brink of malpractice. On the contrary, the demise of the practice of naming everyone remotely connected with a case will probably lead to more thorough investigation resulting in better representation and thus reduce the incidence of legal malpractice. Finally, to the extent that this development inhibits the disreputable practice of filing complaints for their nuisance value, the overall effect may be beneficial. The filing of frivolous suits depletes resources from which truly injured parties may recover and has a destructive effect on the tort system that benefits no one. For the competent attorney who conducts himself honestly and prudently, the widely heralded counterattack will pose no significant problem.

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113. See text accompanying notes 7-8 supra.
114. See text accompanying notes 30-39 and 82-89 supra.
117. See text accompanying notes 49-75 supra.
118. See text accompanying notes 99-102 supra.
119. I.e., that the action has not only terminated in his favor but that the defendant did not have probable cause to believe it could have ended in any other way.