



1-1-1980

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Recommended Citation

Howard Greenbaum, *Physician Countersuits: A Cause without Action*, 12 PAC. L. J. 745 (1981).

Available at: <https://scholarlycommons.pacific.edu/mlr/vol12/iss3/7>

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Physician Countersuits: A Cause Without Action

HOWARD GREENBAUM*

Over the past several years, an increasing number of physicians sued for malpractice by their patients have instituted countersuits against the patient and the patient's attorney. Although results at the lower court levels seemed promising initially, the enthusiasm for the countersuit movement may have been premature in view of recent appellate court decisions on these cases. To determine whether this perception is correct, this article will analyze the key decisions concerning physician countersuits which have emerged in 17 states over the past five years and compare them to decisions in physician countersuits in California. This analysis will shed light on the specific factors considered by the courts in reaching their decisions and offer a commentary on the viability of the countersuit movement as it is being formulated presently by attorneys.

Thirty-four physician countersuits decided between 1976 and 1980 have been chosen for analysis in this study.¹ The cases were analyzed

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1. See (cases listed in alphabetical order by state) Carroll v. Kalar, 112 Ariz. 595, 545 P.2d 411 (1976); Lackner v. LaCroix, 25 Cal. 3d 747, 602 P.2d 393, 159 Cal. Rptr. 693 (1979); Weaver v. Superior Court, 95 Cal. App. 3d 166, 156 Cal. Rptr. 745 (1979); Umansky v. Uguhart, 84 Cal. App. 3d 368, 148 Cal. Rptr. 547 (1978); Ammerman v. Newman, 384 A.2d 637 (D.C. 1978); Fee,

for the type and number of legal theories used in each case and the degree of success of each theory. This article first will analyze the elements of the most frequently alleged cause of action in physician countersuits, malicious prosecution, and examine the treatment of this cause by the courts in the states included in this study. Next, the article will examine the cases alleging professional negligence on the part of the plaintiff's attorney, the second most frequently raised cause of action in this survey, and discuss the problems encountered in establishing this cause. Finally, the article will examine the use and effectiveness of various other less popular causes of action which have been alleged in physician countersuits. This study then will review California's legislative remedy and discuss whether it has lessened the number of groundless malpractice suits that are filed against physicians. The article will conclude that, under current legislation and case law, physician countersuits are not capable of offering adequate protection to innocent physicians.

MALICIOUS PROSECUTION

Malicious prosecution is the most frequently employed theory in physician countersuits.² Of the 34 cases studied, only three cases did not plead a theory of malicious prosecution.³ In the remaining cases, the issue of malicious prosecution was raised in conjunction with one or more other legal theories.⁴ Of the 31 cases alleging malicious prose-

Parker & Lloyd v. Sullivan, 379 So. 2d 412 (Fla. Dist. Ct. App. 1980); Berlin v. Nathan, 64 Ill. App. 3d 940, 381 N.E. 2d 1367, *cert. denied*, 444 U.S. 328 (1979); Davis v. Ruff, 83 Ill. App. 3d 561, 404 N.E.2d 405 (1980); Stopka v. Lesser, 82 Ill. App. 3d 323, 402 N.E.2d 781 (1980); Balthazar v. Dowling, 65 Ill. App. 3d 824, 382 N.E.2d 1257 (1978); Pantone v. Demos, 59 Ill. App. 3d 328, 375 N.E.2d 480 (1978); Lyddon v. Shaw, 56 Ill. App. 3d 815, 372 N.E.2d 685 (1978); Bickel v. Mackie, 447 F. Supp. 1376 (N.D. Iowa 1978); Brody v. Ruby, 267 N.W.2d 902 (Iowa 1978); Nelson v. Miller, 227 Kan. 271, 607 P.2d 438 (1980); Tappan v. Ager, 599 F.2d 376 (10th Cir. 1979); Hill v. Willmott, 561 S.W.2d 331 (Ky. 1978); Raine v. Drasin, Docket Nos. 79CA18MR, 79CA588MR (Ky. 1980) *appeal pending*; Spencer v. Burlass, 337 So.2d 596 (La. Ct. of App. 1976), *cert. denied*, 340 So. 2d 990 (La. 1977); Gasis v. Schwartz, 80 Mich. App. 600, 264 N.W.2d 76 (1978); Friedman v. Dozor, 83 Mich. App. 429, 268 N.W.2d 673 (1978); Ackerman v. Lagano, 172 N.J. Super. 468, 412 A.2d 1054 (1979); Belsky v. Lowenthal, 47 N.Y.2d 820, 392 N.E.2d 560 (1979); Drago v. Buonagurio, 46 N.Y.2d 778, 386 N.E.2d 821, 413 N.Y.S.2d 910 (1978); Hoppenstein v. Zemek, 62 App. Div. 2d 979, 403 N.Y.S.2d 542 (1978); Petrou v. Hale, 43 N.C. App. 655, 260 S.E.2d 130 (1979); O'Toole v. Franklin, 279 Or. 513, 569 P.2d 561 (1977); Garcia v. Wall & Ochs, Inc., 256 Pa. Super. Ct. 74, 389 A.2d 607 (1978); Peerman v. Sidicane, (Tenn. App., Middle Div., 1980) (unpublished opinion on file at the *Pacific Law Journal*); Butler v. Morgan, 590 S.W.2d 543 (Tex. Civ. App. 1979); Martin v. Trevino, 578 S.W.2d 763 (Tex. Civ. App. 1978); Moiel v. Sandlin, 571 S.W.2d 567 (Tex. Civ. App. 1978); Wolfe v. Arroyo, 543 S.W.2d 11 (Tex. Civ. App. 1976); Ayyildiz v. Kidd, 266 S.E.2d 108 (Va. 1980). *See generally*, Annot., 84 A.L.R.3d 555 (1978).

2. *See generally* Birnbaum, *Physician Counterattack: Liability of Lawyers for Instituting Unjustified Medical Malpractice Actions*, 45 FORDHAM L. REV. 1003, 1020-33 (1977) [hereinafter cited as Birnbaum].

3. Tappan v. Ager, 599 F.2d 376 (10th Cir. 1979); Hill v. Willmott, 561 S.W.2d 331 (Ky. 1978); Wolfe v. Arroyo, 543 S.W.2d 11 (Tex. Civ. App. 1976).

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

cution, two were decided in favor of the physician⁵ and three were remanded for further proceedings.⁶ The remaining cases were all decided adversely to the physician-plaintiffs, and eight of these were decided by the highest court in the particular jurisdiction.⁷ The only two successful cases were decided at the intermediate appellate level, and one of these is now on appeal.⁸

The apparent difficulties in establishing malicious prosecution can be seen by examining the elements and nature of the tort. Malicious prosecution originally was intended as an action for wrongful institution of a criminal proceeding, but since has been accepted as a cause of action for the wrongful institution of a civil proceeding.⁹ The elements of this action are four: (1) special damages beyond those ordinarily associated with defending a civil action;¹⁰ (2) termination of the prior suit in favor of the individual bringing the countersuit; (3) lack of probable cause in bringing the initial suit; and (4) malice in the initiation of the prior suit.¹¹ Each element will be examined in its application to physician countersuits.

A. The Requirement of Special Damages

If a court wishes to dispense with a case in a swift and uncomplicated fashion rather than discuss any theoretical issues involved, the simplest method is to find that a necessary element of the cause of action has not been established by the plaintiff. The process is even easier if this element has been isolated and defined unambiguously. The rule requiring

5. *Raine v. Drasin*, Docket Nos. 79CA18MR, 79CA558MR (Ky. App. 1980), *appeal pending*; *Peerman v. Sidicane*, (Tenn. App. Middle Div., 1980) (unpublished opinion on file at the *Pacific Law Journal*).

6. *Weaver v. Superior Court*, 95 Cal. App. 3d 166, 156 Cal. Rptr. 745 (1979); *Nelson v. Miller*, 227 Kan. 271, 607 P.2d 438 (1980); *Friedman v. Dozor*, 83 Mich. App. 429, 268 N.W.2d 673 (1978).

7. *Carroll v. Kalar*, 112 Ariz. 595, 545 P.2d 411 (1976); *Lackner v. LaCroix*, 25 Cal. 3d 747, 602 P.2d 393, 159 Cal. Rptr. 693 (1979); *Berlin v. Nathan*, 64 Ill. App. 3d 940, 831 N.E.2d 1367 (1978), *cert. denied*, 444 U.S. 828 (1979); *Brody v. Ruby*, 267 N.W.2d 902 (Iowa 1978); *Drago v. Buonagurio*, 46 N.Y.2d 778, 386 N.E.2d 821, 413 N.Y.S.2d 910 (1978); *Hoppenstein v. Zemek*, 62 App. Div. 2d 542, 403 N.Y.S.2d 542 (1978); *O'Toole v. Franklin*, 279 Or. 513, 569 P.2d 561 (1977); *Ayyildiz v. Kidd*, 266 S.E.2d 108 (Va. 1980).

8. *Raine v. Drasin*, Docket Nos. 79CA18MR, 79CA588MR (Ky. App. 1980) *appeal pending*; *Perman v. Sidicane*, (Tenn. App. Middle Div., 1980) (unpublished opinion on file at the *Pacific Law Journal*) Petition for review in *Raine* was granted by the Kentucky Supreme Court after this study was completed.

9. See W. PROSSER, LAW OF TORTS §120 (4th ed. 1971) [hereinafter cited as PROSSER]. See generally C. LUTHER, SURVEY OF TORTS §§16-16.8 (3rd ed. 1977) [hereinafter cited as LUTHER]. As applied to civil actions, the tort sometimes is denominated "wrongful initiation of civil proceedings." See RESTATEMENT (SECOND) OF TORTS §674 (1965); LUTHER, *supra* §16.7. See generally PROSSER, *supra*, §120.

10. Special damages are not a requirement in California. See notes 15-17 and accompanying text *infra*. See generally 4 B. WITKIN, SUMMARY OF CALIFORNIA LAW, *Torts* §§255-261 (8th ed. 1974), (Supp. 1980).

11. See PROSSER, *supra* note 9, §120.

special injury in malicious prosecution, also known as the "English rule," is such an element, since it demands that the plaintiff prove damages sustained in the original litigation which go beyond those ordinarily associated with defending a civil action.¹² Nonetheless, special damages routinely have been considered to include such injuries as mental and emotional suffering, injury to reputation, trial costs, and, in medical malpractice cases, the probability of increased malpractice insurance.¹³ Under the strict English rule, a demonstration of an interference with the person (arrest), property (seizure), or other special interference with the person or his property, is necessary to prove special injury. If interference cannot be shown, there is an absolute bar to the action of malicious prosecution.¹⁴

The special damages rule is, however, the minority rule.¹⁵ The majority of the states, including California,¹⁶ do not require a showing of special damages to establish malicious prosecution.¹⁷ Under the "American rule," a malicious prosecution action may be maintained in the absence of an actual interference with the person or property.¹⁸ Eighteen of the 31 cases in this study alleging malicious prosecution were from English-rule jurisdictions.¹⁹ It is not surprising to find that in each of the 18 cases except one,²⁰ the cause of action failed, although

12. See 381 N.E.2d at 1371.

13. See *id.*

14. See, e.g., Bickel v. Mackie, 447 F. Supp. 1376 (N.D. Iowa 1978); Berlin v. Nathan, 64 Ill. App. 3d 940, 381 N.E.2d 1367, *cert. denied*, 444 U.S. 828 (1979); Davis v. Ruff, 83 Ill. App. 3d 651, 404 N.E. 2d 405 (1980); Lyddon v. Shaw, 56 Ill. App. 3d 815, 372 N.E.2d 685 (1978); Brody v. Ruby, 267 N.W. 902 (Iowa 1978); Nelson v. Miller, 227 Kan. 271, 607 P.2d 438 (1980); Ackerman v. Lagano, 172 N.J. Super. 468, 412 A.2d 1054 (1979); Belsky v. Lowenthal, 47 N.Y.2d 820, 392 N.E.2d 560 (1979); O'Toole v. Franklin, 279 Or. 513, 569 P.2d 561 (1977); Garcia v. Wall & Ochs, Inc., 256 Pa. Super. Ct. 74, 389 A.2d 607 (1978); Butler v. Morgan, 590 S.W.2d 543 (Tex. Civ. App. 1979); Martin v. Trevino, 578 S.W.2d 763 (Tex. Civ. App. 1978); Ayyildiz v. Kidd, 266 S.E.2d 108 (Va. 1980). See also Petrick v. Kaminski, 68 Ill. App. 3d 649, 386 N.E.2d 636 (1979) (a patient sued a physician for malicious prosecution of an action to collect a bill for professional services).

15. The 17 jurisdictions following the minority rule are: the District of Columbia, Georgia, Illinois, Iowa, Kentucky, Maryland, New Jersey, New Mexico, New York, North Carolina, Ohio, Oregon, Pennsylvania, Rhode Island, Texas, Washington, and Wisconsin. See 279 Or. at 518 n.3, 569 P.2d at 564 n.3.

16. See generally 4 B. WITKIN, SUMMARY OF CALIFORNIA LAW, *Torts* §§255-261 (8th ed. 1974), (Supp. 1980).

17. The 27 states which follow the majority rule are: Alabama, Arizona, Arkansas, California, Colorado, Connecticut, Florida, Idaho, Indiana, Kansas, Louisiana, Maine, Massachusetts, Michigan, Minnesota, Mississippi, Missouri, Montana, Nebraska, New Hampshire, North Dakota, Oklahoma, South Carolina, South Dakota, Tennessee, Vermont and West Virginia. See generally A.E. JAMES, LEGAL MEDICINE (1980).

18. Note, *Malicious Prosecution: An Effective Attack on Spurious Medical Malpractice Claims?* 26 CASE W. RES. L. REV. 653, 657 (1976) [hereinafter cited as *Malicious Prosecution*]. In *Nelson v. Miller*, 227 Kan. 271, 607 P.2d 438, 447 (1980), the court approved the Restatement of Torts, which includes, in addition to arrest of the person and seizure of property, harm to reputation, emotional distress, expense incurred in defending against the legal proceedings, and any specific pecuniary loss that has resulted from the proceedings.

19. Compare the citations in notes 1 and 3 with the list of states in note 15 *supra*.

20. Raine v. Drasin, Docket Nos. 79CA18MR, 79CA558MR (Ky. App. 1980), *appeal pending*.

the stringent requirement of special injury was severely criticized by at least one of the courts.²¹ In fact, two other cases decided in English-rule jurisdictions did not even plead malicious prosecution, evidently recognizing the almost insurmountable obstacle the rule presents.²²

B. *Favorable Termination of Prior Civil Action*

To prevail on a malicious prosecution cause of action, the plaintiff must show that the prior civil action terminated in his favor.²³ Generally, a suit for malicious prosecution cannot be filed while the original suit is pending.²⁴

In California, "favorable" termination does not require a "final" termination, but must reflect on the merits of the underlying action.²⁵ In *Weaver v. Superior Court*,²⁶ which involved the voluntary dismissal of the prior action, the court, defining the term "favorable termination," stated that the termination should be such that it tends to indicate the innocence of the defendant and devolves on the merits of the case.²⁷ This can occur only if there is a defense verdict or dismissal either on the merits or for failure to prosecute, but not when the dismissal is due to negotiations or consent,²⁸ or when the original civil action is still pending and undetermined.²⁹ In another California case, *Lackner v. LaCroix*,³⁰ a similar issue regarding the definition of favorable termination arose. In this case, the malpractice suit terminated favorably for the physician because the jury found that it was barred by the statute of limitations. The physician filed an action for malicious prosecution and the trial court held that a case dismissed because of the statute of

21. See, e.g., *Stopka v. Lesser*, 82 Ill. App. 3d 323, 402 N.E.2d 781, 784 (1980) ("We believe a reassessment of the special damages requirement in this jurisdiction is appropriate."); *Petrou v. Hale*, 43 N.C. App. 655, 260 S.E.2d 130 (1979) (the court denied plaintiff's appeal, based on the probable cause element of malicious prosecution, rather than on lack of special injuries).

22. *Hill v. Willmott*, 561 S.W.2d 331 (Ky. 1978); *Wolfe v. Arroyo*, 543 S.W.2d 11 (Tex. Civ. App. 1976).

23. See *Kachig v. Booth*, 22 Cal. App. 3d 626, 638-40, 99 Cal. Rptr. 393, 401-02 (1971).

24. See *Gasis v. Schwartz*, 80 Mich. App. 600, 601-02, 264 N.W.2d 76, 77 (1978). Nor may the defendant in the original action allege malicious prosecution by cross-complaint. See *Babb v. Superior Court*, 3 Cal. 3d 841, 479 P.2d 379, 92 Cal. Rptr. 179 (1971); *Baker v. Littman*, 138 Cal. App. 2d 510, 514, 292 P.2d 595, 597 (1956). The *Babb* court said to allow a cross-complaint for malicious prosecution would encourage "dilatatory and harrasing" actions. 3 Cal. 3d at 847, 479 P.2d at 382, 92 Cal. Rptr. at 82.

25. *Jaffe v. Stone*, 18 Cal. 2d 146, 152-58, 114 P.2d 335, 339-42 (1941). See 4 B. WITKIN, SUMMARY OF CALIFORNIA LAW, *Torts* §147 (8th ed. 1974), (Supp. 1980).

26. 95 Cal. App. 3d 166, 156 Cal. Rptr. 745 (1979).

27. *Id.* at 184-85, 156 Cal. Rptr. at 755.

28. *Id.* The court, however, citing *MacDonald v. Josly*, 275 Cal. App. 2d 282, 79 Cal. Rptr. 707 (1969), stated that "a voluntary dismissal . . . is not ordinarily considered a dismissal on technical grounds . . . [and] though expressly made without prejudice is a favorable termination which will support an action for malicious prosecution." 95 Cal. App. 3d at 289, 79 Cal. Rptr. at 711.

29. *Nelson v. Miller*, 227 Kan. 271, —, 607 P.2d 436, 445 (1980).

30. *Lackner v. LaCroix*, 25 Cal. 3d 747, 602 P.2d 393, 159 Cal. Rptr. 693 (1979).

limitations, although terminating favorably for the defendant, had not terminated on its merits. The Court of Appeal reversed, stating that a legal determination on the merits was not necessary³¹ and allowed the case to proceed. The California Supreme Court, however, agreed with the trial court and held that a dismissal on procedural grounds (in this case the statute of limitations) is not on the merits.³² It now appears that the courts have a more consistent definition of "favorable termination" than in the recent past.³³

C. *Lack of Probable Cause*

The third element of the tort of malicious prosecution is a showing that the defendant filed the original action without probable cause to believe the truth of the charge.³⁴ Prosser defines probable cause as a reasonable ground of suspicion, supported by circumstances sufficient to warrant an ordinarily prudent person in believing the party guilty of an offense.³⁵ A lack of probable cause, therefore, may arise from an intentional disregard of the relevant circumstances,³⁶ or, more often, from a failure to make a reasonable investigation of the facts. The issue frequently encountered in medical malpractice cases concerns the amount of research constituting a reasonable investigation. This practical application of the definition, on a case-by-case basis, presents considerable difficulties, and may possibly represent the ultimate defeat of most countersuits, even those in which the plaintiff passes the hurdles of special damages and favorable termination on the merits.

In *Weaver v. Superior Court*,³⁷ the court stated that as long as an attorney does not prosecute a claim which a reasonable lawyer would not regard as tenable, or unreasonably neglect to investigate the facts and law in making a determination to proceed, the opposing party has no right to assert malicious prosecution against the attorney just because the lawyer's efforts prove unsuccessful.³⁸ The *Weaver* court said that the "reasonableness" of determining whether there is probable cause to bring suit is defined in any given case in light of the existing facts and circumstances.³⁹ In a Texas case, *Moel v. Sandlin*,⁴⁰ the court

31. *Lackner v. LaCroix*, 152 Cal. Rptr. 221, 223 (1979).

32. 25 Cal. 3d at 750-52, 602 P.2d at 394-95, 159 Cal. Rptr. at 694-96.

33. See *Malicious Prosecution*, *supra* note 18, at 662 ("Despite general agreement that termination does not require an adjudication on the merits, judicial opinion is not uniform in its characterization of what constitutes termination in favor of the original defendant.").

34. See RESTATEMENT (SECOND) OF TORTS §662 (1965).

35. PROSSER, *supra* note 9, §119.

36. This is not to say that a lack of probable cause may be inferred from apparently malicious acts. See notes 43-47 and accompanying text *infra*.

37. 95 Cal. App. 3d 166, 156 Cal. Rptr. 745 (1979).

38. *Id.* at 188, 156 Cal. Rptr. at 757.

39. *Id.* Is there a difference in the negligence aspect of malicious prosecution and ordinary

said that

an attorney may generally rely in good faith upon the facts his client relates. Unless lack of probable cause for a claim is obvious from the facts disclosed by the client or otherwise brought to the attorney's attention, he may assume the facts so disclosed are substantially correct.⁴¹

Taken together, *Weaver* and *Moiel* highlight the reluctance of the courts to impose a meaningful duty of investigation on plaintiffs' attorneys in medical malpractice cases. This attitude makes the proof of a lack of probable cause extremely difficult in a physician's countersuit.⁴²

D. Malice

Finally, to prevail on a malicious prosecution cause of action, the plaintiff must prove malice.⁴³ Malice, in the context of malicious prosecution, has been variously defined. At its most obvious, malice includes proof of an intentional or willful act which attempts to bring about a wrongful result.⁴⁴ But as the court noted in *Weaver v. Superior Court*,⁴⁵ the uniform practice is to permit an inference of malice from a lack of probable cause, even if there is no proof of "actually demonstrated ill will or bad faith."⁴⁶ While such an inference appears to benefit the plaintiff, the threshold for establishing lack of probable cause may be so high that it becomes virtually impossible to prove. The inference of malice becomes concomitantly more difficult.⁴⁷

Aside from inferring malice from a lack of probable cause, malice exists when the prior suit was brought for a purpose other than the

tort negligence? *Weaver* opined that there is. Whereas negligence liability is based on a duty of care, malicious prosecution is not based on any particular duty. A jury might find that a defendant-attorney unreasonably failed to investigate facts and was therefore negligent. While this would support a finding of a lack of probable cause, it would not necessarily support an inference of malice. "[T]he quantum of culpable conduct which must be proved to prevail as a plaintiff in a malicious prosecution case is significantly greater than that required to prevail in a case alleging only negligence." *Id.* at 192-93, 156 Cal. Rptr. at 760 (emphasis added).

40. 571 S.W.2d 567 (Tex. Civ. App. 1978).

41. *Id.* at 570.

42. An even more permissive attitude is apparent in the Louisiana case of *Spencer v. Burglass*, 337 So. 2d 596 (1976). The *Spencer* court viewed the attorney strictly as a conduit between the plaintiff and the courtroom. *See id.* at 600.

43. See 4 B. WITKIN, SUMMARY OF CALIFORNIA LAW, *Torts* §261 (8th ed. 1974), (Supp. 1980).

44. See *Malicious Prosecution*, *supra* note 18, at 669.

45. 95 Cal. App. 3d 166, 156 Cal. Rptr. 745 (1979).

46. *Id.* at 188, 156 Cal. Rptr. at 757, citing Comment, *Attorney Liability for Malicious Prosecution and Legal Malpractice: Do They Overlap?*, 8 PAC. L.J. 897, 904 (1977) ("Regardless of the theory on which a court relies to find malice, a close factual analysis of the cases suggests that malice is almost always found from the same facts as those which establish lack of probable cause."). The converse inference, i.e., finding a lack of probable cause from facts establishing a motive of ill will, is not permitted generally. *See* PROSSER, *supra* note 9, at §120.

47. See text accompanying notes 36-39 *supra*.

adjudication of the alleged claim.⁴⁸ Here again, however, the proof of malice likely will be regarded by the trier of fact as co-extensive with the proof of lack of probable cause. Thus, malice is established most easily in the case where there is overt evidence of an intent to "vex, injure, or annoy"⁴⁹ the physician in the original action. This is not the typical case.

E. Prospects of Successfully Establishing Malicious Prosecution

In summary, it appears that in jurisdictions following the minority English rule concerning special injury in malicious prosecution a plaintiff has virtually no chance of success.⁵⁰ In those jurisdictions following the majority American rule regarding damages, the chances of a favorable decision are theoretically better, but the problems in proving lack of probable cause are still a formidable obstacle. Barring some definite change in the attitude of the courts, or meaningful intervention by legislatures, physicians contemplating suits for malicious prosecution should consider the probability of success as remote at the present time.⁵¹

ATTORNEY PROFESSIONAL NEGLIGENCE

The second most frequent theory used in the physician countersuits surveyed, was attorney professional negligence.⁵² Twenty of the 34 cases studied raised this allegation.⁵³ In none of the cases was attorney

48. See PROSSER, *supra* note 9, §120; LUTHER, *supra* note 9, §16.7.

49. BAJI No. 6.94.

50. In Illinois, for example, of 191 malicious prosecution cases tried from 1848 to 1980, only 8 have been successful, and none since 1934. See *Stopka v. Lesser*, 82 Ill. App. 3d 323, 326 n.3, 402 N.E.2d 781, 783 n.3 (1980).

51. It is somewhat difficult to gather complete data on the status of pending countersuit cases at any given time, but the following is an approximation of the situation at the time this study was done. The information was drawn from the following sources: LEGAL ASPECTS OF MEDICAL PRACTICE, Vol. 8, No. 2, at 52 (February 1980); MALPRACTICE LIFELINE, Vol. 5, No. 8, at 4 (August 1980); Vol. 5, No. 7, at 1, 7 (July 22, 1980); Vol. 4, No. 8, at 3 (August 31, 1979); Vol. 4, No. 6, at 4-8 (June 25, 1979); MEDICAL LIABILITY ADVISORY SERVICE, Vol. 4, No. 6, at 1 (June 1979); PROFESSIONAL LIABILITY NEWSLETTER, Vol. 11, No. 1, at 4 (September 1979). Cases lost at trial level in 1980—14.

Cases won at trial level in 1980 but appeals may be pending—6.

Out of court settlements in 1980—9.

The most common cause of action in the settled cases was malicious prosecution and the most common allegation was that the attorney failed to review properly and investigate the facts prior to filing the action. The amount of damages ranged from \$4,000 to \$28,000 and, in a few cases, a letter of apology from the attorney to the physician was requested and received. The exact number of physician countersuits presently pending nationwide is not known, but according to a figure cited in MALPRACTICE LIFELINE, Vol. 4, Number 3, March 30, 1979 at 3, in California alone there were at least 25 countersuits pending at that time and twice as many contemplated.

52. See generally Birnbaum, *supra* note 2, at 1066.

53. See *Carroll v. Kalar*, 112 Ariz. 595, 545 P.2d 411 (1976); *Lackner v. LaCroix*, 25 Cal. 3d 747, 602 P.2d 393, 159 Cal. Rptr. 693 (1979); *Weaver v. Superior Court*, 95 Cal. App. 3d 166, 156 Cal. Rptr. 745 (1979); *Umansky v. Urguhart*, 84 Cal. App. 3d 368, 148 Cal. Rptr. 547 (1978); *Ammerman v. Newman*, 384 A.2d 637 (D.C. Ct. App. 1978); *Fee, Parker & Lloyd v. Sullivan*, 379

negligence successfully argued.

Attorney professional negligence is a theory which attempts to find the attorney culpable in bringing the original malpractice action against the physician.⁵⁴ The problems a plaintiff faces with this action include issues of contract, privity, duty to third parties, and public policy.

In all but two cases, a cause of action for attorney professional negligence was joined with a malicious prosecution theory.⁵⁵ It is clear from the tone and language of decisions from California and other states that the courts find it inappropriate to join the attorneys under a separate negligence cause of action.⁵⁶ The reasons adduced fall into two major groups. In the first, the courts point out that an attorney owes no duty to a third party, especially when the third party is an adverse litigant such as the defendant physician in a medical malpractice trial.⁵⁷ The second reason, based on public policy, is that the courts fear that imposing the threat of third party legal malpractice liability on attorneys would so interfere with their functions that an individual citizen's

So.2d 412 (Fla. Dist. Ct. App. 1980); *Berlin v. Nathan*, 64 Ill. App. 3d 940, 381 N.E.2d 1367, *cert. denied*, 444 U.S. 328 (1979); *Davis v. Ruff*, 83 Ill. App. 3d 561, 404 N.E.2d 405 (1980); *Stopka v. Lesser*, 82 Ill. App. 3d 323, 402 N.E.2d 781 (1980); *Balthazar v. Dowling*, 65 Ill. App. 3d 824, 382 N.E.2d 1257 (1978); *Pantone v. Demos*, 59 Ill. App. 3d 328, 375 N.E.2d 480 (1978); *Lyddon v. Shaw*, 56 Ill. App. 3d 815, 372 N.E.2d 685 (1978); *Bickel v. Mackie*, 447 F. Supp. 1376 (N.D. Iowa 1978); *Brody v. Ruby*, 267 N.W.2d 902 (Iowa 1978); *Nelson v. Miller*, 227 Kan. 271, 607 P.2d 438 (1980); *Tappan v. Ager*, 599 F.2d 376 (10th Cir. 1979); *Hill v. Willmott*, 561 S.W.2d 331 (Ky. 1978); *Raine v. Drasin*, Docket Nos. 79CA18MR, 79CA558MR (Ky. App. 1980), *appeal pending*; *Spencer v. Burglass*, 337 So. 2d 596 (La. Ct. of App. 1976), *cert. denied*, 340 So. 2d 990 (La. 1977); *Gasis v. Schwartz*, 80 Mich. App. 600, 264 N.W.2d 76 (1978); *Friedman v. Dozor*, 83 Mich. App. 429, 268 N.W.2d 673 (1978); *Ackerman v. Lagano*, 172 N.J. Super. 468, 412 A.2d 1054 (1979); *Belsky v. Lowenthal*, 47 N.Y.2d 820, 392 N.E.2d 560 (1979); *Drago v. Buonagurio*, 46 N.Y.2d 778, 386 N.E.2d 821, 413 N.Y.S.2d 910 (1978); *Hoppenstein v. Zemek*, 62 App. Div. 2d 979, 403 N.Y.S.2d 542 (1978); *Petrou v. Hale*, 43 N.C. App. 655, 260 S.E.2d 130 (1979); *O'Toole v. Franklin*, 279 Or. 513, 569 P.2d 561 (1977); *Garcia v. Wall & Ochs, Inc.*, 256 Pa. Super. Ct. 74, 389 A.2d 607 (1978); *Peerman v. Sidicane*, (Tenn. App. Middle Div., 1980) (unpublished opinion on file at the *Pacific Law Journal*); *Butler v. Morgan*, 590 S.W.2d 543 (Tex. Civ. App. 1979); *Martin v. Trevino*, 578 S.W.2d 763 (Tex. Civ. App. 1978); *Moiel v. Sandlin*, 571 S.W.2d 567 (Tex. Civ. App. 1978); *Wolfe v. Arroyo*, 543 S.W.2d 11 (Tex. Civ. App. 1976); *Ayyildiz v. Kidd*, 266 S.E.2d 108 (Va. 1980).

54. *Weaver v. Superior Court*, 95 Cal. App. 3d 166, 156 Cal. Rptr. 745 (1979).

55. *Hill v. Willmott*, 561 S.W.2d 331 (Ky. 1978); *Drago v. Buonagurio*, 46 N.Y.2d 778, 386 N.E.2d 821, 413 N.Y.S.2d 910 (1978).

56. See *Norton v. Hines*, 49 Cal. App. 3d 917, 922-23, 123 Cal. Rptr. 237, 240-41 (1975).

57. The initial question . . . is whether an attorney can be held civilly liable to one, other than his client, who claims to have been damaged as a result of the alleged negligence of that attorney. . . . Traditionally, this has been answered in the negative based, among other things, on lack of privity between the parties.

Ackerman v. Lagano, 412 A.2d 1055 (N.J. 1978), *citing* Annot., 45 A.L.R. 3d 1181 (1972).

In *Friedman v. Dorzor*, 83 Mich. App. 429, 435, 268 N.W.2d 673, 676 (1978), the court declared that

The courts of this state have consistently held that an attorney is not liable to third parties for the negligent performance of his obligation to a client, even where such negligence results in damage to third parties.

A similar rule appears in *Weaver v. Superior Court*, 95 Cal. App. 3d 166, 179, 156 Cal. Rptr. 745, 751 (1979).

protected right of full access to the judicial system would be impaired.⁵⁸

The question of privity between an attorney and adverse party was considered in California in *Norton v. Hines*.⁵⁹ In that case, the plaintiff refused to include the attorneys in the malicious prosecution cause of action and instead named them in a separate negligence count.⁶⁰ The trial court sustained a demurrer against this count without leave to amend.⁶¹ The Court of Appeal first discussed the traditional concept of lack of privity between a lawyer and an injured third party, and the absence of a duty owed by a lawyer to anyone other than his client. The court then traced the development of a limited duty to third parties on an intended third party beneficiary theory.⁶² However, the court continued that "in the case at bar a former litigant is suing adverse counsel. Clearly, an adverse party is not an intended beneficiary of the adverse counsel's client."⁶³ After further justifying this concept under public policy doctrines, the court, following other jurisdictions confronted with this issue, proceeded to advise the plaintiff that his true cause of action lay in malicious prosecution.⁶⁴ Such advice will lead plaintiffs in a futile circle with no realistic hope of relief.⁶⁵

LESS POPULAR ACTIONS

Less frequently used legal theories in physician countersuits include:

58. A California court noted that

California courts, in refusing to impose a duty of care owed by an attorney to an adverse third party have recognized that "the burden of imposing liability upon defendant" attorney outweighs "the consequences to the community if liability . . . is withheld."

Weaver v. Superior Court, 95 Cal. App. 3d at 179, 156 Cal. Rptr. at 751. When this concept is joined with the English rule of special injury or the ambiguities of probable cause, it is obvious why a countersuit plaintiff is effectively excluded from realistically pursuing an adequate remedy.

59. 49 Cal. App. 3d 917, 123 Cal. Rptr 237 (1975).

60. *Id.* at 919, 123 Cal. Rptr. at 238.

61. *Id.* at 924, 123 Cal. Rptr. at 242.

62. *Id.* The court cited *Lucas v. Hamm*, 56 Cal. 2d 583, 364 P.2d 685, 15 Cal. Rptr. 821 (1961), which involved third party beneficiaries to a will, and *Donald v. Garry*, 19 Cal. App. 3d 769, 97 Cal. Rptr. 191 (1971), which involved a collection agency's loss of a debt owed due to the lack of diligent prosecution by the attorney. *Freese v. Lemon*, 210 N.W.2d 576 (Iowa 1973), stands in contrast to California's narrow definitions of third party liability of attorneys. In *Freese* the Supreme Court of Iowa found that a cause of action could be sustained against a physician. *Id.* at 579-80.

63. 49 Cal. App. 3d at 921, 123 Cal. Rptr. at 240.

64. *Id.* at 924, 123 Cal. Rptr. at 242; see *Balthazar v. Dowling*, 65 Ill. App. 3d 824, 382 N.E.2d 1257 (1978); cf. *Lyddon v. Shaw*, 56 Ill. App. 3d 815, 372 N.E.2d 685 (1978). See notes 2-53 and accompanying text *supra*.

65. This is especially true in English rule jurisdictions requiring a showing of special damages for malicious prosecution. If a third party plaintiff cannot sue an attorney for professional negligence because of public policy and is referred back to a malicious prosecution cause of action, and if the same public policy (to avoid a chilling effect on free access to the courts) is the reason for the insurmountable barrier of special injury, then indeed, the plaintiff is effectively excluded from the legal process himself. See *Martin v. Trevino*, 578 S.W.2d 763, 767 (Tex. Civ. App. 1978). "The special damage rule was initially adopted by our Supreme Court for policy reasons to assure every litigant free and open access to the judicial system without fear of a countersuit for malicious prosecution." *Id.*

(1) abuse of process; (2) prima facie tort; (3) barratry; (4) invasion of privacy; (5) unprofessional conduct by the attorney; and (6) defamation and intentional infliction of mental distress. In all except one case,⁶⁶ these causes of action failed. In fact, it is extremely doubtful that any of these actions will ever prove successful because the pattern of the court decisions has been, as already noted, to simply refer the plaintiff back to the "appropriate" cause of action—malicious prosecution.⁶⁷

A. Abuse of Process

Abuse of process is the intentional misuse of a legitimate court process for some ulterior or collateral purpose.⁶⁸ It sometimes is considered a form of extortion.⁶⁹ Twelve of the 34 cases studied advanced the theory of abuse of process in combination with some other cause of action.⁷⁰

Abuse of process theories in physician countersuits have been rejected by most courts.⁷¹ The general view is that an allegation of institution of a groundless civil suit is not sufficient alone to state a cause of action for abuse of process.⁷² The reason is that when process is used in a technically correct manner, that is, to institute a suit, the process has not been abused even though the suit is without merit.⁷³ In the Texas case of *Martin v. Trevino*,⁷⁴ the physician-plaintiff alleged that the defendants obtained the issuance of a citation in the earlier malpractice case in order to "profit at the physician's expense" by at least coercing a settlement even though they did not have a good faith belief in the

66. *Raine v. Drasin*, Docket Nos. 79CA18MR, 79CA558MR (Ky. App. 1980), *appeal pending*. The court allowed damages for injury to reputation based on defamatory statements in the complaint. This is an unusual decision since in the other cases in which the courts have discussed defamation, the general rule has been that the judicial process itself confers immunity on statements made. See CAL. CIV. CODE §472 (confers a privilege on all publications in a civil proceeding).

67. See note 64 and accompanying text *supra*.

68. See generally 4 B. WITKIN, SUMMARY OF CALIFORNIA LAW, *Torts* §§263-270 (8th ed. 1974).

69. "It is unnecessary for the plaintiff to prove that the prior civil proceeding terminated in his favor, or that the process was obtained without probable cause." PROSSER, *supra* note 9, §121 at 856.

70. See generally *Tappan v. Ager*, 599 F.2d 376 (10th Cir. 1979); *Bickel v. Mackie*, 447 F. Supp. 1376 (Iowa 1978); *Umansky v. Urguhart*, 84 Cal. App. 3d 368, 148 Cal. Rptr. 547 (1978); *Berlin v. Nathan*, 64 Ill. App. 3d 940, 381 N.E.2d 1367 (1978), *cert. denied*, 444 U.S. 828 (1979), *rehearing denied*, 444 U.S. 974 (1979); *Lyddon v. Shaw*, 56 Ill. App. 3d 815, 372 N.E.2d 685 (1978); *Brody v. Ruby*, 267 N.W.2d 902 (Iowa 1978); *Freidman v. Dozor*, 83 Mich. App. 429, 268 N.W.2d 673 (1978); *Ackerman v. Lagano*, 172 N.J. Super. 468, 412 A.2d 1054 (1978); *Drago v. Buonagurio*, 46 N.Y.2d 788, 386 N.E.2d 821, 413 N.Y.S.2d 910 (1978); *Hoppenstein v. Zemek*, 62 App. Div. 2d 979, 403 N.Y.S.2d 542 (1978); *Petrou v. Hale*, 43 N.C. App. 655, 260 S.E.2d 130 (1979); *Martin v. Trevino*, 578 S.W.2d 763 (Tex. Civ. App. 1979).

71. See generally *Birnbaum*, *supra* note 2, at 1033.

72. See *Martin v. Trevino*, 578 S.W.2d 763, 769 (Tex. Civ. App. 1979); 4 B. WITKIN, SUMMARY OF CALIFORNIA LAW, *Torts* §268 (8th ed. 1974).

73. See generally PROSSER, *supra* note 9, §121, at 856.

74. 578 S.W.2d 764 (Tex. Civ. App. 1979).

merits of the case.⁷⁵ The court held that the complaint failed to allege an improper use of the citation, stating:

In contrast to an action for abuse of process, an action for malicious prosecution is generally available against one who maliciously caused process to issue and without probable or reasonable cause. In an abuse of process action, however, generally the original issuance of a legal process is justified, but the process itself is subsequently used for a purpose for which it was not designed.⁷⁶

Abuse of process may not succeed even when the plaintiff in the original malpractice action asserts a claim or theory specifically foreclosed under existing law. In the California case of *Umansky v. Urguhart*,⁷⁷ an action against a physician for wrongful death, the plaintiff prayed for punitive damages notwithstanding a statutory prohibition against such damages in wrongful death cases.⁷⁸ By stipulation, an amended complaint was filed which removed the request for punitive damages. The physician then filed a countersuit for abuse of process, asserting *inter alia* that the defendants' sole reasons for originally asking for punitive damages were the ulterior motive of embarrassing the doctor and pressuring him into a settlement. The Court of Appeal affirmed the dismissal of the doctor's suit, commenting that despite the current statutory bar to punitive damages, the law is not immutable and it is therefore reasonable for an attorney to hope he might change existing law.⁷⁹

B. *Prima Facie Tort*

Five cases⁸⁰ advanced the theory of prima facie tort, that is, the "intentional malicious injury to another by otherwise lawful means without economic or social justification, but solely to harm the other."⁸¹ Prima facie tort is by definition an act that does not fall within the categories of the traditional torts.⁸² It is a relatively amorphous concept that apparently has not received wide acceptance. In none of the

75. See *id.* at 769.

76. *Id.* See also *Drago v. Buonagurio*, 89 Misc.2d 171, 172, 391 N.Y.S.2d 61, 62 (1977) ("The gist of the action for abuse of process lies in the improper use of process after it is issued, and not for its issuance."). For a discussion of the very infrequently used action of champerty and maintenance, see *Lum v. Stinnett*, 488 P.2d 347, 350 (Nev. 1971).

77. 84 Cal. App. 3d 368, 148 Cal. Rptr. 547 (1978).

78. See *Stenrel Aero Engineering Co. v. Superior Court*, 56 Cal. App. 3d 978, 985, 128 Cal. Rptr. 691, 694 (1976); CAL. CIV. PROC. CODE §377.

79. 84 Cal. App. 3d at 372, 148 Cal. Rptr. at 549-50.

80. *Berlin v. Nathan*, 64 Ill. App. 3d 940, 381 N.E.2d 1367 (1978), *cert. denied*, 444 U.S. 828 (1979), *rehearing denied*, 444 U.S. 974 (1979); *Drago v. Buonagurio*, 46 N.Y.2d 778, 386 N.E.2d 821, 413 N.Y.S.2d 910 (1978); *Hoppenstein v. Zemek*, 62 App. Div. 2d 979, 403 N.Y.S.2d 542 (1978); *Belsky v. Lowenthal*, 47 N.Y.2d 820, 392 N.E.2d 560 (1979); *Martin v. Trevino*, 578 S.W.2d 763 (Tex. Civ. App. 1979).

81. *Morrison v. National Broadcasting Co.*, 24 App. Div. 2d 284, 287, 266 N.Y.S.2d 406, 409, *rev'd on other grounds*, 19 N.Y.2d 453, 280 N.Y.S.2d 641, 227 N.E.2d 572 (1967).

82. *Belsky v. Lowenthal*, 47 N.Y.2d 820, 392 N.E.2d 560 (1979).

five cases involved here did the theory succeed. The courts disdainfully view a pleading of prima facie tort as an attempt either to cure defective allegations of malicious prosecution,⁸³ or to create a new cause of action for insulted physicians.⁸⁴ The courts disapprove of both attempts. California apparently has not directly addressed the issue yet.⁸⁵

C. Barratry

Three cases raised allegations of barratry,⁸⁶ which is the offense of "frequently exciting and stirring up quarrels and lawsuits."⁸⁷ As a vehicle for physicians' countersuits, barratry is virtually useless. In *Berlin v. Nathan*⁸⁸ and *Lyddon v. Shaw*,⁸⁹ the Appellate Court of Illinois dismissed barratry claims by stating that it is the general practice, and not the particular act, that defines barratry. In *Moiel v. Sandlin*,⁹⁰ the Texas Court of Civil Appeals ruled that the offense of barratry is a public remedy and not a private one.⁹¹

California defines barratry in Penal Code Section 158 as "the practice of exciting groundless judicial proceedings," and punishes violations as misdemeanors.⁹² Conviction requires institution of at least three proceedings with "corrupt or malicious intent to vex or annoy."⁹³ There is no indication that California courts would sustain a physician's private right of action based on the barratry statute, especially for a single meritless suit.

D. Invasion of Privacy

Invasion of privacy has also been used by countersuing physicians primarily in an attempt to prove actual damages in malicious prosecution.⁹⁴ The nature of the tort as applied in physician countersuits, involves either an intrusion upon the plaintiff's solitude or seclusion, public disclosure of private facts, or publicity which places the plaintiff

83. For example, see 64 Ill. App. 3d at 950-51, 381 N.E.2d at 1374.

84. For example, see 578 S.W.2d at 773.

85. See generally Birnbaum, *supra* note 2, at 1051-66.

86. *Berlin v. Nathan*, 64 Ill. App. 3d 940, 381 N.E.2d 1367 (1978), *cert. denied*, 444 U.S. 828 (1979), *rehearing denied*, 444 U.S. 974 (1979); *Lyddon v. Shaw*, 56 Ill. App. 3d 815, 372 N.E.2d 685 (1978); *Moiel v. Sandlin*, 571 S.W.2d 567 (Tex. Civ. App. 1978).

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

88. 64 Ill. App. 3d 940, 381 N.E.2d 1367 (1978), *cert. denied*, 444 U.S. 828 (1979), *rehearing denied*, 444 U.S. 974 (1979).

89. 56 Ill. App. 3d 815, 372 N.E.2d 685 (1978).

90. 571 S.W.2d 567 (Tex. Civ. App. 1978).

91. *Id.* at 571.

92. See CAL. PENAL CODE §158.

93. *Id.* §159.

94. See *Tappan v. Ager*, 599 F.2d 376, 381-82 (10th Cir. 1979); *Wolfe v. Arroyo*, 543 S.W.2d 11, 13 (Tex. Civ. App. 1976).

in a false light in the public eye.⁹⁵ Two of the cases studied here raised invasion of privacy. Both were dismissed because, as in defamation, publications or disclosures in judicial proceedings are privileged.⁹⁶

E. Unprofessional Conduct

Seven cases⁹⁷ alleged that the attorney's behavior in the original medical malpractice case was in conflict with those provisions of the local professional code of conduct for the bar regarding the diligent and proper investigation and research of a case. The professional code generally was considered not directly relevant or binding by the courts, and in no instance was the argument successful.⁹⁸

A number of countersuit plaintiffs relied on violations of local codes of professional conduct and related statutes to show that a case had been filed without probable cause. In general, the courts dismissed this approach by either stating that no breach of the code had occurred or observing that even if the attorney was in violation of some of the statutory code sections or professional codes of the bar association, this did not create a private cause of action for civil damages.⁹⁹

F. Other Causes

Other applicable causes not raised in the cases included in this survey are defamation and intentional infliction of emotional distress.¹⁰⁰ These causes have met with little success because of judicial privilege in case of the former and the requirement of outrageous conduct in the case of the latter.¹⁰¹

CALIFORNIA'S SOLUTION TO THE PHYSICIANS' FLIGHT

Since at present the judiciary appears unwilling to deal with the problem of unjustified medical malpractice actions in a realistic fashion,¹⁰² physicians must seek relief in the legislature. An effective stat-

95. See PROSSER, *supra* note 9, §117 at 804-14. See generally 4 B. WITKIN, SUMMARY OF CALIFORNIA LAW, *Torts* §§334-349 (8th ed. 1974).

96. See 599 F.2d at 381-82; Wolfe v. Arroyo, 543 S.W.2d, 11, 13 (Tex. Civ. App. 1976).

97. Bickel v. Mackie, 447 F. Supp. 1376, 1383 (N.E. Iowa 1978); Hill v. Willmott, 561 S.W.2d 331, 334-35 (Ky. 1978); Berlin v. Nathan, 64 Ill. App. 3d 940, 953, 381 N.E.2d 1367, 1376-77 (1978), *cert. denied*, 444 U.S. 828 (1979), *rehearing denied*, 444 U.S. 974 (1979); Brody v. Ruby, 267 N.W.2d 902, 906-07 (Iowa 1978); Friedman v. Dozorc, 83 Mich. App. 429, 268 N.W.2d 673, 674-76 (1978); Drago v. Buonagurio, 46 N.Y.2d 778, 779, 386 N.E.2d 821, 822, 413 N.Y.S.2d 910, 911 (1978); Martin v. Trevino, 578 S.W.2d 763, 770 (Tex. Civ. App. 1979).

98. See generally, Birnbaum, *supra* note 2, at 1074-77.

99. See, e.g., 447 F. Supp. at 1383; 561 S.W.2d at 334-35; 64 Ill. App. 3d at 953, 381 N.E.2d at 1376; 267 N.W.2d at 906-07; 83 Mich. App. at 431-37, 268 N.W.2d at 674-76; 578 S.W.2d at 770; O'Toole v. Franklin, 279 Or. 513, 522-24, 569 P.2d 561, 566 (App. 1977).

100. See generally Birnbaum, *supra* note 2, at 1042-51.

101. See Birnbaum, *supra* note 2, at 1042-51.

102. In *Lyddon v. Shaw*, 56 Ill. App. 3d 815, 372 N.E.2d 685 (1978) and *Hill v. Willmott*, 561

ute ideally should address the procedural factors which lead to unwarranted suits. In this way, the more difficult issue of determining the motives of a plaintiff in initiating a suit need not become an issue, when they cannot be determined.¹⁰³ Regardless of the motives for bringing an action, the obvious lack of probable cause in bringing an unjustified action would be a much more easily identifiable issue on which to base the liability of a defendant in a countersuit. Thus, liability would be indicated in those cases in which no medical reviewer could find any medical merit in the case, or where inappropriate parties are named as defendants. If malpractice actions could be screened early on the basis of these two criteria, it is likely that a large portion of the nonmeritorious actions could be eliminated prior to trial.¹⁰⁴ However, such a procedure could create problems for plaintiffs' attorneys in medical malpractice cases since obtaining medical opinions may be difficult.¹⁰⁵ Furthermore, the attorney may be reluctant to name all possible defendants, and obtaining the necessary material for a proper investigation from the defendants in a timely fashion may be difficult.¹⁰⁶

S.W.2d 331 (Ky. 1978), the court returned the cases for further trial on the issue of malicious prosecution, although the statistical evidence indicates this is an empty gesture.

A puzzling case is reported in *MALPRACTICE LIFELINE*, July 22, 1980, at 7. In this case, an insurance company settled a medical malpractice case for \$1,250, apparently against the doctor's wishes. The physician sued the insurance company on the theory that by settling the case, the company had deprived him of the opportunity to bring a malicious prosecution countersuit action. The trial court ruled against the physician but the appellate court reversed, allowing the case to proceed. What is odd about this case is that it occurred in Illinois, a state which has consistently denied plaintiffs a cause of action based on malicious prosecution because of the special injury rule. The court apparently based its decision on a legal theory which at the present time cannot be effectively pursued in that jurisdiction.

103. Malice becomes a question of fact whenever the defendant is accused of (1) bringing the action solely out of spite, ill will, or harassment; (2) failing to properly investigate the facts or law prior to filing an action, or maintaining the action when such information becomes available and no longer supports the action; (3) filing the action in an attempt to exact a settlement from the insurance carrier or the hope that the company will find it economically beneficial to settle a groundless case rather than pay the substantial costs of defending; (4) initiating a suit in response to a physician's claim for an unpaid bill; (5) naming a physician for the sole purpose of obtaining his opinion because of inability in obtaining expert opinion. *See generally* Birnbaum, *supra* note 2, at 1017-18.

104. There is a large group of cases which have little or no merit in the medical facts, but present major defense problems because of the evidentiary and credibility problems of inadequately documented medical records. The only way to deal effectively with this group of cases is for medical practitioners to maintain the most complete and accurate medical records possible.

105. *See* Hart v. Browne, 103 Cal. App. 3d 947, 163 Cal. Rptr. 356 (1980) (a patient sued the medical expert who reviewed her records and advised her attorneys that there was no medical negligence, and her attorneys for allowing the statute of limitations to run on a medical malpractice claim and failing to obtain a second expert medical consultation). In *Togstad v. Vesely, Otto, Miller and Keefe*, 291 N.W.2d 686 (Minn. 1980) the Minnesota Supreme Court found an attorney liable for \$650,000 in legal malpractice for failing to check hospital records or to discuss a case with a medical expert regarding a possible medical malpractice claim, before advising the patient there was no case.

106. At times, an attorney may be caught in what appears to be a serious dilemma. On the one hand, if he names inappropriate defendants, he may be liable in an action for malicious prosecution; on the other hand, if he fails to name a defendant and the statute of limitations runs,

California has attempted to meet these problems by requiring a certificate of merit in medical malpractice cases.¹⁰⁷ This certificate must be filed by the plaintiff's attorney on or before the date of service of the complaint on any defendant.¹⁰⁸ The certificate may make one of the following declarations: (1) that the attorney has reviewed the facts of the case, has consulted with at least one physician and surgeon or dentist regarding the merits of the case, and has concluded that there is reasonable and meritorious cause for filing;¹⁰⁹ (2) that such consultation could not have been obtained prior to the expiration of the statute of limitations;¹¹⁰ or (3) that the attorney was unable to obtain such consultation after three separate good faith attempts with three separate experts.¹¹¹ Excluded from the requirements of filing a certificate are situations in which the attorney intends to rely solely on the theory of *res ipsa loquitur* or on a failure to inform of the consequences of a medical procedure.¹¹² Failure to file a certificate is a ground for a demurrer.¹¹³ A violation of the provisions of this section "may constitute unprofessional conduct and be grounds for discipline against the attorney."¹¹⁴

While the certificate of merit is a step forward in the countersuit area, the statute leaves considerable latitude for improvement. For example, the provision that an attorney review the facts of the case may not offer the protection it seems. While the provision presumably requires the attorney at least to review the medical records, it conceivably could allow the attorney merely to rely on the representations of the client.¹¹⁵ Moreover, the certificate covers only the period of time prior to serving the complaint.¹¹⁶ Even though much more information is acquired during the ensuing period of discovery, there is no provision for an update of the certificate by the attorney to allow for the dismissal of the case or of certain defendants, based on later-acquired information. Furthermore, the remedy for failure to comply lies with a disci-

he may be liable for malpractice to his client. For a lively discussion of whether this concern is more theoretical than real, see Comment, *Liability for Malicious Prosecution and Legal Malpractice: Do They Overlap?* 8 PAC. L.J. 897 (1977).

107. See CAL. CIV. PROC. CODE §411.30. The Section is to be repealed in January, 1984, in accordance with its own provisions; *id.* §411.30(j); 10 PAC. L.J., REVIEW OF SELECTED 1978 CALIFORNIA LEGISLATION 595 (1979). See generally, Birnbaum, *supra* note 2, at 1077-84; see also *Martin v. Trevino*, 578 S.W.2d 763 (Tex. Civ. App. 1979) (discussion of the Texas approach).

108. CAL. CIV. PROC. CODE §411.30(a).

109. *Id.* §411.30(b)(1).

110. *Id.* §411.30(b)(2).

111. *Id.* §411.30(b)(3).

112. *Id.* §411.30(d).

113. *Id.* §411.30(h).

114. *Id.* §411.30(g).

115. See text accompanying note 41 *supra*.

116. See CAL. CIV. PROC. CODE §411.30(a).

plinary body and *not* with the injured party.¹¹⁷ It clearly is not an invitation for personal tort actions nor have other jurisdictions considered such a law to be the foundation of such actions.¹¹⁸ It remains to be seen whether such disciplinary sanctions will be applied, and if so, to what extent and to what effect. Finally, a recent amendment provides that the certificate of merit procedure does not apply to malpractice plaintiffs who are not represented by an attorney.¹¹⁹ While it may be assumed that appearing *in propria persona* significantly reduces the probability of success in a medical malpractice suit, it also may be assumed that a significant number of *pro se* plaintiffs have nonmeritorious cases. Elimination of the certificate of merit for this class of plaintiffs thus removed an important protective device for physicians.

CONCLUSION

The rapid increase of medical malpractice actions has inevitably brought with it a number of cases which physicians believe are non-meritorious, either as to the medical facts or to specifically named defendants. Putting motivation for bringing the suit aside, the primary problem appears to be failure by the attorney to investigate properly the case prior to filing a complaint or failure to dismiss certain causes of action or specific defendants after more detailed information is obtained during discovery. Emphasizing public policy considerations based on the desire to retain open access to the judicial system, appellate courts, for the most part, have been reluctant to recognize any of the causes of action physicians have brought against attorneys and their clients in countersuit actions.¹²⁰

117. *Id.* §411.30(g).

118. *See, e.g.*, Bickel v. Mackie, 447 F. Supp. 1376, 1388 (Iowa 1978); Martin v. Trevino, 578 S.W.2d 763, 770 (Tex. Civ. App. 1979).

119. *See* CAL. CIV. PROC. CODE §411.30(i); 11 PAC. L.J., REVIEW OF SELECTED 1979 CALIFORNIA LEGISLATION 668, 669 (1980).

120. A few cases have ended in favor of the physician-plaintiff in out of court settlements, see note 46 *infra*, and two very recent cases in the physicians' favor at the trial level have been upheld at the intermediate appellate level. Raine v. Drasin, Docket Nos. 79CA18MR, 79CA558MR (Ky. 1980) *appeal pending*; Peerman v. Sidicane, (Tenn. App. Middle Div., 1980) (unpublished opinion on file at the *Pacific Law Journal*). The fact that one of these is currently on appeal and the other was decertified underscores the physician's plight. As pointed out earlier, of nine cases to reach a state's highest court, eight decisions were unfavorable for the physician-plaintiff, see note 7 and accompanying text *supra*, and one was remanded for further consideration of the malicious prosecution issue, Nelson v. Miller, 227 Kan. 271, 607 P.2d 438 (1980). *Bull v. McCuskey*, 96 Nev. Adv. Opinion 186, 615 P.2d 957 (1980), a recent Nevada case not included in this survey, is one of the apparently few successful countersuits. In that case, the Nevada Supreme Court affirmed a \$35,000 compensatory damage verdict in favor of the physician based on the fact that the underlying suit had been filed without obtaining hospital records or review by a physician, and based on the finding of fact by the jury that the case had been filed solely for the purpose of coercing a "nuisance settlement" from the physician's carrier. The Nevada Supreme Court also affirmed a \$50,000 punitive damages award, since the action was filed "intentionally and with reckless disregard of the consequences." 96 Nev. Adv. Opinion 186, at 4-5, 615 P.2d at 961.

While the concern of the judiciary is understandable, it has effectively excluded countersuit plaintiffs from a remedy for a perceived wrong. While such public policy decisions are not unique, they usually are confined to specific situations and are not overly diffuse in their effect.¹²¹ The question is whether such broad and diffuse requirements as are imposed in establishing a countersuit case are really necessary. There is no reason that a middle position cannot be achieved which would give physicians protection from frivolous and unwarranted malpractice actions, and yet not be so broad as to jeopardize the free access to the judicial system by creating a climate in which attorneys are fearful of accepting all but the totally obvious and predictably successful cases. This can be accomplished by screening cases based on those factors which indicate a lack of probable cause in bringing the case, or, conversely, by identifying specific basic requirements of investigation which, if performed, would reasonably insure that there is probable cause for bringing an action. In this manner, the situation could be resolved to the satisfaction of both sides on this issue. Since the courts appear disinclined at present to move on this problem, legislative intervention is the only effective method left to protect the interests of innocent physicians.

121. For example, good samaritan statutes exempt a physician from liability when rendering care at the scene of an emergency. *See* CAL. BUS. & PROF. CODE §2144. A physician is required to report to the local health officer any person diagnosed as suffering from a disorder involving lapses of consciousness so that the information may be given to the Department of Motor Vehicles. *See also* CAL. HEALTH & SAFETY CODE §410.