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## *Malicious Prosecution Suits As Counterbalance To Medical Malpractice Suits*

*Allen P. Adler\**

A FEW YEARS AGO medical malpractice suits were something of a rarity in the United States.<sup>1</sup> They now appear to be a major national problem.<sup>2</sup> The magnitude of this ever increasing problem can be illustrated by the fact that a Senate subcommittee, chaired by Sen. Abraham Ribicoff, has investigated the increase in malpractice litigation and that President Nixon has ordered the establishment of a Commission on Medical Malpractice, under the Department of Health, Education and Welfare, to research the problem and report a possible solution by March 1, 1972.<sup>3</sup>

There are no accurate figures available on the overall increase in medical malpractice litigation.<sup>4</sup> It is estimated that malpractice claims have increased at the rate of 10% per year for the last five years.<sup>5</sup> The Aetna Life and Casualty Company reports a 43% increase in claims filed against its policy holders between 1964 and 1969.<sup>6</sup> Crawford Morris, a Cleveland attorney, reports a 400% increase in the number of cases in which he has been called upon to defend doctors between 1955 and 1966.<sup>7</sup>

It is estimated that between 6,000 and 9,000 suits are brought against the 250,000 practicing physicians in the United States each year.<sup>8</sup> An investigation by the American Medical Association shows that one doctor in six now practicing in the United States has been sued for malpractice.<sup>9</sup> The A.M.A. also estimates that one doctor in four will be sued before the end of his career.<sup>10</sup>

Along with the increase in the number of malpractice actions, the size of the individual claim has increased. There has been a 200% increase in the claim cost in the last five years.<sup>11</sup> The Nettleship Company of Los Angeles, a medical malpractice insurance carrier, reports an increase in the average closing cost of claims from \$2,478.00

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<sup>1</sup> U. S. NEWS & WORLD REPORT, Mar. 8, 1971, at 70; TIME, Nov. 2, 1970, at 36; NEWSWEEK, Jan. 19, 1970, at 93.

<sup>2</sup> U. S. NEWS & WORLD REPORT, *supra* note 1. Even including veterinarians: see Oleck, *Veterinarians' Malpractice*, in *The Practicing Veterinarian* (No. 6) 164 (1966).

<sup>3</sup> U. S. NEWS & WORLD REPORT, *supra* note 1; TIME, *supra* note 1.

<sup>4</sup> Brooke, *Medical Malpractice: A Socio-Economic Problem from a Doctor's View*, 6 WILLIAMETTE, L. J. 225 (1970); Halberstam, *The Doctor's New Dilemma—"Will I Be Sued?"*, THE NEW YORK TIMES MAGAZINE, Feb. 14, 1971, at 8.

<sup>5</sup> U. S. NEWS & WORLD REPORT, *supra* note 1.

<sup>6</sup> Brooke, *supra* note 4, at 227.

<sup>7</sup> *Id.*; NEWSWEEK, *supra* note 1.

<sup>8</sup> NEWSWEEK, *supra* note 1.

<sup>9</sup> U. S. NEWS & WORLD REPORT, *supra* note 1.

<sup>10</sup> TIME, *supra* note 1.

<sup>11</sup> Brooke, *supra* note 4, at 227.

in 1957 to \$13,325.00 in 1970. These figures include investigation costs, adjustments, defense fees, and settlements.<sup>12</sup>

The above figures go a long way in explaining the rapidly increasing premiums of medical malpractice insurance. Rates increased 110% in California in 1969.<sup>13</sup> The rates in Utah, for the year 1969, were thirteen times what they had been in 1967.<sup>14</sup> Individual premiums as high as \$10,000.00 per year have been reported.<sup>15</sup> These premium increases, like any other cost of doing business, are passed on to the general public.<sup>16</sup>

Along with the increase in cost, the increase of malpractice litigation is reflected in the way medicine is practiced. There is marked caution in diagnostic procedure and in the prescription of drugs. This offshoot of the malpractice dilemma does not appear to be all bad.<sup>17</sup>

There have been several suggested cures for the increase in malpractice litigation and the accompanying costs to the medical profession and society as a whole. These cures run from malpractice group insurance and government financed re-insurance pools for doctors who have lost their coverage, to the proposed establishment of local boards of lawyers and doctors to arbitrate malpractice claims.<sup>18</sup> These boards would function much like the one now in existence in Pima County, Arizona. It has also been suggested that patients buy a "no fault" type of insurance that would operate along the lines of workman's compensation or airline trip coverage.<sup>19</sup> The abolition of the private practice of medicine has also been suggested.<sup>20</sup>

It is clear that something must be done by the medical profession or by society as a whole to alleviate the strain of an overabundance of malpractice actions. To completely grasp the situation it is necessary to have some idea of how much of this litigation is well founded. Again, there are no accurate figures and those figures which are available are widely divergent. It is said that only one case out of ten ever reaches the jury.<sup>21</sup> It is also stated that lawyers reject the cases of nine out of ten prospective plaintiffs who seek their advice and that 30% of all malpractice cases have no merit.<sup>22</sup> The reported results of those cases that do come to trial are widely varied. By some estimates the results are half and half, plaintiffs winning 50% of the time.<sup>23</sup> Other sources state that doctors are vindicated in as many

<sup>12</sup> *Id.* at 230.

<sup>13</sup> NEWSWEEK, *supra* note 1.

<sup>14</sup> TIME, *supra* note 1.

<sup>15</sup> SCIENCE NEWS, Dec. 13, 1969, at 552.

<sup>16</sup> Brooke, *supra* note 4, at 232.

<sup>17</sup> *Id.* at 233; Halberstam, *supra* note 4, at 37.

<sup>18</sup> U. S. NEWS & WORLD REPORT, *supra* note 1.

<sup>19</sup> NEWSWEEK, *supra* note 1.

<sup>20</sup> SCIENCE NEWS, *supra* note 15.

<sup>21</sup> U. S. NEWS & WORLD REPORT, *supra* note 1.

<sup>22</sup> TIME, *supra* note 1; SCIENCE NEWS, *supra* note 15.

<sup>23</sup> Brooke, *supra* note 4, at 228; U. S. NEWS & WORLD REPORT, *supra* note 1.

as 90% of the cases tried.<sup>24</sup> The most convincing statistics are the results of compulsory arbitration carried out in Pima County, Arizona. Of the sixty-five cases arbitrated there over a twelve year period fifty-seven had no merit.<sup>25</sup>

No matter what source is to be believed, it is obvious that at least some of the thousands of medical malpractice suits brought each year are brought without justifiable cause. This leads to the conclusion that a number of doctors are in fact innocent of the charges of malpractice which have been brought against them. Many doctors feel, and rightfully so, that they are entitled to protection from the harassment of invalid suits.<sup>26</sup>

Working from the premise that the best defense is often a good offense, certain positive steps can be taken to insure that physicians are not set upon by every ex-patient who is dissatisfied with their services.

Doctors, like ordinary people, are protected from defamation. This protection extends to the practice of their profession.<sup>27</sup> It is certain that a practicing member of the medical profession would have a clear cause of action in defamation against anyone who had compared him with a run-of-the-mill meat cutter.

A doctor's reputation clearly suffers when a malpractice action is brought against him. Malpractice is an ill-famed word, nearly synonymous with quack and charlatan.<sup>28</sup> The definition of the term "malpractice" varies from one jurisdiction to another. "In general it means the wreaking of bodily harm by virtue of neglect, abandonment, or the omission or commission of certain actions which fall below the standards of the average medical practitioner."<sup>29</sup> It takes little imagination to realize the harm a charge of medical malpractice might do a practicing physician.

It is conceded that a cause of action for defamation will not lie where the allegations are made in the course of a civil proceeding. The plaintiff in a malpractice suit enjoys immunity to publish false and defamatory material as long as he stays within the scope of the action.<sup>30</sup> However, this privilege does not extend to a suit that is maliciously prosecuted.<sup>31</sup>

The threat of a doctor counterattacking a malpractice suit with a suit for malicious prosecution may cause a disgruntled patient and

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<sup>24</sup> Brooke, *supra* note 4, at 228.

<sup>25</sup> *Id.* at 229.

<sup>26</sup> *Id.* at 226. So do many lawyers: Oleck, *A Cure for Doctor-Lawyer Frictions*, 7 CLEV.-MAR. L. REV. 473 (1958).

<sup>27</sup> *Blende v. Hurst Publications*, 93 P.2d 733, (Wash., 1939); *Charging a Physician With Incompetence in a Particular Case*, 73 UNITED STATES L. REV. 490 (1939).

<sup>28</sup> Note, *The Malpractice Dilemma*, 9 W. RES. L. REV. 471 (1958).

<sup>29</sup> Brooke, *supra* note 4, at 225.

<sup>30</sup> RESTATEMENT OF TORTS, § 587 Comment (c) (1938).

<sup>31</sup> *Id.* § 681 (b).

his lawyer to think twice before bringing a frivolous or poorly founded action. An action for malicious prosecution can be used as an effective weapon to counter the threat of a malpractice suit, but it is necessary to have a general understanding of the elements of malicious prosecution and their adaptability to the facts surrounding a medical malpractice suit. The attorney representing the physician is in a position to watch his case develop as the events making up the facts occur.<sup>32</sup>

Malicious prosecution is an action not favored in the law.<sup>33</sup> The law of malicious prosecution represents an adjustment between the conflicting interests of the parties to a civil suit. The plaintiff is immune from any cause of action arising out of his good faith efforts to secure a legal or equitable determination of his rights. The defendant, at the same time, has a right to be free from unreasonable litigation.<sup>34</sup>

The plaintiff in a suit for malicious prosecution must prove that a suit was instituted against him without probable cause, that it has been terminated in his favor, that there was a malicious motive in instituting it, and that he has sustained damage as a result of the maliciously prosecuted suit.<sup>35</sup>

A majority of the jurisdictions in this country allow suits for malicious prosecution for the institution of a civil action where the other elements are present.<sup>36</sup>

The matter of probable cause will vary from case to case. It is usually a mixed question of law and fact. In a medical malpractice action there is a lack of probable cause when the patient does not honestly believe that the doctor is guilty of the malpractice charged, or where he does believe that the doctor's actions constituted malpractice, that belief is unreasonable.<sup>37</sup>

The second element that must be proved is the termination of the prior suit in the present plaintiff's favor. Generally, any manner of termination, which constitutes a final disposition, is sufficient.<sup>38</sup>

The plaintiff must next prove the defendant's malicious intent in instituting the malpractice proceedings. The question of malice is almost exclusively a question of fact.<sup>39</sup> The jury may infer malice from the lack of probable cause.<sup>40</sup> It must be kept in mind that both malice and lack of probable cause are separate elements of the tort

<sup>32</sup> 16 AM. JUR. *Trials* § 205 (1969).

<sup>33</sup> 52 AM. JUR. 2d *Malicious Prosecution* § 5 (1970).

<sup>34</sup> Note, *Malicious Prosecution—Essential Elements*, 26 TENN. L. REV. 437 (1959).

<sup>35</sup> W. PROSSER, *HANDBOOK OF THE LAW OF TORTS* 853, 873 (3rd ed. 1964); Note, *supra* note 34; Cassidy, *Malicious Prosecution—Its Scope and Purpose*, 22 GEO. L. J. 343 (1934); 52 AM. JUR. 2d *Malicious Prosecution* § 6 (1970).

<sup>36</sup> W. PROSSER, *supra* note 35, at 870.

<sup>37</sup> *Id.* at 866; Note, *supra* note 34, at 439.

<sup>38</sup> *Babb v. Superior Court of Sonoma County*, 92 Cal. Rptr. 179, 479 P. 2d 379 (1971); *supra* note 34, at 441; 52 AM. JUR. 2d *Malicious Prosecution* § 42 (1970).

<sup>39</sup> W. PROSSER, *supra* note 35, at 868; Note, *supra* note 34, at 440.

<sup>40</sup> RESTATEMENT OF TORTS § 669 Comment (a) (1938); Henderson, *supra* note 34, at 440.

of malicious prosecution; they must both be present.<sup>41</sup> Generally, the malice necessary to support an action for malicious prosecution resulting from a civil action is malice in fact. Malice in fact suggests the presence of an evil, wrongful, or improper motive in bringing the action for malpractice.<sup>42</sup>

No damages will be presumed in an action founded upon a civil suit. The plaintiff must prove actual damages.<sup>43</sup> In many jurisdictions, including Ohio, the general rule is that the party maliciously sued must prove injury to or interference with his person or property. This requirement precludes damages for injury to the reputation alone.<sup>44</sup>

It would appear that in jurisdictions where this rule is in effect, a suit for malicious prosecution against a defendant who had brought an unfounded suit for medical malpractice would be barred. There would be no interference with or damage to the doctor's person or property. The only thing that would suffer harm would be the doctor's profession, and in some cases, his private reputation.

There is an exception to this rule where the original civil action is based on lunacy or bankruptcy. These allegations would amount to defamation outside the courtroom.

Almost all jurisdictions allow the plaintiff in a malicious prosecution action to recover for damage done his reputation once actual damages are proved.<sup>45</sup> It also appears that in jurisdictions that do not generally allow damages for injury to the reputation alone, actual damages have been allowed. This is the case in Ohio.<sup>46</sup> It was stated in *Board of Education v. Marting*,<sup>47</sup> "Actions for malicious prosecution are for injuries to an individual's character or reputation."

In a recent law review article the proposition was set forth that injury to the reputation should be a basis for recovery in an action for malicious prosecution.<sup>48</sup> The author of this article dealt with a suit for malicious prosecution brought as a result of damages done to the business reputation of an individual in a wrongfully instituted insolvency action under Oregon law. Oregon is a jurisdiction that allows recovery only where arrest of the person or seizure of property can be proved.<sup>49</sup>

A businessman's reputation and a physician's professional reputation can easily be correlated. Perhaps, the professional reputation of

<sup>41</sup> Note, *supra* note 34, at 440.

<sup>42</sup> 52 AM. JUR. 2d *Malicious Prosecution* § 48 (1970).

<sup>43</sup> W. PROSSER, *supra* note 35 at 875.

<sup>44</sup> Cincinnati Daily Tribune Co. v. Bruck, 61 Ohio St. 482, 56 N. E. 198 (1900).

<sup>45</sup> W. PROSSER, *supra* note 35, at 875.

<sup>46</sup> Perry v. Adjustable Awning, Inc., 117 Ohio App. 486, 192 N. E. 2d 672 (1962); Edgington v. Glassmeyer, 11 Ohio Op. 2d 439, 168 N. E. 2d 425 (Ohio App. 1959).

<sup>47</sup> 217 N. E. 2d 712 (C. P. Fayette County 1966).

<sup>48</sup> Note, *Malicious Prosecution—Injury to Reputation as a Basis for Recovery*, 6 WILLAMETTE L. J. 173 (1970).

<sup>49</sup> *Id.* at 179.

a practicing physician should be given more consideration than the business reputation of a merchant.

An examination of the article and the law used to formulate the author's opinions reveals that the damages allowed for injury to a person's reputation, arising from a maliciously prosecuted bankruptcy action, have their roots in the theory that one who initiates a malicious prosecution is liable for any harm done the defendant from such an action.<sup>50</sup>

One of the first cases to recognize the value of a man's reputation was *Quartz Hill Consolidated Mining Co. v. Eyre*.<sup>51</sup> This case stands for the concept that a businessman's credit is injured by a bankruptcy proceeding before he has a chance to show that the accusation is false.<sup>52</sup>

The author postulated that the defamation theory should be extended to any suit which is based on defamatory matter. He stated:

If the subject matter of the suit is of itself defamatory, it is submitted that there is sufficient injury to support an action for malicious prosecution; and an allegation of damage to reputation should be adequate to survive a demurrer. The plaintiff must still prove damage to his reputation and must also prove all other elements necessary to his cause of action. For example, a number of cases hold that the institution of lunacy or insanity proceedings is actionable. An action for malicious prosecution likewise should be allowed where the charge is defamatory and where the other elements of this cause of action are satisfied. A cause of action for defamation will not lie when the allegations in a civil action are defamatory, since all parties are accorded a judicial immunity; however, the *Restatement* takes the position that this immunity will not preclude a malicious prosecution suit if the subject matter of the allegation is defamatory.<sup>53</sup>

The author bases his contention, in part, on two cases. *Savile v. Roberts* laid down a three-part test for malicious prosecution: damage to the person, damage to property, and damage to a man's fame.<sup>54</sup> The second case, *Wade v. National Bank of Commerce of Tacoma*,<sup>55</sup> holds that the defamatory matter in a complaint is, without interference to person or property, sufficient to sustain an action for malicious prosecution.

In summarizing his view the author states:

The *Wade* case, cited above, called attention to the fact that the courts should not be used to inflict a wanton injury. This is in accord with public policy. It is not to be expected that every civil action will support malicious prosecution, but it is to be expected that the courts will take care to protect the personal and/or busi-

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<sup>50</sup> *Id.* at 176.

<sup>51</sup> 11 Q. B. D. 674 (1883).

<sup>52</sup> *Supra* note 48, at 177; RESTATEMENT OF TORTS, § 674, Comment (c) (1938).

<sup>53</sup> *Id.* at 177-178.

<sup>54</sup> 91 Eng. Rep. 1147 (1698).

<sup>55</sup> 114 F. 277 (9th Cir. 1902).

ness reputation of those who are maliciously sued. Chief Justice Holt's threefold test for damages to person, property, and reputation is complete and fair. If the pleadings in the original suit are defamatory, they should be actionable without a showing of interference with person or property. This can be reconciled with the majority rule in that these damages to reputation, resulting from a malicious prosecution, are damages that do "not ordinarily result from all suits maintained for like causes". Oregon has rejected the underlying theory of section 678 of the *Restatement of Torts*, but it would seem both logical and desirable to accept and extend the theory of this section to all civil actions where the defendant has suffered an injury to his reputation. It is submitted that this more liberal rule will tend to discourage those who might otherwise bring groundless suits maliciously.<sup>56</sup>

This more liberal rule of allowing damages in a malicious prosecution proceeding could work as an effective means to counter the increase in medical malpractice actions.

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<sup>56</sup> *Supra* note 48, at 180-181.