

NOTES

LIABILITY FOR MALICIOUS INSTITUTION OF A CIVIL SUIT

A sues B to recover for personal injuries allegedly sustained as a result of B's negligence. In fact, as A well knows, A has no valid claim, having fabricated his suit for the purpose of forcing B to agree to a substantial out-of-court settlement. On the trial of the case judgment is rendered for B. Can B then maintain an action for damages based on A's initiation of the unfounded suit? If there is a right of action, what is B required to prove in order to recover?

While it is well-established that an individual who has been maliciously prosecuted on a criminal charge can recover damages from the instigator of the prosecution,¹ courts generally have been extremely reluctant to impose liability for the malicious institution of a civil suit.² In many jurisdictions an action based on a malicious suit can be maintained only in an extremely limited category of cases.³ In those situations in which courts have recognized a right of action, the burden of proof necessary to recover damages for a malicious lawsuit has proved almost insurmountable. The purpose of this note is to analyze the fact situations in which the courts have recognized a right of action, to suggest considerations essential to the proper determination of whether, and under what circumstances, a remedy should be provided, and to set forth the elements of proof which must be established to maintain an action for damages for the malicious institution of a civil suit.

I

Under the English common law, a defendant against whom a malicious civil suit was brought could not maintain an action to recover damages for the malicious suit except in a highly restricted group of cases, such as bankruptcy proceedings, corporate liquidation proceedings, and suits accompanied by attachment of property.⁴ A substantial number of American jurisdictions have adopted a less restrictive version of this rule. In thirteen states⁵ and the District of Colum-

1. NEWELL, MALICIOUS PROSECUTION § 5 (1892); PROSSER, TORTS 860 (1941); RESTATEMENT, TORTS § 653 (1938).

2. PROSSER, TORTS 885 (1941).

3. See text supported by notes 5-21 *infra*.

4. For other proceedings in which the English courts have recognized a right of action, see SALMOND, TORTS 738 (11th ed., Heuston 1953). See notes 9, 10 *infra*.

5. *Josey v. Grayson-Robinson, Inc.*, 84 S.E.2d 615 (Ga. App. 1954); *Smith v. Michigan Buggy Co.*, 175 Ill. 619, 51 N.E. 569 (1898); *Aalfs v. Aalfs*, 66 N.W.2d 121 (Iowa 1954); *North Point Construction Co. v. Sagner*, 185 Md. 200, 44 A.2d 441 (1945); *Saum v. Proudfit*, 122 N.J.L. 96, 4 A.2d 35 (1939); *Johnson v. Walker-Smith Co.*, 47 N.M. 310, 142 P.2d 546 (1943); *Serxner v. Elgart*, 196

bia,⁶ a defendant who has been the victim of a malicious civil suit has no remedy unless the suit resulted in an "interference" with his person or his property, or other "special injury."

The courts in these states have failed to define clearly the terms "interference" and "special injury"; consequently, until a case involving each particular type of suit is decided, it is difficult to determine what suits will be considered to result in an "interference" or "special injury." These courts have found an interference with the person in cases in which a defendant was arrested under civil process,⁷ and in various quasi-criminal actions, such as lunacy or bastardy proceedings.⁸ Interference with the property of the defendant has been found in cases in which the suit was accompanied by ancillary proceedings, such as attachment or garnishment,⁹ and in bankruptcy proceedings,¹⁰ proceedings to dissolve a partnership,¹¹ and in suits in which injunctive relief was sought.¹²

Although the courts in these states have frequently stated that no action will lie for the malicious institution of an "ordinary" civil suit, such an action may be maintained if the allegedly malicious suit caused "special injury."¹³ The cases have failed to delineate adequately what is considered to be an "ordinary" civil suit, merely stating negatively that an ordinary civil suit is one which causes no direct interference with the defendant's person or property. An examination of the cases, however, indicates that suits which courts have considered to be "ordinary" civil suits have three common elements: (1) the defendant is brought into court merely by the service of summons; (2) the suit is not accompanied by ancillary proceedings, such as attachment of property; (3) the relief sought is, in most

Misc. 1053, 94 N.Y.S.2d 731 (Sup. Ct. 1949); *Jerome v. Shaw*, 172 N.C. 862, 90 S.E. 764 (1916); *Cincinnati Daily Tribune Co. v. Bruck*, 61 Ohio St. 489, 56 N.E. 198 (1900); *Publix Drug Co. v. Breyer Ice Cream Co.*, 347 Pa. 346, 32 A.2d 413 (1943); *Shapleigh Hardware Co. v. Keeland Bros.*, 60 S.W.2d 510 (Tex. Civ. App. 1933); *Manhattan Quality Clothes, Inc. v. Cable*, 154 Wash. 654, 283 Pac. 460 (1929); *Myhre v. Hessey*, 242 Wis. 638, 9 N.W.2d 106 (1943). See Note, 150 A.L.R. 897 (1944).

6. *Peckham v. Union Finance Co.*, 48 F.2d 1016 (D.C. Cir. 1931).

7. *Woodley v. Coker*, 119 Ga. 226, 46 S.E. 89 (1903).

8. *Brandt v. Brandt*, 297 Ill. App. 306, 17 N.E.2d 535 (1938) (lunacy proceeding); *Coffee v. Meyers*, 84 Ind. 105 (1882) (bastardy proceeding).

9. *King v. Yarbray*, 136 Ga. 212, 71 S.E. 131 (1911) (garnishment); *Connelly v. White*, 122 Iowa 391, 98 N.W. 144 (1904) (attachment).

10. *Stewart v. Sonneborn*, 98 U.S. 187 (1878); *Norin v. Scheldt Mfg. Co.*, 297 Ill. 521, 130 N.E. 791 (1921).

11. *Luby v. Bennett*, 111 Wis. 613, 87 N.W. 804 (1901).

12. *H. P. Reiger & Co. v. Knight*, 128 Md. 189, 97 Atl. 358 (1916); *Black v. Judelsohn*, 251 App. Div. 559, 296 N.Y. Supp. 860 (1st Dep't 1937). See Note, 145 A.L.R. 711 (1943). As the text reveals the cases in which an interference with the person or property was found are not strictly civil "suits"; for purposes of this note these cases will be utilized only for illustrative purposes.

13. See, e.g., *Saum v. Proudfit*, 122 N.J.L. 96, 4 A.2d 35 (1939); *Johnson v. Walker-Smith Co.*, 47 N.M. 310, 142 P.2d 546 (1943).

cases, money damages.¹⁴ Since these elements are the typical characteristics of the average lawsuit, it is manifest that the bulk of civil litigation is included in the "ordinary" civil suit category.

Similarly, most courts have failed to attempt even a cursory analysis of the meaning of the term "special injury." The usual formulation is that a suit does not result in special injury where the damages incurred by the defendant are no different from the expenses which necessarily result from all suits of similar character, whether or not maliciously initiated.¹⁵ While this definition would appear to be sufficiently indefinite to permit virtually any judicial interpretation which might be desired, in practice the special injury category has been narrowly restricted. The courts are generally agreed that injuries to reputation, credit, or business, and the annoyance, loss of time, and expense resulting from the defense of an ordinary civil suit, are not "special injuries," regardless of the severity of the injury in a particular case.¹⁶

The most notable situation in which courts recognize a special injury, and therefore a right of action, is where a party maliciously institutes successive civil suits for the same claim against the same person. In the leading case of *Shedd v. Patterson*¹⁷ the defendant had previously harassed the plaintiff with nine successive suits over a twenty-year period. In each case the suit had been dismissed. The court held that, while no action would lie for the malicious institution of a single civil suit, the defendant's repeated suits on the same claim after the court had conclusively determined the rights of the parties had caused a special injury, and the plaintiff could maintain an action for damages caused by defendant's malicious conduct.¹⁸ Presented with the same fact situation, other courts have denied a right of action, reasoning that, while the amount of the damages might increase with the successive malicious suits, the nature of the injury is not altered, and that, if recovery is denied for the initiation of a single malicious suit, the same rule should apply to successive malicious suits.¹⁹

14. These are the constituent elements of an "ordinary" civil suit in the bulk of the cases. Certain situations, however, have been treated by some courts as "ordinary" civil suits (for which no recovery is permitted) although the relief sought was not money damages. For example, a dispossessory action by a landlord, *Price v. Fidelity Trust Co.*, 41 S.E.2d 614 (Ga. App. 1947); an action of ejectment, *Muldoon v. Rickey*, 103 Pa. 110 (1883); an action for rescission based upon allegations of fraud, *Wm. R. Moore Dry Goods Co. v. Mann*, 171 Ark. 350, 284 S.W. 42 (1926).

15. *Josey v. Grayson-Robinson, Inc.*, 84 S.E.2d 615 (Ga. App. 1954); *North Point Construction Co. v. Sagner*, 185 Md. 200, 44 A.2d 441 (1945); *Abbott v. Thorne*, 34 Wash. 692, 76 Pac. 302 (1904).

16. See note 15 *supra*.

17. 302 Ill. 355, 134 N.E. 705 (1922).

18. *Ibid.* See also, *Soffos v. Eaton*, 152 F.2d 682 (D.C. Cir. 1945).

19. *Pye v. Cardwell*, 224 S.W. 542 (Tex. Civ. App. 1920); *Myhre v. Hessey*, 242 Wis. 638, 9 N.W.2d 106 (1943).

Aside from the situation involving successive malicious suits, the courts have seldom found a special injury which was considered sufficiently grievous to permit a right of action for the malicious institution of an "ordinary" civil suit. Several cases have indicated that special injury might be found when the allegedly malicious suit contained defamatory charges,²⁰ but in cases in which the problem was directly in issue the courts did not find special injury, and no action was permitted.²¹ Viewed in the light of the previous discussion, the "special injury" category which has been developed by the courts which deny a right of action for the malicious institution of an ordinary civil suit, appears to be merely a flexible instrument which the courts can manipulate to achieve desired results. Since the judicial policy has been to restrict recovery in actions based upon allegedly malicious lawsuits, the "special injury" concept, while potentially a broad category, has become a virtual nullity.

In contrast to those states which, in the absence of special circumstances, deny a right of action for the malicious institution of a civil suit, at least eighteen states²² recognize such a right of action regardless of whether the malicious suit results in an interference with the defendant's person or property, or in other special injury. In these states, therefore, recovery is dependent only upon the plaintiff's establishing the essential elements of proof necessary to maintain the action.²³

The substantial conflict of authority among the courts as to what factors must be present to enable a party to maintain an action for a malicious civil suit is mainly attributable to "policy factors" which are given varying emphasis by different courts. What policy reasons are applied by the courts? Are these the basic considerations which

20. See, e.g., *Van Hunter v. Beckley Newspapers Corp.*, 129 W. Va. 302, 316, 40 S.E.2d 332, 339 (1946) (dictum); *Myhre v. Hessey*, 242 Wis. 638, 649, 9 N.W.2d 106, 110 (1943) (dictum).

21. *Smith v. Michigan Buggy Co.*, 175 Ill. 619, 51 N.E. 569 (1898); *Aalfs v. Aalfs*, 66 N.W.2d 121 (Iowa 1954); *Serxner v. Elgart*, 196 Misc. 1053, 94 N.Y.S.2d 731 (Sup. Ct. 1949).

22. *Peerson v. Ashcraft Cotton Mills*, 201 Ala. 348, 78 So. 204 (1918); *Ackerman v. Kaufman*, 41 Ariz. 110, 15 P.2d 966 (1932); *Eastin v. Bank of Stockton*, 66 Cal. 123, 4 Pac. 1106 (1884); *Slee v. Simpson*, 91 Colo. 461, 15 P.2d 1084 (1932); *Whipple v. Fuller*, 11 Conn. 581 (1836); *Levy v. Adams*, 140 Fla. 515, 192 So. 177 (1939); *Whitesell v. Study*, 37 Ind. App. 429, 76 N.E. 1010 (1906); *Bratton v. Exchange State Bank*, 129 Kan. 82, 281 Pac. 857 (1929); *Smith v. Smith*, 296 Ky. 785, 178 S.W.2d 613 (1944); *Graffagnini v. Shnaider*, 164 La. 1108, 115 So. 287 (1927); *Antcliff v. June*, 81 Mich. 477, 45 N.W. 1019 (1890); *Virtue v. Creamery Package Mfg. Co.*, 123 Minn. 17, 142 N.W. 930 (1913); *Hughes v. Aetna Ins. Co.*, 261 S.W.2d 942 (Mo. 1953); *McCormick Harvester Mach. Co. v. Willan*, 63 Neb. 391, 88 N.W. 497 (1901); *Kolka v. Jones*, 6 N.D. 461, 71 N.W. 558 (1897); *Teesdale v. Liebschwager*, 42 S.D. 323, 174 N.W. 620 (1919); *Lipscomb v. Shofner*, 96 Tenn. 112, 33 S.W. 818 (1896); *Closson v. Staples*, 42 Vt. 209 (1869). See Note, 150 A.L.R. 897 (1944).

23. See text following note 41 *infra*.

should be applied to determine whether, and in what situations, a right of action arises?

The most frequently discussed factor is the function served by the award of costs to the successful party in a lawsuit. The courts which deny a right of action to recover damages for a malicious lawsuit in the absence of special circumstances have urged, as justification, that the taxable costs received by the successful defendant are presumed to be adequate compensation for the injury sustained.²⁴ This so-called presumption, while historically sound, is now no more than rationalization. The items of expense which are included as taxable costs in a suit at law, and the amount of compensation to be awarded, generally are fixed by statute,²⁵ and vary considerably among the states. There are, however, several factors common to virtually all statutory bills of costs. The statutes of each state providing for the amount of costs to be awarded were enacted, in most cases, early in the history of the state and have remained substantially unchanged over the years; as a result of inflated monetary conditions the amount of compensation has become grossly inadequate.²⁶ In addition, while costs usually include relatively minor items such as witness fees, fees for court officers, and miscellaneous items of trial expense,²⁷ the most important monetary item in a lawsuit, the expense of counsel fees, generally is not part of the taxable costs in this country. In England, the successful party receives counsel fees as part of his costs, in the discretion of the court. Thus, while there is some justification for denying a right of action in England, since the award of costs there approximates the expenses that are actually incurred, there would seem to be no justification for such a denial in this country.²⁸

Other American courts which deny a right of action in the absence of special circumstances concede that statutory costs are inadequate compensation, but insist that the matter is a "legislative problem." These courts are also indulging in judicial question-begging. It is, of course, within the legislative province to determine the statutory costs to be awarded to the successful litigant; the statutory award, however, does not distinguish between the malicious and unfounded suit, and the suit which is merely unsuccessful. To distinguish these two situations would seem to be an appropriate judicial function, to be exercised by permitting a defendant in a malicious lawsuit to maintain a separate action for damages.

24. *Johnson v. Walker-Smith Co.*, 47 N.M. 310, 142 P.2d 546 (1943); *Publix Drug Co. v. Breyer Ice Cream Co.*, 347 Pa. 346, 42 A.2d 413 (1943); *Shapleigh Hardware Co. v. Keeland Bros. Inc.*, 60 S.W.2d 510 (Tex. Civ. App. 1933).

25. MCCORMICK, DAMAGES § 61 (1935).

26. See Note, *Use of Taxable Costs to Regulate the Conduct of Litigants*, 53 COLUM. L. REV. 78 (1953).

27. *Id.* at 81, & nn.26, 27 (1953).

28. See MCCORMICK, DAMAGES § 60 (1935).

Another factor advanced to justify denial of a remedy in the absence of special circumstances is a fear that a party may be deterred from resorting to the courts, feeling that he might be subjecting himself to a subsequent action for having brought a malicious suit.²⁹ While this concern of the courts is doubtless an honest one, its realism is questionable. Even in those states where an action to recover damages for a malicious civil suit is freely permitted, recovery is infrequent. The realistic considerations which determine whether a controversy is to be litigated include such factors as the possibility of success, the expenses of litigation, and the chances of recovery even if a favorable judgment is received. It is doubtful whether the average person (or the average lawyer) contemplating whether to sue realizes that he may be subjecting himself to liability if his claim proves unsuccessful.³⁰

In addition, the courts which have denied a remedy for the malicious initiation of an "ordinary" civil suit, which comprises the vast bulk of litigation,³¹ are giving tacit judicial recognition to a notorious form of legal blackmail. The institution of, or the threat of, an unfounded suit is a notably efficient means of extortion from persons who are financially unable to defend the suit, or who are unwilling, because of personal or business reasons, to undergo the unfavorable publicity resulting from a lawsuit.³²

There would seem to be little justification, therefore, for the position adopted by the courts which refuse to permit a right of action to recover for a malicious suit unless the action results in an "interference" with the defendant's person or property, or in "special injury." The courts in which the existence of a right of action is dependent only upon proof that the suit was in fact malicious have not been overburdened with actions based upon allegedly malicious suits. In these states recovery is still infrequent, not because no remedy is recognized, but because of the extreme difficulty of proving that a suit was in fact instituted maliciously.³³

II

A problem which is closely related to the question of liability for the institution of a malicious civil suit concerns the liability which is

29. See, *e.g.*, *Smith v. Michigan Buggy Co.*, 175 Ill. 619, 51 N.E. 569 (1898); *Aalfs v. Aalfs*, 66 N.W.2d 121 (Iowa 1954); *Abbott v. Thorne*, 34 Wash. 692, 76 Pac. 302 (1904).

30. The individual who is deciding whether to bring suit may consider that he will be subjecting himself to a counter-claim by his opponent in the same action. There is little reason to suspect, however, that the honest litigant would be deterred from suing because of fear of being sued in return for initiating unfounded litigation.

31. See text supported by note 14 *supra*.

32. For an excellent example of extortion by suit see *Pye v. Cardwell*, 224 S.W. 542 (Tex. Civ. App. 1920).

33. GREEN, JUDGE AND JURY 338 (1930).

imposed when the malicious conduct is not the institution of an unfounded suit, but is the filing of an unfounded defense or counter-claim. While it might appear that litigation on such matters would be frequent, there are in fact only two cases in which the problem was directly presented. In *Baxter v. Brown*,³⁴ a Kansas case, the payee of a promissory note, upon default in payment, brought suit against the maker of the note. The maker, in his answer, filed a general denial that he owed any amount on the note. On the trial of the case the payee recovered judgment for the amount of his claim. The payee then sued the maker again, alleging that in the prior suit the maker had maliciously filed the general denial, knowing that it was false. The court held that the payee could not maintain an independent action for damages, even if it were proved that the maker had knowingly set up the unfounded defense, since in so doing the maker had merely hindered and delayed the payee's recovery, and had not personally sought affirmative relief.

In *Slee v. Simpson*,³⁵ a Colorado case, the issue before the court was whether an action could be maintained to recover damages for the malicious filing of a counter-claim. Defendant, in answer to plaintiff's claim for damages for personal injuries sustained in an auto accident, filed a counter-claim to recover for injuries allegedly caused by the same accident. Judgment was rendered for plaintiff on his claim, but defendant's counter-claim was dismissed. Plaintiff subsequently brought another action for damages, claiming that the defendant had maliciously filed the unfounded counter-claim. The court held that the defendant's counter-claim was the equivalent of a separate action, and that the plaintiff could recover if, in the subsequent trial, he could prove that the counter-claim had been instituted maliciously.³⁶

The results of the *Baxter* and *Simpson* cases raise several problems. In theory, the basic legal "wrong" for which liability is imposed for malicious prosecution, and for the malicious institution of a civil suit, is the setting in motion of the forces of the law to achieve a purpose for which they were not intended.³⁷ On this basis, the view of the *Baxter* case, denying liability for the filing of a false general denial, would appear to be correct. It is, of course, an open secret that a defendant will frequently set up defenses which he knows cannot be proved for the purpose of delaying and additionally burdening the plaintiff. While such conduct is doubtless unethical, it would be a startling proposition to subject a defendant to liability in a subse-

34. 83 Kan. 302, 111 Pac. 430 (1910).

35. 91 Colo. 461, 15 P.2d 1084 (1932).

36. *Slee v. Simpson*, 91 Colo. 461, 466, 15 P.2d 1084, 1086 (1932).

37. RESTATEMENT, TORTS § 674, comment a (1938).

quent suit after the plaintiff had already recovered judgment based upon his original cause of action.³⁸ The rationale of the *Baxter* case would also seem to apply in the situation in which the defendant's answer is based upon any of the affirmative defenses, such as contributory negligence, fraud, or statute of limitations, since the defendant in such a case is not, in any sense, seeking affirmative relief.

Although the *Simpson* case does not accord with the traditional theory that the essential wrongful conduct consists in the malicious *initiation* of an unfounded suit, the result of the case is clearly correct. A counter-claim under the modern codes must contain all the elements of an affirmative cause of action; both in theory and in practice a counter-claim is substantially the equivalent of an independent action.³⁹ Moreover, under the Colorado statute then existing,⁴⁰ the defendant could elect to seek his relief either by counter-claim or by a separate action. Had the defendant in the *Simpson* case elected to proceed in a separate action the court would have imposed liability if his claim had been proved malicious and unfounded.⁴¹ It would then have been anomalous to deny recovery merely because the defendant elected to seek relief by means of a counter-claim in the original action. The distinction between the *Baxter* case and the *Simpson* case, therefore, is a substantial one. The defendant's counter-claim in the *Simpson* case went beyond mere delaying tactics; he was seeking affirmative relief and the actual effect of his conduct was the same as if a separate action had been pursued.

III

Judicial recognition of a right of action to recover for a malicious civil suit is merely the first step on the road to relief; in a case in which a remedy is available the plaintiff must also establish that the prior suit was in fact malicious. The classification of the elements

38. If the plaintiff had *not* recovered judgment in the original action, then he would have no basis for asserting that the defense set up by the defendant was malicious and unfounded, since the court's judgment for the defendant would establish that his defense was valid.

To deter the filing of sham pleadings a few states provide by statute that a party filing a bad faith allegation or denial may be taxed with double costs. Note, *Use of Taxable Costs to Regulate the Conduct of Litigants*, 53 COLUM. L. REV. 78 (1953). In addition, some jurisdictions provide for a speedy disposition of sham pleadings by a motion to strike the entire pleading and grant summary judgment where no valid cause of action or defense is stated. CLARK, CODE PLEADING § 88 (2d ed. 1947).

39. CLARK, CODE PLEADING § 102 (2d ed. 1947).

40. COLO. CODE ANN. § 63 (1933); *Herefort v. Cramer*, 7 Colo. 483, 4 Pac. 896 (1884). Colorado has since adopted the federal rule providing that a defendant who has a claim that arises out of the transaction or occurrence that is the subject matter of the opposing party's claim is required to seek relief by counter-claim in the original action, and if he fails to do so he is deemed to have waived his claim. COLO. R. CIV. P. 13(a) (1953).

41. *Slee v. Simpson*, 91 Colo. 461, 465, 15 P.2d 1084, 1085 (1932) (dictum).

of proof necessary to maintain an action for damages for the malicious institution of a civil suit is well-established. The party seeking to recover must prove that the prior suit terminated in his favor, and that the suit was instituted with malice, and without probable cause.⁴² Although the classification of the elements of proof is well-recognized, their application to varying factual situations has caused considerable difficulty. The various elements will be considered separately, except where the interrelation of the elements requires comparative treatment.

A. *Favorable Termination of the Prior Suit*

A party seeking to recover damages for a malicious civil suit in which he was defendant must prove that the allegedly malicious suit terminated in his favor.⁴³ Since the result of a suit is a matter of public record, few problems arise in determining in whose favor an action terminated. A suit may terminate in favor of the defendant by either of two methods: (1) when a court renders a final judgment on the merits in the defendant's favor;⁴⁴ or (2) when the suit is dismissed, either voluntarily or involuntarily.⁴⁵ If a suit is pending as a result of a temporary continuance, or if an appeal has been taken to a higher court, no action for damages can be based on such a suit, since there has been no final termination of the action.⁴⁶ In addition, if a suit is terminated by an out-of-court settlement it is not considered to be a termination "favorable" to the defendant, and no action for damages can be based on such suit.⁴⁷ When the allegedly malicious suit has not terminated in favor of the party against whom the suit was brought, such party is generally prevented by the principle of *res judicata* from relitigating the controversy in a subsequent action based on the initiation of the supposedly

42. RESTATEMENT, TORTS § 674 (1938). In addition, the plaintiff must prove actual damages since none will be presumed. The damages recoverable in an action based on a malicious lawsuit are beyond the scope of this note.

43. This is subject to the exception that if the prior suit was an *ex parte* one, which the original defendant was given no opportunity to contest, then he need not show that the prior proceeding terminated in his favor. PROSSER, TORTS 889 (1941). For purposes of this section, a plaintiff against whom a malicious counter-claim was filed will be treated as a defendant. See *Slee v. Simpson*, 91 Colo. 461, 15 P.2d 1084 (1932).

44. The judgment may be on demurrer or after a jury trial. *Ackerman v. Kaufman*, 41 Ariz. 110, 116, 15 P.2d 966, 968 (1932) (demurrer); *Levy v. Adams*, 140 Fla. 515, 192 So. 177 (1939) (jury trial).

45. *Ackerman v. Kaufman*, 41 Ariz. 110, 117, 15 P.2d 966, 968 (1932) (involuntary); *Smith v. Burrus*, 106 Mo. 94, 16 S.W. 881 (1891) (voluntary); *Kolka v. Jones*, 6 N.D. 461, 71 N.W. 558 (1897) (voluntary). See the discussion in RESTATEMENT, TORTS § 674, comment *g* (1938).

46. *Ehrlich v. Exchange Bank of Savannah*, 35 Ga. App. 790, 134 S.E. 809 (1926); *Lindsay v. Evans*, 174 S.W.2d 390 (Mo. App. 1943).

47. *Fenton Storage Co. v. Feinstein*, 129 Pa. Super. 125, 195 Atl. 176 (1937).

malicious suit,⁴⁸ unless he can prove that the prior judgment was procured by fraud or by perjured testimony.⁴⁹

B. *Want of Probable Cause*

The crucial factor which a party must prove to recover damages for the malicious institution of a civil suit is that the original plaintiff, when he initiated the prior suit,⁵⁰ did not have probable cause for pursuing the action.⁵¹ There have been various judicial attempts to define probable cause with precision. However, definitions of probable cause, like most other definitions, have seldom aided the actual process of judicial decision. The usual formulation is that probable cause for a suit exists when the instigator of an action has a reasonable belief that his claim may possibly be held to be valid. Essentially, the courts are applying an objective standard to evaluate the reasonableness of the instigator's belief. If it is determined that a reasonable man, in similar circumstances, would have brought suit, then the courts will find that the defendant had probable cause for initiating his action.⁵²

While there is an infinite variety of factual situations which present the question of whether there was probable cause for the initiation of the supposedly malicious suit, a perusal of the cases reveals several common factors. First, actions to recover damages for fabricated personal injury suits, which are popularly conceived to be most often the subject of unfounded litigation, are conspicuously infrequent.⁵³ Second, the controversy usually arises between parties who have had extensive dealings with each other prior to the supposedly malicious suit. The prior relationship of the parties is usually an economic one, as for example, between business competitors, debtor and creditor, employer and employee, or landlord and tenant. At some time during the parties' relations a controversy arises, hostility develops, and litigation ensues. Third, the primary purpose of a party who maintains an action to recover for the institution of a

48. *McCord-Collins Commerce Co. v. Levi*, 21 Tex. Civ. App. 109, 50 S.W. 606 (1899); *Porter v. Mack*, 50 W. Va. 581, 40 S.E. 459 (1901).

49. *Anteliff v. June*, 81 Mich. 477, 45 N.W. 1019 (1890); *Wilcox v. Gilmore*, 320 Mo. 980, 8 S.W.2d 961 (1928).

50. The fact that circumstances arising after the suit was brought would support the position of the party initiating the action is not relevant on the question of probable cause. GREEN, JUDGE AND JURY 341 (1930).

51. PROSSER, TORTS 890 (1941).

52. *Murdock v. Gerth*, 65 Cal. App. 2d 170, 150 P.2d 489 (1944); *Gray v. Abboud*, 184 Okla. 331, 87 P.2d 144 (1939); *Brown v. Keyes*, 54 S.D. 596, 223 N.W. 819 (1929).

53. At least two explanations seem plausible: (1) individuals who fabricate personal injury claims are notably judgment-proof; (2) since the usual fabricated personal injury claim is brought against a large and solvent entity, such as a public service company, railroad or business establishment, such an organization is not likely to have a *personal* interest to vindicate by seeking to recover for such a suit, and would be satisfied merely to successfully defend the unfounded suit.

malicious civil suit is not to seek compensation for his injury through the award of money damages; rather, the primary purpose is to *punish* the instigator of the unfounded suit and to *vindicate* the victim's general standing in the community.⁵⁴ With these factors in mind, what legal rationale have the courts developed to aid their determination of whether the instigator of the action had probable cause for initiating the litigation?

Since the determination of probable cause involves essentially an inquiry into whether it was reasonable, under all the circumstances, for the instigator to have filed his allegedly malicious suit,⁵⁵ it would appear that probable cause would be a question of fact to be decided by the jury. In fact, however, whether the original complainant had probable cause for initiating his action is, in most states, a question which is determined by the court.⁵⁶ Thus, allowing the court to determine whether the instigator of the prior suit had probable cause—*i.e.*, a reasonable belief in the possible success of his action—is the crucial factor which distinguishes an action for the malicious institution of a civil suit from the usual tort action wherein the question whether an individual acted as a reasonable man is determined by the jury.⁵⁷ While the result is desirable, the cases have seldom offered an adequate explanation of *why* probable cause is determined by the court. The basic reason is probably to avoid a confusion of issues. The jury is likely to confuse the fact that the prior suit was unsuccessful with the real issue, which is whether the original complainant had a reasonable belief in the possible success of his action at the time he filed suit.⁵⁸

Some courts have made the misleading statement that probable cause is a "mixed question of law and fact" in any situation in which there is conflicting evidence on the issue of probable cause. If there is conflicting testimony on the circumstances under which the party initiating the suit acted, then the jury's only function is to determine, under proper instructions, the actual circumstances.⁵⁹ The court's instructions specify whether the circumstances as found by

54. See, *e.g.*, Peerson v. Ashcraft Cotton Mills, 201 Ala. 348, 78 So. 204 (1918); Ackerman v. Kaufman, 41 Ariz. 110, 15 P.2d 966 (1932); Eastin v. Bank of Stockton, 66 Cal. 123, 4 Pac. 1106 (1884).

55. See text supported by note 52 *supra*.

56. See, *e.g.*, Murdock v. Gerth, 65 Cal. App. 2d 170, 150 P.2d 489 (1944); Paranto v. Ball, 132 Conn. 568, 46 A.2d 6 (1946); Kolka v. Jones 6 N.D. 461, 71 N.W. 558 (1897).

57. Dean Prosser says that the determination of probable cause "does not differ essentially from the determination of negligence." PROSSER, TORTS 879 (1941).

58. See text supported by note 52 *supra*.

59. It has been suggested, however, that once the case is sent to the jury for a general verdict it is probable that the jury will make its decision on the whole case, and not merely upon the narrow question as to the actual circumstances under which the party initiating the suit acted. GREEN, JUDGE AND JURY 342 (1930).

the jury would, or would not, constitute probable cause for the initiation of the action.⁶⁰ Thus, by deciding the pivotal question of probable cause, the courts exercise extensive control over recovery in actions based upon allegedly malicious suits.

The court, in determining whether the defendant had probable cause for instituting his action, must decide the difficult question of whether the defendant reasonably believed that he could establish a valid claim. Courts have been extremely reluctant to make a detailed inquiry into the facts and circumstances involved in the prior suit, and have lightened the burden of decision considerably by the development of a series of evidentiary rules and presumptions which are uniformly applied to various factual situations. These rules will be set forth and analyzed in determining whether they offer an adequate basis for deciding the various problems that may arise.

The result of the allegedly malicious suit is an important evidentiary factor in determining probable cause. If the prior suit terminated in favor of the party initiating the action, that fact is considered as a *prima facie* presumption of probable cause, even though the judgment is reversed on appeal.⁶¹ This presumption can be rebutted only by proof that the judgment was obtained by fraud or by perjured testimony.⁶² If the prior suit terminated in favor of the party against whom the action was brought, however, that fact does not create a presumption, nor is it evidence, of a *want* of probable cause for initiating the action.⁶³

While termination of a prior suit in favor of the party against whom it was brought is not evidence of a want of probable cause, in several courts the *manner* by which the suit was terminated is considered to have an evidentiary effect on the issue of probable cause. Thus, several cases have held that the fact that the party initiating the action voluntarily dismissed his suit creates a presumption of a want of probable cause for the action.⁶⁴ The obvious purpose of this presumption is to shift the burden of proof of probable cause to the party who has voluntarily dismissed the suit because of the court's feeling that such party alone has the evidence necessary to explain his conduct. The presumption of a want of probable cause

60. RESTATEMENT, TORTS § 673, comment *d* (1938).

61. *Beatty v. Puritan Cosmetic Co.*, 236 Mo. App. 807, 158 S.W.2d 191 (1942); *Palmer v. Avery*, 41 Barb. 290 (N.Y. 1864). Some cases have stated that the judgment is conclusive evidence of probable cause, but in fact the conclusive character of the prior judgment always can be rebutted by proof that the judgment was obtained by fraud or perjured testimony.

62. *Antcliff v. June*, 81 Mich. 477, 45 N.W. 1019 (1890); *Ripley v. Bank of Skidmore*, 355 Mo. 897, 198 S.W.2d 861 (1947).

63. *Johns v. Gibson*, 60 Ga. App. 585, 4 S.E.2d 480 (1939); *Eickhoff v. Fidelity & Casualty Co.*, 74 Minn. 139, 76 N.W. 1030 (1898).

64. *Burhans v. Sandford & Brown*, 19 Wend. 47 (N.Y. 1838); *Kolka v. Jones*, 6 N.D. 461, 71 N.W. 558 (1897). *Contra*, *Smith v. Burrus*, 106 Mo. 94, 16 S.W. 881 (1891).

which is applied merely because of a voluntary dismissal by the instigator of a suit seems to be both harsh and unreasonable. The privilege of voluntarily dismissing a suit is recognized in virtually all states, either by statute or by court practice; to make the exercise of such a privilege a basis for the presumption that the suit was brought without probable cause seems inequitable. The unreasonableness of the presumption is emphasized when contrasted with the established rule that an involuntary dismissal in the same fact situation would not, of itself, create such a presumption.⁶⁵ Furthermore, there are many valid reasons why a party would take a voluntary nonsuit, *e.g.*, absence or death of key witnesses, desire to obtain additional evidence, or to try the case at a more convenient time and place; none of these reasons have any connection with the question whether the instigator of the suit had probable cause for pursuing the action.

. In connection with the evidentiary effect of the termination of the allegedly malicious suit, a problem which the courts have seldom considered is the effect on the probable cause question of the trial judge's refusal to grant a directed verdict. The situation in which the problem arises is in a suit by *A* against *B*, where, after *B*'s motion for a directed verdict is refused, the case is submitted to the jury which then renders a verdict for *B*. The action has terminated in favor of the defendant *B*, but does not the judge's refusal to direct a verdict for *B* strongly tend to establish that *A* had probable cause for his action? In a leading Missouri case, *Hughes v. Aetna Ins. Co.*,⁶⁶ the court held that the trial judge's refusal to direct a verdict was merely "equivocal" on the question of probable cause. It is well-recognized that trial judges, in order to placate participants and avoid reversals, unnecessarily submit many questions to the jury. Nevertheless, by refusing to direct a verdict, it would seem that the trial judge is necessarily implying that the jury could render a verdict for either the plaintiff or the defendant. This is the equivalent of saying that a reasonable man could conclude that the party initiating the suit had a valid claim, which is the very issue involved in determining whether the suit was instituted with probable cause.⁶⁷

Another evidentiary rule adopted by the courts to avoid extended inquiry into the circumstances leading to the supposedly malicious suit is that if the action was brought in reliance on the advice of counsel, such advice is conclusive evidence of probable cause, and is an absolute defense, even though the counsel's advice proved to be erroneous.⁶⁸ There are, of course, few situations in which suit is

65. See text supported by note 63 *supra*.

66. 261 S.W.2d 942 (Mo. 1953).

67. See text supported by note 52 *supra*. It would seem that the court should find probable cause even in a case in which the trial judge renders a judgment against the instigator of the action notwithstanding a contrary jury verdict.

68. *Baber v. Fitzgerald*, 311 Ky. 382, 224 S.W.2d 135 (1949); *Thelma Oil & Gas Co. v. Sinclair Gulf Oil Co.*, 97 Okla. 5, 222 Pac. 686 (1924).

brought without aid of counsel. The mere bringing of suit by counsel, however, does not enable the party initiating the action to assert the defense. Before the instigator of the action can justifiably rely on the advice of counsel, he is generally required to prove: (1) that he made a reasonable investigation to ascertain the true facts of the controversy; (2) that he made a full disclosure to counsel of all relevant facts; and (3) that counsel advised him that there was a possibility that the claim would be held valid.⁶⁹ If there is conflicting evidence on these points the issues of fact are determined by the jury.⁷⁰

The various evidentiary rules and presumptions developed by the courts to avoid a detailed inquiry into the facts and circumstances involved in the supposedly malicious suit do not cover every possible situation. For example, in a case wherein a suit which has been instituted without counsel's advice terminates in a judgment in favor of the party against whom the suit was brought there are no operative evidentiary rules or presumptions to aid in the determination of probable cause. In such a situation the court necessarily must make a thorough examination of the facts and circumstances involved in the allegedly malicious suit. It is submitted that the following factors should be considered by the courts in determining whether the party initiating such a suit had a reasonable belief in the possible success of his action:

- (1) The nature of the claim. For example, a "reasonable man" would be more likely to litigate a controversy involving a disputed debt, than to bring suit for damages based upon alleged fraudulent conduct by the defendant.
- (2) The complexity of the controversy. A party should, of course, be allowed greater leeway for mistakenly litigating a matter involving an extremely complicated fact situation. But, conversely, where the controversy is complex and the party initiating suit is ignorant of the legal significance of the situation, then as a "reasonable man" he should consult an attorney for advice instead of immediately litigating the matter.
- (3) The reason the supposedly malicious suit ended unsuccessfully. Consideration should be given to whether the party initiating the suit had an erroneous apprehension of the *facts* in controversy, or whether he was mistaken about the *legal effect* of such facts.⁷¹

69. *Harter v. Lewis Stores, Inc.*, 240 S.W.2d 86 (Ky. App. 1951); *St. Pierre v. Warner*, 24 R.I. 295, 53 Atl. 41 (1902).

70. *White v. Carr*, 71 Me. 555 (1880); *Virtue v. Creamery Package Mfg. Co.*, 128 Minn. 17, 142 N.W. 930 (1931); *Hughes v. Aetna Ins. Co.*, 261 S.W.2d 942 (Mo. 1953).

71. For example, a party who has ascertained the facts of the controversy and has merely mistakenly believed that under such facts he has a cause of action should be judged less harshly than a party who initiates litigation while in error as to the facts involved in the controversy.

- (4) The certainty of the law applicable to the controversy. Since the party initiating the action can make a reasonable mistake about the legal principles applicable to his case, the reasonableness of the mistake will depend partly on whether the law on the point involved is well-settled, in a state of confusion, or somewhere in between.

While any one of these factors may not be determinative of the question whether the party initiating the suit had probable cause for his action, a judicial examination of all the factors set forth would provide a relatively sound basis for decision.

C. *Malice*

If there was probable cause for a suit, then the party initiating the action cannot be held liable, and the existence of a malicious purpose is immaterial.⁷² If it is established that there was no probable cause for initiating the action, however, then the question of malice becomes material, and malice, being a question of fact, is determined by the jury.⁷³

A party initiating an action has acted with malice when he has instituted his action for an improper purpose.⁷⁴ The only proper purpose for which a suit may be brought is, of course, to secure a bona fide adjudication of the claim upon which the action is based. A suit may be brought for an improper purpose, however, even though the party initiating the action was not motivated by *actual* malice or ill-will.⁷⁵ But, while actual malice need not be present, something more than "legal malice" which, in some torts, is implied from the intentional performance of an unlawful act, must be found by the jury.⁷⁶ Thus, a jury may find malice by determining that the primary purpose of the instigator of the action was not to secure a bona fide adjudication of his claim. In practice, once it is established that the suit was instituted without probable cause, the jury generally will find, as a matter of course, that the party initiating the action acted with malice, and consequently will impose liability.

CONCLUSION

In view of the foregoing discussion the following propositions are submitted:

- (1) Conceding the validity of the judicial policy against encouraging actions to recover for malicious lawsuits, an undesirable method

72. *McKenna v. Heinlen*, 128 Cal. 97, 60 Pac. 668 (1900); *Johns v. Gibson*, 60 Ga. App. 585, 4 S.E.2d 480 (1939); *Wilcox v. Gilmore*, 320 Mo. 980, 8 S.W.2d 961 (1928).

73. *McKenna v. Heinlen*, 128 Cal. 97, 60 Pac. 668 (1900); *Wilcox v. Gilmore*, 320 Mo. 980, 8 S.W.2d 961 (1928).

74. PROSSER, TORTS 891 (1941).

75. RESTATEMENT, TORTS § 676, comment *b* (1938).

76. Compare, for example, the fictitious use of the term "malice" in the tort of defamation. PROSSER, TORTS 815 (1941).

of effectuating such policy has been adopted by the courts which deny a right of action unless the prior suit resulted in an interference with the person or property, or in other special injury. Common experience indicates that the injury to an individual's reputation, business, or earning capacity which can result from an "ordinary" civil suit is often more severe than the damage caused by suits which these courts have recognized to be a special grievance. The preferable view is clearly the one adopted by the courts which allow an action to recover for a malicious suit regardless of the type of prior suit involved. This result could be achieved by any one of three methods.

(A) The courts which have denied a remedy in the absence of a special injury or of an interference with person or property could adopt the most direct method and simply overrule their prior decisions.

(B) If these courts feel bound by precedent they can achieve the same result within their established rationale by a liberal interpretation of the "special injury" concept.⁷⁷

(C) If the courts are unwilling to modify the existing situation, then the legislatures in these states could follow the position of Connecticut which provides for a statutory right of action⁷⁸ in which recovery is governed by the established common-law principles relative to the elements of proof.

(2) In seeking a permanent solution to the problem caused by the increasing amount of unfounded litigation, it is suggested that a realistic deterrent would be an increase in the statutory costs to be awarded to the successful party to a lawsuit. A statutory provision for the award to the successful litigant of a reasonable amount for counsel fees seems desirable.

(3) The judicial policy to restrict recovery in actions based upon allegedly malicious lawsuits can be effectuated adequately by the courts themselves, through their control of the element of probable cause. If the courts properly exercise their function of deciding the question of probable cause, the reasonably mistaken litigant need not fear that a jury may find him liable for having initiated an unfounded action, for the court would not submit the question of his liability to a jury.

These suggestions should help to achieve a more equitable compromise between the judicial desire to insure unfettered resort to the courts to settle controversies, and the interest of the individual in being free from unfounded litigation.

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77. See text supported by notes 13-21 *supra*.

78. CONN. GEN. STAT. § 8309 (1949).