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MALICIOUS PROSECUTION:
AN EFFECTIVE ATTACK ON SPURIOUS
MEDICAL MALPRACTICE CLAIMS?

As the number of medical malpractice claims filed against physicians and
the size of damage awards continues to increase, physicians have sought various
methods to arrest these trends. One proposed remedy is a countersuit in
malicious prosecution by the physician against the original plaintiff and his
attorney. The author examines the general requirements for success in
malicious prosecution actions and concludes that judicial reluctance to expand
the scope of the action would undermine much of its compensatory and
deterrent value if applied to spurious medical malpractice claims.

I. INTRODUCTION

THE HUMAN ERRORS which prompted the proliferation of
medical malpractice suits of the 1960's, predominantly incidents
in which foreign bodies were left in patients following surgery, have
been largely compensated by the litigation of the early 1970's.
Physicians, aware of the growing number of cases and of the in-
creasingly large verdicts being awarded,1 have begun to exercise
greater caution in their treatment of patients.2 Despite this practice

1. In the past decade in New York, the average cost of a malpractice claim
—awarded either by judge or jury, or resulting from an out-of-court settle-
ment—grew from $6,000 to $23,400. Even more dramatic, however, has been
the sudden increase in outsize awards. Until last year Chicago had never
seen a malpractice judgment larger than $250,000 against a physician.
Since then, three awards in excess of $1 million have been brought against
Chicago doctors, including one that totaled $2.5 million. In California,
there were only 5 judgments or awards for more than $300,000 in 1970,
but in 1974 there were 36. Of the 19 settlements or awards of more than
$1 million in the entire history of the state, 13 have come during the last
28 months.

NEWSWEEK, June 9, 1975, at 59.

2. As Eli Bernzweig, malpractice expert at HEW, noted:
There seems to be little doubt that the specter of malpractice litigation
has had a sobering effect upon many, if not most, physicians. It has
prompted them to be overly cautious in many areas of medical practice.
For example, it has become commonplace for physicians to order complete
X-ray studies of an injured limb even without the slightest indication of a
fracture. Needless to say, these X-rays can add $20 to $30 to the patient's
bill even though they may be unwarranted in 99 out of 100 cases.

SUBCOMM. ON EXECUTIVE REORGANIZATION OF THE SENATE COMM. ON GOV'T
OPERATIONS, 91ST CONG., 1ST SESS., MEDICAL MALPRACTICE: THE PATIENT
VERSUS THE PHYSICIAN, 22 (Comm. Print 1969); see Betzweig, Defensive Medi-
cine, in DEPT. OF HEW, REPORT OF THE SECRETARY'S COMMISSION ON MEDICAL
MALPRACTICE, APP. 38 (1973); Project, The Medical Malpractice Threat: A Study
of Defensive Medicine, 1971 DUKE L.J. 939.
of "defensive medicine," the total number of claims and the amount of damages awarded continue to increase.³

Part of the cause, and cure, of the increase in malpractice suits must reside with both the individual physician and the medical profession. The lack of self-discipline within the medical profession, evidenced by its failure to reassess periodically the qualifications of its members and sanction those unfit for practice, has inevitably led to instances of inadequate treatment.⁴ In addition, the disappearance of the intimate physician-patient relationship, which had operated as a psychological salve to patients' wounds, has prompted those patients to search for more formal procedures for airing their grievances.⁵ Not unexpectedly, a greater demand for favorable results has accompanied the significant advances in medical technology and knowledge, but such advances have also increased the opportunity for physician error.⁶ The number of malpractice suits consequently continues to multiply and plague the profession.

The nature of the typical medical malpractice action has compounded the problem. Unlike other tort actions, the tort of medical malpractice requires the introduction of expert testimony in establishing the standard of care.⁷ Consequently, although a patient may have suffered an injury in fact, he may be unable to prove by the requisite testimony that compensation should be granted. The injury may not even be one for which the law allows compensation. Nonetheless the suit may be brought, forcing the physician to defend

³. "Once an uncommon occurrence in tort law, more than 20,000 malpractice claims are now brought against doctors each year and the number is rising steadily." Newsweek, supra note 1, at 59; see N.Y. Times, Aug. 3, 1975, § 1, at 41, col. 5.

⁴. Various sources estimate that 16,000 physicians are unfit to practice medicine, even though medical disciplinary boards expel an average of only 66 physicians per year. Rensberger, Unfit Doctors Create Worry in Profession, N.Y. Times, Jan. 26, 1976, at 1, col. 1.


⁶. Perhaps even physicians would admit to the value of medical malpractice suits. Aside from compensating the injured, such suits provide some degree of social control over the medical profession, limiting an increase of exploitation over the public and at the same time increasing public faith in the profession. The judicial review provided by malpractice suits encourages change in the profession and, at the same time, induces a higher standard of care. See Kretzmer, The Malpractice Suit: Is It Needed?, 11 Osgoode Hall L.J. 55, 65-69 (1973); Roemer, Controlling and Promoting Quality in Medical Care, 35 Law & Contemp. Probs. 284, 297-98 (1970). Contra, N.Y. Times, Aug. 3, 1975, § 1, at 41, col. 5. See generally Subcomm. on Executive Reorganization, supra note 2. For an analysis of the factors behind the increase in the number of malpractice cases, see King, Malpractice Prevention: A Bi-Professional Approach, 1971 Ins. L.J. 335.

against an action which may be devoid of legal basis or incapable of proof.

Available statistical information suggests that a significant percentage of the malpractice claims filed lacks either a legal or factual basis. Various devices have been proposed and implemented to discourage the institution of medical malpractice suits which, although predicated upon injury, have no legal basis. However, the present deterrent effect of these procedures appears to be limited and too contingent upon eventual acceptance by the public and the medical profession to be significantly effective.

In a recent attempt to decrease the number of meritless medical malpractice suits, some physicians have adopted a distinctly novel approach: a countersuit for malicious prosecution against their former patients and those patients' attorneys. This solution is particularly attractive to physicians who, if successful, may recover not only expenses reasonably incurred in the original defense, but also damages for loss of business, injury to reputation, and mental

8. Data compiled by the Secretary's Commission on Medical Malpractice on claims files which were closed in 1970 indicate that approximately 60% of the total number of incidents resulted in no payment to the claimant. Rudov, Myers & Mirabella, Medical Malpractice Insurance Claims Files Closed in 1970, in Dep't of HEW, supra note 2, at App. 14 (Table 2). According to a study of malpractice suits filed in the Detroit area between 1970 and 1974, attorneys settle many cases for reasons that seldom relate to the merits of the charges. N.Y. Times, Aug. 3, 1975, § 1, at 41, col. 5.

9. See generally, Dep't of HEW, supra note 2, at App. 214-493.

In 1972, there were approximately 20 screening panels in operation and 2 more under consideration by state legislatures and medical and bar associations. The goals and motives of these panels are "[t]o prevent where possible the filing in court of actions . . . where the facts do not warrant a reasonable inference of malpractice and to make possible the fair and equitable disposition of legitimate claims." In jurisdictions where the public and the medical profession have enlisted the aid of these panels, the belief is that the practice of settling nuisance claims has been partially reversed. Winikoff, Medical-Legal Screening Panels as an Alternative Approach to Medical Malpractice Claims, 13 WM. & MARY L. REV. 695, 705 (1972) (Documentary Supplement). See also A. Holder, Medical Malpractice Law 416-22 (1975); Gibbs, Malpractice Screening Panels and Arbitration in Medical Liability Disputes, 1 J. LEGAL MED., May-June 1973, at 30; Holder, Joint Screening Panels, 215 J.A.M.A. 1715 (1971).

For a discussion of the effectiveness of arbitration as a remedy, see Zimmerly, Is Arbitration the Answer?, 1 J. LEGAL MED., March-April 1973, at 48.

10. See generally Roth & Rosenthal, Non-Fault Based Medical Injury Compensation Systems, in Dept. of HEW, supra note 2, at App. 450.

suffering. An action for malicious prosecution has the advantage of not being circumscribed by constitutional strictures, as is, for example, an action for defamation. Theoretically, it offers a maligned physician the best method of obtaining damages and provides a potential deterrent against the institution of spurious claims in the future.

Malicious prosecution actions have, however, been disfavored in law, particularly as countersuits to civil proceedings, and the courts have evinced a general reluctance to expand the scope of their application. Because of this reluctance, both the compensatory and potential deterrent values of the action are unduly undermined. Whether a physician who has been subjected to a medical malpractice suit can prevail on a malicious prosecution claim remains to be seen. This Note will attempt to answer whether such an action can surmount the difficult obstacles which the law has placed in its path.

II. ELEMENTS OF AN ACTION FOR MALICIOUS PROSECUTION

The action in tort for malicious prosecution provides an avenue of redress for the maligned defendant who has been compelled to defend against a spurious claim, but the effectiveness of the remedy has been curtailed by the stringent limitations placed upon the cause of action. Fearful that the threat of a counteraction for malicious prosecution will deter the vindication of legal wrongs in the courtroom, the judiciary has restricted the availability of the remedy and imposed strictly maintained proof requirements upon those to whom the remedy is available:

Some margin of safety in asserting rights, though they turn out to be groundless and their assertion accompanied by some degree of ill-will, must be maintained. Otherwise litigation would lead, not to an end of disputing, but to its beginning, and rights violated would go unredressed for fear of the danger of asserting them.

In balancing the needs of the public to enter the courts without fear of reprisal against the possible deterrent effects that an action for malicious prosecution might have on spurious claims, the scales have been tipped heavily in favor of the former. Although agreeing that there is a need to protect adequately the defendant’s right of redress, the courts are unsure as to how that protection should be provided.

13. See Part II infra.
A. Majority vs. Minority View

The majority of jurisdictions follow the more liberal "American" rule and permit the institution of a malicious prosecution action following a civil suit, irrespective of whether there has been actual interference with the person or property of the defendant. In these jurisdictions, the plaintiff must allege that an original judicial or quasi-judicial proceeding was instituted against him, which has terminated in his favor and which was instituted without probable cause and with malice. The concurrent establishment of these elements presents enormous practical difficulties.

A sizeable minority of jurisdictions has adopted the English, or "strict" rule, which states that an action for malicious prosecution will not lie in the absence of an arrest, an interference with property, or some special injury which would not necessarily result in all suits prosecuted for a like cause of action. Although subject to


18. Prior to the passage of the Statute of Marlbridge in 1269, actions to recover damages for suits maliciously prosecuted, where neither the person nor property had been interfered with, were entertained by the English courts. Passage of the Act foreclosed the institution of malicious prosecution suits arising out of a civil action where there had been no arrest or seizure of property. To insure that its passage would not displace preexisting damages at common law, however, the Act proscribed the payment of costs to the defendant who prevailed in his action. These costs were not limited to attorney fees, but included the fees of witnesses and court officials and the honorarium of the barrister. In this manner a summary remedy was provided in place of the existing cause of action. For a development of the law of malicious prosecution in England, see Lipscomb v. Shofner, 96 Tenn. 112, 33 S.W. 818 (1896).

the same proof requirements as a claimant under the majority view, a claimant in a minority jurisdiction must first allege that he has suffered some special injury directly resulting from the original proceeding, apart from the injury to his reputation or business which accompanies the prosecution of all suits. The special injury which traditionally provided the basis for malicious prosecution actions resulted from an attachment, an appointment of receiver, a writ of replevin, or an injunction. The court's special role in these particular procedures increased the interest of the court in preserving the sanctity of its decisionmaking process, thereby prompting the court to look more favorably upon an action against a plaintiff who had abused the privilege of suing in court by bringing an unfounded claim. To the defendant of a negligence action, who is unlikely to be the victim of a special injury or an interference with property, this requirement is particularly onerous.

Cognizant of the need for modifying the harshness of the minority rule, a number of jurisdictions have extended the definition of special injury beyond its accepted meaning to include the loss of a legally protected right, such as the right to practice a profession, the additional vexation of the successive instigation of suits, and the burden of defending an unconscionable appeal. An increasing number of jurisdictions also permit a malicious prosecution action based upon the instigation of an administrative proceeding, including professional disciplinary proceedings, where the proceeding is adjudicatory in nature and may adversely affect a legally protected right. Notwithstanding that such a proceeding is "not, strictly

377 (1816); Johnson v. Walker-Smith Co., 47 N.M. 310, 142 P.2d 546 (1943); Burt v. Smith, 181 N.Y. 1, 73 N.E. 495 (1905); Ely v. Davis, 111 N.C. 24, 15 S.E. 878 (1892); Cincinnati Daily Tribune v. Bruck, 61 Ohio St. 489, 56 N.E. 198 (1900); Mitchell v. Silver Lake Lodge, 29 Ore. 294, 45 P. 798 (1896); Muldoon v. Rickey, 103 Pa.-110 (1883); Abbott v. Thorne, 34 Wash. 692, 76 P. 302 (1904).


speaking, either a criminal or a civil action, these courts have held that if the proceeding was instituted maliciously and without probable cause, the injured party should have redress in an action for damages.

Inherent in the more lenient majority view toward malicious prosecution actions is a consistent application of the tort principle of compensatory damages. Since compensation is accorded one who sues in vindication of his rights, it "seems most harmonious with the standards which allow compensation generally" to extend that compensation to one who must defend a suit in vindication of his rights, particularly if the suit is brought maliciously and without probable cause. An absolute bar to the action of malicious prosecution as a response to a wide variety of civil cases would favor the rights of potential plaintiffs over those of potential defendants, irrespective of improper motives or bad faith. Of course, it might be contended that a plaintiff is as burdened when a defendant interposes a groundless defense as a defendant is in the defense of a groundless claim. This argument, however,

[F]ails to distinguish between the position of the parties, plaintiff and defendant, in an action at law. The plaintiff sets the law in motion; if he does so groundlessly and maliciously, he is the cause of the defendant's damages. But the defendant stands only on his legal rights—the plaintiff having taken his case to court, the defendant has the privilege of calling upon him to prove it to the satisfaction of the judge or jury, and he is guilty of no wrong in exercising this privilege.

Unlike the plaintiff, the defendant is not in court of his own volition. Even if the defendant prevails, he still has not emerged the victor. He not only risks a monetary judgment, but his reputation is at stake as well. In the prosecution of a spurious claim, the plaintiff has perverted the legal process, causing the defendant to incur these risks needlessly, but he may nonetheless be shielded from liability:

[P]ublic policy requires that the honest plaintiff should not be frightened from asking the aid of the law by the fear of an extremely heavy bill of costs against him should he lose. But this reason does not apply to the plaintiff who seeks to harass, damage and even ruin the honest citizen by

27. Id.
28. McCormick, Counsel Fees and Other Expenses of Litigation as an Element of Damages, 15 Minn. L. Rev. 619, 643 (1931).
maliciously invoking the aid of the courts in support of a claim which he knows to be unfounded. . . . [T]he same public policy which requires the defendant to bear some of the expense of an honest, even though unsuccessful, suit, should give him a full and complete remedy against the dishonest and malicious litigant, and this can only be done under our practice by an action of the nature involved here-in.\textsuperscript{31}

The policy behind the minority view is in sharp conflict with that of the majority view. Apprehensive that the threat of a malicious prosecution action will deter the vindication of rights, the minority-view courts have concluded that an outright rejection of the remedy in civil cases where special injury cannot be alleged is the only method of insuring recourse to the judicial process for the settlement of grievances.\textsuperscript{32} Concomitantly, these jurisdictions have adopted the English rule of statutory costs, which limits costs to the fees of witnesses and court officials, as the sole "measure of damages in a mere civil action of a successful defendant."\textsuperscript{33} While the imposition of statutory costs may at one time have afforded adequate compensation for the expenses necessary to a defense, thus providing the defendant with some remedy, the allotment is sorely inadequate today.\textsuperscript{34} Nonetheless, the minority-view jurisdictions maintain that the threat of deterrence is too great, and judicial enforcement of high proof thresholds too speculative, to permit an adoption of the majority's compromise position.

The necessity of preserving the minority position is not apparent. Although the potential countersuit in malicious prosecution might conceivably deter the honest claimant from a vindication of his rights, there is a dearth of empirical data confirming this fear or indicating a marked decline in the number of original prosecutions filed in the jurisdictions which have adopted the liberal majority

\textsuperscript{31} Ackerman v. Kaufman, 41 Ariz. 110, 114, 15 P.2d 966, 967 (1932).
\textsuperscript{32} See Wetmore v. Mellinger, 64 Iowa 741, 744-45, 18 N.W. 870, 871 (1884); Muldoon v. Rickey, 103 Pa. 110 (1883).
\textsuperscript{33} Lipscomb v. Shofner, 96 Tenn. 112, 114, 33 S.W. 818, 819 (1896); see Pope v. Pollock, 46 Ohio St. 367, 371, 21 N.E. 356, 357 (1889).

The English system of costs was transplanted in the United States prior to the American Revolution. Professor McCormick suggested that this rule complemented a demand in frontier America for fair play and equality in the courtroom, where "two inflamed citizens [could exchange] blows upon the courthouse square," undeterred by the threat of an onerous bill of costs to the loser. McCormick, supra note 28, at 642. However, the conditions from which the rule developed—\textit{i.e.}, the phenomenon of "court week," when the circuit judge came to a given town, and the spectacular entertainment that court week provided—no longer exist in the urban setting of the 20th century.

\textsuperscript{34} Id. at 620-21.
Courts which posit deterrence of legitimate claims as a justification for the limitation on malicious prosecution actions assume its validity only by judicial notice, and do not support it by practical results. The difficulty with the justification stems from its assumption that the main deterrent to a potential litigant is the threat of a countersuit in malicious prosecution. The payment of costs incidental to an unsuccessful suit, as well as the time demanded in the prosecution of any claim, constitute sufficient barriers to the institution of legitimate and frivolous suits, without further discouraging the assertion of rights.

Implicit in the fear of permitting malicious prosecution actions is a vision of the interminable suit—litigation which "would lead, not to an end of disputing, but to its beginning." This conclusion, however, lacks a pragmatic basis: "Such fears have little foundation, as the party who has sustained the burden of one action will be unlikely to assume so quickly the expense of a second suit unless he is reasonable [sic] assured of success." Furthermore, an admission of the merits of these contentions would not require a foreclosure of the remedy of an action in malicious prosecution, but a tightening of the proof requirements which bar the path to success.

The assertion that the value of malicious prosecution actions lies only in their possible deterrent effects on the institution of spurious suits disregards the need to protect and compensate those maligned by a misuse of the legal process. The value that has been placed on the right to bring a cause of action must be considered in light of both the interest of the "peaceful citizen" to be free from vexation, damage, and possible ruin, and the interest of the courts in promoting the honest use of the judicial process:

Every citizen has three important interests which, among others, are protected by the law of torts—his interest in reputation and honor, his interest in bodily freedom, and his interest in financial security. A tort action for defamation

36. A comment directed at this issue by the Alabama Supreme Court in 1917 suggests that at least at that time "[T]he testimonies of the judges in other jurisdictions concur to the effect that this rule has brought to the courts no crowd of rashly importunate litigants [in actions for malicious prosecution]." Peerson v. Ashcraft Cotton Mills, 201 Ala. 348, 349, 78 So. 204, 205 (1917).
provides protection for the first of these, while an action for false imprisonment protects the second. An action for malicious prosecution protects all three.\footnote{Note, Malicious Prosecution—The Law in Arkansas, 22 ARK. L. REV. 340 (1968).}

The paramount value of the malicious prosecution action is thus the protection it affords to every individual. Even though the majority view comes closer to providing this protection than the minority view, the requirement that the defendant establish termination, lack of probable cause, and malice before the action can be sustained demonstrates the difficulty inherent in utilizing that protection.

B. Termination

A claim for malicious prosecution must await the termination favorable to the defendant of the proceeding on which it is based before a cause of action will accrue.\footnote{See, e.g., Embassy Sewing Stores, Inc. v. Leumi Financial Corp., 39 App. Div. 2d 940, 333 N.Y.S.2d 106 (1972); Reichler v. Tillman, 21 N.C. App. 38, 203 S.E.2d 68 (1974).} This requirement effectively forecloses the initiation of counterclaims for malicious prosecution during the pendency of the original action,\footnote{Luckett v. Cohen, 169 F. Supp. 808 (S.D.N.Y. 1956).} whether the counterclaim seeks damages or a declaration of malice and want of probable cause.\footnote{Babb v. Superior Court, 3 Cal. 3d 841, 479 P.2d 379, 92 Cal. Rptr. 179 (1971).} Despite general agreement that termination does not require an adjudication on the merits,\footnote{See Crawford v. Theo, 112 Ga. App. 83, 143 S.E.2d 750 (1965); Mayflower Indus. v. Thor Corp., 15 N.J. Super. 139, 83 A.2d 246 (Ch. 1951).} judicial opinion is not uniform in its characterization of what constitutes termination "in favor of" the original defendant.

The dismissal of a criminal complaint by the court\footnote{See Overson v. Lynch, 83 Ariz. 158, 317 P.2d 948 (1957).} or the entry of a \textit{nolle prosequi} by the prosecutor, without the request of or agreement with the defendant,\footnote{See v. Gosselin, 133 Conn. 158, 48 A.2d 560 (1946); Davis v. McCrory Corp., 262 So. 2d 207 (Fla. Dist. Ct. App. 1972).} is sufficient evidence of a favorable termination:

It is not necessary that the proceeding should have gone so far as to preclude further prosecution on the ground of double jeopardy. Hence, although the quashing of an indictment does not preclude the initiation of new proceedings for the same offense . . . it constitutes a termination of the original proceeding in favor of the accused unless such new
proceedings have been initiated before the trial of the civil action. . . .

In civil actions, either a termination not adverse to or a decision favorable to the defendant, as distinguished from judgment on the merits, is similarly sufficient evidence of termination. The distinction between the termination requirements of criminal and civil actions is that a nolle prosequi is presumptive evidence of favorable termination, but its civil analogue, a voluntary dismissal, is not. Acknowledging inherent differences between criminal and civil actions and the relative ease with which civil proceedings may be instituted, courts on occasion have required additional evidence of an intention to terminate prior to permitting a subsequent action in malicious prosecution.

The rationale in support of the termination rule is three-fold. First, without the termination rule, the resulting institution of counterclaims, which are less time-consuming and expensive than original prosecutions, would foster the expansion of a cause of action which the courts disfavor. Second, the termination rule prevents inconsistent judgments, avoiding the result that a plaintiff might conceivably win his original action and yet lose the counterclaim for malicious prosecution. Third, if it were not for the termination rule, the introduction of evidence establishing want of probable cause and malice might prejudice the case of the original plaintiff. The plaintiff and his attorney would be placed in adverse positions as cross-defendants in those instances where the malicious prosecution action is directed at both. Additionally, because the elements of malice and want of probable cause are difficult to establish, an adjudication on these issues would be hindered by the absence of an original record from which evidence could be taken.

Balanced against the rationales in favor of the termination rule are the arguments of judicial economy and justice. Under liberalized
procedural rules, a counterclaim need not arise out of the same transaction or occurrence as the opposing party's claim.  

Absent a requirement of termination, the procedure for handling the malicious prosecution counterclaim could be tailored to maximize judicial economy. Since the underlying facts and essential testimony are likely to originate from the same or similar sources, pretrial discovery could be combined in order to permit investigation into both causes of action, thus saving time, expense, and further overcrowding of the docket. The counterclaim would be filed in the original action, but adjudication of the claim could be postponed until the disposition of the original action, thus avoiding unwarranted litigation. It follows that a cause of action would not arise unless and until the prior proceedings had terminated, but a petition would be allowed during the pendency of the original action. If the cause of action did arise, the same jury would be retained, whenever possible, to hear the trial on the counterclaim. Such a procedure would be analogous to that in indemnity proceedings, in which a defendant seeks a declaration of rights prior to an adjudication of his own obligation.

Case law, however, has not favored changing the termination requirement. In Babb v. Superior Court, the California Supreme Court, ruling on a demurrer to a cross-complaint in malicious prosecution filed pending an action in medical malpractice, found the policy reasons supporting abolition of the termination requirement to be unconvincing and the analogy to indemnity proceedings to be unsupportable. After noting a "metaphysical" difficulty in permitting a counterclaim in malicious prosecution, the court set forth the administrative and policy reasons for retaining the termination rule. Countering the analogy to indemnity proceedings with key distinctions between the two causes of action, the court noted the absence of a deterrent or harassing effect in the indemnity cross-ac-

54. See, e.g., Fed. R. Civ. P. 13(b) (providing for permissive as well as compulsory counterclaims).
56. Id.
58. 3 Cal. 3d 841, 479 P.2d 379, 92 Cal. Rptr. 179 (1971).
59. Theoretically a cause of action in malicious prosecution does not exist prior to termination. Id. at 846-47, 479 P.2d at 383-84, 92 Cal. Rptr. at 183-84. The court has suggested, however, that such a cross-action might be permissible in the event of a joint pretrial statement that, where judgment is rendered in favor of the defendant, the issue of whether the action has been maliciously prosecuted would be decided. Id. at 849-50, 479 P.2d at 383-84, 92 Cal. Rptr. at 183-84.
tion. Unlike the action in malicious prosecution, the indemnity claim is instituted against a third party and arises out of the same transaction as the principal action. In the counterclaim for malicious prosecution, however, evidence is aimed at the motives and state of mind of the original plaintiff, and not at the substantive issues of the original action.

There has, nonetheless, been some indication of a willingness to depart from the termination requirement pursuant to equitable principles. In *Herendeen v. Ley Realty Co.*, a New York court permitted the institution of the counterclaim, asserting:

> [I]t is the malicious prosecution itself, and not the determination that the prosecution is malicious, which gives rise to the cause of action; that the requirement . . . that the determination precede the commencement of an action for damages is based upon considerations of justice and convenience; and that justice and convenience are promoted by allowing a counterclaim for such damage to be interposed in the action claimed to constitute malicious prosecution.

However compelling this opinion may appear, subsequent New York courts have not acquiesced in its logic, and the termination rule has lost none of its vitality.

C. Probable Cause

A claimant who reasonably believes in the existence of facts under which his claim may be valid at common law or under an existing statute has probable cause for the institution of a suit. In other words, probable cause is present when "such a state of facts

60. 75 N.Y.S.2d 836 (Sup. Ct. 1947).
61. Id. at 838.
62. See Embassy Sewing Stores, Inc. v. Leumi Financial Corp., 39 App. Div. 2d 940, 333 N.Y.S.2d 106 (1972). Reasoning expanding the premise of *Herendeen* has been adopted by the Ninth Circuit Court of Connecticut in Sonnichsen v. Streeter, 4 Conn. Cir. 659, 239 A.2d 63 (1967), and by the Superior Court of New Jersey, Chancery Division in Mayflower Indus. v. Thor Corp., 15 N.J. Super. 139, 83 A.2d 246 (Ch. 1951), suggesting the possibility of interjecting the counterclaim but withholding its disposition until adjudication of the first action.
63. Although the reasonable-man standard is generally the test applied to civil proceedings, the "cautious-man" standard, frequently used in criminal cases, has been suggested and applied to some civil proceedings. See Ray v. City Bank & Trust Co., 358 F. Supp. 630 (S.D. Ohio 1973); Woods v. Standard Personal Loan Plan, Inc., 420 S.W.2d 380 (Mo. Ct. App. 1967). The effect of this formulation may be most pronounced in respect to the investigation requirement prior to the institution of an action. See text accompanying notes 67-71 infra.
exists as would warrant institution of the suit or proceedings complained of" as legally just and proper.\(^6\) A successful malicious prosecution action depends upon the ability to demonstrate that the original claimant against whom the malicious prosecution action is brought instituted his claim without probable cause, \(i.e.,\) without a reasonable belief in the viability of his claim. This issue is viewed in light of both the objective reasonableness of the claimant and his actual belief in his claim.

An appraisal of the claimant's reasonableness based on an objective standard focuses upon the "effects and circumstances" of which the claimant was aware at the time the proceedings were instituted.\(^6\) Courts which have formulated their standard in terms of the "cautious man"\(^6\) in lieu of the "reasonable man" have also inquired into the circumstances of which the claimant "should, upon reasonable inquiry, have been aware."\(^6\) Prior to the filing of a complaint, the plaintiff is not required to exhaust all sources of information bearing on the facts within his knowledge\(^6\) or to continue his investigation subsequent to filing.\(^7\) Yet even though the fullest investigation possible is not mandated, if a recitation of the facts "excluded recitation of those facts, if any, which might reasonably have incited further investigation or inquiry,"\(^7\) probable cause will be found to be lacking.

A complete and honest disclosure to an attorney of all facts known to the claimant when the claim was instituted strongly establishes the existence of probable cause for that proceeding, provided that the attorney sought is a reputable one and the client acts in good faith reliance upon his advice.\(^7\) The solicitation of legal advice, accompanied by good faith reliance, is demonstrative of a reasonable effort to discern the viability of a claim from one who allegedly can appraise it.\(^7\) The "mistaken belief as to the legal consequences of a person's conduct"\(^7\) of one ignorant of the law does not furnish evidence of probable cause, no matter how reason-

\(^6\) See note 63 supra.
\(^7\) Williams v. Frey, 182 Okla. 556, 78 P.2d 1052 (1938).
able the belief may be.\textsuperscript{75} Conversely, good faith reliance on the advice of counsel, no matter how mistaken that advice may have been, is conclusive as to probable cause.\textsuperscript{76}

If the client has acted in bad faith, either through a misfeasance in the failure to relate all relevant facts, a malfeasance in the recitation of false information,\textsuperscript{77} or a recitation of a claim in which he does not, in good faith, believe,\textsuperscript{78} he has demonstrated the lack of a good faith belief in the viability of his claim, and thus meets neither the objective nor the subjective test of probable cause. Consequently, the affirmative defense of advice of counsel will be unavailable to him:

\begin{quote}
Even though a defendant [to a malicious prosecution action] shows reasonable grounds of suspicion, sufficiently strong in themselves to warrant a cautious man in the belief that there was probable cause for the [original] prosecution, nevertheless, if it be apparent that he did not himself believe in the guilt of the accused, then the circumstances upon which he relied will not suffice to shield and vindicate him.\textsuperscript{79}
\end{quote}

If sufficient evidence is offered to warrant a conclusion that the plaintiff did not in fact believe in the merit of his claim, the question of probable cause is decided by the jury.\textsuperscript{80}

The burden of establishing want of probable cause by a preponderance of the evidence is on the plaintiff.\textsuperscript{81} In civil actions there is a presumption that prosecutions are instituted with probable cause, although that presumption is weaker in civil actions than in criminal actions.\textsuperscript{82} Ordinarily a determination on the existence of probable cause is made by the jury. If, however, the facts are not in dispute and the available evidence permits only a finding of probable cause, the determination is made by the court.\textsuperscript{83}

Despite protestations that legal cause and probable cause are not one and the same,\textsuperscript{84} courts have consistently held that a judg-

\textsuperscript{75} Id.
\textsuperscript{79} Id. at 579, 221 P. at 934-35.
\textsuperscript{82} Id.
\textsuperscript{84} Id.
ment adverse to the defendant in the original proceeding is con-
clusive as to the existence of probable cause for that proceeding.85
Based on an objective standard of reasonableness, proceedings which
terminate in victory are, by virtue of their success, well-founded.86
Because the identity of the parties in the original suit and the ma-
lieous prosecution action is likely to be the same, one court has
likened the situation to an estoppel,87 requiring the parties to litigate
the existence of probable cause in the original contest or be estopped
to deny its presence. Yet, while promoting a judicial policy dis-
favoring the action of malicious prosecution, this legal fiction neces-
sarily conflicts with a policy underlying the termination require-
ment, which is the postponement of debate on the issues of malice
and probable cause until a later proceeding in order to minimize the
prejudice to either side. By accepting what is essentially the jury's
assessment of probable cause, however, the courts have ignored one
of the two aspects of the probable cause test: the plaintiff's sub-
jective assessment of the original claim. Furthermore, the adoption
of this view is not mandated by legal necessity, but is prompted by a
sense of public policy. Inherent in its adoption is a desire to pre-
serve the authority of judicial tribunals by investing their procedures
and determinations with such "force and sanctity" that they act as
a "shield and protection to all parties and persons in privity with
them."88

Even though a victory for the plaintiff is thought to prove the
presence of probable cause, the converse does not follow: a judg-
ment adverse to him does not establish a prima facie case of want
of probable cause for that action,89 even where the judgment is
predicated upon a mistake of law.90 An adverse determination is
thus indicative only of an objective evaluation of the merits at the
time of filing. Extending this analysis, it would seem that a volun-

85. An adverse judgment is conclusive evidence of probable cause unless evi-
dence is presented of fraud, perjury, or other improper means, notwithstanding
that the judgment is later reversed on appeal. E.g., Boothby Realty Co. v. Hay-
good, 269 Ala. 549, 114 So. 2d 555 (1959); Goldstein v. Sabelia, 88 So. 2d 910
(Fla. 1956); Owens v. Graetzel, 149 Md. 689, 132 A. 265 (1926). But see Nisewanger
v. W.J. Lane Co., 75 N.D. 448, 28 N.W.2d 409 (1947), holding that an adverse
judgment does not preclude investigation into probable cause, even where the
original judgment was based on a question of law.
86. See Ripley v. Bank of Skidmore, 355 Mo. 897, 198 S.W.2d 861 (1947).
87. Herman v. Brookerhoff, 8 Watts 1839.
88. Crescent City Livestock Co. v. Butchers' Union Slaughter-House Co.,
120 U.S. 141, 159 (1887).
89. See Kassan v. Bledsoe, 252 Cal. App. 2d 810, 60 Cal. Rptr. 799 (1967);
tary dismissal by the plaintiff would be insufficient evidence of want of probable cause. Nonetheless, a limited number of jurisdictions regard the voluntary dismissal as raising a presumption of want of probable cause.

D. Malice

Malice is not only an essential element of malicious prosecution, but the very core of the action. An understanding of malice is, however, plagued by the many meanings attributed to the expression by the law and by the vagueness and ambiguity which those meanings have engendered. Contrary to common misconceptions, proof of deliberate violence or apprehension is not required to bring a malicious prosecution action. Proof of an intentional or willful act which attempts to bring about a wrongful result, however, will be sufficient evidence to take the case to the jury.

When a claimant evidences ill will, anger, or a desire to vex, there is actual malice, or malice in fact. In many jurisdictions, actual malice also includes the prosecution of a case undertaken for improper or collateral motives, i.e., motives other than the motive of securing justice. Improper motive may be established by evidence of hostility or ill will, the hope of obtaining a private advantage, or the absence of a bona fide belief of fault. Jurisdictions which do not denominate this improper motivation as “actual malice” refer to it as “legal malice.” In those jurisdictions, such a finding satisfies the malice requirement for malicious prosecution, since legal malice stemming from improper motivation is equivalent to actual malice.

Proof of malice need not be direct, but may be inferred from

91. See Smith v. Burrus, 106 Mo. 94 (1891); Novick v. Becker, 4 Wis. 2d 432, 90 N.W.2d 620 (1958).
the circumstances surrounding the defendant's act. In the great majority of jurisdictions, malice may be inferred entirely from facts and circumstances indicating a lack of probable cause,\textsuperscript{100} although the inference is at most permissive and is subject to negation by proof of the absence of actual malice.\textsuperscript{101} Great indifference to the person, property, or rights of another may evince a hostile or vindictive motive from which an inference of malice may be drawn.\textsuperscript{102} Similarly, a suit instituted without a bona fide belief in its viability or prosecuted for the purpose of obtaining a private advantage over the defendant may demonstrate improper conduct.\textsuperscript{103} "In a legal sense any unlawful act done willfully and purposely to the injury of another is, as against that person, malicious; the proof of malice need not be direct but may be inferred from circumstances."\textsuperscript{104} Because this inference is sufficient to obtain a jury instruction on malice, few cases touch directly on what is required to prove actual malice.\textsuperscript{105}

If the defendant . . . did not act as a man of caution and prudence impartially, reasonably and without prejudice and malice or a desire to gain an undue advantage of the plaintiff, [the jury] may find that the order was issued without probable cause and may infer malice on the part of the defendant.\textsuperscript{106}

As with other matters left to the jury, it may be easier to obtain an instruction than a favorable verdict, and unless the verdict is clearly erroneous, little is left for appeal.

\textsuperscript{100} See, e.g., Tanner-Brice Co. v. Baris, 55 Ga. App. 453, 190 S.E. 676 (1937); Stubbs v. Mulholland, 168 Mo. 47, 67 S.W. 650 (1902); Delgado v. Rivera, 40 N.M. 217, 57 P.2d 1141 (1936); Melanowski v. Judy, 102 Ohio St. 153, 131 N.E. 360 (1921); Hyde v. Southern Grocery Stores, 197 S.C. 263, 15 S.E.2d 353 (1941).

A number of courts have required some independent evidence of bitterness, animosity, or vindictiveness before permitting an inference of malice. See Hudson v. Zumwalt, 64 Cal. App. 2d 866, 149 P.2d 437 (1944); Ahring v. White, 156 Kan. 60, 131 P.2d 699 (1943); Barker v. Waltz, 40 Wash. 2d 866, 246 P.2d 846 (1952). See also Hunter v. Beckley Newspapers Corp., 129 W. Va. 302, 40 S.E. 2d 332 (1946), requiring the establishment of want of probable cause by a preponderance of the evidence prior to permitting the inference of malice.


\textsuperscript{102} Adams v. Whitfield, 290 So. 2d 49 (Fla. 1974).


\textsuperscript{104} Note, \textit{Malicious Prosecution—The Law in Arkansas}, 22 ARK. L. REV. 340, 353 (1968), quoting Lemay v. Williams, 32 Ark. 166 (1877).

\textsuperscript{105} Note, \textit{Malicious Prosecution—The Law in Arkansas}, 22 ARK. L. REV. 340 (1968).

\textsuperscript{106} Id. at 353, quoting Lemay v. Williams, 32 Ark. 166 (1877).
E. Malicious Prosecution Actions Against the Attorney

An attorney "enjoys immunity from liability to third persons insofar as he does not materially depart from his role as a quasi-judicial officer, charged with responsibility for the administration of justice." An attorney is required only to entertain a reasonable and honest belief that his client has a viable claim for which probable cause exists. An attorney is obligated to present a claim if, in his estimation, the client has a good cause of action. He is not, however, authorized to advance a claim that is not warranted under existing law, unless that claim is supportable.


An alternative solution to the problem of spurious claims is strict enforcement by the judiciary of the provisions of the ABA Code of Professional Responsibility. The Code provides a set of ethical guidelines for the attorney to follow in his relationships with his client, with the public, and with his profession. Canon I requires that an attorney "assist in maintaining the integrity and competence of the legal profession." The attorney is faced with a possible conflict, however, as he attempts to perform the duty expressed in Canon 7: "A lawyer should represent a client zealously within the bounds of the law." Although the Code envisions these duties as complementary, the partisanship of the attorney may preclude a consideration of his duty to the public.

The Code does not clearly state the distinction between permissible and impermissible conduct in the filing of claims. The conflict is best expressed through the juxtaposition of Disciplinary Rule 7-101 with Disciplinary Rule 7-102. The former prohibits a lawyer from intentionally failing to seek the lawful objectives of his client through "reasonably available means permitted by law." The latter forbids the assertion of a claim when the attorney knows or "when it is obvious" that such action would serve merely to harass, or when such claim is unwarranted under existing law. It has become the responsibility of the judiciary to harmonize these two interests. Sullcor Realty, Inc. v. Battaglino, 81 Misc. 2d 325, 365 N.Y.S.2d 952 (1975).

Without adequate enforcement by the legal profession, these Disciplinary Rules provide no protection for the public. An ABA Special Committee, chaired by former Supreme Court Justice Tom C. Clark and assembled to study the effectiveness of current enforcement procedures, characterized the prevailing attitude of lawyers toward enforcement as ranging from apathy to outright hostility. Lawyers failed to report violations of the Code and, rather than cooperate with grievance committees, exerted their influence to stymie committee action. ABA SPECIAL COMM. ON EVALUATION OF DISCIPLINARY ENFORCEMENT: PROBLEMS & RECOMMENDATIONS IN DISCIPLINARY ENFORCEMENT (1970).

The Clark Report noted several obstacles to effective enforcement and offered a series of recommendations, including a need for active investigation into known areas of recurrent misconduct, in lieu of investigation based solely upon complaint. Notwithstanding that such suggestions may aid in an alleviation of the disciplinary problem, a true solution to the problem will require an adherence to the Code and full disclosure of its violators.


by a good faith argument for the extension, modification, or reversal of that law.\textsuperscript{110}

An attorney is not required to weigh the factors of a case in order to guarantee its success, but must provide his client with a candid opinion of the merits and probable results of pending or contemplated litigation.\textsuperscript{111} He may pursue a claim as long as there exists an issue genuinely in doubt,\textsuperscript{112} even though unsure of the truthfulness of its assertion. He may ethically institute a suit with full knowledge that it may be barred by an affirmative defense, such as a running of the statute of limitations, if he has advised his client of the availability and effect of that defense.\textsuperscript{113} The rationale behind this relative freedom to file a claim is that the zealous advocate must be able to present fearlessly a debatable legal issue\textsuperscript{114} as long as he entertain a reasonable belief in its validity.

An attorney may forfeit this immunity if he institutes a proceeding without probable cause, or if, motivated by personal malice or swayed by the private interest of his client, "he ceases to be a minister of justice and instead knowingly becomes an instrumentality for the perpetration of fraud or for the malicious prosecution ... of a party against whom he knows his client has no just claim."\textsuperscript{115} Because of his position as an officer of the court, an attorney has a concurrent obligation to "treat with consideration all persons involved in the legal process and to avoid the infliction of needless harm."\textsuperscript{116} Accordingly, he is held to a higher standard of care in the institution of a suit than is a layman:

An attorney does not guarantee the soundness of his opinions ... however he is expected to possess knowledge of those plain and elementary principles of law which, although not commonly known may readily be found by standard research technique ... . Even with respect to an unsettled area of the law, an attorney assumes an obligation ... to undertake reasonable research in an effort to ascertain relevant legal principles and to make an informed

115. \textit{Id.} at 241, 28 N.W.2d at 791.
decision as to a course of conduct based on an intelligent
assessment of the problem.  

Most notably, when reliance on his opinion affords the client an
exemption from liability for damages in a subsequent action, the
attorney must prepare a researched assessment of the claim. An
attorney may violate this duty of care by failing to investigate the
law and underlying facts of a claim, or by instituting a proceeding
which no other attorney would regard as viable.

The availability to a client of the absolute defense of good faith
reliance upon the advice of counsel, which constitutes probable cause
for the institution of a malpractice action, may prompt a defendant
physician to sue the attorney representing the patient, rather than,
or in addition to, the patient himself. Particularly in actions as com-
plex and time-consuming as medical malpractice, prospective
plaintiffs are likely to rely upon counsel in determining whether or
not to prosecute. In such instances, suit against the attorney is
hindered not so much by an inability to allege want of probable
cause as by a difficulty in alleging malice. Although an attorney who
is himself actuated by malice or who is aware of the malicious
motives of his client may have demonstrated this improper motive,
such situations are rare. The permissive inference of malice, although
inconclusive, may fill this void satisfactorily.

III. APPLYING MALICIOUS PROSECUTION TO
MEDICAL MALPRACTICE

Few courts have yet confronted the difficulty of allowing an

117. Smith v. Lewis, 13 Cal. 3d 349, 358, 530 P.2d 589, 595, 118 Cal. Rptr. 621,
627 (1975).

118. Cf. ABA Comm. on Ethics & Professional Responsibility, Formal
Opinions, No. 335 (1974), concerning the duty of an attorney in providing opinions
for exemption of registration under the Securities Act of 1933. See also ABA Code
of Professional Responsibility, Disciplinary Rule 6-101(a)(2), (3) (1975), ap-
plicable to conduct in furnishing legal opinions which involves "indifference and a
consistent failure to carry out the obligations he has assumed to his client." Formal
Opinions, No. 335, supra at n.1, citing ABA Comm. on Ethics & Professional

119. The reasonableness of an attorney's actions may be negated by a showing
of interest in the subject matter and outcome of a suit. See Adkin v. Pillen, 136
Mich. 682, 100 N.W. 176 (1904). In the area of medical malpractice, attorney
interest beyond that which is commonly expected of the profession may be evi-
denced by two courses of conduct, both in violation of professional ethics: the
solicitation of clients, a practice commonly referred to as "ambulance-chasing,"
and the advancement of funds for the payment of living or medical expenses,
subject to reimbursement only upon a favorable settlement. See In re Meck, 51

120. See text accompanying notes 72-73 supra.

121. Hoppe v. Klapperich, 224 Minn. 224, 28 N.W.2d 780 (1947).
action in malicious prosecution as a remedy to the institution of spurious medical malpractice suits. Only recently has an increasing number of suits\textsuperscript{122} compounded the problem and provided physicians with the incentive for counteraction.

An expansion of the allowable scope of malicious prosecution in order to extend to medical malpractice the cautious liberality which the action has enjoyed in cases of injury suffered in administrative proceedings\textsuperscript{123} is currently unlikely. While the judicial attitude disfavoring the action does not mandate its foreclosure in cases where the proof requirements have been met, the pervasive fear of discouraging access to the courts precludes a loosening of these proof requirements in response to particular tort actions, such as medical malpractice.\textsuperscript{124} In the majority of jurisdictions, the necessity of establishing want of probable cause and malice remains an obstacle to a successful suit.\textsuperscript{125} In the large minority of jurisdictions which do not permit malicious prosecution actions in which there has been no injury to property or arrest of the person, it is unlikely that the abuse of the judicial system by those filing unfounded claims will prompt an expansion of the doctrine in order to include these, and other, civil suits.

\textbf{A. Present Case Law}

Although there have not yet been any successful counteractions in malicious prosecution by doctors in response to medical malpractice claims, there have been a small number of adventurous attempts brought either as malicious prosecution claims or substantially similar causes of action. \textit{Foster v. McClain}\textsuperscript{126} was filed as a libel action against three attorneys, individually and as partners, and against the doctor's former patient. The complaint alleged that the patient, through her attorneys, had filed three separate damage suits for medical malpractice in which she falsely and maliciously alleged that Dr. Foster had left a foreign substance, described as a sponge, in her abdomen. Two of the original malpractice claims were voluntarily dismissed and the third was dismissed after judgment by the trial court. Evidence presented in the malpractice trial revealed that the discomfort the patient had experienced after surgery was probably a reaction to the cotton sutures which had closed the surgical incision. In a subsequent operation performed by

\textsuperscript{122} See note 3 supra.
\textsuperscript{123} See note 25 supra.
\textsuperscript{124} See text accompanying notes 22-25 supra.
\textsuperscript{125} See text accompanying notes 16-17 supra.
\textsuperscript{126} 251 So. 2d 179 (La. 1971).
the doctor, a cotton suture or a piece of cotton was removed from the area of incision. Dr. Foster testified that, at the time of the second operation, he may have commented on the discovery of the cotton.

Dr. Foster was successful at the trial level, even though the judgment did not stand on appeal. A jury awarded him $33,000 in his libel action. The defendants' motion for a new trial was denied as to the attorneys but granted as to the defendant McClain. The defendant-attorneys appealed. After a review of the evidence introduced at the malpractice trial, the appellate court ruled that, as a matter of law, Dr. Foster had failed to meet his burden of proof on the issues of probable cause and malice.

Because of the peculiar nature of the libel action under Louisiana law, Foster was very similar to an action for malicious prosecution. Under the distinctive civil law libel and slander provisions of Louisiana, the extension of privilege to allegations made pursuant to a judicial proceeding requires not only that the allegations be relevant or material, but also that there be probable cause and an absence of actual malice. In common law jurisdictions this privilege is derived from the first amendment and depends only on a showing of relevancy and materiality. These additional prerequisites liken the Louisiana action closely to the action of malicious prosecution, although the requirement of favorable termination is absent. The burden of proof, in either action, is upon the plaintiff to show malice and want of probable cause.

In its analysis, the Foster court essentially equated probable cause with an attorney's belief in the client's allegations:


128. Protection secured by the first amendment's guarantee of free speech extends to the inflictor of a potentially defamatory statement either by virtue of an immunity conferred by public policy upon those involved in judicial and quasi-judicial proceedings or by virtue of the status of the victim. Extensive material is available on the immunity in the judicial function. See cases in Annot., 42 A.L.R.2d 825 (1955); Annot., 40 A.L.R.2d 941 (1955); 155 A.L.R. 1346 (1945). For a development of the protection afforded because of the status of the victim, see New York Times Co. v. Sullivan, 376 U.S. 254 (1964) (prohibiting public officials from recovering damages for a statement relating to official conduct unless made with actual malice); Curtis Publishing Co. v. Butts, 388 U.S. 130 (1967) (extending this protection to statements made about "public figures"). But see Gertz v. Robert Welch, Inc., 418 U.S. 323 (1974), in which the majority retracted from the plurality position taken three years earlier in Rosenbloom v. Metromedia, Inc., 403 U.S. 29 (1971) and held that absent clear evidence of general fame or notoriety in the community, an individual should not be deemed a public personality for all aspects of his life.

Although not specifically enumerated in the first amendment, the right of access
Nothing in the record indicates . . . that at the time of the filing of the suit, the attorneys had any reason to doubt Mrs. McClain's statements made to them that it was a "piece of cotton about the size of a finger" . . . . [T]he record fails to indicate that the attorneys could have known that the allegations made in the petition were untrue . . . . The defendants had no reason to doubt Mrs. McClain's story. It is clear that something was removed from Mrs. McClain as a result of the second operation, and whether it was a piece of cotton suture that had been used to close the surgical incision, or whether in fact it was a piece of cotton inadvertently left in the incision, was a matter which could only be proven by a thorough pretrial investigation as well as a trial on the merits.129

By delaying the attorney's duty to investigate the viability of a claim until pretrial investigation, the court substituted a presumption of the truthfulness of a client's allegations for a showing of probable cause. One plausible explanation for this unusual position could be the inherent difficulty of proving a medical malpractice injury. This explanation would, however, result in a postponement of the duty to investigate in all medical malpractice suits, barring the presence of actual malice or vindictiveness.

Perhaps a better explanation of Foster would limit this distortion of the probable cause issue to the particular facts of the case and others like it. Such cases typically involve situations where foreign objects are left in the body following surgery. The doctrine of res ipsa loquitur is often applied to permit an inference of negligence (and at least initial avoidance of expert testimony) once certain circumstances surrounding the injury have been established. The underlying factual framework could be unraveled only in pretrial investigation, until which time the attorney would be bound by the allegations of his client. The great majority of medical malpractice cases, however, are not factually suitable for the application of res ipsa loquitur, and require evidence of a standard of care. The Foster rationale on probable cause would be inapplicable to the court has been deemed to be one aspect of the right to petition the government. California Motor Transp. Co. v. Trucking Unlimited, 404 U.S. 508 (1972). The Supreme Court has held in certain circumstances that due process of law prohibits a state from denying access to the courts solely on the basis of wealth. See Boddie v. Connecticut, 401 U.S. 371 (1971) (right of indigent to obtain a divorce, irrespective of ability to pay court fees); Griffin v. Illinois, 351 U.S. 12 (1956) (right of indigent in criminal proceeding to receive a transcript of the trial proceeding free of cost). The Court has, however, upheld a federal statute mandating that all debtors in voluntary bankruptcy proceedings pay a $50 filing fee. In re Kras, 409 U.S. 434 (1973).

to these cases, which would still demand for the establishment of probable cause that the attorney conduct some independent research into his client's claim before prosecution.

In addition to deviating from the recognized concept of probable cause, the *Foster* court also confined the malice requisite for a circumvention of the libel privilege to actual malice, thereby excluding legal malice. Simultaneously, the court embraced a new standard of reckless disregard:

The record is void of any evidence indicating that the allegations were made with malicious intent or through feelings of ill will towards the doctor. The libel action could be sustained, however, if it were shown that the allegations were made with a reckless disregard for whether or not the allegations were true. We do not believe the record supports such a finding.\(^{130}\)

Traditionally, the protection against the plaintiff's "reckless disregard" has resulted from a concern for the "rights" of the defendant. Although the standard of reckless disregard could be interpreted to impose upon the plaintiff's attorney the duty to investigate the veracity of his client's claim, as well as its legal basis, in order not to infringe recklessly on the defendant's right to be free from malicious and groundless suits, the *Foster* court's formulation requires only that the plaintiff's attorney not recklessly disregard the fact that his allegations may not, in fact, be true.

The hardship imposed by the requirement of alleging malice in the institution of the original procedure is further demonstrated in *Spencer v. Burglass*,\(^{131}\) a more recent Louisiana case. Dr. Spencer filed a malicious prosecution action against Burglass, an attorney, for filing and litigating a medical malpractice suit without any expert medical testimony. The defendant filed an exception of no cause of action, asserting that plaintiff's petition failed to allege malice. Judgment was granted with leave to amend. Upon the plaintiff's failure to amend, the case was dismissed. The plaintiff appealed the dismissal to the court of appeals, arguing that she could not allege malice in fact and therefore could not amend. Under those circumstances, she requested that the judgment against her be treated as a final, and therefore appealable, judgment of dismissal. Her request was refused.

An assessment of the impact of *Spencer* is problematic in light of the case's early dismissal. Decided after *Foster*, *Spencer* may merely reiterate the Louisiana requirement of proof of actual malice,

\(^{130}\) Id. at 182 (emphasis added).

\(^{131}\) 288 So. 2d 68 (La. 1974).
which requirement is not satisfied simply by an inference of malice. If so, its holding may be of limited value in the majority of jurisdictions, which accept proof of either actual or legal malice. However, the impact of the dismissal may be more substantial. The claim in malicious prosecution was predicated upon a malpractice action in which no expert testimony was offered. If the deficiency of the complaint was solely its failure to allege malice, the remaining elements of the action having been alleged, then inferring malice from a showing of want of probable cause has been foreclosed by the court's opinion. This interpretation would permit the institution of medical malpractice suits which have no foundation in expert testimony and would bar any answering countersuits for malicious prosecution, even though without such testimony, the malpractice suit would lack a legal basis.  

B. Problems Confronting Physicians Bringing an Action for Malicious Prosecution

The infrequency of actions for malicious prosecution and their consistent lack of success indicate the difficulties confronting the physician who pursues such a cause of action. A large number of jurisdictions have continued to withhold the remedy through the somewhat arbitrary interference with the person or property requirement. In those jurisdictions which permit malicious prosecution actions predicated upon civil suits, irrespective of interference with property or special injury, the difficulties of establishing want of probable cause and malice have appeared insurmountable.

Notwithstanding its operation as an effective bar to the litigation of counterclaims in malicious prosecution, the termination requirement is not a significant obstacle to the cause of action. Although requiring the plaintiff suing for malicious prosecution to plead that the original action has terminated in his favor, the requirement of probable cause would preclude a malicious prosecution action in the absence of favorable termination even if there were no ter-

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132. To date, the progress of one other physician's action in malicious prosecution, Kauffman v. A.H. Robins Co., 223 Tenn. 515, 448 S.W.2d 400 (1969), has been reported, although its ultimate disposition remains undisclosed. The plaintiff Kauffman, a pharmacist, was investigated by the State Board of Pharmacy on charges of substituting a medical preparation for the defendant drug company's product. Subsequently exonerated, the pharmacist brought an action for malicious prosecution in a Tennessee Circuit Court. The defendant maintained that Tennessee did not permit an action in malicious prosecution and entered a demurrer. The Supreme Court of Tennessee reversed the demurrer and remanded to the circuit court for further proceedings.

133. See text accompanying notes 85-92 supra.
mination rule. The major consequence of the termination requirement is instead its exclusion of counterclaims. Although this consequence by itself is not detrimental to the physician, only the hardy will “assume so quickly the expense of a second suit, unless . . . reasonably assured of success.” On the assumption that the menace of a present counterclaim has more impact than the speculative threat of a future counteraction, the potential deterrent value of malicious prosecution actions may be limited.

Certainly the most difficult task confronting the physician is establishing want of probable cause. Where evidence of bad faith is lacking, the physician must demonstrate that, considering only the facts known at the time of filing, the institution of the suit was unreasonable. If expert testimony has been utilized, the reasonableness of the plaintiff’s action is conclusively established. Since the issues of breach of duty and causation in the field of medicine are complex, the plaintiff, through his use of and reliance upon a medical expert, has demonstrated a reasonable belief in the viability of

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134. See note 39 supra.

135. In the vast majority of medical malpractice cases, the plaintiff is required to establish both the standard of care and a deviation therefrom through the use of competent expert medical testimony. See, e.g., Lewis v. Read, 80 N.J. Super. 148, 170, 193 A.2d 255, 267 (App. Div. 1963). The standard of care owed by a physician is measured “in light of the ordinary skill possessed and applied by other members of his profession in like situations,” and demands the exercise of ordinary care and diligence in the treatment of a case and his best judgment in the application of skill therein. Downer v. Veilleux, 322 A.2d 82, 86 (Me. 1974). A physician is presumed to have employed the requisite skill in the performance of his medical duties. Lane v. Calvert, 215 Md. 457, 138 A.2d 902 (1958). As long as he has administered a course of treatment recognized by a segment of the medical profession to be permissible, he has not breached the standard imposed upon him. See, e.g., Christian v. Wilmington Hosp. Ass’n, 50 Del. 550, 135 A.2d 727 (1957). But see Helling v. Carey, 83 Wash. 2d 514, 519 P.2d 981 (1974) (failure of ophthalmologist to perform glaucoma test on patient under 40 held negligent as a matter of law despite uncontradicted expert testimony that this was universal medical practice). See also Lundahl v. Rockford Memorial Hosp. Ass’n, 93 Ill. App. 2d 461, 235 N.E.2d 671 (1968), where the fact that the treatment administered had been the usual or customary one did not of itself preclude the possibility that the practice was negligent. See generally 20 N.Y.L.F. 669 (1975).

Where expert testimony is mandated and none is introduced, there is no issue of fact upon which a jury is competent to judge. Because of the rules of procedure in a number of jurisdictions, however, the testimony of the defendant physician may be introduced by the plaintiff as expert testimony. See Lawless v. Calaway, 24 Cal. 2d 81, 147 P.2d 604 (1944); Anderson v. Florence, 288 Minn. 351, 181 N.W.2d 873 (1970); Oleskiw v. Weidener, 2 Ohio St. 2d 147, 207 N.E.2d 375 (1965). It is unlikely, though, that the defendant, as an adverse witness, will offer the testimony on a deviation from the standard of care necessary to establish a prima facie case of malpractice. As an exception to the hearsay rule, rule 803(18) of the Federal Rules of Evidence permits the introduction upon cross-examination of learned treatises as substantive evidence of a deviation from the standard of care. See Fed. R. Evid. 803(18), Advisory Committee Notes (1975).
his suit, as an objective evaluation—that of the medical expert—of its merit.\(^{136}\)

Perhaps most important to the physicians who defend malpractice claims are those suits which are filed without expert testimony. A major problem then faced by the physician is that the absence of expert testimony will not, of necessity, demonstrate either that a proceeding was undertaken with a disregard for the rights of the physician or instituted without probable cause. The potential plaintiff may have been unable to obtain expert testimony prior to the institution of a suit because the statute of limitations would have run before he could do so.\(^{137}\) An attorney may have discovered too late that the testimony upon which he had relied was not forthcoming, or that it would have been inadequate to establish the standard of care. An attorney may have proceeded with an action in the hope of obtaining a jury instruction on *res ipsa loquitur*,\(^ {138}\) thereby avoid-

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\(^{136}\) Although reliance on the introduction of expert medical testimony as the test for establishing probable cause may be inequitable upon consideration of the high cost of procuring such testimony and the general reluctance of physicians to testify against one another, there appears little doubt that the introduction of such testimony is sufficient, although perhaps not necessary, for the demonstration of good faith.

\(^{137}\) The problem of the prospective claim which is unresearched and is facing the expiration of the limitations period may be partially alleviated by statutory enactment. See, e.g., Ohio Rev. Code Ann. § 2305.11(a) (Page Legis. Bull. 1975), granting the potential plaintiff 180 days subsequent to the running of the statute of limitations in which to file a claim, provided that within the statutory period he had notified the prospective defendant of his intent to bring suit. This 180-day extension would presumably provide adequate time to research the claim and adjudge its merit.

\(^{138}\) Judicial recognition of a "conspiracy of silence" among doctors may have led to the elimination of a need for expert testimony in a growing number of cases. In certain situations, the manner and circumstances of an injury, as distinguished from the nature of the injury itself, may justify the application of *res ipsa loquitur* and permit an inference of negligence without the introduction of expert testimony. E.g., Truhlicka v. Beech Aircraft Corp., 162 Kan. 535, 178 P.2d 252 (1947). The application of the doctrine is generally limited to situations in which the negligence lies within the comprehension of laymen, and may in reality be an extension of the "common knowledge" doctrine, in recognition of the public's augmented knowledge of medical practices. See Seidelson, Medical Malpractice Cases & The Reluctant Expert, 16 Cath. U.L. Rev. 158 (1966).

ing the need for expert testimony, only to have been informed that his client's injury does not come within the purview of "common knowledge." None of these courses of conduct demonstrates ab initio any impropriety on the part of the patient or his attorney.¹³⁹

Since the absolute defense of good faith reliance upon the advice of counsel may be available to the client, a prudent physician should sue both the patient and the patient's former counsel. The hardship in establishing lack of probable cause against an attorney stems not so much from the legal requirements of malicious prosecution as from the reluctance of the courts, based on public policy, to uphold such an action brought against a formerly adverse counsel. A recent California decision, Norton v. Hines,¹⁴⁰ rejected the attempt of a former defendant to demonstrate that a duty of reasonable care was owed to him by the opposing attorney. Norton, a named co-defendant in an action in which no supporting testimony was offered, countersued in simple negligence against the attorneys who had initiated the original proceeding. An alternate cause of action was stated in malicious prosecution against the former plaintiff, but a demurrer was sustained for failure to allege malice.

Urging the court to adopt a definition of duty as "the risk reasonably to be perceived," Norton asserted that he was a foreseeable third party to whom the adverse attorneys had owed a duty of reasonable care.¹⁴¹ Norton claimed that in advising their client to pursue an action for which there was no support, these attorneys had acted negligently and in dereliction of the standard of care imposed upon attorneys similarly situated. While agreeing, however,


¹³⁹ The attorney may have realized that he was unable to prosecute an action properly because of limited resources or knowledge, and thus may have withdrawn from the action.


¹⁴¹ Norton's argument was an attempt to extend even further the foreseeability doctrine of Dillon v. Legg, 68 Cal. 2d 728, 441 P.2d 912, 69 Cal. Rptr. 72 (1968). In that case, the Supreme Court of California departed from the concept of tort liability based on the "zone of danger" in favor of measuring the duty to onlookers and third parties in terms of foreseeability and found liability for the mental distress suffered by an onlooker to a traffic accident. Dillon, however, awarded damages under the foreseeability rationale only to a secondary victim of a tort. Norton attempted to apply this rationale to obtain damages as a primary victim. The innovation in Dillon, however, has been denounced widely both inside and outside of California because of the arbitrary standards it promotes. See Negligent Infliction of Mental Distress: Reaction to Dillon v. Legg in California and Other States, 25 HASTINGS L.J. 1248 (1974).
that the traditionally strict requirement of privity of contract for the imposition of tort liability had been eased in certain situations, and that attorneys had, in the past, been held liable to third parties, the court noted that the imposition of a duty had been limited to situations in which the third party was an intended beneficiary of the attorney's conduct:

The determination whether in a specific case the defendant will be held liable to a third person not in privity is a matter of policy and involves the balancing of various factors, among which are the extent to which the transaction was intended to affect the plaintiff . . . 142

Since an adverse party could not by definition be the intended beneficiary of adverse counsel's performance, an extension of the formulation of foreseeable risk was held to be unwarranted.

Suggesting that a proper pleading would have stated a cause of action against the attorneys in malicious prosecution, the court reaffirmed the interest in a public policy favoring free access to the courts. In light of the court's emphasis on attorney freedom, it is likely that nothing short of a repeated instigation of frivolous suits would suffice to meet this demanding burden of proof. 143

In limited situations, it may be possible to prove actual malice in the form of ill will, particularly when the patient displays vindictiveness outside the courtroom. In Jankelson v. Cisel, 144 a patient dissatisfied with the treatment she had received from her dentist complained of his services to several dental societies and governmental agencies. During consultation with other dentists, she further denigrated her original treatment as well as the treatment of an additional dentist whom she had consulted subsequently. Receiving no satisfaction from her complaints, she filed a malpractice action against the original dentist. While the action was pending, she dismissed her attorney and entered a voluntary nonsuit for failure to prepare adequately. In response to her filing, the dentist instituted a libel and slander action, to which the patient counterclaimed in malpractice. Judgment in the libel and slander action was rendered for the physician and the counterclaim dismissed, in the absence of competent expert testimony, for failure to establish a prima facie case.

Although one might arguably characterize the conduct of this

patient as malicious, it is more likely that actual malice indicates a willfulness that appears to be lacking in Jankelson. Admittedly, such instances of actual malice are rare and are not representative of the typical malpractice action. The institution of malicious prosecution actions in response to such cases would not provide a counterbalance to the mainstream of medical malpractice cases. Should malice during the pendency of a proceeding be construed to require proof of actual malice, or a reckless disregard for the truth, as indicated by the decisions in Spencer and Foster, it is unlikely that the physician will be able to meet his burden of proof in situations other than those evincing ill will similar to Jankelson.

In the absence of evidence of ill will, perhaps the only available option is a demonstration of a reckless disregard for the rights of the physician. There is, however, no indication that this alternative has yet been pursued by physicians, so its ultimate value remains much in doubt. Its effectiveness would also be greatly undermined by the adoption of the Foster and Spencer courts' interpretation of malice. Such an adoption retreats from the long-accepted definition of actual malice and would produce an unnecessary curtailment of malicious prosecution actions.

Should the accepted definition of "reckless disregard" be extended to malpractice claims, thus permitting the inference of malice from a showing of want of probable cause, a greater number of situations may support a malicious prosecution action. The repeated instigation of suits based on the same cause of action, each pleaded differently but all lost, may be sufficient evidence to constitute malice. Extensive delay at trial, where the proceedings span many years and the case must be docketed many times, may also be evidence of disregard.

When treated individually, the elements of malicious prosecution provide substantial barriers for the wrongfully sued physician. When viewed cumulatively, in light of judicial sentiment against the action, the barriers appear almost overwhelming. The necessary conclusion is that the action of malicious prosecution as it is now constituted is exceedingly difficult to utilize.

C. Reformation of the Cause of Action

In its present state, malicious prosecution offers only the slight-
est prospect of providing a remedy for the maligned doctor. Because of the judiciary's fear that malicious prosecution actions will become unmanageable if made available to physicians, the courts have restricted the efficacy of the remedy by imposing strict requirements on the cause of action. Although lacking probative evidence in support of this fear, the judiciary also clings to its intuitive notions that reprisals in malicious prosecution will be frequent and their deterrent value significant. Neither supposition is necessarily correct, although each is widely held.

A gradual retraction from this position would greatly enhance the potency of the remedy without belittling judicial fears. This retraction can partially be accomplished by permitting a greater liberality in pleading the cause of action. This suggestion focuses on the foreclosure of the remedy in jurisdictions which follow the minority rule requiring arrest, seizure of property, or special injury prior to a stating of the cause of action, and thus demands a total abrogation of the minority rule in order for the remedy to be effective. The retraction would be accomplished more thoroughly by loosening the proof requirements governing the various elements of the action. This suggestion concentrates on the difficulty in establishing, as a matter of law, the elements of the cause of action to the satisfaction of the jury. It is within the latter suggestion that the greater potential for reformation lies.

A three-fold modification of the action in malicious prosecution may provide a remedy for the doctor who has defended against a spurious claim. First, the filing of a counterclaim during the pendency of the original proceeding may provide the physician with a less expensive and more immediate remedy. It could also provide a greater deterrent against the institution of spurious claims. Adjudication of the counterclaim could await disposition of the original action, in order to minimize the unfairness to the original plaintiff while maximizing judicial economy and fairness to the defendant. Second, an inquiry into probable cause for the institution of a suit by an attorney should include the extent to which the attorney has investigated the factual and legal bases of his client's claim. In an effort to determine the reasonableness of the advice given to his client, consideration should be given to the time allocated and the sources consulted by the attorney. Despite the evidentiary difficulties of this inquiry, the imposition of a duty to investigate would broaden the standard of care within which an attorney operates, so that a consideration of the rights of the potential defendant would be required. Unlike the imposition of a duty running to the defendant as a third party beneficiary of the employment contract be-
tween attorney and client, as advocated in *Norton v. Hines*,\(^{148}\) the duty to investigate merely reflects the obligation of the attorney to the public to avoid spurious claims. Third, the definition of malice as the "reckless disregard for the rights of the defendant"\(^{149}\) should be accepted in all jurisdictions as an alternative to the already accepted definition of ill will. This extension would complement the standard of care imposed upon the attorney and would demand a further evaluation of the merits of a claim prior to filing.

These modifications, if adopted, could facilitate the institution of malicious prosecution suits without imposing undue restrictions on access to the courts or on the right to litigate. By imposing a greater burden upon the attorney to whom the knowledge of the law is available, rather than on the proponent, the judiciary could effectively decrease the number of spurious claims filed while promoting a general accountability by attorneys for their conduct.

**IV. CONCLUSION**

The medical profession and its subscribing public confront a medical malpractice crisis which may be reaching epidemic proportions. The lack of public and medical endorsement of screening devices has lessened the likelihood of any alleviation of the problem in the near future. In search of a panacea for their legal woes, physicians have stumbled upon the tort of malicious prosecution and demanded that it become the impossible—an effective deterrent to litigation through the imposition of heavy fines on those patients who cannot emerge victorious from the malpractice arena. While there is little doubt that malicious prosecution will never approximate that goal, there exists much room for debate on its potential deterrent and compensatory values.

Any true potential for success on a malicious prosecution claim is contingent upon a loosening of the limitations which circumscribe the tort and a retreat from the paternalism which guides the courts' interaction with the public. Fearing a denial of access to the courts, the judiciary has neglected its duty to protect the unjustly accused defendant. At the present time, the action in malicious prosecution with its nearly insurmountable burdens of probable cause and malice is unlikely to offer that protection to any defendant. The physician confronts the additional obstacle of a judiciary which, rather than hinder malpractice litigation, has fostered it through an extension of *res ipsa loquitur*,\(^ {150}\) a gradual retraction of the local-

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149. *See* notes 102-04 *supra* and accompanying text.
150. *See* note 138 *supra*.
ity rule, and the permissible introduction of medical treatises as expert testimony. Because of this judicial attitude, it may be impossible for the physician to allege malice and want of probable cause.

Self-regulation by the legal profession may be one successful method of controlling spurious suits. The attorney should establish, if he has not already done so, a procedure involving preliminary investigations and research, which, if conducted, would free him from concerns that a suit in malicious prosecution may be successfully litigated. A showing that the attorney followed these individual standards may provide sufficient evidence to convince the victorious physician that the lawyer performed his tasks in good faith. The attorney who disregards the legal rights of a physician, however, may soon learn that his failure to self-regulate may lead to the imposition of regulation by others.

Absent adequate self-regulation by the legal profession, spurious medical malpractice suits can be controlled only if the action for malicious prosecution is modified in such a way as to make it a viable option for the defendant physician. If courts begin to allow malicious prosecution counterclaims with the pendency of the original action, if attorneys are required to investigate their clients' allegations earlier, and if the malice requirement is modified so it can be satisfied by a showing of reckless disregard, malicious prosecution will be an effective weapon for the physician. Otherwise, doctors will be frustrated by the reluctance of the judiciary to meet the changing demands of the current medical malpractice crisis.

Pearl Kisner

151. In many jurisdictions, the standard of care to which a defendant physician will be held is the standard ordinarily observed by other physicians, either in the defendant's locality or in a similar locality. See, e.g., McGulpin v. Bessmer, 241 Iowa 1119, 43 N.W.2d 121 (1950). A number of jurisdictions, however, have totally disregarded geographic boundaries and have permitted a medical witness from a locality other than that in which the defendant practices to testify. See Carbone v. Warburton, 11 N.J. 418, 94 A.2d 680 (1953).

152. See note 135 supra.